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DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

7 CFR Part 4279

[Docket No. RBS-20-BUSINESS-0016]

RIN 0570-AB07

Guaranteed Loanmaking and Servicing Regulations

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Final rule.

SUMMARY: The Rural Business-Cooperative Service (RB-CS) (Agency), a Rural Development (RD) agency of the United States Department of Agriculture (USDA), is issuing a final rule to amend the interim rule published on May 22, 2020. The interim rule amended the Business and Industry (B&I) Guaranteed Loan Program to allow flexibility to obligate Federal funds for guaranteed loans pursuant to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) in response to the national COVID-19 Public Health Emergency. This final rule addresses public comments received on the interim rule and makes clarifying modifications identified by commenters and the Agency.

DATES:

Effective date: November 24, 2023.

Applicability dates: This final rule applies to applications submitted under the B&I CARES Act Guaranteed Loan Program from May 22, 2020, and received no later than 11:59 p.m. Eastern Time on September 15, 2021, or until Program funding expired on September 30, 2021.

FOR FURTHER INFORMATION CONTACT:

Mark Brodziski, Deputy Administrator, Rural Business and Cooperative Service, Rural Development, U.S. Department of Agriculture, 1400 Independence Avenue SW, Stop Washington, DC 20250-3221; email: mark.brodziski@usda.gov; telephone (202) 205-0903.

SUPPLEMENTARY INFORMATION:

I. Background Information

The RD is a mission area within the USDA that is comprised of the RB-CS, the Rural Housing Service (RHS), and the Rural Utilities Service (RUS). Its mission is to increase economic opportunity and improve the quality of life in rural communities by providing the leadership, infrastructure, access to capital, and technical support that enables rural communities to prosper. To achieve its mission, the RD provides financial support through more than 40 programs including direct loans, grants, loan guarantees, and technical assistance to help improve the quality of life and provide the foundation for economic development in rural areas.

The B&I Guaranteed Loan Program was authorized under Section 310B of the Consolidated Farm and Rural Development Act of 1972, as amended by subsequent Farm Bills, with the aim to revitalize and develop rural areas and to help foster a balance between rural and urban America. The loans are made by private lenders to rural businesses for the purposes of creating new businesses, expanding existing businesses, and for other purposes of creating employment opportunities in rural America. Businesses located in rural areas are eligible for this program. Rural areas, as defined at 7 CFR 4279.108(c), are any area of a State other than a city or town that has a population of greater than 50,000 inhabitants and any urbanized area contiguous and adjacent to such a city or town. The types of borrowers that are served by the B&I Guaranteed Loan Program are cooperative organizations, corporations, partnerships, or other legal entities organized and operated on a profit or nonprofit basis; Indian Tribes on a Federal or State reservation or other federally recognized Tribal group; public bodies; or individuals, provided the borrower is engaged in, or proposing to engage in, a business. Loans can be made for a variety of purposes, including business acquisition, expansion, or improvement; purchase of real estate, machinery and equipment, or supplies; limited debt refinancing; and working capital. The rate and term of the loan is negotiated between the business and the lender.

On March 13, 2020, the ongoing Coronavirus Disease 2019 (COVID-19)

pandemic was declared of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID-19 Public Health Emergency, many businesses nationwide began experiencing economic hardship as a direct result of the Federal, State, and local public health measures that were being taken to minimize the public's exposure to the virus. These measures, as well as advice to physically social distance from other people and to stay at home or "shelter in place," resulted in a dramatic negative impact on the livelihood of many Americans and, in turn, negatively impacted the national economy.

In order to provide critical financial relief to American families, on March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (Pub. L. 116-136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic.

II. Purpose of This Regulatory Action

This final rule updates the B&I CARES Act Program Loans, as implemented in 7 CFR part 4279—Guaranteed Loan Making and 7 CFR part 4287—Servicing and as published in the **Federal Register** on May 22, 2020, as an interim rule.

RBCS received funding and authority through Division B, Title I of the CARES Act to provide additional funds for use under the B&I Guaranteed Loan Program to prevent, prepare for, and respond to the effects of the COVID-19 pandemic. The regulatory impact analysis for the interim rule documents the anticipated costs and benefits of the program against the benchmark of no rule (*i.e.*, absent the interim final rule). In summary, the baseline of the cost benefit analysis for the interim final rule was mostly qualitative using existing information the Agency had from the B&I Guaranteed Loan Program and anticipated results of the provisions in the interim rule that allowed the flexibility to obligate Federal funds for guaranteed loans pursuant to the CARES Act in response to the nation COVID-19 Public Health Emergency. As a result of these considerations and the funding purposes outlined in the CARES Act, the Agency decided to offer the

following—using the interim rule—under the B&I CARES Act Program: (1) 90-percent guarantees to all B&I CARES Act funded loans; (2) 2-percent guarantee fee; (3) acceptance of appraisals completed within 2 years of the date of the application; (4) no discounting of collateral for working capital loans; and (5) extension of the maximum term for working capital loans to 10 years. The regulatory impact analysis associated with the interim final rule can be viewed at www.regulations.gov under Docket No. RBS–20–BUSINESS–0016.

The economic impacts of the final rule are minimal or de minimus when set against the benchmark for the interim final rule. The CARES Act provided \$20,500,000 in budgetary authority, which RD anticipated would support an allocation of approximately \$951,000,000 in loan guarantees, which supported approximately \$811,645,477 in loan guarantees. Applications for B&I CARES Act funds expired at the end of fiscal year 2021 as all available funds were exhausted. Though RD staff have successfully implemented the regulatory requirements, they have determined through their continuous interaction with stakeholders that changes to the interim rule are needed to clarify eligible uses of funds and to further improve program delivery. Eligible uses of funds include the ability of borrowers to address financial needs related to COVID–19 in addition to loss of income, related challenges directly related to COVID–19, and challenges businesses faced in order to return to normal operations, not just losses incurred as a result of COVID–19. This final rule provides clarification of the Agency's position on the eligible use of funds for auditing purposes and future servicing actions including loss payments to lenders. Additionally, the Agency will be able to reference this final rule should the B&I program be utilized again to directly respond to and alleviate the issues resulting from another National Public Health Emergency.

III. Summary of Comments and Responses

On May 22, 2020 (85 FR 31035), the Agency published an interim rule to supplement the current B&I Guaranteed Loan Program, as implemented in 7 CFR part 4279, Guaranteed Loan Making, and 7 CFR part 4287, Servicing, with the new B&I CARES Act Guaranteed Loan Program (B&I CARES Act Program). The Agency received the following comments from one commenter:

Comment: The commenter suggested that from experience, the Agency

understands that some companies need to expand production due to the pandemic such as Personal Protective Equipment (PPE) and sanitary products, while others need to provide PPE inventory to staff and protective materials for retail clients, which creates a need for financial assistance for items that also meet the impact of the crisis.

Agency Response: The Agency agrees with the commenter and clarifies in 7 CFR 4279.190(c)(1) that the borrower may use the program for financial needs related to the COVID–19 Public Health Emergency in general and not just to address the loss of income and to provide funds for operating overhead expenses in response to the epidemic.

Comment: One commenter stated that there appeared to be contradictory information in the interim regulation between the “Preamble” and the “Eligible Use of Funds” sections. The commenter indicated that the Preamble suggests that the B&I CARES Act Program guaranteed loan funds may be used by rural businesses that require additional working capital to sustain and ramp up business operations once the emergency is resolved. However, the commenter asserted that the “Eligible Use of Funds” section states that B&I CARES Act Program Loans should not exceed the amount needed to overcome the financial distress caused by the COVID–19 Public Health Emergency. The commenter further specified that there appears to be a discrepancy between intent, which includes ramping up business operations, and the actual regulation which appears to only address a shortfall in operating capital.

Agency Response: The Agency concurs with the concern raised by the commenter and revises 7 CFR 4279.190(c)(1) to include language to address the discrepancy and clarify the intent of the program.

Comment: One commenter expressed a concern that the B&I CARES Act program could be interpreted to be for the primary purpose of covering operating losses only, rather than for working capital in totality, and further encourages the Agency to recognize that a business may have needs now that were not present pre-Coronavirus, and the business may need more working capital than before the pandemic.

Agency Response: The Agency concurs with this concern raised by the commenter and revises 7 CFR 4279.190(c)(3)(viii) by adding language to the eligible purposes to include additional expenses due to challenges directly related to the national COVID–19 Public Health Emergency.

Comment: One commenter commented that the Agency should

understand the ever-changing environment that businesses face and allow the B&I CARES Act Program to provide working capital to get the business back on a strong footing.

Agency Response: The Agency concurs with this statement and revises 7 CFR 4279.190(d)(2) to clarify the intent of the program and the ability to “address challenges” caused by the COVID–19 Public Health Emergency.

IV. Summary of Changes

The following is a summary list of changes to the B&I CARES Act Program (7 CFR 4279.190) as a result of public comments:

1. Add language in the introductory text of § 4279.190(a) to clarify that a loan is limited to the amount necessary to address a borrower's financial needs related to the COVID–19 Public Health Emergency.

2. In § 4279.190(c)(1) and (2), add language that refers to the challenges faced by borrowers due to the COVID–19 Public Health Emergency in order to clarify the use of the B&I CARES Act Program Loans.

3. In § 4279.190(c)(3)(i), (iv), and (viii), clarify that the eligible use of loan funds for borrowers for challenges directly related to the National COVID–19 Public Health Emergency includes the owner's wages and salaries if these costs were verifiable and constitute historical working capital costs.

4. In § 4279.190(d)(1), (2), and (3), include language clarifying minimum loan amount threshold, inventory and production costs, and the maximum loan amount.

The following is a summary list of the technical corrections and clarifications to the B&I CARES Act Program (7 CFR 4279.190):

5. Correct the authority citation for 7 CFR part 4279 by adding 7 U.S.C. 1932(a), which includes 7 CFR 4287, Servicing for the B&I Program.

6. In § 4279.190(c)(5), specify that the Agency should verify ineligibility for Farm Service Agency (FSA) loan programs, and clarify that agricultural producers must be located in a rural area as defined in 7 CFR 4279.108(c) unless they meet the food processing provisions under 7 CFR 4279.113(y). The interim rule only allowed for eligibility for B&I CARES Act Program Loans if the loan amount exceeded the FSA size limit or the applicant was otherwise ineligible for FSA programs.

7. In § 4279.190(h), add language to clarify loan terms and provisions.

8. In § 4279.190(k)(1) and (3), add language that was originally omitted from the interim rule regarding “tangible balance sheet equity.”

9. In § 4279.190(k)(2), add clarifying language regarding borrower equity allowing additional sources of matching funds, which was inadvertently omitted from the interim rule.

10. In § 4279.190(m), add introductory language to clarify the application information and priority scoring process.

11. In § 4279.190(m)(4), add language to clarify the use of a borrowers' application request for the B&I CARES Act loan process.

Executive Order 12866, Regulatory Planning and Review

This final rule has been reviewed by the Office of Management and Budget under Executive Order 12866 and determined to be significant for the purposes of Executive Order 12866. The Executive Order defines a section 3(f)(1) “significant regulatory action” as one that is likely to result in a rule that may (1) have an annual effect on the economy of \$200 million or more 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, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this E.O. This final rule was determined to be significant because the changes to the B&I Guaranteed Loan Program regulations are estimated to have an impact on the economy of more than \$200 million.

Executive Order 12988, Civil Justice Reform

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. The Agency has determined that this final rule meets the applicable standards provided in section 3 of the Executive Order. In addition, all State and local laws, and regulations that conflict with this final rule will be preempted. No retroactive effect will be given to this final rule and, in accordance with section 212(e) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. 6912(e)), administrative appeal procedures must be exhausted before an action against the Department, or its agencies may be initiated.

Executive Order 12372, Intergovernmental Review

B&I guaranteed loans are subject to the Provisions of Executive Order 12372, which require intergovernmental consultation with State and local officials. The Agency will conduct intergovernmental consultation in accordance with 2 CFR part 415, subpart C.

Executive Order 13132, Federalism

The policies contained in this final rule do not have any substantial direct effect on 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. Nor does this final rule impose substantial direct compliance costs on State and local governments. Therefore, the Agency has determined that consultation with the States is not required.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Rural Development has assessed the impact of this final rule on Indian Tribes and determined that this final rule does not, to our knowledge, have Tribal implications that require Tribal consultation under E.O. 13175. If a Tribe would like to engage in consultation with Rural Development on this rule, please contact Rural Development’s Tribal Coordinator at (720) 544–2911 or AIAN@usda.gov.

Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register** in accordance with 5 U.S.C. 603 and 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a “small entity” as (1) a proprietary firm meeting the size standards of the SBA; (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. Except for such small government jurisdictions as defined in 5

U.S.C. 601 (5), neither State nor local governments are considered small entities. Similarly, for purposes of the RFA, individual persons are not small entities. As outlined in 5 U.S.C. 605(b), the requirement to conduct a regulatory impact analysis does not apply if the head of the agency “certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” In addition, 5 U.S.C. 604(a) and 608(b) specifies that the agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, “along with a statement providing the factual basis for such certification.” If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things, the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. Accordingly, as authorized by sections 553(b)(3)(B) and 553(d) of the APA, as well as supported in the Federal agency source book published by the Small Business Administration’s Office of Advocacy, “A Guide to for Government Agencies, How to Comply with the Regulatory Flexibility,” Ch. 1, p. 9., the Agency is not required to conduct a regulatory flexibility analysis.

Information Collection and Recordkeeping Requirements

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the information collection activities associated with this final rule are approved under OMB Control Number 0570–0069 and this final rule contains no new reporting or recordkeeping burdens.

E-Government Act Compliance

The RB–CS is committed to the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

National Environmental Policy Act

In accordance with the National Environmental Policy Act of 1969, Public Law 91–190, this final rule has been reviewed in accordance with 7 CFR part 1970 (“Environmental Policies and Procedures”). The Agency has determined that (1) this action meets the criteria established in 7 CFR 1970.53(f); (2) no extraordinary circumstances exist; and (3) the action is not “connected” to other actions with potentially significant impacts, is not considered a “cumulative action” and is not precluded by 40 CFR 1506.1. Therefore, the Agency has determined that the action does not have a significant effect on the human environment, and therefore neither an Environmental Assessment nor an Environmental Impact Statement is required.

Assistance Listing

The program described by this final rule is listed in the Assistance Listings (AL), (formerly Catalog of Federal Domestic Assistance (CFDA)), under number 10.766—Business and Industry Guaranteed Loan Program.

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effect of their regulatory actions on State, local, and Tribal governments, and the private sector. Under section 202 of the UMRA, the Agency generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local, or Tribal governments, in the aggregate, or to the private sector, of \$100 million, or more, in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires the Agency to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. This final rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and Tribal governments, or the private sector. Therefore, this final rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Civil Rights Impact Analysis

Rural Development has reviewed this final rule in accordance with USDA Regulation 4300–4, “Civil Rights Impact Analysis,” to identify any major civil rights impacts this final rule might have on program participants on the basis of

age, race, color, national origin, sex, or disability. After review and analysis of the final rule and available data, it has been determined that based on the analysis of the program purpose, application submission and eligibility criteria, issuance of this final rule will not likely adversely or disproportionately impact very low, low, and moderate-income populations, minority populations, women, Indian Tribes, or persons with disability, by virtue of their race, color, national origin, sex, age, disability, or marital or familial status.

USDA Non-Discrimination Statement

In accordance with Federal civil rights laws and USDA civil rights regulations and policies, the USDA, its Mission Areas, agencies, staff offices, employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Program information may be made available in languages other than English. Persons with disabilities who require alternative means of communication to obtain program information (e.g., Braille, large print, audiotape, American Sign Language) should contact the responsible Mission Area, agency, or staff office; or 711 Relay service.

To file a program discrimination complaint, a complainant should complete a Form AD–3027, *USDA Program Discrimination Complaint Form*, which can be obtained online at <https://www.usda.gov/sites/default/files/documents/ad-3027.pdf> from any USDA office, by calling (866) 632–9992, or by writing a letter addressed to USDA. The letter must contain the complainant's name, address, telephone number, and a written description of the alleged discriminatory action in sufficient detail to inform the Assistant Secretary for Civil Rights (ASCR) about the nature and date of an alleged civil rights violation. The completed AD–3027 form or letter must be submitted to USDA by:

(1) *Mail*: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400

Independence Avenue SW, Washington, DC 20250–9410; or

(2) *Fax*: (833) 256–1665 or (202) 690–7442; or

(3) *Email*: Program.Intake@usda.gov.

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List of Subjects for 7 CFR Parts 4279

Loan programs-business, Reporting and recordkeeping requirements, Rural areas.

Accordingly, for reasons set forth in the preamble, 7 CFR part 4279 is amended as set forth below:

PART 4279—GUARANTEED LOANMAKING

■ 1. The authority citation for part 4279 is revised to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1989; 7 U.S.C. 1932(a); and Public Law 116–136, Division B, Title I.

Subpart B—Business and Industry Loans

■ 2. Amend § 4279.190 by:

■ a. Revising and republishing paragraph (a);

■ b. Revising and republishing paragraphs (c)(1), (2), (3), and (5);

■ c. Revising and republishing paragraphs (d)(1), (2), and (3);

■ d. Revising and republishing paragraph (h);

■ e. Revising and republishing paragraphs (k)(1), (2), and (3);

■ f. Adding introductory text to paragraph (m); and

■ g. Revising paragraph (m)(4).

The revisions, republications, and addition read as follows:

§ 4279.190 Business and Industry national COVID–19 Public Health Emergency Loans.

(a) *Introduction*. This section contains regulations for the Business and Industry National COVID–19 Public Health Emergency loan program (B&I CARES Act Program Loans). The purpose of the program is to provide loan guarantees under the authority of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Pub. L. 116–136). These B&I CARES Act Program Loans cover costs to prevent, prepare for, and respond to the coronavirus limited to the amount necessary to address the borrower's financial needs related to the COVID–19 Public Health Emergency. Consistent with the purposes of the CARES Act, the Agency has determined that the most effective use of these program funds is to support the cost of guaranteed loans to rural businesses to respond to the coronavirus. No B&I CARES Act Program Loan guarantee will be

approved after September 30, 2021. All provisions of subparts A and B of this part and subpart B of part 4287 of this chapter apply to B&I CARES Act Program Loans, except as provided in this section. All forms used in connection with a B&I CARES Act Program Loan will be those used with other Business and Industry (B&I) loans, except as provided in this section.

* * * * *

(c) * * *

(1) *Purpose.* The purpose of any B&I CARES Act Program Loan must be to cover costs to prevent, prepare for, and respond to the coronavirus pandemic, limited to the amount necessary to address the borrower's financial needs related to the COVID-19 Public Health Emergency, in accordance with paragraph (a) of this section. B&I CARES Act Program Loans should not exceed the amount needed to overcome the financial distress or related challenges caused by the COVID-19 Public Health Emergency.

(2) *Use of loan proceeds.* Notwithstanding the provisions of § 4279.113, B&I CARES Act Program guaranteed loans will be limited to loans for working capital loan purposes in accordance with paragraph (c)(3) of this section. Loan proceeds may be used only to support facilities and business operations in rural areas and the Borrower must have been in operation on February 15, 2020. Loan proceeds must be disbursed through multiple draws on an as-needed monthly basis. Loan proceeds issued in full at loan closing must be evidenced by documented need provided by the lender and with concurrence of the Agency.

(3) *Eligible working capital uses.* Eligible working capital uses of B&I CARES Act Program Loan funds are limited to:

(i) Wages, salaries, sales commissions to employees, group healthcare benefits, and other employee benefits; owner's wages and salaries may be considered if these costs are verifiable and constitute historical working capital costs;

(ii) Administrative expenses and administrative service contracts;

(iii) Property insurance, hazard insurance, and other business insurance;

(iv) Principal and interest payments on outstanding debt excluding owner/stockholder debt and related-party debts; payments may include existing Business & Industry loan payments to bring loans current as loan payments to a creditor are a working capital expense;

(v) Rent, payments on leases, and routine maintenance;

(vi) Utilities;

(vii) Inventory, feed, seed, fertilizer and chemicals, livestock (excluding livestock for breeding) and supplies;

(viii) Marketing, shipping, and other expenses incurred through normal business operations or such additional expenses due to challenges directly related to the national COVID-19 Public Health Emergency;

(ix) Taxes; and

(x) Loan costs and essential loan-related expenses.

* * * * *

(5) *Agricultural production.* The provisions of § 4279.113(q) do not apply to B&I CARES Act Program Loans. Loans for working capital to support agricultural production, including independent agricultural production, is an eligible use of funds when the applicant's loan request exceeds the maximum loan available through FSA guaranteed loan programs or the applicant's request is otherwise ineligible for FSA loans. The Agency should verify ineligibility for FSA loan programs. Agricultural producers must be located in a rural area as defined in 7 CFR 4279.108(c) unless they meet the requirements provided for under 7 CFR 4279.113(y).

(d) * * *

(1) The provisions of § 4279.119(a) do not apply to B&I CARES Act Program Loans. The total amount of B&I and B&I CARES Act Program Loans to one borrower (including the guaranteed and unguaranteed portions, the outstanding principal and interest balance of any existing B&I guaranteed loans, and the new loan request) cannot exceed \$25 million. There is no minimum threshold for B&I CARES Act Program loans.

(2) The amount of the B&I CARES Act Program Loan shall be based on a cash flow analysis and must not be greater than the amount needed to address challenges caused by the COVID-19 emergency, including those related to inventory and production costs, so that the business is reestablished on a successful basis. Losses and business operating expenses that were adequately paid by insurance or by loans or grants from other sources will not be covered by B&I CARES Act Program Loans. The B&I CARES Act Program Loans may be used to supplement insurance payments or assistance from other sources when the insurance coverage or other assistance is insufficient. The amount of the B&I CARES Act Program loan will be reduced by any SBA Paycheck Protection Program (PPP) loans received by the borrower.

(3) The maximum loan amount of the B&I CARES Act Program Loan for

working capital purposes may not exceed 12 times the borrower's total average monthly costs of eligible working capital loan purposes less the total amount of covered loans received under the provisions of sections 1102 and 1110(a)(2) of the CARES Act and other Federal emergency assistance received. Annual tax returns may be utilized to calculate the maximum loan amount under the B&I CARES Act Program. It is the Agency's preference to review the last three full years of operations to calculate average working capital expenses for the borrower. If three years of financial information is not available, then actual working capital expenses for the business duration may be evaluated. Borrowers, who have not been in operation for a full year may estimate an average monthly cost of eligible working capital based on available historical months as long as they were in operation as of February 15, 2020.

* * * * *

(h) *Loan terms.* Notwithstanding the provisions of § 4279.126, the maximum allowable repayment term of loans for working capital purposes is 10 years. Loan repayment may defer principal payments or principal and interest payments for a period up to 12 months from loan closing and may extend deferral of principal payments up to a total of three years with a maximum repayment term of 10 years from the date of loan closing. B&I CARES Act Program Loans must be paid in full since the B&I CARES Act Program provides no loan forgiveness.

* * * * *

(k) * * *

(1) A minimum of 10 percent balance sheet equity or tangible balance sheet equity (including subordinated debt when subject to a standstill agreement); or a maximum debt-to-balance sheet equity ratio of 9 to 1.

(2) A Borrower investment of equity or other funds into the project equal to 10 percent or more of total eligible project costs, (such investment may include grants or subordinated debt when subject to a standstill agreement). Additional sources of matching funds may be derived from other loan funds; however, such funds must be in the form of cash. In-kind contributions are not eligible to meet equity requirements; or

(3) The balance sheet equity or tangible balance sheet equity includes owner-contributed capital of 10 percent or more of total fixed assets (net total fixed assets plus depreciation).

* * * * *

(m) * * * Applications are to be received and processed in the State Office in the State where the business is located. Funds will be maintained in a National Office Reserve account. The Agency will consider applications in the order they are received by the Agency on a first come, first served basis. Priority scoring will not be needed initially, however towards the end of the funding period the Agency will need to assign priority points for the limited remaining funds and for this purpose the Agency will score and compare an application to other pending applications that are competing for funding in accordance with 7 CFR 4279.166.

* * * * *

(4) A lender or borrower may combine applications for a B&I CARES Act Program loan for working capital with an application for B&I appropriated fiscal year funds. State Offices are allowed to use the same lender's analysis for each request. The existing Conditional Commitment template can be used for B&I CARES Act Program loans and deletion of certain provisions that do not impact the borrower or credit quality can be removed. Business Program Directors are encouraged to contact the National Office Program Processing Division with any questions regarding borrower eligibility, use of B&I loan proceeds, calculations of the loan amount or borrower equity, and any other questions related to a specific project. The provisions of this section do not apply to applications for B&I appropriated fiscal year funds.

Karama Neal,

Administrator, Rural Business-Cooperative Service.

[FR Doc. 2023-25908 Filed 11-22-23; 8:45 am]

BILLING CODE 3410-XY-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Chapter IX

[Doc. No. AMS-SC-22-0051]

Nomenclature Changes; Technical Amendments

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

ACTION: Final rule; technical amendments.

SUMMARY: This rule revises the general regulations for Federal marketing orders covering fruits, vegetables, and specialty crops by updating the section regarding information collections. Further, this

rule updates nomenclature in the general regulations, numerous Federal marketing orders, the import regulations, the domestic hemp program regulations, and the peanut handling regulations administered by the Agricultural Marketing Service (AMS). Finally, this rule corrects typographical errors found in the AMS marketing order and import regulations and removes regulations no longer in effect. These changes are necessary to provide more accurate information in the regulations moving forward.

DATES: Effective November 24, 2023.

FOR FURTHER INFORMATION CONTACT:

Matthew Pavone, Branch Chief, Rulemaking Services Branch, or Andrew Hatch, Deputy Director of Operations, Market Development Division, Agricultural Marketing Service, USDA; phone: (202) 720-2491 or email: Matthew.Pavone@usda.gov or Andrew.Hatch@usda.gov.

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, makes updates and corrections to regulations issued to carry out marketing orders as defined in 7 CFR 900.2(j). This rule revises the General Regulations (7 CFR part 900) and the marketing orders in numerous other parts of chapter IX that regulate the handling of fruits, vegetables, nuts, and specialty crops (parts 905, 906, 915, 917, 920, 929, 930, 932, 945, 948, 955, 958, 959, 966, 981, 982, 983, 985, 987, 989, and 993) and imported products (parts 944, 980, and 999). These parts are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." In addition, this rule corrects typographical errors in the domestic hemp program regulations (part 990), which are effective under the Agricultural Marketing Act of 1946, as amended. Finally, this rule makes corrections to the peanut handling regulations (part 996), which are effective under Public Law 107-171, the Farm Security and Rural Investment Act of 2002, as amended (7 U.S.C. 7958).

This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, AMS is issuing this final rule in conformance with Executive Orders 12988, 13175, and 13563.

Section 553(b)(3)(B) of the Administrative Procedure Act (APA), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule

without providing notice and an opportunity for public comment. AMS has determined that there is good cause for making this technical amendment final without prior proposal and opportunity for comment because the revisions are not substantive and will have no impact on the regulatory requirements in the affected parts. In addition, AMS has determined that public comment on such administrative changes is unnecessary and that there is good cause under the APA for proceeding with a final rule.

Further, because a notice of proposed rulemaking and opportunity for public comment is not required to be given for this rule under the APA or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, this rule is issued in final form.

Overview of Changes

This final rule makes technical amendments to regulations in 7 CFR parts 900, 905, 906, 915, 917, 920, 929, 930, 932, 944, 945, 948, 955, 958, 959, 966, 980, 981, 982, 983, 985, 987, 989, 990, 993, 996, and 999. USDA has determined that this action is only administrative in nature. This action updates the information collection provisions in § 900.601 to remove obsolete references and to align current Office of Management and Budget (OMB) control numbers and descriptions with the appropriate programs. This rule also revises outdated nomenclature in the general regulations pertaining to marketing agreements and marketing orders in 7 CFR part 900; in Federal marketing orders in 7 CFR parts 905, 915, 932, 945, 958, 966, 987, and 989; in the import regulations contained in 7 CFR parts 944, 980, and 999; and in the peanut handling regulations in 7 CFR part 996 to reflect current nomenclature. For example, the name of the Marketing Order and Agreement Division has been changed to Market Development Division, so references to the former name have been changed to reflect the current name. Additionally, this rule removes obsolete language and some regulatory sections (§§ 982.254 through 982.255; and §§ 985.234 through 985.236) that are no longer in effect. Lastly, this action corrects typographical errors throughout 7 CFR chapter IX. The final rule does not add to or amend any existing program requirements.

List of Subjects

7 CFR Part 900

Administrative practice and procedure, Freedom of information,

Marketing agreements, Reporting and recordkeeping requirements.

7 CFR Part 905

Grapefruit, Marketing agreements, Oranges, Pummelos, Reporting and recordkeeping requirements, Tangelos, Tangerines.

7 CFR Part 906

Grapefruit, Marketing agreements, Oranges, Reporting and recordkeeping requirements.

7 CFR Part 915

Avocados, Marketing agreements, Reporting and recordkeeping requirements.

7 CFR Part 917

Marketing agreements, Peaches, Pears, Plums, Reporting and recordkeeping requirements.

7 CFR Part 920

Kiwifruit, Marketing agreements, Reporting and recordkeeping requirements.

7 CFR Part 929

Acreage allotments, Cranberries, Marketing agreements, Reporting and recordkeeping requirements.

7 CFR Part 930

Cherries, Marketing agreements, Reporting and recordkeeping requirements.

7 CFR Part 932

Marketing agreements, Olives, Reporting and recordkeeping requirements.

7 CFR Part 944

Avocados, Food grades and standards, Grapefruit, Grapes, Imports, Kiwifruit, Limes, Olives, Oranges, Plums, Prunes.

7 CFR Parts 945 and 948

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

7 CFR Part 955

Marketing agreements, Onions, Reporting and recordkeeping requirements.

7 CFR Part 958

Onions, Reporting and recordkeeping requirements.

7 CFR Part 959

Marketing agreements, Onions, Reporting and recordkeeping requirements.

7 CFR Part 966

Marketing agreements, Reporting and recordkeeping requirements, Tomatoes.

7 CFR Part 980

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

7 CFR Parts 981, 982, and 983

Marketing agreements, Nuts, Reporting and recordkeeping requirements.

7 CFR Part 985

Marketing agreements, Oils and fats, Reporting and recordkeeping requirements.

7 CFR Part 987

Dates, Marketing agreements, Reporting and recordkeeping requirements.

7 CFR Part 989

Grapes, Marketing agreements, Raisins, Reporting and recordkeeping requirements.

7 CFR Part 990

Administrative practice and procedure, Agricultural commodities, Drugs, Indians, Intergovernmental relations, Laboratories, License and registration, Marijuana, Penalties, Reporting and recordkeeping requirements.

7 CFR Part 993

Marketing agreements, Plums, Prunes, Reporting and recordkeeping requirements.

7 CFR Part 996

Food grades and standards, Marketing agreements, Peanuts, Reporting and recordkeeping requirements.

7 CFR Part 999

Dates, Food grades and standards, Imports, Nuts, Prunes, Raisins, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, AMS amends 7 CFR chapter IX as follows:

PART 900—GENERAL REGULATIONS

■ 1. The authority citation for part 900 continues to read as follows:

Authority: 7 U.S.C. 601–674; 7 U.S.C. 7401; 5 U.S.C. 301, 552; and 44 U.S.C. Ch. 35.

§ 900.4 [Amended]

■ 2. In § 900.4, in paragraph (b)(1)(iii), remove the word “ntoice” and add in its place the word “notice”.

§ 900.14 [Amended]

■ 3. In § 900.14, in paragraph (e), remove the word “therof” and add in its place the word “thereof”.

§ 900.64 [Amended]

■ 4. In § 900.64, in paragraph (c), remove the text “conclusions,and” and add in its place the text “conclusions, and”.

§ 900.101 [Amended]

■ 5. In § 900.101, in paragraph (k), remove the word “Department” and add in its place the word “Department”.

§ 900.211 [Amended]

■ 6. In § 900.211, remove the word “wilfully” and add in its place the word “willfully”.

§ 900.305 [Amended]

■ 7. In § 900.305, in paragraph (b)(2), remove the word “requries” and add in its place the word “requires”.

§ 900.353 [Amended]

■ 8. In § 900.353, remove the word “coopertive” and add in its place the word “cooperative”.

§ 900.503 [Amended]

■ 9. In § 900.503, in paragraph (c)(3), remove the word “discretinary” and add in its place the word “discretionary”.

■ 10. In § 900.601, revise paragraph (b) to read as follows:

§ 900.601 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) *Display.*

TABLE 1 TO PARAGRAPH (b)

7 CFR part, where identified and described	Current OMB control No.
905, Florida Citrus	0581–0189
906, Texas Citrus	0581–0189
915, Florida Avocados	0581–0189
920, California Kiwifruit	0581–0189
922, Washington Apricots	0581–0189
923, Washington Sweet Cherries	0581–0189
925, California Desert Grapes ..	0581–0189
927, Oregon & Washington Pears	0581–0189
929, Cranberries	0581–0189
930, Tart Cherries	0581–0177
932, California Olives	0581–0178
945, Idaho-Eastern Oregon Potatoes	0581–0178
948, Colorado Potatoes	0581–0178
955, Vidalia Onions	0581–0178
956, Walla Walla Onions	0581–0178
958, Idaho-Eastern Oregon Onions	0581–0178
959, South Texas Onions	0581–0178
966, Florida Tomatoes	0581–0178
981, California Almonds	0581–0178
981, California Almond Salmonella	0581–0242
982, Oregon & Washington Hazelnuts	0581–0178
983, Pistachios	0581–0215

TABLE 1 TO PARAGRAPH (b)—
Continued

7 CFR part, where identified and described	Current OMB control No.
984, California Walnuts	0581-0178
985, Far West Spearmint Oil	0581-0178
986, Pecans	0581-0291
987, California Dates	0581-0178
989, California Raisins	0581-0178
990, Domestic Hemp	0581-0318
993, California Dried Prunes	0581-0178

§ 900.700 [Amended]

- 11. In § 900.700, in paragraph (c)(1) introductory text, remove the text “FV-649” and add in its place the text “SC-649”.

PART 905—ORANGES, GRAPEFRUIT, TANGERINES, AND PUMMELOS GROWN IN FLORIDA

- 12. The authority citation for part 905 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 905.41 [Amended]

- 13. In § 905.41, in paragraph (c), remove the words “short term” and add in their place the word “short-term”.

§ 905.82 [Amended]

- 14. In § 905.82, remove the text “e.s.t.” and add in its place the text “Eastern Standard Time”.

- 15. In § 905.153, in paragraph (f), revise the second sentence to read as follows:

§ 905.153 Procedure for determining handlers' permitted quantities of red seedless grapefruit when a portion of sizes 48 and 56 of such variety is restricted.

* * * * *

(f) * * * Each new handler shall provide on a form furnished by the Committee the Florida citrus fruit dealer's license number, their Florida Department of Agriculture and Consumer Services, Division of Fruit and Vegetables, packinghouse registration number, and the physical location of the packinghouse where the red seedless grapefruit is to be prepared for market. * * *

§ 905.161 [Amended]

- 16. In § 905.161, in paragraph (c) introductory text, remove the words “notwithstanding” and add in their place the word “notwithstanding”.

PART 906—ORANGES AND GRAPEFRUIT GROWN IN LOWER RIO GRANDE VALLEY IN TEXAS

- 17. The authority citation for part 906 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 906.34 [Amended]

- 18. In § 906.34, in paragraph (d), remove the word “functioning” and add in its place the word “functioning”.

§ 906.40 [Amended]

- 19. In § 906.40, in the introductory text, remove the word “regulation” and adding in its place the word “regulation”.

PART 915—AVOCADOS GROWN IN SOUTH FLORIDA

- 20. The authority citation for part 915 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 915.120 [Amended]

- 21. In § 915.120, in paragraphs (b) and (e), remove the word “avacados” wherever it occurs and add in its place the word “avocados”.

§ 915.305 [Amended]

- 22. In § 915.305, in paragraph (c), remove the text “20 bushel” and add in its place the text “20-bushel”.

- 23. In § 915.306, in paragraph (a)(5), revise the third sentence to read as follows:

§ 915.306 Florida avocado grade, pack, and container marking regulation.

(a) * * *

(5) * * * Only stamps and tape which have been approved by the Specialty Crops Inspection Division, Specialty Crops Program, Agricultural Marketing Service, U.S. Department of Agriculture, may be used for purposes of stamping and sealing containers to meet these requirements.

* * * * *

PART 917—FRESH PEARS AND PEACHES GROWN IN CALIFORNIA

- 24. The authority citation for part 917 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 917.18 [Amended]

- 25. In § 917.18:
- a. Lift the suspension of October 27, 2011;
- b. In paragraph (a), remove the text “fruit.The” and “aforesaid.In” and add in their places the text “fruit. The” and “aforesaid. In”, respectively; and
- c. Stay the section indefinitely.

§ 917.61 [Amended]

- 26. In § 917.61:
- a. Lift the suspension of October 27, 2011;
- b. In paragraph (c), remove the word “therof” and add in its place the word “thereof”; and
- c. Stay the section indefinitely.

PART 920—KIWIFRUIT GROWN IN CALIFORNIA

- 27. The authority citation for part 920 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 920.66 [Amended]

- 28. In § 920.66, remove the word “priviliges” and add in its place the word “privileges”.

PART 930—TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN

- 29. The authority citation for part 930 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 930.100 [Amended]

- 30. In § 930.100, in paragraph (c)(1), remove the text “200 acre” and add in its place the text “200-acre”.

§ 930.162 [Amended]

- 31. In § 930.162, in paragraphs (c)(1), (2), and (4), remove the text “short and long term” wherever it appears and add in its place the text “short- and long-term”.

PART 932—OLIVES GROWN IN CALIFORNIA

- 32. The authority citation for part 932 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 932.35 [Amended]

- 33. In § 932.35, in paragraph (e), remove the word “chairman” and add in its place the word “chairperson”.

§ 932.36 [Amended]

- 34. In § 932.36, remove the word “chairman” and add in its place the word “chairperson”.

§ 932.37 [Amended]

- 35. In § 932.37, remove the word “chairman” and add in its place the word “chairperson”.

§ 932.39 [Amended]

- 36. In § 932.39, in paragraph (c), remove the word “presecrbed” and add in its place the word “prescribed”.

§ 932.52 [Amended]

■ 37. In § 932.52, in paragraph (b)(2), remove the words “Processed Products Branch” and add in their place the words “Specialty Crops Inspection Division”.

§ 932.53 [Amended]

■ 38. In § 932.53, in paragraph (a), remove the words “Processed Products Branch” and add in their place the words “Specialty Crops Inspection Division”.

§ 932.139 [Amended]

■ 39. In § 932.139, in paragraph (b), remove the text “30 day payment” and add in its place the text “30-day payment”.

§ 932.152 [Amended]

■ 40. In § 932.152:
■ a. In paragraph (b), remove the words “Processed Products Branch (PPB)” and add in their place the words “Specialty Crops Inspection Division (SCI)”; and
■ b. In paragraph (c)(1) introductory text, remove the words “work day” and add in their place the word “workday”.

§ 932.154 [Amended]

■ 41. In § 932.154:
■ a. In paragraph (a), remove the word “transferring” and add in its place the word “transferring”; and
■ b. In paragraph (c), remove the words “Processed Products Branch” and add in their place the words “Specialty Crops Inspection Division”.

PART 944—FRUITS; IMPORT REGULATIONS

■ 42. The authority citation for part 944 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 944.28 [Amended]

■ 43. In 944.28:
■ a. In paragraph (b), remove the text “Fruit and Vegetable Division” and add in its place the text “Specialty Crop Inspection Division”; and
■ b. In paragraph (c), remove the text “United States Customs Service” and add in its place “U.S. Customs and Border Protection”.

§ 944.31 [Amended]

■ 44. In § 944.31:
■ a. In paragraph (c), remove the text “United States Customs Service” and add in its place “U.S. Customs and Border Protection”; and
■ b. In paragraph (e), remove the text “Fruit and Vegetable Division” and add in its place the text “Specialty Crop Inspection Division”.

§ 944.312 [Amended]

■ 45. In § 944.312:
■ a. In paragraph (a), remove the word “parageaph” and add in its place the word “paragraph”;
■ b. In paragraph (c), remove the text “United States Customs Service” and add in its place “U.S. Customs and Border Protection”; and
■ c. In paragraph (f), remove the text “Fruit and Vegetable Division” and add in its place the text “Specialty Crop Inspection Division”.
■ 46. Revise § 944.350 to read as follows:

§ 944.350 Safeguard procedures for avocados, grapefruit, kiwifruit, olives, oranges, prune variety plums (fresh prunes), and table grapes, exempt from grade, size, quality, and maturity requirements.

(a) *Exempt use.* Each person who imports or receives any of the commodities listed in paragraphs (a)(1) through (5) of this section shall file (electronically or paper) an “Importer’s Exempt Commodity Form” (SC–6) with the Market Development Division, Specialty Crops Program, AMS, USDA. A “person who imports” may include a customs broker, acting as an importer’s representative (hereinafter referred to as “importer”). A copy of the completed form (electronic or paper) shall be provided to the U.S. Customs and Border Protection. If a paper form is used, a copy of the form shall accompany the lot to the exempt outlet specified on the form. Any lot of any commodity offered for inspection and, all or a portion thereof, subsequently imported as exempt under this provision shall also be reported on an SC–6 form. Such form (electronic or paper) shall be provided to the Market Development Division in accordance with paragraph (d) of this section. The applicable commodities are:

- (1) Avocados, grapefruit, kiwifruit, olives, oranges, prune variety plums (fresh prunes) and table grapes for consumption by charitable institutions or distribution by relief agencies;
- (2) Avocados, grapefruit, kiwifruit, oranges, prune variety plums (fresh prunes), and table grapes for processing;
- (3) Olives for processing into oil;
- (4) Grapefruit for animal feed; or
- (5) Avocados for seed.

(b) *Certification of exempt use.* (1) Each importer of an exempt commodity as specified in paragraph (a) of this section shall certify on the SC–6 form (electronic or paper) as to the intended exempt outlet (e.g., processing, charity, livestock feed). If certification is made using a paper SC–6 form, the importer

shall provide a handwritten signature on the form.

(2) Each receiver of an exempt commodity as specified in paragraph (a) of this section shall also receive a copy of the associated SC–6 form (electronic or paper) filed by the importer. Within two days of receipt of the exempt lot, the receiver shall certify on the form (electronic or paper) that such lot has been received and will be utilized in the exempt outlet as certified by the importer. If certification is made using a paper SC–6 form, the receiver shall provide a handwritten signature on the form.

(c) *Disposition.* It is the responsibility of the importer to notify the Market Development Division of any lot of exempt commodity rejected by a receiver, shipped to an alternative exempt receiver, exported, or otherwise destroyed. In such cases, a second SC–6 form must be filed by the importer, providing sufficient information to determine ultimate disposition of the exempt lot, and such disposition shall be so certified by the final receiver.

(d) *Filing.* All SC–6 forms and other correspondence regarding entry of exempt commodities must be submitted electronically, by mail, or by fax to the Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; telephone (202) 720–2491; email ComplianceInfo@usda.gov; or fax (202) 720–5698.

§ 944.401 [Amended]

■ 47. In § 944.401:
■ a. In paragraph (a)(6), remove the text “the U.S. Bureau of Customs” and add in its place “U.S. Customs and Border Protection”.
■ b. In paragraph (b)(12) introductory text, remove the word “limited-use” and add in its place the words “limited use”.

§ 944.503 [Amended]

■ 48. In § 944.503, in paragraph (c), remove the text “United States Customs Service” and add in its place “U.S. Customs and Border Protection”.

§ 944.550 [Amended]

■ 49. In § 944.550:
■ a. In paragraph (b), remove the text “Fruit and Vegetable Division” and add in its place the text “Specialty Crop Inspection Division”; and
■ b. In paragraph (c), remove the text “United States Customs Service” and add in its place “U.S. Customs and Border Protection”.

PART 945—IRISH POTATOES GROWN IN CERTAIN DESIGNATED COUNTIES IN IDAHO, AND MALHEUR COUNTY, OREGON

■ 50. The authority citation for part 945 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 945.42 [Amended]

■ 51. In § 945.42, in paragraph (e), remove the words “short term” and add in their place the word “short-term”.

■ 52. In § 945.341:

■ a. In paragraph (b)(3)(i), remove the word “complaine” and add in its place the word “compliance”; and

■ b. In paragraph (d)(2), remove the text “Fresh Products Branch, Fruit and Vegetable Division” and adding in its place “Specialty Crops Inspection Division, Specialty Crops Program”.

PART 948—IRISH POTATOES GROWN IN COLORADO

■ 53. The authority citation for part 948 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 948.51 [Amended]

■ 54. In § 948.51, in the third sentence, remove the word “Committeemen” and add in its place the word “Committeepersons”.

§ 948.63 [Amended]

■ 55. In § 948.63, in paragraph (a)(1), remove the words “chairman” and “officers” and add in their places the words “chairperson” and “officers”, respectively.

§ 948.142 [Amended]

■ 56. In § 948.142, remove the words “one ach” and add in their place the words “on each”.

§ 948.386 [Amended]

■ 57. In § 948.386, in the third sentence in paragraph (g), remove the word “extend” and add in its place the word “extent”.

PART 955—VIDALIA ONIONS GROWN IN GEORGIA

■ 58. The authority citation for 7 CFR part 955 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 955.4 [Amended]

■ 59. In § 955.4, in the last sentence, remove the word “Truetlen” and add in its place the word “Treutlen”.

§ 955.42 [Amended]

■ 60. In § 955.42, in paragraph (e), remove the word “seasons’s” and add in its place the word “season’s”.

PART 958—ONIONS GROWN IN CERTAIN DESIGNATED COUNTIES IN IDAHO, AND MALHEUR COUNTRY, OREGON

■ 61. The authority citation for part 958 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 958.27 [Amended]

■ 62. In § 958.27, in the “District No. 6” paragraph in paragraph (a), remove the word “Meredian” and add in its place the word “Meridian”.

§ 958.86 [Amended]

■ 63. In § 958.86, remove the word “wilful” and add in its place the word “willful”.

§ 958.91 [Amended]

■ 64. In § 958.91, in the first paragraph of the agreement, remove the text “Fruit and Vegetable Division” and add in its place the text “Market Development Division, Specialty Crops Program”.

PART 959—ONIONS GROWN IN SOUTH TEXAS

■ 65. The authority citation for part 959 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 959.4 [Amended]

■ 66. In § 959.4, remove the word “De Witt” and add in its place the word “DeWitt”.

§ 959.24 [Amended]

■ 67. In § 959.24, in paragraph (b), remove the words “Jim Hogg De Witt” and add in its place “Jim Hogg, DeWitt”.

PART 966—TOMATOES GROWN IN FLORIDA

■ 68. The authority citation for part 966 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 966.323 [Amended]

■ 69. In § 966.323:

■ a. In paragraph (d)(1), remove the word “cerasiform” and add in its place the word “cerasiforme”; and

■ b. In paragraph (d)(5), remove the text “Fresh Products Branch, Fruit and Vegetable Programs” and add in its place the text “Specialty Crops Inspection Division, Specialty Crops Program”.

PART 980—VEGETABLES; IMPORT REGULATIONS

■ 70. The authority citation for part 980 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 980.1 [Amended]

■ 71. In § 980.1:

■ a. In paragraph (b)(1), remove the text “Area II” and add in its place the text “Area 2”;

■ b. In paragraph (g)(1)(ii), remove the text “Marketing Order and Agreement Division” and add in its place the text “Market Development Division”, and remove the text “*8eImports@ams.usda.gov*” and add in its place “*ComplianceInfo@usda.gov*”; and

■ c. In paragraph (i)(2), remove the text “the U.S. Customs Service” and add in its place “U.S. Customs and Border Protection”.

§ 980.117 [Amended]

■ 72. In § 980.117:

■ a. In paragraph (d), remove the word “supercede” and add in its place the word “supersede”; and

■ b. In paragraph (f)(3), remove the text “Marketing Order and Agreement Division” and add in its place the text “Market Development Division”, and remove the text “*8eImports@ams.usda.gov*” and add in its place “*ComplianceInfo@usda.gov*”.

§ 980.212 [Amended]

■ 73. In § 980.212:

■ a. In paragraph (b)(1), remove the text “Fresh Products Branch, Fruit and Vegetable Programs” and add in its place the text “Specialty Crop Inspection Division, Specialty Crops Program”;

■ b. In paragraph (f)(3), remove the text “Marketing Order and Agreement Division” and add in its place the text “Market Development Division”, and remove the text “*8eImports@ams.usda.gov*” and add in its place “*ComplianceInfo@usda.gov*”; and

■ c. In paragraph (h), remove the text “the United States Bureau of Customs” and add in its place “U.S. Customs and Border Protection”, and remove the word “cerasiform” and add in its place the word “cerasiforme”.

■ 74. Revise § 980.501 to read as follows:

§ 980.501 Safeguard procedures for potatoes, onions, and tomatoes exempt from grade, size, quality, and maturity requirements.

(a) *Exempt use.* Each person who imports or receives any of the commodities listed in paragraphs (a)(1) through (5) of this section shall file

(electronically or paper) an “Importer’s Exempt Commodity Form” (SC-6) with the Market Development Division, Specialty Crops Program, AMS, USDA. A “person who imports” may include a customs broker, acting as an importer’s representative (hereinafter referred to as “importer”). A copy of the completed form (electronic or paper) shall be provided to the U.S. Customs and Border Protection. If a paper form is used, a copy of the form shall accompany the lot to the exempt outlet specified on the form. Any lot of any commodity offered for inspection and, all or a portion thereof, subsequently imported as exempt under this provision shall also be reported on an SC-6 form. Such form (electronic or paper) shall be provided to the Market Development Division in accordance with paragraph (d) of this section. The applicable commodities are:

(1) Potatoes, onions or tomatoes for consumption by charitable institutions or distribution by relief agencies;

(2) Potatoes, onions, or tomatoes for processing;

(3) Potatoes or onions for livestock feed; or

(4) Pearl onions; or

(5) Tomatoes to be used in noncommercial outlets for experimental

(b) *Certification of exempt use.* (1) Each importer of an exempt commodity as specified in paragraph (a) of this section shall certify on the SC-6 form (electronic or paper) as to the intended exempt outlet (e.g., processing, charity, livestock feed). If certification is made using a paper SC-6 form, the importer shall provide a handwritten signature on the form.

(2) Each receiver of an exempt commodity as specified in paragraph (a) of this section shall also receive a copy of the associated SC-6 form (electronic or paper) filed by the importer. Within two days of receipt of the exempt lot, the receiver shall certify on the form (electronic or paper) to the Market Development Division that such lot has been received and will be utilized in the exempt outlet as certified by the importer. If certification is made using a paper SC-6 form, the receiver shall provide a handwritten signature on the form.

(c) *Disposition.* It is the responsibility of the importer to notify the Market Development Division of any lot of exempt commodity rejected by a receiver, shipped to an alternative exempt receiver, returned to the country of origin, or otherwise disposed of. In such cases, a second SC-6 form must be filed by the importer, providing sufficient information to determine ultimate disposition of the exempt lot,

and such disposition shall be so certified by the final receiver.

(d) *Filing.* All SC-6 forms and other correspondence regarding entry of exempt commodities must be submitted electronically, by mail, or by fax to the Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; telephone (202) 720-2491; email *ComplianceInfo@usda.gov*; or fax (202) 720-5698.

PART 981—ALMONDS GROWN IN CALIFORNIA

■ 75. The authority citation for part 981 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 981.19 [Amended]

■ 76. In § 981.19, remove the text “twelve month” and add in its place the word “twelve-month”.

§ 981.21 [Amended]

■ 77. In § 981.21, remove the word “kernelweight” and add in its place the words “kernel weight”.

§ 981.33 [Amended]

■ 78. In § 981.33, in paragraph (c), remove the text “three year” and add in its place the word “three-year”.

§ 981.61 [Amended]

■ 79. In § 981.61, in paragraph (a), remove the word “kernelweight” and add in its place the words “kernel weight”.

§ 981.70 [Amended]

■ 80. In § 981.70, in the last sentence, remove the word “insure” and add in its place the word “ensure”.

§ 981.442 [Amended]

■ 81. In § 981.442, in paragraph (a)(5), remove the text “50 percent requirement” and add in its place “50-percent requirement”.

§ 981.467 [Amended]

■ 82. In § 981.467:

- a. In the first sentence in paragraph (b), remove the word “quantity” and add in its place the word “quantity”; and
- b. Remove paragraphs (c) and (d).

§ 981.481 [Amended]

■ 83. In § 981.481, in the last sentence in paragraph (a), remove the text “a half” and add in its place the text “one-half”.

PART 982—HAZELNUTS GROWN IN OREGON AND WASHINGTON

■ 84. The authority citation for part 982 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 85. Revise the undesignated center heading following § 982.20 to read as follows:

Hazelnut Marketing Board

§ 982.33 [Amended]

■ 86. In § 982.33, in paragraph (b), remove the text “beginning with the 1996–97 marketing year,”.

§ 982.53 [Amended]

■ 87. In § 982.53, remove the word “insure” and add in its place the word “ensure”.

Subpart C [Removed and Reserved]

■ 88. Remove and reserve subpart C, consisting of §§ 982.254 and 982.255.

PART 983—PISTACHIOS GROWN IN CALIFORNIA, ARIZONA, AND NEW MEXICO

■ 89. The authority citation for part 983 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 983.92 [Amended]

■ 90. In § 983.92, remove the text “5,000 pound quantity” and add in its place the text “5,000-pound quantity”.

PART 985—MARKETING ORDER REGULATING THE HANDLING OF SPEARMINT OIL PRODUCED IN THE FAR WEST

■ 91. The authority citation for part 985 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 985.154 [Amended]

■ 92. In § 985.154, in paragraph (b), remove the word “insure” and add in its place the word “ensure”.

PART 987—DOMESTIC DATES PRODUCED OR PACKED IN RIVERSIDE COUNTY, CALIFORNIA

■ 93. The authority citation for part 987 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 987.12 [Amended]

■ 94. In § 987.12, in paragraph (c), remove the word “expection” and add in its place the word “exception”.

§ 987.41 [Amended]

■ 95. In § 987.41, in paragraph (c), remove the text “Processed Products Standardization and Inspection Branch” and add in its place the text “Specialty Crop Inspection Division”.

§ 987.112 [Amended]

- 96. In § 987.112:
- a. In paragraph (a), remove the word “shipped” and add in its place the word “shipped”; and
- b. In paragraph (d), remove the word “fieldrun” and add in its place the word “field-run”.

§ 987.112a [Amended]

- 97. In § 987.112a:
- a. In paragraph (b)(2), remove the text “semi-dry of dry” and add in its place the text “semi-dry or dry” and remove the text “, except beginning February 21, 1997, and ending October 31, 1997, the 10 percent tolerance shall be increased to 15 percent”;
- b. In paragraph (c)(2), remove the text “, except beginning February 21, 1997, and ending October 31, 1997, the 10 percent tolerance shall be increased to 15 percent”; and
- c. In the last sentence in paragraph (d)(3), remove the word “exercice” and add in its place the word “exercise”.

§ 987.145 [Amended]

- 98. In § 987.145, in the first sentence in paragraph (b)(2), remove the word “credited” and add in its place the word “Credited” and remove the word “exceeds” and add in its place the word “exceeds”.

§ 987.172 [Amended]

- 99. In § 987.172, in paragraph (b), remove the text “one half” and add in its place the text “one-half”.

PART 989—RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA

- 100. The authority citation for part 989 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 989.58 [Amended]

- 101. In § 989.58, in paragraph (e)(5), remove the word “insure” and add in its place the word “ensure”.

§ 989.159 [Amended]

- 102. In § 989.159, in paragraph (c)(2), remove the text “FV 146” wherever it appears and add in its place the text “SC-146”.

PART 990—DOMESTIC HEMP PRODUCTION PROGRAM

- 103. The authority citation for part 990 continues to read as follows:

Authority: 7 U.S.C. 1639o note, 1639p, 1639q, 1639r.

§ 990.1 [Amended]

- 104. In § 990.1, in the definition of “USDA licensee”, remove the word “planto” and add in its place the words “plan to”.

§ 990.3 [Amended]

- 105. In § 990.3, in paragraph (a)(2)(iii)(B) introductory text, removed the word “cannabisplant” and add in its place the words “cannabis plant”.

PART 993—DRIED PRUNES PRODUCED IN CALIFORNIA

- 106. The authority citation for part 993 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 993.49 [Amended]

- 107. In § 993.49:
- a. Lift the suspension of May 27, 2005;
- b. In paragraph (b), remove the word “resepect” and add in its place the word “respect”; and
- c. Stay the section indefinitely.

§ 993.50 [Amended]

- 108. In § 993.50:
- a. Lift the suspension of May 27, 2005;
- b. In the fifth sentence in paragraph (g), remove the word “insure” and add in its place the word “ensure”; and
- c. Stay the section indefinitely.

§ 993.56 [Amended]

- 109. In § 993.56:
- a. Lift the suspension of May 27, 2005;
- b. In the second and third sentences, remove the word “setaside” and add in its place the word “set-aside”; and
- c. Stay the section indefinitely.

§ 993.149 [Amended]

- 110. In § 993.149:
- a. Lift the suspension of May 27, 2005;
- b. In paragraph (c)(2)(vii), remove the word “offgrade” and add in its place the word “off-grade”; and
- c. Stay the section indefinitely.

§ 993.162 [Amended]

- 111. In § 993.162:
- a. Lift the suspension of May 27, 2005;
- b. In paragraph (b)(3), remove the word “he” and add in its place the word “the”; and
- c. Stay the section indefinitely.

§ 993.515 [Amended]

- 112. In § 993.515:
- a. Lift the suspension of May 27, 2005;
- b. In paragraph (b) introductory text, remove the word “nonmenclature” and add in its place the word “nomenclature”; and
- c. Stay the section indefinitely.

PART 996—MINIMUM QUALITY AND HANDLING STANDARDS FOR DOMESTIC AND IMPORTED PEANUTS MARKETING IN THE UNITED STATES

- 113. The authority citation for part 996 continues to read as follows:

Authority: 7 U.S.C. 7958.

§ 996.71 [Amended]

- 114. In § 996.71, in paragraph (b), remove the text “Southeast Marketing Field Office, Marketing Order and Agreement Division” and add in its place the text “Southeast Region Branch, Market Development Division”.

PART 999—SPECIALTY CROPS; IMPORT REGULATIONS

- 115. The authority citation for part 999 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 999.1 [Amended]

- 116. In § 999.1, in paragraph (a)(7), remove the text “Fruit and Vegetable Program” and add in its place “Specialty Crops Program”.

§ 999.100 [Amended]

- 117. In § 999.100:
 - a. In paragraph (a)(5), remove the text “Fresh Products Standardization and Inspection Branch of the Fruit and Vegetable Division, Consumer and Marketing Service” and add in its place “Specialty Crops Inspection Division, Specialty Crops Program, Agricultural Marketing Service”;
 - b. In paragraph (a)(6), remove the text “United States Customs Service” and add in its place “U.S. Customs and Border Protection”; and
 - c. In paragraph (b)(2), remove the text “effective January 25, 1959”.
 - 118. In § 999.200:
 - a. Lift the suspension of January 16, 2009;
 - b. Revise paragraphs (a)(10) through (12);
 - c. In paragraph (b)(5), remove the text “Form FV-6” and add in its place the text “Form SC-6”;
 - d. Revise paragraph (e)(1);
 - e. In paragraph (e)(2), remove the text “Form FV-6” and add in its place the text “Form SC-6”; and
 - f. Stay the section indefinitely.
- The revisions read as follows.

§ 999.200 Regulation governing the importation of prunes.

(a) * * *

(10) *Specialty Crops Program* means the Specialty Crops Program of the Agricultural Marketing Service, U.S. Department of Agriculture, Washington, DC 20250.

(11) *USDA inspector* means an inspector of the Specialty Crops Inspection Division, Specialty Crops Program, or any other duly authorized employee of the USDA.

(12) *Importation* means release from custody of U.S. Customs and Border Protection.

* * * * *

(e) * * *

(1) *General.* Prior to importation of any prunes, the person importing such prunes shall file an inspection certificate with the Collector of Customs at the port at which the customs entry is filed. In addition, if such prunes are manufacturing grade substandard prunes, such person shall also file with the Collector of Customs an executed Form SC-6—‘Importer’s Exempt Commodity Form.’ Promptly after such filing, such person shall transmit a copy of this form to the Specialty Crops Program. No person may import, sell, or use any manufacturing grade substandard prunes other than for use as set forth in paragraph (b)(5) of this section. Each person importing manufacturing grade substandard prunes shall obtain from each purchaser, no later than the time of delivery to such purchaser, and file with the Specialty Crops Program not later than the 5th day of the month following the month in which the prunes were delivered, an executed Form SC-6—‘Importer’s Exempt Commodity Form.’ One copy of this executed form shall be retained by the importer and one copy shall be retained by the purchaser.

* * * * *

§ 999.300 [Amended]

■ 119. In § 999.300, in paragraph (a)(5), remove the text “Fruit and Vegetable Program” and add in its place the text “Specialty Crops Program”.

§ 999.400 [Amended]

■ 120. In § 999.400:

■ a. In paragraph (a)(5), remove the text “Food Safety and Quality Service” and add in its place “Specialty Crops Inspection Division, Specialty Crops Program”; and

■ b. In paragraph (a)(6), remove the text “United States Bureau of Customs” and add in its place “U.S. Customs and Border Protection”.

■ 121. In § 999.500:

■ a. In paragraph (a) introductory text wherever it appears, remove the text “Marketing Order and Agreement Division” and add in its place the text “Market Development Division”;

■ b. Remove the text “FV-6” wherever it appears and add in its place the text “SC-6”; and

■ c. Revise paragraphs (c) and (d).

The revisions read as follows.

§ 999.500 **Safeguard procedures for walnuts, dates, pistachios, and raisins exempt from grade, size, quality, and maturity requirements.**

* * * * *

(c) It is the responsibility of the importer to notify the Market Development Division of any lot of exempt commodity rejected by a receiver, shipped to an alternative exempt receiver, exported, or otherwise disposed of. In such cases, a second SC-6 form must be filed by the importer, providing sufficient information to determine ultimate disposition of the exempt lot, and such disposition shall be so certified by the final receiver.

(d) All SC-6 forms and other correspondence regarding entry of exempt commodities must be submitted electronically, by mail, or by fax to the Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; telephone (202) 720-2491; email *ComplianceInfo@usda.gov*; or fax (202) 720-5698.

§ 999.600 [Amended]

■ 122. In § 999.600:

■ a. In paragraph (a)(8) remove the text “Federal Inspection Service, Fruit and Vegetable Programs” and add in its place “Specialty Crops Inspection Division, Specialty Crops Program”; and

■ b. In paragraph (h), remove the text “Marketing Order and Agreement Division” and add in its place “Market Development Division”.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2023-25238 Filed 11-22-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF ENERGY

10 CFR Part 1045

[EHSS-RM-22-WSHP]

RIN 1992-AA62

Organizational Changes in Certain Department of Energy Health, Safety, and Security Regulations; Correction

AGENCY: Office of Environment, Health, Safety and Security, U.S. Department of Energy.

ACTION: Final rule; correction.

SUMMARY: On June 26, 2023, the U.S. Department of Energy (DOE) issued a final rule that inadvertently contained inaccurate amendatory instructions so

that the revisions in certain sections of the Code of Federal Regulations (CFR) could not be made. This document corrects the CFR.

DATES: Effective November 24, 2023.

FOR FURTHER INFORMATION CONTACT:

Mr. James Dillard, U.S. Department of Energy, Office of Environment, Health, Safety and Security, Mailstop EHSS-11, 1000 Independence Ave. SW, Washington, DC 20585, Telephone: (301) 903-1165, or by Email at: *james.dillard@hq.doe.gov*.

Ms. Jennifer Tiedeman, U.S. Department of Energy, Office of General Counsel, GC-33, 1000 Independence Ave. SW, Washington, DC 20585, Telephone: (202) 287-6111, or by Email at: *jennifer.tiedeman@hq.doe.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

On February 10, 2022, DOE updated its organizational structure and changed certain titles and reporting duties within DOE’s Office of Environment, Health, Safety and Security (EHSS). Certain of the EHSS’s functions are subject to regulations in title 10 of the CFR. As a result of the changes, title 10 of the CFR contained references to DOE organizational names and positions that are no longer current. On June 26, 2023, DOE issued a final rule that made amendments to 10 CFR parts 602, 710, 712, 725, 835, 850, 851, 1016, 1017, 1045, and 1046 to reflect the new titles and organizational names. 88 FR 41289.

II. Need for Correction

One of the changes DOE made in its June 26, 2023, amendments was to change the title of the “Associate Under Secretary for Environment, Health, Safety and Security” (also referred to as the “Associate Under Secretary of Environment, Health, Safety and Security” in 10 CFR part 1045) to the “Director, Office of Environment, Health, Safety and Security” in 10 CFR parts 602, 710, 712, 835, 850, 851, 1016, 1045, and 1046. However, the rulemaking inadvertently contained inaccurate amendatory instructions at 10 CFR 1045.80, 1045.180, 1045.210, 1045.215, and 1045.220 such that all the revisions in 10 CFR part 1045 could not be made.

The purpose of this final rule technical correction is to correct references to the “Associate Under Secretary of Environment, Health, Safety and Security” and the “Associate Under Secretary for Environment, Health, Safety and Security” and instead reference the “Director, Office of Environment, Health, Safety and Security” in 10 CFR part 1045.

III. Procedural Issues and Regulatory Review

DOE has concluded that the determinations made pursuant to the various procedural requirements applicable to the June 26, 2023, final rule remain unchanged for this final rule technical correction. These determinations are set forth in the June 26, 2023, final rule. 88 FR 41289.

Pursuant to the Administrative Procedure Act, 5 U.S.C. 553(b), DOE finds that there is good cause to not issue a separate notice to solicit public comment on the changes contained in this document. Neither the errors nor the corrections in this document affect the substance of the June 26, 2023, final rule or any of the conclusions reached in support of the final rule. For these reasons, this rule is not subject to the 30-day delay in effective date requirement of 5 U.S.C. 553(d) otherwise applicable to rules that make substantive changes.

IV. Approval by the Office of the Secretary of Energy

The Secretary of Energy has approved publication of this final rule.

List of Subjects in 10 CFR Part 1045

Classified information, Declassification, Formerly restricted data, Restricted data, Transclassified foreign nuclear information.

Signing Authority

This document of the Department of Energy was signed on November 14, 2023, by David Turk, Deputy 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 20, 2023.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

For the reasons set forth in the preamble, the Department of Energy corrects part 1045 of chapter X of title 10 of the Code of Federal Regulations by making the following correcting amendments:

PART 1045—NUCLEAR CLASSIFICATION AND DECLASSIFICATION

■ 1. The authority citation for part 1045 continues to read as follows:

Authority: 42 U.S.C. 2011; E.O. 13526, 75 FR 705, 3 CFR 2010 Comp., pp. 298–327.

§ 1045.80 [Amended]

■ 2. Amend § 1045.80 in paragraph (a) by removing the words “Associate Under Secretary of Environment, Health, Safety and Security” and adding in their place the words “Director, Office of Environment, Health, Safety and Security”.

§ 1045.180 [Amended]

■ 3. Amend § 1045.180 in paragraphs (b)(2), (d), and (e)(1) and (2) by removing the words “Associate Under Secretary for Environment, Health, Safety and Security” and adding in their place the words “Director, Office of Environment, Health, Safety and Security”.

§ 1045.210 [Amended]

■ 4. Amend § 1045.210 in paragraph (a) by removing the words “Associate Under Secretary for Environment, Health, Safety and Security” and adding in their place the words “Director, Office of Environment, Health, Safety and Security”.

§ 1045.215 [Amended]

■ 5. Amend § 1045.215 by:

■ a. Removing the words “Associate Under Secretary for Environment, Health, Safety and Security” and adding in their place the words “Director, Office of Environment, Health, Safety and Security” in paragraph (a); and

■ b. Removing the words “Associate Under Secretary for Environment, Health, Safety and Security’s” and adding in their place the words “Director, Office of Environment, Health, Safety and Security’s” in paragraph (b).

§ 1045.220 [Amended]

■ 6. Amend § 1045.220 in paragraphs (a) and (b) by removing the words “Associate Under Secretary for Environment, Health, Safety and Security” and adding in their place the words “Director, Office of Environment, Health, Safety and Security”.

[FR Doc. 2023–25923 Filed 11–22–23; 8:45 am]

BILLING CODE 6450–01–P

FARM CREDIT ADMINISTRATION

12 CFR Parts 619 and 627

RIN 3052–AD48

Conservators and Receivers

AGENCY: Farm Credit Administration.
ACTION: Final rule.

SUMMARY: The Farm Credit Administration (FCA, we, our) is adopting a final rule that updates, restructures, and reorganizes our regulations that govern the appointment of the Farm Credit System Insurance Corporation (FCSIC) as the conservator or receiver of Farm Credit System (FCS or System) banks, associations, service corporations, and the Federal Farm Credit Banks Funding Corporation (Funding Corporation). The final rule also ensures FCA conservatorship and receivership regulations are consistent with the Agricultural Improvement Act of 2018 (2018 Farm Bill), which strengthens, updates, and clarifies FCSIC’s powers as the conservator or receiver of these FCS institutions. Additionally, the final rule consolidates and reorganizes our conservatorship and receivership regulations, so they are easier to understand and use. We also made conforming amendments to definitional regulations to clarify that bridge System banks, while subject to FCA supervision and oversight, are not subject to FCA regulations that apply to other System institutions. We revised these definitions because several provisions of the Farm Credit Act expressly exempt bridge banks from certain legal requirements that apply to viable and solvent System banks.

DATES: This final rule will be effective 30 days after publication in the **Federal Register** during which either or both Houses of Congress are in session. We will publish a document announcing the effective date in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

Technical information: Jason Moore, Associate Director, Office of Regulatory Policy, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4414, TTY (703) 883–4056; or

Legal information: Karen Hunter, Attorney Advisor, or Richard A. Katz, Senior Counsel, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TTY (703) 883–4056.

SUPPLEMENTARY INFORMATION:

I. Objectives

The objectives of this final rule are to:

- Consolidate, reorganize, and update our regulations governing FCA’s

appointment of FCSIC as the conservator or receiver of any System bank, association, service corporation, or the Funding Corporation.

- Ensure our conservatorship and receivership regulations in part 627 are consistent with section 5412 of the 2018 Farm Bill,¹ which added section 5.61C to the Farm Credit Act of 1971, as amended (Act).
- Restructure and reorganize part 627 so it is easier for FCA examiners, FCS institutions and other interested parties to understand and use, and to make conforming or technical revisions to other FCA regulations.
- Make conforming amendments to two definitions in part 619 to exempt bridge System banks, which are created pursuant to section 5.61C(h) of the Act, from FCA regulations and other laws that apply to healthy and ongoing FCS banks, associations, and service corporations.

II. Background

Section 4.12 of the Act governs the dissolution of Farm Credit institutions through voluntary and involuntary liquidation, mergers, and receiverships or conservatorships.² Pursuant to section 4.12(b), FCA has the “exclusive power and jurisdiction” to appoint a conservator or receiver for any System institution³ when any of six specific conditions exist that indicates an institution is insolvent or unviable.⁴ Over the last thirty years, FCA’s regulations in Part 627 regarding

conservators, receivers, and voluntary liquidations have implemented the provisions in section 4.12 of the Act.

The main reason for this rulemaking is the 2018 Farm Bill added a new section 5.61C to the Act, which strengthens, clarifies, and updates the powers and duties of FCSIC in its capacity as the appointed conservator or receiver of any FCS institution. Section 5.61C enhances FCSIC’s authority to: (1) operate any FCS institution in conservatorship or receivership and perform all its functions; (2) handle all claims by various parties against such institution; and (3) enforce contracts on the institution’s behalf. This enhanced statutory conservatorship and receivership authority is comparable to the authority of the Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration (NCUA), and Federal Housing Finance Agency (FHFA) regarding the institutions they oversee.⁵

The Farm Bill also introduced the concept of bridge System banks as a means for FCSIC to resolve or liquidate failing or failed System banks. Section 5.61C(h) authorizes FCA to charter bridge System banks at FCSIC’s request for one or more distressed System banks and dissolve them once such failing or failed banks are resolved.⁶ The statutory provisions governing all aspects of bridge System banks from their creation to their termination and dissolution are comprehensive, clear, and prescriptive.⁷

This final rule completes our second rulemaking since 2021 to revise our regulations in part 627 to implement changes section 5412 of the 2018 Farm Bill made to the Act. In March 2021, we issued a direct final rule that rescinded ten regulations in Part 627 that the 2018 Farm Bill superseded and rendered obsolete because they were no longer

consistent with FCSIC’s new statutory authority over the priority of claims and other aspects relating to the administration and management of conservatorships and receiverships.⁸

In this most recent phase of this rulemaking, we published a proposed rule on April 4, 2022⁹ that would update, restructure, and consolidate FCA regulations at part 627 governing the appointment and role of FCSIC as the conservator or receiver of an FCS institution, other than Farmer Mac. More specifically, we proposed combining the four remaining conservatorship regulations into a single regulation and consolidating the three receivership regulations we retained into a separate regulation.

FCA also proposed to reverse the chronological order of the existing regulations by presenting the conservatorship regulation first and the receivership regulation second.¹⁰ FCA also proposed to simplify the numbering system for the regulations in part 627 such that they will have no more than a two-digit number after the decimal point, which is consistent with the way FCA has numbered regulations in recent years. The proposed rule also: (1) reorganized the definitions in alphabetical order, (2) deleted references to the defunct Farm Credit System Financial Assistance Corporation, and (3) updated the reference to FCSIC in our conservatorship and receivership regulations to be consistent with all other FCA regulations. We also proposed conforming changes to other FCA regulations to be consistent with the changes made to part 627.

In response to the proposed rule, we received one substantive comment from an individual who supported the proposed rule.

III. Final Rule

After careful consideration, FCA is finalizing the proposed rule without material change.¹¹ We received no

¹ Public Law 115–334, 132 Stat. 4490 (Dec. 20, 2018).

² Section 4.12 of the Act governs both the voluntary and involuntary dissolution of System institutions. Subpart D of part 627 addresses the voluntary liquidation of System banks, associations, service corporations, and the Funding Corporation. However, the voluntary liquidation of these System institutions is outside the scope of this rulemaking.

³ In contrast to all other FCS institutions, section 8.41 governs the conservatorship, liquidation, and receivership of Farmer Mac. Under section 8.41(c)(1)(A) of the Act, FCA is allowed, but not required, to appoint FCSIC as the conservator or receiver of Farmer Mac. Regulations in part 650, subpart B, govern the conservatorship or receivership of Farmer Mac. For these reasons, this rulemaking does not apply to the conservatorship or receivership of Farmer Mac.

⁴ These conditions include: (1) insolvency, in that the assets of the institution are less than its obligations to its creditors and others, including its members; (2) substantial dissipation of assets or earnings due to any violation of law, rules, or regulations, or to any unsafe or unsound practice; (3) an unsafe or unsound condition to transact business; (4) willful violation of a cease and desist order that has become final; (5) concealment of books, papers, records, or assets of the institution or refusal to submit books, papers, records or other material relating to the affairs of the institution for inspection to any examiner or to any lawful agent of FCA; (6) the institution in unable to timely pay principal or interest on any insured obligation issued by the institution.

⁵ Additionally, the legislative history to the 2018 Farm Bill further reveals Congress intended FCSIC’s authorities “to be functionally equivalent to the parallel authorities of the [FDIC].” See Conf. Report No. 115–1072, 115th Cong., 2nd Sess., (Dec. 10, 2018) p. 648.

⁶ According to section 5.61C(h)(2)(A) of the Act, FCA may charter a bridge System bank only if it determines that: (1) the amount which is reasonably necessary to operate the bridge System bank will not exceed the amount which is reasonably necessary to save the cost of liquidating 1 or more System banks in default or danger of default; (2) chartering a bridge System bank is essential to continue providing adequate farm credit services in communities where such System bank(s) in default or danger of default provides such farm credit services; or (3) the continued operation of such System bank(s) in default or danger of default with respect to which the bridge System bank is chartered is in the best interest of the FCS or the public.

⁷ Section 5.61(h) of the Act lists all the aspects of bridge System banks from cradle to grave. See also footnote 7 of the proposed conservators and receivers’ rule at 87 FR 19398 (Apr. 4, 2022).

⁸ See 86 FR 15081 (Mar. 22, 2021). The rule became effective on May 13, 2021. See FR 27510 (May 21, 2021).

⁹ See 87 FR 19397 (Apr. 4, 2022).

¹⁰ As explained in the preamble to the proposed rule, this is a logical change because (1) it follows the order of section 4.12 of the Act and (2) an institution in a conservatorship can be placed into receivership if its condition worsens. See 87 FR 19399 (Apr. 4, 2022).

¹¹ However, we made a few minor, non-substantive revisions to the text of specific regulatory provisions to improve their clarity, flow, and readability. We removed “that are” before “identified in section 1.2 of the Act, and “it” before “excludes bridge System banks” in § 619.9146 because these words are superfluous and unnecessary. In § 627.3(a), we substituted “FCA”

comments that opposed the proposed rule or asked us to change it. As noted earlier, the purpose of this rulemaking is to update, clarify, restructure, and reorganize our conservators and receivers regulations to be consistent with changes the 2018 Farm Bill made to the Act. More specifically, the 2018 Farm Bill realigned and clarified the roles of FCA and FCSIC pertaining to the conservatorship and receivership of failing and failed FCS institutions, and it gave FCSIC enhanced powers as the conservator or receiver of System institutions. Accordingly, we restructured and reorganized our regulations in part 627 to implement FCA's specific statutory authorities governing conservatorships and receiverships while deferring to FCSIC as to how it will carry out its own authorities.¹²

The final rule also achieves FCA's goal of making these regulations more user-friendly. Restructuring, consolidating, renumbering, eliminating redundancies, and simplifying the wording of these regulations improves their clarity and readability. As a result, FCA examiners, System institutions and borrowers, and other members of the public who may be affected by the conservatorship or receivership of an FCS institution will find it easier to understand, use, and rely on these regulations.

We now discuss the specific provisions of the final rule and how they alter many of the regulations in part 627 that were previously in effect. This analytical discussion primarily focuses on substantive changes to these regulations. We have already explained minor, non-substantive regulatory revisions (such as a simplified numbering system, and stylistic wording changes) both above and in the preamble to the proposed rule and, therefore, we do not describe them in great detail here.

We discuss the specific provisions of the final rule in the same chronological order they appear in the regulations in part 627. Conforming amendments to certain definitions in part 619 appear last in this analysis.

for "it" immediately after the word "if." This revision clarifies an ambiguity in the text of the proposed rule by clearly identifying FCA as the party that determines if one or more of the grounds in 627.3(b) exists for placing a System institution in conservatorship or receivership. We omitted the word "that" in three out of four places it appeared in §§ 627.10(c)(1) and (c)(2), and 627.20(d)(1) because this term is not needed to support the grammatical structure of these respective sentences.

¹² See 87 FR 19397, *supra* at 19399.

A. Subpart A—General Provisions

As before, subpart A continues to house the general regulatory provisions that apply to the other subparts of part 627. The final rule retains the four regulations in subpart A but renumbered them for the reasons discussed above.

1. Applicability—§ 627.1

Final and redesignated § 627.1 states the "provisions in this part apply to conservatorships, receiverships, and voluntary liquidations of System institutions chartered under titles I, II, III, IV, and VII of the Act." The only substantive difference between final § 627.1 and its predecessor, former § 627.2700, is the addition of specific references to other titles of the Act. This change clarifies that the regulations in part 627 do not apply to Farmer Mac. Instead, as noted earlier, the regulations in Subpart B of part 650 govern the conservatorship, receivership, or voluntary liquidation of Farmer Mac.

2. Definitions—§ 627.2

The definitions that apply to part 627 are located in final and redesignated § 627.2. Final § 627.2 lists the definitions alphabetically, without paragraph designations, which is consistent with FCA's recent practice in rulemakings. The most significant changes in final and redesignated § 627.2 are to the definition of "Farm Credit institution(s) or institution(s)." First, we removed the reference to the now-defunct Farm Credit System Financial Assistance Corporation from this definition.¹³ Second, we added a final sentence to the provision specifically stating these terms do not include bridge System banks chartered by FCA in accordance with section 5.61C(h)(2) of the Act.

3. Grounds for Appointing FCSIC as Conservator or Receiver

Final and redesignated § 627.3 specifies the grounds for FCA appointing FCSIC as conservator or receiver of a System institution pursuant to sections 4.12(b) and 5.61C(l) of the Act. Essentially, final § 627.3(a) allows FCA, in its discretion, to appoint FCSIC as the conservator or receiver of an FCS institution if FCA determines that one or more of the grounds in the § 627.3(b) exist. As before, paragraph (b) of this regulation identifies six grounds for FCA to appoint FCSIC as the

¹³ Section 5411(39) of the 2018 Farm Bill repealed title VI of the Act. Subpart B of former title VI of the Act established the Farm Credit System Financial Assistance Corporation. See Public Law 115–334, *supra* at 4683.

conservator or receiver of a System institution, which derive from section 4.12(b) of the Act. The most substantive change we made to this regulation is an added sentence at the end of final and redesignated § 627.3(a) that implements new section 5.61C(l)(1) of the Act, which requires FCA, to the extent practicable, to consult with FCSIC before taking a pre-resolution action that could result in a conservatorship or receivership of a distressed FCS institution.¹⁴ As explained in detail in the preamble to the proposed rule, the other changes to this regulation are non-substantive, technical, grammatical, and stylistic revisions that improve its clarity and readability.¹⁵

4. Action for the Removal of the Conservator or Receiver—§ 627.4

Final and redesignated § 627.4, which replaces former § 627.2715, allows an FCS institution placed into conservatorship or receivership to initiate an action for removal of the conservator or receiver. This regulation implements provisions in section 4.12(b) of the Act that authorizes an FCS institution, within 30 days after FCA appoints FCSIC as its conservator or receiver, to bring an action in certain United States district courts to remove the conservator or receiver. Once an institution is placed in conservatorship or receivership, all powers, rights, and privileges of its board of directors, management, and employees transfer to FCSIC and the charter of an institution in receivership is cancelled.

Final and redesignated § 627.4 creates an exception for an institution's board of directors to meet after the appointment of a conservator or receiver and initiate an action for removal. Under this regulation, only an institution's board of directors has the power to authorize an action to remove the conservator or receiver.

The revisions to this regulation are non-substantive. We improved its clarity by rewriting it in the active voice, and by adding cross-references to this regulation in § 627.10 and § 627.20.

B. Subpart B—Conservator and Conservatorships

As revised, subpart B of part 627 addresses FCA's authority under section 4.12(b) of the Act to appoint FCSIC as the conservator of distressed FCS

¹⁴ Section 5.61C(l) of the Act establishes a reciprocal requirement on FCSIC. According to section 5.61C(l)(2) of the Act, FCSIC "acting in the capacity of the Corporation as a conservator or receiver, shall consult with the [FCA] prior to taking any significant action impacting System institutions or service to System borrowers."

¹⁵ *Id.* at 19399–400.

institutions. As discussed above, we relocated our conservatorship regulations from subpart C to subpart B and combined the four remaining regulations into a single conservatorship regulation. Yet, final § 627.10 is not substantively different from the four regulations it replaces because both the former and new regulations effectively carry out FCA's statutory powers and responsibilities concerning the conservatorship of FCS institutions.

The role of a conservator is to continue the ongoing operations of an institution while taking measures to preserve its assets and restore its financial viability so it can resume its normal business activities when it emerges from conservatorship. The purpose of a conservatorship is to resuscitate a trouble institution, not to liquidate it. In this context, our revised conservatorship regulation continues to implement FCA's authority to: (1) appoint FCSIC as the conservator of a System institution; (2) transfer the day-to-day operations of the institution to FCSIC, in its capacity as the conservator, (3) examine the institution in conservatorship; (4) require audits and published financial reports for any FCS institution in conservatorship, and (5) terminate the conservatorship by either discharging FCSIC as conservator or by placing the institution into receivership.

Final and redesignated § 627.10(a), which replaces former § 627.2775, governs FCA's appointment of FCSIC as conservator of a failing FCS institution. According to new § 627.10(a)(1), the FCA Board may exercise its authority under 4.12(b) of the Act and § 627.3 to appoint FCSIC as conservator of an FCS institution once it finds one or more grounds identified in § 627.3(b) exist. This provision also authorizes the FCA Board to appoint FCSIC as the conservator of a System institution *ex parte* and without notice. The substance of final § 627.10(a)(1) is the same as its predecessor, § 627.2775(a). However, we changed the order and flow of this regulatory provision. As rewritten, the rule now requires us to first find legal grounds exist for appointing the conservator before we can do so *ex parte* and without notice. This revision makes the regulation more logical and easier to read and understand.

Final and redesignated § 627.10(a)(2) requires the FCA Chairman, upon the appointment of the conservator, to immediately notify the affected institution and if it is an association, its funding bank. It also requires FCA to publish a notice in the **Federal Register** whenever it appoints FCSIC as the conservator of a System institution. The

only substantive change to this provision is that we deleted the provision in former § 627.2775(b) that required FCSIC to notify all holders of the institution's voting stock and participation certificates, by First-Class mail about the establishment of the conservatorship, and its effects on the: (1) institution's operations, and (2) borrowers' loans and equity holdings. As explained earlier, new section 5.61C of the Act strengthened FCSIC's powers as the conservator of FCS institutions and, therefore, FCA regulations will not instruct FCSIC how to administer conservatorships unless a specific statutory provision explicitly requires us to do so. Notification to shareholders of System institutions about how a conservatorship will affect them is now within FCSIC's jurisdiction. Final § 627.10(a)(2) also incorporates two non-substantive, stylistic changes we proposed to update the language and improve the readability of this provision.¹⁶

Final and redesignated § 627.10(b) addresses FCA's role, responsibilities, powers, and prerogatives once it places an FCS institution into conservatorship. It incorporates various provisions in its predecessor regulations, §§ 627.2775 and 627.2785.

Final § 627.10(b)(1), which is a restatement of former § 627.2775(c), reaffirms that once the FCA Board issues an order placing an FCS institution into conservatorship, all rights, privileges, and powers of its members, board of directors, and employees are transferred to and vested exclusively in FCSIC as conservator. The FCA added a passage at the end of § 627.10(b)(1) that states, "the board of directors of the institution retains authority to initiate an action in Federal court to remove the conservator pursuant to § 627.4." This new passage adds a cross-reference to § 627.4, which replaces the more ambiguous "notwithstanding" clause in former § 627.2715.

The next four paragraphs of final § 627.10(b) derive from various provisions of former § 627.2785. It establishes requirements for the examination, auditing, and financial reporting of a System institution in conservatorship. Final § 627.10(b)(2), which restates the first sentence of former § 627.2785(b), affirms FCA's authority to examine FCS institutions in conservatorship in accordance with

section 5.19 of the Act. The second sentence of former § 627.2785(b), which requires a certified public accountant audit a System institution in conservatorship pursuant to part 621, now becomes a separate regulatory provision, and is redesignated as final § 627.10(b)(3). Final §§ 627.10(b)(4) and (b)(5) govern financial reporting by a System institution in conservatorship to FCA and its shareholders, respectively. Former § 627.2785(c), which this rulemaking redesignates as § 627.10(b)(4), requires each System institution in conservatorship to file financial reports required by part 621. More specifically § 621.14 requires each System institution to certify that: (1) its financial reports have been prepared in accordance with applicable regulations and instructions, and (2) its financial reports are a true and accurate representation of the institution's financial condition and performance. Also, § 621.14 requires an officer of the institution to certify these financial reports. Since FCSIC replaces the management of a System institution in conservatorship, FCSIC is required by both the former and new regulation to certify the reports of financial condition the institution submits to FCA. Similarly, final § 627.10(b)(5), which replaces former § 627.2785(d), requires System institutions in conservatorship to prepare and publish financial reports for their shareholders in accordance with part 620. Under this regulation, FCSIC, as conservator, must sign and certify such disclosures to the institution's shareholders. As explained in the preamble to the proposed rule, several stylistic revisions to redesignated §§ 627.10(b)(2) through (b)(5) shortened these four provisions, simplified their language, and improved their readability and clarity without altering their substantive meaning.¹⁷

The final rule repeals the provision in former § 627.2785(a) that required the conservator to: (1) take an inventory of the assets and liabilities of the institution from the date FCA placed it into conservatorship; and (2) file a copy of the inventory with FCA. Conducting an inventory of the assets and liabilities of an FCS institution in conservatorship falls within FCSIC's new powers and duties under section 5.61C(b) of the Act. As explained in the proposed rule, FCA continues to have the right to obtain a copy of the inventory because a System institution in conservatorship is still chartered as an ongoing FCS institution, and it remains subject to FCA examination, supervision, and regulation. FCA has authority under the

¹⁶ First, we changed "district bank" to "funding bank." Second, the provision about publishing the notice in the *Federal Register* became a separate sentence. *Id.* at 19400–401.

¹⁷ *Id.* at 19401.

2018 Farm Bill to receive a copy of the conservator's inventory of the institution's assets and liabilities. However, requiring FCSIC, by regulation, to conduct the inventory and share a copy of it with us is not necessary under the new legislation.

Final and redesignated § 627.10(c) governs the termination of a conservatorship. A conservatorship ends in one of two ways. In the first situation, the conservatorship corrects and resolves the problems or conditions that led to the conservatorship of the institution, and FCA determines the institution is able to resume normal operations under new management. Alternatively, the institution's conditions continue to deteriorate, and FCA decides to place it into receivership. In this situation, FCA will appoint FCSIC as the institution's receiver, and FCSIC will determine the best course of action for liquidating and resolving the institution.

These two scenarios are set forth in final § 627.10(c)(1) and § 627.10(c)(2), respectively. More specifically, the FCA Board may terminate the conservatorship under final § 627.10(c)(1) by determining the institution is in a position to resume normal management. In this situation, our Board will instruct FCSIC to turn the institution's operations over to new management FCA designates. Once new management is in place, FCA discharges FCSIC as conservator. In the alternative, the conservatorship will end when FCA places the institution in receivership and appoints FCSIC as receiver under § 627.10(c)(2). Both provisions of final § 627.10(c) are a restatement of the last two sentences of former § 627.2770(a).

The final rule rescinds former § 627.2790, which previously required FCSIC to submit a report to FCA on its conservatorship activities before its discharge as conservator of an institution. Filing a report with the FCA is not a statutory requirement for terminating a conservatorship. FCA and FCSIC will jointly determine what documentation is appropriate to share when conservatorship terminates.

C. Subpart C—Receivers and Receiverships

The final rule also consolidates the three remaining receivership regulations, former §§ 627.2720, 627.2735, and 627.2765 into a single regulation, which we redesignated as § 627.20. As noted above, we reorganized part 627 by transferring our receivership regulations from subpart B to subpart C, where it now follows our conservatorship regulations. To a large extent, final and redesignated § 627.20

follows the same format and structure as the revised conservatorship regulation. Yet, a receivership is fundamentally different from a conservatorship because it liquidates and resolves a failing institution rather than correcting its problems. For this reason, there are some key distinctions between our conservatorship and receivership regulations. As a result, the changes to our receivership regulations are more extensive and substantive than those to our conservatorship regulations.

Final § 627.20(a) addresses FCA's appointment of FCSIC as the receiver of an FCS institution. More specifically, § 627.20(a)(1) states the FCA Board "may exercise its authority under section 4.12(b) of the Act and § 627.3 to appoint FCSIC as the receiver of an FCS institution upon finding that one or more of the grounds identified in § 627.3(b) exist." This regulatory provision also authorizes the FCA Board to appoint FCSIC as the receiver of any System institution *ex parte* and without notice.

In this context, final § 627.20(a)(1) has the same substantive requirements as its predecessor, former § 627.2720(a). Additionally, § 627.20(a)(1) is virtually identical to the corresponding provision in the final conservatorship regulation, § 627.10(a)(1). We made the same technical and stylistic changes to both provisions because the same reasoning applies to the appointment of both conservators and receivers. As explained above in the preamble discussion to the final conservatorship regulation, legal grounds must exist for FCA to appoint FCSIC as the conservator or receiver of an FCS institution before we can do so *ex parte* and without notice.

Upon appointment of FCSIC as receiver, final § 627.20(a)(2) requires the FCA Chairman to immediately notify the affected institution and its funding bank if it is an association. It also requires FCA to publish a notice in the **Federal Register** whenever it appoints FCSIC as the receiver of a System institution. Again, the technical changes to final § 627.20(a)(2) mirror changes to the corresponding provision of the conservatorship regulation. The same explanation and rationale provided in this preamble explaining these changes to the conservatorship regulation apply to the receivership rule, as well.

Final and redesignated § 627.20(b), which replaces former § 627.2720(d), continues to require the funding bank, in the event of the voluntary or involuntary liquidation of an affiliated association, to take appropriate measures to minimize the adverse effect of the liquidation on borrowers whose

loans are purchased by, or otherwise transferred to another System institution. The only revisions to this provision are a few minor word changes. As explained earlier, our current rulemaking does not substantively amend our voluntary liquidation regulations in subpart D of part 627. For this reason, final § 627.20(b) continues to apply to both voluntary liquidations and receiverships for the time being.

Former § 627.2720(e), which the final rule redesignates as § 627.20(c), addresses how receivership changes the status of a failed System institution. Final § 627.20(c)(1) continues to state that once the FCA Board issues an order placing an FCS institution into receivership, "all rights, privileges, and powers of its members, board of directors, and employees are transferred to and vested exclusively in FCSIC as receiver." We have added a new provision at the end of § 627.20(c)(1) that carves out an exception that enables the institution's board to initiate an action in Federal court to remove the receiver pursuant to § 627.4. We have already explained the reasons for these changes twice above.

Final and redesignated § 627.20(c)(2) revises the last sentence of former § 627.2729(e). This provision governs the cancellation of a System institution's charter when FCA appoints FCSIC as its receiver. Under the former rule, FCA could cancel a System institution's charter either when it appoints FCSIC as receiver, or at any time thereafter.¹⁸ In contrast to former § 627.2720(e), final § 627.20(c)(2) requires cancellation of the charter when FCSIC is appointed as the receiver of a System institution. Canceling the charter means an institution is out of business and undergoing liquidation and resolution. A 'live' corporate charter is inconsistent with FCSIC's rights, powers, and duties as receiver under section 5.61C of the Act, as added by Congress in 2018. As long as the charter remains in effect, the institution is not defunct as a matter of law, and FCSIC's authority and ability to resolve the estate by disposing of its assets and liabilities can more easily be challenged by creditors, shareholder-members, and other parties, contrary to Congressional intent to provide for an

¹⁸ In 1992, we added the provision to former § 627.2720(e) that allowed us to cancel the charter at a later time in response to a comment from a System trade association. At that time, FCA opted for the flexibility to consider when to cancel an institution's charter on a case-by-case basis, although the preamble to the former regulation expressed FCA's expectation that it would ordinarily cancel the charter when it appointed FCSIC as the institution's receiver. See 57 FR 46482 (Oct. 9, 1992).

orderly liquidation process comparable to that of other federally chartered financial institutions.¹⁹

Final and redesignated § 627.20(d) implements section 4.37 of the Act, which addresses the treatment of uninsured voluntary and involuntary accounts of a System institution in receivership.²⁰ This regulation provides that once the FCA Board has placed a System institution into receivership, FCSIC, in accordance with section 4.37 of the Act, will, as soon as practicable, notify every borrower who holds an uninsured voluntary or involuntary account, as described in § 624.4175, at such institution that: (1) such accounts ceased earning interest from the date the receivership commenced; and (2) FCSIC, as receiver, will immediately apply the funds in a borrower's account(s) as payment against the outstanding balance of the borrower's loan(s). The final rule rescinds a provision in the former regulation, § 627.2735(e), that allowed a borrower, within 15 days of receiving this notice, to direct FCSIC to apply the funds in the account for some other purpose specified in the loan documents. We are repealing this provision because these accounts are uninsured and unsecured, and section 4.37 of the Act explicitly states these funds must be applied to reduce the outstanding balance of the borrower's loans.²¹ All other changes to this regulation are not substantive, and they are designed to improve its readability and clarity.

The final rule also rescinds former § 627.2735(b), which requires FCSIC to provide notice to stockholders of an FCS institution in receivership regarding the value they will receive for their stock upon its liquidations. No regulation is needed to implement statutory

provisions that protect borrower stock at System institutions in liquidation. Section 4.9A(c) of the Act, which requires FCSIC to retire borrower stock at par at a System institution in receivership, provides clear and unambiguous guidance to FCSIC.

Finally, redesignated § 627.20(e) amends and restates former § 627.2765, which governs the final discharge and release of the receiver. According to this regulation, the receivership terminates once FCSIC makes a final distribution of the liquidated institution's assets. At that time, final § 627.20(e) specifies the FCA Board will completely and finally release and discharge the receiver. This rulemaking repealed a provision in former § 627.2765 that required our Board to cancel the institution's charter at this time if it had not done so previously. We rescinded this provision because, as discussed earlier, § 627.20(c)(2) requires FCA to cancel the charter when the FCA Board places the institution in receivership.

D. Conforming Amendments

The final rule makes conforming amendments to other regulations in parts 619 and 627.

1. Definitions in Part 619

Our regulations in part 619 define terms that apply to all regulations unless a provision in a part, subpart, or section specifically states a different definition applies. This final rule amends the definition of "Farm Credit bank" in § 619.9240 and "Farm Credit institutions" in § 619.9146, so both terms explicitly exclude bridge System banks FCA charters at FCSIC's request under section 5.61C(h)(2) of the Act. Bridge System banks are vehicles to resolve System institutions in liquidation. These conforming amendments to §§ 619.9140 and 619.9146 exempt bridge System banks from FCA regulations that govern the activities and operations of healthy, ongoing FCS institutions. Thus, FCA regulations governing the organization and governance, capitalization, funding, and other activities of other System institutions would not apply to bridge System banks unless we enact a regulation that states otherwise.

Additionally, we deleted the reference to the Funding Corporation from the definition of "Farm Credit institution" in § 619.9146. The reason for this revision is section 5411(2) of the 2018 Farm Bill amended section 1.2(a) of the Act to expressly identify the Funding Corporation as a System institution. As a result, referencing the Funding Corporation in this regulation is now duplicative and unnecessary.

2. Voluntary Liquidation Regulation in Subpart D of Part 627

As noted earlier, FCA is not revising its voluntary liquidation regulations in Subpart D at this time. However, the final rule made non-substantive conforming changes we proposed to ensure these regulations in subpart D are consistent with amendments to the conservatorship and receivership regulations in part 627. First, we redesignated the two regulations in subpart D, §§ 627.2795 and 627.2797 as §§ 627.40 and 627.41 respectively, so they conform to the numbering changes we made to subparts A, B, and C of part 627. Second, we changed the reference to "subpart B" in redesignated § 627.40(a) to subpart C because, as discussed above, the final rule relocates our new receivership regulation to subpart C. Finally, we deleted the passage at the end of the final sentence in former § 627.2797(a), which states, "except that if the Farm Credit institution is placed in receivership, the provisions of § 627.2730 shall govern further disposition of the equities of the Farm Credit institution." We deleted this passage because the direct final rule we enacted in 2021 repealed § 627.2730.

IV. Bridge System Banks and Voluntary Liquidations

A. Bridge System Banks

Bridge System banks are one of the new tools the 2018 Farm Bill gave FCSIC, in its capacity as receiver, for resolving or liquidating failing or failed System banks. Section 5.61C(h) of the Act authorizes FCA to charter bridge System banks at FCSIC's request and dissolve them once a failing or failed Farm Credit bank is resolved.²²

The statutory provisions governing the creation, operation, capitalization, and termination and dissolution of bridge System banks are comprehensive, unambiguous, and prescriptive.²³ For that reason, new regulations are not necessary to implement FCA's statutory authority pertaining to bridge System banks. To date, FCA has not proposed regulations for bridge System banks and instead will rely on its chartering and supervisory powers, as well as coordination with FCSIC, to fulfill FCA's responsibilities and obligations under section 5.61C(h) of the Act. We note section 5.61C(h) grants FCSIC authority to organize, control, manage, and operate bridge System banks. Other

¹⁹ Federal statutes comparable to section 4.12(b) of the Act permit commercial banks, credit unions, and Federal Home Loan Banks to challenge in Federal court, decisions by the three Federal banking regulatory agencies, the NCUA, and FHFA to appoint receivers and seek their removal. These agencies cancel the charters of institutions they supervise at the time they place them into receivership to ensure an orderly liquidation and resolution.

²⁰ Section 4.37 of the Act requires money of a borrower held in an uninsured voluntary or involuntary account at a System institution must be immediately applied as payment against the borrower's outstanding loans if the institution is placed in liquidation. This statutory provision also requires FCA to enact regulations that: (1) define the term "uninsured voluntary or involuntary account"; and (2) effectively carry out section 4.37 of the Act.

²¹ Section 4.37 of the Act requires FCA to enact regulations about how uninsured voluntary and involuntary accounts at System institutions are to be resolved by FCSIC. For this reason, final § 627.20(d) specifies how FCSIC will address the resolution of these specific liabilities of a System institution in receivership.

²² See *supra* note 6. See also 87 FR *supra* at 19398, footnote 6.

²³ See *supra* note 7. Detailed information concerning bridge System banks for cradle to grave is in available in the preamble to the proposed rule. *Id.* at footnote 7.

Federal regulators of financial institutions, including the Comptroller of the Currency, the NCUA, and the FHFA, have not enacted regulations to implement similar statutory provisions.

Section 5.61C(h) of the Act also establishes the statutory framework for creating a healthy and viable successor bank to a bridge System bank once the receivership ends.²⁴ However, replacing the bridge System bank with successor FCS banks raises novel issues of first impression for both FCA and FCSIC. As noted in the preamble to the proposed rule, both agencies are exploring and consulting about this issue. FCA may propose new regulations in the future to implement section 5.61C(h)(9) and (h)(10) concerning the processes and procedures for replacing a bridge System bank with a solvent, and viable Farm Credit bank.

B. Voluntary Liquidations

As discussed above, the FCA has not substantively amended its regulations in subpart D of part 627 governing the voluntary liquidation of System institutions other than Farmer Mac. These regulations have been in effect since 1998, and FCA is reviewing them to determine whether revisions are needed.²⁵

IV. Regulatory Analysis

A. Regulatory Flexibility Act and Major Rule Conclusion

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), FCA hereby certifies the final rule will not have a significant economic impact on a substantial number of small entities. Each of the banks in the Farm Credit System, considered together with its affiliated associations, has assets and annual income in excess of the amounts that would qualify them as small entities. Therefore, Farm Credit System institutions are not “small entities” as defined in the Regulatory Flexibility Act.

B. Congressional Review Act

[To be determined.]

List of Subjects

12 CFR Part 619

Agriculture, Banks, Banking, and Rural areas.

12 CFR Part 627

Agriculture, Banks, Banking, Claims, Rural areas.

For the reasons stated in the preamble, parts 619 and 627 of chapter VI, title 12 of the Code of Federal Regulations are amended as follows:

PART 619—DEFINITIONS

- 1. The authority citation for part 619 is revised to read as follows:

Authority: Secs. 1.4, 1.5, 1.7, 2.1, 2.2, 2.4, 2.11, 2.12, 3.1, 3.2, 4.9, 5.9, 5.17, 5.19, 5.61C, 7.0, 7.1, 7.6, 7.8 and 7.12 of the Farm Credit Act (12 U.S.C. 2012, 2013, 2015, 2072, 2073, 2075, 2092, 2093, 2122, 2123, 2160, 2243, 2252, 2254, 2279a, 2279a–1, 2279b, 2279c–1, 2279f); sec 514 of Pub. L. 102–552. 106 Stat. 4102.

- 2. Revise § 619.9140 to read as follows:

§ 619.9140 Farm Credit bank(s).

Except as otherwise defined, the term *Farm Credit bank(s)* includes Farm Credit Banks, agricultural credit banks, and banks for cooperatives, but excludes bridge System banks chartered by the Farm Credit Administration Board pursuant to section 5.61C(h)(2) of the Act.

- 3. Revise § 619.9146 to read as follows:

§ 619.9146 Farm Credit institutions.

Except as otherwise defined, the term *Farm Credit institutions* refers to all institutions identified in section 1.2 of the Act and are chartered and regulated by the Farm Credit Administration but excludes bridge System banks chartered by the Farm Credit Administration Board pursuant to section 5.61C(h)(2) of the Act.

PART 627—TITLE IV CONSERVATORS, RECEIVERS, BRIDGE SYSTEM BANKS, AND VOLUNTARY LIQUIDATIONS

- 4. The authority citation for part 627 is revised to read as follows:

Authority: Secs. 4.2, 5.9, 5.10, 5.17, 5.51, 5.58, 5.61, 5.61C of the Farm Credit Act (12 U.S.C. 2183, 2243, 2244, 2252, 2277a, 2277a–7).

- 5. The heading for part 627 is revised to read as set forth above. 2277a–10, 2277a–10c.).

- 6. Subparts A, B, and C are revised to read as follows:

Subpart A—General Provisions

Sec.

627.1 Applicability.

627.2 Definitions.

627.3 Grounds for appointing a conservator or receiver.

627.4 Action for removal of a conservator or receiver.

Subpart B—Conservator and Conservatorships

627.10 FCSIC as conservator.

Subpart C—Receiver and Receiverships

627.20 FCSIC as receiver.

Subpart A—General Provisions

§ 627.1 Applicability.

The provisions of this part apply to conservatorships, receiverships, and voluntary liquidations of System institutions chartered under titles I, II, III, IV, and VII of the Act.

§ 627.2 Definitions.

For the purposes of this part, the following definitions apply:

Act means the Farm Credit Act of 1971, as amended.

Conservator means the Farm Credit System Insurance Corporation acting in its capacity as the conservator of a Farm Credit institution.

Farm Credit institution(s) or *institution(s)* means all Farm Credit banks, associations, service corporations chartered under title IV of the Act, and the Federal Farm Credit Banks Funding Corporation. These two terms do not include any bridge System bank chartered by FCA, in accordance with section 5.61C(h)(2) of the Act.

FCSIC means the Farm Credit System Insurance Corporation.

Receiver means FCSIC acting in its capacity as the receiver of a Farm Credit institution.

§ 627.3 Grounds for appointing FCSIC as conservator or receiver.

(a) FCA may, in its discretion, appoint a conservator or receiver of a Farm Credit institution if FCA determines that one or more of the grounds in paragraph (b) of this section exists. FCA must appoint FCSIC as conservator or receiver of a Farm Credit institution. To the extent practicable, FCA will consult with FCSIC before taking a pre-resolution action that may result in a conservatorship or receivership of a Farm Credit institution.

(b) The grounds for appointing FCSIC as a conservator or receiver of a System institution are:

(1) The institution is insolvent because the value of its assets is less than its obligations to creditors and others, including its members. For the purpose of determining insolvency, “obligations to members” does not include stock or allocated equities held by current or former borrowers.

(2) There has been a substantial dissipation of assets or earnings of the institution due to the violation of any law, rule, or regulation, or one or more unsafe or unsound practice(s).

²⁴ *Id.* at 10398.

²⁵ See 63 FR 5726 (Feb. 4, 1998).

(3) The institution is in an unsafe or unsound condition to transact business, including having insufficient capital levels or otherwise. For the purpose of this part, “unsafe or unsound condition” includes, but is not limited to, the following conditions:

(i) For associations, a default by the association of one or more terms of its general financing agreement with its funding bank that the Farm Credit Administration determines to be a material default;

(ii) For all institutions, permanent capital of less than one-half the minimum required level for the institution; or

(iii) For associations, stock impairment.

(4) The institution has committed a willful violation of a final cease and desist order issued by the Farm Credit Administration Board.

(5) The institution is concealing its books, papers, records, or assets, or is refusing to submit its books, papers, records, assets, or other material relating to the affairs of the institution for inspection to any examiner or to any lawful agent of the Farm Credit Administration Board.

(6) A Farm Credit bank is unable to make a timely payment of principal or interest on any insured obligation(s) defined in section 5.51(3) of the Act issued by the bank individually, or on which it is primarily liable.

§ 627.4 Action for the removal of the conservator or receiver.

Within 30 days after the Farm Credit Administration Board appoints FCSIC as the conservator or receiver of a Farm Credit institution, pursuant to § 627.3, the institution may bring an action in the United States District Court for the judicial district in which its home office is located, or the United States District Court for the District of Columbia, for an order requiring the Farm Credit Administration Board to remove such conservator or receiver and, if the charter has been canceled, to rescind the cancellation of the charter. The institution’s board of directors is empowered to meet subsequent to the appointment of a conservator or receiver and authorize the filing of an action in Federal court to remove the conservator or receiver. Only the institution’s board of directors has the power to authorize an action to remove the conservator or receiver.

Subpart B—Conservator and Conservatorships

§ 627.10 FCSIC as Conservator.

(a) *Appointment.* (1) The Farm Credit Administration Board may exercise its

authority under section 4.12(b) of the Act and § 627.3 to appoint FCSIC as the conservator of a Farm Credit institution upon finding that one or more of the grounds identified in § 627.3(b) exists. The Farm Credit Administration Board may appoint, *ex parte* and without notice, FCSIC as conservator for any Farm Credit institution.

(2) Upon appointing FCSIC as the conservator of an institution, the Chairman of the Farm Credit Administration shall immediately notify such institution and, in the case of an association, its funding bank. The Farm Credit Administration will immediately publish notice of the appointment of the conservator in the **Federal Register**.

(b) *Conservatorship.* (1) Once the Farm Credit Administration Board issues the order placing a Farm Credit institution in conservatorship, all rights, privileges, and powers of its members, board of directors, officers, and employees, are transferred to and vested exclusively in FCSIC as conservator, except that the board of directors of the institution retains authority to initiate an action in a Federal district court to remove the conservator pursuant to § 627.4.

(2) The Farm Credit Administration will continue to examine Farm Credit institutions in conservatorship in accordance with section 5.19 of the Act.

(3) A qualified public accountant must audit a Farm Credit institution in conservatorship in accordance with part 621 of this chapter.

(4) Pursuant to the requirements of part 621 of this chapter, each institution in conservatorship must prepare and file with the Farm Credit Administration financial reports, certified by FCSIC, as required by § 621.14.

(5) Each institution in conservatorship must prepare and issue published financial reports in accordance with the requirements of part 620 of this chapter. FCSIC, as the conservator of the institution, will provide the signatures and certifications required by § 620.3.

(c) *Termination of the conservatorship.* (1) Whenever the Farm Credit Administration Board determines the problem(s) or condition(s) that led to the conservatorship have been corrected and resolved, and the institution is in a position to resume normal operations, it may terminate the conservatorship and direct FCSIC to turn over the institution’s operations to such management that FCA designates. Once new management is in place, the conservatorship terminates and FCA discharges FCSIC as conservator; or

(2) Whenever the Farm Credit Administration Board determines the institution should be placed in

receivership, the Farm Credit Administration Board will appoint FCSIC as the receiver of such institution.

Subpart C—Receiver and Receiverships

§ 627.20 FCSIC as receiver.

(a) *Appointment.* (1) The Farm Credit Administration Board may exercise its authority under section 4.12(b) of the Act and § 627.3 to appoint FCSIC as the receiver of a Farm Credit institution upon finding that one or more of the grounds identified in § 627.3(b) exists. The Farm Credit Administration Board may appoint, *ex parte* and without notice, FCSIC as receiver for any Farm Credit institution.

(2) Upon appointing FCSIC as the receiver of an institution, the Chairman of the Farm Credit Administration shall immediately notify such institution and, in the case of an association, its funding bank. The Farm Credit Administration will immediately publish notice of the appointment of the receiver in the **Federal Register**.

(b) *Funding bank role for association in liquidation.* In the event of the voluntary or involuntary liquidation of an association, the funding bank must institute appropriate measures to minimize the adverse effect of the liquidation on those borrowers whose loans are purchased by, or otherwise transferred to another System institution.

(c) *Receivership.* (1) Once the Farm Credit Administration Board issues the order placing a Farm Credit institution in receivership, all rights, privileges, and powers of its members, the board of directors, officers, and employees, are transferred to and vested exclusively in FCSIC as receiver, except that the institution’s board of directors retains authority to initiate an action in a Federal district court to remove the receiver pursuant to § 627.4.

(2) The Farm Credit Administration Board simultaneously will cancel the charter of the institution when it appoints FCSIC as receiver.

(d) *Uninsured accounts.* Once the Farm Credit Administration Board has placed an institution into receivership, FCSIC, in accordance with section 4.37 of the Act will, as soon as practicable, notify every borrower who holds an uninsured voluntary or involuntary account, as described in § 614.4175 of this subchapter, at the institution that:

(1) Such accounts ceased earning interest from the date the Farm Credit Administration Board placed the institution into receivership; and

(2) FCSIC, as receiver, will immediately apply the funds in a borrower's uninsured account(s) as payment against the outstanding balance of the borrower's loan(s).

(e) *Final discharge and release of the receiver.* The receivership terminates after FCSIC makes a final distribution of the assets of the liquidated institution. Then, the Farm Credit Administration Board will completely and finally release and discharge the receiver.

Subpart D—Voluntary Liquidation

§ 627.2795 [Redesignated as § 627.40]

■ 7. Redesignate § 627.2795 as § 627.40.

§ 627.40 [Amended]

■ 8. In newly redesignated § 627.40, in paragraph (a), remove “subpart B” and add “subpart C” in its place.

§ 627.2797 [Redesignated as § 627.41]

■ 9. Redesignate § 627.2797 as § 627.41.

■ 10. In newly redesignated § 627.41, revise the last sentence in paragraph (a) to read as follows:

§ 627.41 Preservation of equity.

(a) * * * In the event the resolution to liquidate is approved by the stockholders of the Farm Credit institution and the liquidation plan is approved by the Farm Credit Administration Board, the liquidation plan shall govern disposition of the equities of the Farm Credit institution.

* * * * *

Dated: November 15, 2023.

Ashley Waldron,

Secretary, Farm Credit Administration Board.

[FR Doc. 2023–25652 Filed 11–22–23; 8:45 am]

BILLING CODE 6705–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1722; Project Identifier MCAI–2023–00493–T; Amendment 39–22597; AD 2023–22–13]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2023–04–15, which applied to certain Dassault Aviation Model FALCON 7X airplanes. AD 2023–04–15 required revising the

existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. This AD continues to require the actions in AD 2023–04–15 and requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective December 29, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of December 29, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of May 10, 2023 (88 FR 20062, April 5, 2023).

ADDRESSES:

AD Docket: You may examine the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2023–1722; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For material incorporated by reference in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email ADS@easa.europa.eu; website easa.europa.eu. You may find this material on the EASA website at ad.easa.europa.eu.

- You may view this material 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 in the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2023–1722.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone: 206–231–3226; email: tom.rodriguez@faa.gov.

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2023–04–15, Amendment 39–22362 (88 FR 20062, April 5, 2023) (AD 2023–04–15). AD 2023–04–15 applied to certain Dassault Aviation Model FALCON 7X airplanes. AD 2023–04–15 required revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. The FAA issued AD 2023–04–15 to address reduced structural integrity and reduced control of the airplane due to the failure of system components. AD 2023–04–15 specified that accomplishing the revision required by that AD terminates the requirements of paragraph (q) of AD 2014–16–23, Amendment 39–17947 (79 FR 52545, September 4, 2014) (AD 2014–16–23). This AD therefore continues to allow that terminating action.

The NPRM published in the **Federal Register** on August 29, 2023 (88 FR 59473). The NPRM was prompted by AD 2023–0063, dated March 20, 2023, issued by EASA, which is the Technical Agent for the Member States of the European Union (EASA AD 2023–0063) (also referred to as the MCAI). The MCAI states that new or more restrictive airworthiness limitations have been developed.

In the NPRM, the FAA proposed to continue to require the actions in AD 2023–04–15 and to require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in EASA AD 2023–0063. The FAA is issuing this AD to address reduced structural integrity and reduced control of the airplane due to the failure of system components.

You may examine the MCAI in the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2023–1722.

Discussion of Final Airworthiness Directive

Comments

The FAA received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA reviewed the relevant data and

determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on this product. Except for minor editorial changes, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Related Service Information Under 1 CFR Part 51

The FAA reviewed EASA AD 2023–0063. This service information specifies new or more restrictive airworthiness limitations for airplane structures and safe life limits.

This AD also requires EASA AD 2022–0142, dated July 7, 2022, which the Director of the Federal Register approved for incorporation by reference as of May 10, 2023 (88 FR 20062, April 5, 2023).

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

Costs of Compliance

The FAA estimates that this AD affects 122 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

The FAA estimates the total cost per operator for the retained actions from AD 2021–09–12 to be \$7,650 (90 work-hours × \$85 per work-hour).

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 work-hours per operator, although the agency recognizes that this number may vary from operator to operator. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate.

The FAA estimates the total cost per operator for the new actions to be \$7,650 (90 work-hours × \$85 per work-hour).

Authority for This Rulemaking

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

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA

with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

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

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and
- (3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

- 2. The FAA amends § 39.13 by:
 - a. Removing Airworthiness Directive (AD) 2023–04–15, Amendment 39–22362 (88 FR 20062, April 5, 2023); and
 - b. Adding the following new AD:

2023–22–13 Dassault Aviation:

Amendment 39–22597; Docket No. FAA–2023–1722; Project Identifier MCAI–2023–00493–T.

(a) Effective Date

This airworthiness directive (AD) is effective December 29, 2023.

(b) Affected ADs

- (1) This AD replaces AD 2023–04–15, Amendment 39–22362 (88 FR 20062, April 5, 2023) (AD 2023–04–15).

- (2) This AD affects AD 2014–16–23, Amendment 39–17947 (79 FR 52545, September 4, 2014) (AD 2014–16–23).

(c) Applicability

This AD applies to Dassault Aviation Model FALCON 7X airplanes, certificated in any category, with an original airworthiness certificate or original export certificate of airworthiness issued on or before September 7, 2022.

Note 1 to paragraph (c): Model FALCON 7X airplanes with modification M1000 incorporated are commonly referred to as “Model FALCON 8X” airplanes as a marketing designation.

(d) Subject

Air Transport Association (ATA) of America Code 05, Time Limits/Maintenance Checks.

(e) Unsafe Condition

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address reduced structural integrity and reduced control of the airplane due to the failure of system components.

(f) Compliance

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

(g) Retained Revision of the Existing Maintenance or Inspection Program, With No Changes

This paragraph restates the requirements of paragraph (j) of AD 2023–04–15, with no changes. For airplanes with an original airworthiness certificate or original export certificate of airworthiness issued on or before June 7, 2021, except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2022–0142, dated July 7, 2022 (EASA AD 2022–0142). Accomplishing the revision of the existing maintenance or inspection program required by paragraph (j) of this AD terminates the requirements of this paragraph.

(h) Retained Exceptions to EASA AD 2022–0142, With No Changes

This paragraph restates the exceptions specified in paragraph (k) of AD 2023–04–15, with no changes.

- (1) The requirements specified in paragraphs (1) and (2) of EASA AD 2022–0142 do not apply to this AD.

- (2) Paragraph (3) of EASA AD 2022–0142 specifies revising “the approved AMP” within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, within 90 days after May 10, 2023 (the effective date of AD 2023–04–15).

- (3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2022–0142 is at the applicable “limitations” and “associated thresholds” as incorporated by the requirements of paragraph (3) of EASA AD 2022–0142, or within 90 days after May 10, 2023 (the

effective date of this AD 2023–04–15), whichever occurs later.

(4) The provisions specified in paragraphs (4) and (5) of EASA AD 2022–0142 do not apply to this AD.

(5) The “Remarks” section of EASA AD 2022–0142 does not apply to this AD.

(i) Retained Restrictions on Alternative Actions, Intervals, and Critical Design Configuration Control Limitations (CDCCLs), With a New Exception

This paragraph restates the requirements of paragraph (l) of AD 2023–04–15, with a new exception. Except as required by paragraph (j) of this AD, after the maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (e.g., inspections), intervals, or CDCCLs are allowed unless they are approved as specified in the provisions of the “Ref. Publications” section of EASA AD 2022–0142.

(j) New Revision of the Existing Maintenance or Inspection Program

Except as specified in paragraph (k) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2023–0063, dated March 20, 2023 (EASA AD 2023–0063). Accomplishing the revision of the existing maintenance or inspection program required by this paragraph terminates the requirements of paragraph (g) of this AD.

(k) Exceptions to EASA AD 2023–0063

(1) This AD does not adopt the requirements specified in paragraphs (1) and (2) of EASA AD 2023–0063.

(2) Paragraph (3) of EASA AD 2023–0063 specifies revising “the approved AMP [aircraft maintenance program]” within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, within 90 days after the effective date of this AD.

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2023–0063 is at the applicable “limitations” and “associated thresholds” as incorporated by the requirements of paragraph (3) of EASA AD 2023–0063, or within 90 days after the effective date of this AD, whichever occurs later.

(4) This AD does not adopt the provisions specified in paragraphs (4) and (5) of EASA AD 2023–0063.

(5) This AD does not adopt the “Remarks” section of EASA AD 2023–0063.

(l) New Provisions for Alternative Actions, Intervals, and CDCCLs

After the existing maintenance or inspection program has been revised as required by paragraph (j) of this AD, no alternative actions (e.g., inspections), intervals, and CDCCLs are allowed unless they are approved as specified in the provisions of the “Ref. Publications” section of EASA AD 2023–0063.

(m) Terminating Action for Certain Requirements in AD 2014–16–23

Accomplishing the actions required by paragraphs (g) or (j) of this AD terminates the

requirements of paragraph (q) of AD 2014–16–23.

(n) Additional AD Provisions

The following provisions also apply to this AD:

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

(2) *Contacting the Manufacturer*: For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Validation Branch, FAA; or EASA; or Dassault Aviation’s EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(o) Additional Information

For more information about this AD, contact Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3226; email: tom.rodriguez@faa.gov.

(p) 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 this AD specifies otherwise.

(3) The following service information was approved for IBR on December 29, 2023.

(i) European Union Aviation Safety Agency (EASA) AD 2023–0063, dated March 20, 2023.

(ii) [Reserved]

(4) The following service information was approved for IBR on May 10, 2023 (88 FR 20062, April 5, 2023).

(i) European Union Aviation Safety Agency (EASA) AD 2022–0142, dated July 7, 2022.

(ii) [Reserved]

(5) For EASA ADs 2023–0063 and 2022–0142, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email ADs@easa.europa.eu; website easa.europa.eu. You may find these EASA ADs on the EASA website at ad.easa.europa.eu.

(6) 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.

(7) 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 16, 2023.

Ross Landes,

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

[FR Doc. 2023–25833 Filed 11–22–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1296; Airspace Docket No. 23–ANE–2]

RIN 2120–AA66

Amendment of Canadian Area Navigation Routes Q–907 and Q–951, and Establishment of United States Area Navigation (RNAV) Route T–739; Eastern United States

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends high altitude Canadian Area Navigation routes Q–907 and Q–951; and establishes United States (U.S.) Area Navigation (RNAV) route T–739, in support of the FAA’s Very High Frequency Omnidirectional Range (VOR) Minimum Omnidirectional Network (MON) Program. The purpose is to enhance the efficiency of the National Airspace System (NAS) by transitioning from ground-based navigation aids to a satellite-based navigation system.

DATES: Effective date 0901 UTC, January 25, 2024. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: A copy of the Notice of Proposed Rulemaking (NPRM), all comments received, this final rule, and all background material may be viewed online at www.regulations.gov using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year.

FAA Order JO 7400.11H, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at www.faa.gov/air_traffic/publications/. You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation

Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Brian Vidis, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it will expand the availability of RNAV routing in the eastern United States and improve the efficient flow of air traffic within the NAS by lessening the dependency on ground-based navigation.

History

The FAA published a NPRM for Docket No. FAA–2023–1296 in the **Federal Register** (88 FR 37182; June 7, 2023), proposing to amend 2 high altitude Canadian Area Navigation routes and establish 1 U.S. RNAV route in support of transitioning the NAS from a ground-based to a satellite-based navigation system. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Differences From the NPRM

Subsequent to the NPRM, minor amendments to the geographic coordinates for the TALNO, NY, Waypoint (WP) and DANOL, ME, WP were made that do not substantively alter the proposed route. The TALNO, WP is updated from “lat. 44°59'35.12” N, long. 074°21'35.70” W” to “lat. 44°59'35.11” N, long. 074°21'35.70” W”. The DANOL, WP is updated from “lat. 45°41'49.50” N, long. 067°48'11.94” W” to “lat. 45°41'49.51” N, long. 067°48'11.94” W”.

Additionally, the DAVDA, NY, WP was added to the legal description of RNAV route T–739 as it is a turn of more than one degree, but it does not substantively alter the route.

Incorporation by Reference

High altitude Canadian Area Navigation routes are published in paragraph 2007 and United States Area Navigation Routes are published in paragraph 6011 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. FAA Order JO 7400.11H is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next update to FAA Order JO 7400.11.

FAA Order JO 7400.11H lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This action amends 14 CFR part 71 to amend Canadian Area Navigation routes Q–907 and Q–951; and to establish United States Area Navigation route T–739, in cooperation with NAV CANADA for replacement of Computer Notification Fixes (CNF). Replacement fixes are relocated to lie on the U.S./Canada border. This action is in support of the FAA's VOR MON Program. The purpose is to enhance the efficiency of the NAS by transitioning from ground-based navigation aids to a satellite-based navigation system. The proposed changes are described below.

Q–907: Q–907 is an amended route that extends between the POSTS, MI, WP and the IMAMA, ME, WP. This amended route replaces CNFs with pronounceable WP names and moves multiple WPs to lie on the U.S./Canada border.

Q–951: Q–951 is an amended route that extends between the POSTS, MI, WP and the DANOL, ME, WP. This amended route replaces CNFs with pronounceable WP names and moves multiple WPs to lie on the U.S./Canadian border.

T–739: T–739 is a new route that extends between the KATEK, NY, WP and the DANOL, ME, WP. This route overlays a portion of VOR Federal airway V–300 from the CAMPO, ME, WP to the DANOL WP.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a “significant regulatory action” under Executive Order 12866; (2) is not a

“significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action of establishing high altitude Canadian Area Navigation routes Q–907 and Q–951; and establishing United States (U.S.) Area Navigation (RNAV) route T–739, to provide additional RNAV routing within the NAS in support of transitioning it from ground-based to satellite-based navigation, qualifies for categorical exclusion under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations at 40 CFR part 1500, and in accordance with FAA Order 1050.1F, “Environmental Impacts: Policies and Procedures,” paragraph 5–6.5a, which categorically excludes from further environmental impact review rulemaking actions that designate or modify classes of airspace areas, airways, routes, and reporting points (see 14 CFR part 71, Designation of Class A, B, C, D, and E Airspace Areas; Air Traffic Service Routes; and Reporting Points); and paragraph 5–6.5b, which categorically excludes from further environmental impact review “Actions regarding establishment of jet routes and Federal airways (see 14 CFR 71.15, *Designation of jet routes and VOR Federal airways*) . . .”. As such, this airspace action is not expected to cause any potentially significant environmental impacts. In accordance with FAA Order 1050.1F, paragraph 5–2 regarding Extraordinary Circumstances, the FAA has reviewed this action for factors and circumstances in which a normally categorically excluded action may have a significant environmental impact requiring further analysis. Accordingly, the FAA has determined that no extraordinary circumstances exist that warrant preparation of an environmental assessment or environmental impact study.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

- 1. The authority citation for 14 CFR part 71 continues to read as follows:
Authority: 49 U.S.C. 106(f), 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p.389.

§ 71.1 [Amended]

- 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and effective September 15, 2023, is amended as follows:

Paragraph 2007 Canadian Area Navigation Routes.
* * * * *

Q-907 POSTS, MI to IMAMA, ME [Amended]

POSTS, MI	WP	(Lat. 42°18'00.00" N, long. 085°02'00.00" W)
PADDE, MI	WP	(Lat. 42°17'09.00" N, long. 084°28'28.00" W)
Salem, MI (SVM)	VORTAC	(Lat. 42°24'31.11" N, long. 083°35'38.05" W)
GADAV, MI	WP	(Lat. 42°42'27.47" N, long. 082°29'24.66" W)
ATENE, ME	WP	(Lat. 46°14'15.18" N, long. 070°15'28.92" W)
IMAMA, ME	WP	(Lat. 46°44'09.51" N, long. 067°47'20.94" W)
Excluding the airspace within Canada		

* * * * *

Q-951 POSTS, MI to DANOL, ME [Amended]

POSTS, MI	WP	(Lat. 42°18'00.00" N, long. 085°02'00.00" W)
PADDE, MI	WP	(Lat. 42°17'09.00" N, long. 084°28'28.00" W)
Salem, MI (SVM)	VORTAC	(Lat. 42°24'31.11" N, long. 083°35'38.05" W)
GADAV, MI	WP	(Lat. 42°42'27.47" N, long. 082°29'24.66" W)
KATEK, NY	WP	(Lat. 44°40'45.38" N, long. 075°32'22.66" W)
DAVDA, NY	WP	(Lat. 44°43'27.00" N, long. 075°22'28.20" W)
SSENA, NY	WP	(Lat. 44°54'51.43" N, long. 074°43'21.31" W)
TALNO, NY	WP	(Lat. 44°59'35.11" N, long. 074°21'35.70" W)
KERVO, ME	WP	(Lat. 45°26'41.75" N, long. 070°39'02.77" W)
DANOL, ME	WP	(Lat. 45°41'49.51" N, long. 067°48'11.94" W)
Excluding the airspace within Canada		

* * * * *

Paragraph 6011 United States Area Navigation Routes.

* * * * *

T-739 KATEK, MD to DANOL, ME [New]

KATEK, NY	WP	(Lat. 44°40'45.38" N, long. 075°32'22.66" W)
DAVDA, NY	WP	(Lat. 44°43'27.00" N, long. 075°22'28.20" W)
SSENA, NY	WP	(Lat. 44°54'51.43" N, long. 074°43'21.31" W)
TALNO, NY	WP	(Lat. 44°59'35.11" N, long. 074°21'35.70" W)
KERVO, ME	WP	(Lat. 45°26'41.75" N, long. 070°39'02.77" W)
CAMPO, ME	WP	(Lat. 45°26'49.95" N, long. 070°20'54.73" W)
Millinocket, ME (MLT)	VOR/DME	(Lat. 45°35'12.15" N, long. 068°30'55.67" W)
DANOL, ME	WP	(Lat. 45°41'49.51" N, long. 067°48'11.94" W)
Excluding the airspace within Canada		

* * * * *

Issued in Washington, DC, on November 17, 2023.

Karen L. Chiodini,
Acting Manager, Rules and Regulations Group.

[FR Doc. 2023–25853 Filed 11–22–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–2097; Airspace Docket No. 23–ANE–7]

RIN 2120–AA66

Amendment of Very High Frequency Omnidirectional Range (VOR) Federal Airway V–16; Northeast United States

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Very High Frequency Omnidirectional Range (VOR) Federal airway V–16. This action

is necessary to reinstate six route points that were inadvertently omitted in a previous route amendment of VOR Federal Airway V–16 that took effect August 10, 2023.

DATES: Effective date 0901 UTC, January 25, 2024. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order JO 7400.11H, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at www.faa.gov/air_traffic/publications/. You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800

Independence Avenue SW, Washington, DC 20591; telephone: (202) 267-8783.

FOR FURTHER INFORMATION CONTACT:

Brian Vidis, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267-8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies the route structure as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System.

History

The FAA published a NPRM for Docket No. FAA-2022-0901 in the **Federal Register** (87 FR 43755; July 22, 2022), proposing to amend VOR Federal airway V-16 by removing the route segments between the Richmond, VA (RIC), VOR/Tactical Air Navigation (VORTAC) and the Boston, MA (BOS), VOR/Distance Measuring Equipment (VOR/DME). The FAA then published a final rule for Docket No. FAA-2022-0901 in the **Federal Register** (88 FR 32638; May 22, 2023) amending V-16. In the final rule, differences from the NPRM were stated that after publication of the NPRM the FAA decided to retain some of the segments of V-16. Specifically, the FAA removed the segments between the Richmond VORTAC, and the Smyrna, DE (ENO), VORTAC; and the segments between the CREAM, NY, Fix, and the Boston VOR/DME. The segment between the Smyrna VORTAC and the CREAM, Fix was retained. The legal description in that final rule only reinstated the first and last points in the segment being retained and inadvertently omitted the six intermediate route points that made up the original route segments. This action reinstates the six route points that originally defined the route segments between the Smyrna VORTAC and the CREAM, Fix.

Incorporation by Reference

United States VOR Federal Airways are published in paragraph 6010 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. FAA Order JO 7400.11H is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next update to FAA Order JO 7400.11.

FAA Order JO 7400.11H lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This action amends 14 CFR part 71 by modifying VOR Federal airway V-16 to reinstate six route points that were inadvertently omitted in a previous route amendment in Docket No. FAA-2022-0901 in the **Federal Register** (88 FR 32638; May 22, 2023). The route changes are described below.

V-16: V-16 consists of three parts: between the Los Angeles, CA (LAX), VORTAC, and the Holly Springs, MS (HLI), VORTAC; between the Shelbyville, TN (SYI), VOR/DME, and the Richmond VORTAC; and between the Smyrna VORTAC and the CREAM Fix. The CREAM Fix is defined by the intersection of the Calverton, NY (CCC), VOR/DME 044°, and the Madison, CT (MAD), VOR/DME 142° radials. The first and second part of the route, between the Los Angeles VORTAC and the Holly Springs VORTAC; and between the Shelbyville VOR/DME and the Richmond VORTAC remains unchanged as currently published in FAA Order JO 7400.11H. This action amends the third part of the route by reinstating six route points to the legal description between the Smyrna VORTAC and the Calverton VOR/DME, 044°, and the Madison VOR/DME 142° radials. As amended the third route segment is defined as Smyrna VORTAC; Cedar Lake, NJ (VCN), VOR/DME; Coyle, NJ (CYN), VORTAC; INT Coyle VORTAC 036° and Kennedy, NY (JFK), VOR/DME 209° radials; Kennedy VOR/DME; INT Kennedy VOR/DME 040° and Calverton VOR/DME 261° radials; Calverton VOR/DME; to INT Calverton VOR/DME 044° and Madison VOR/DME 142° radials.

The NAVAID radials listed in the V-16 description in The Rule section are unchanged and stated in degrees True north.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action of amending VOR Federal airway V-16 in the Northeastern United States, qualifies for categorical exclusion under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations at 40 CFR part 1500, and in accordance with FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures," paragraph 5-6.5a, which categorically excludes from further environmental impact review rulemaking actions that designate or modify classes of airspace areas, airways, routes, and reporting points (see 14 CFR part 71, Designation of Class A, B, C, D, and E Airspace Areas; Air Traffic Service Routes; and Reporting Points); and paragraph 5-6.5b, which categorically excludes from further environmental impact review "Actions regarding establishment of jet routes and Federal airways (see 14 CFR 71.15, *Designation of jet routes and VOR Federal airways*) . . .". As such, this airspace action is not expected to cause any potentially significant environmental impacts. In accordance with FAA Order 1050.1F, paragraph 5-2 regarding Extraordinary Circumstances, the FAA has reviewed this action for factors and circumstances in which a normally categorically excluded action may have a significant environmental impact requiring further analysis. Accordingly, the FAA has determined that no extraordinary circumstances exist that warrant preparation of an environmental assessment or environmental impact study.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p.389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and effective September 15, 2023, is amended as follows:

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V–16 [Amended]

From Los Angeles, CA; Paradise, CA; Palm Springs, CA; Blythe, CA; Buckeye, AZ; Phoenix, AZ; INT Phoenix 155° and Stanfield, AZ, 105° radials; Tucson, AZ; San Simon, AZ; INT San Simon 119° and Columbus, NM, 277° radials; Columbus, El Paso, TX; Salt Flat, TX; Wink, TX; INT Wink 066° and Big Spring, TX, 260° radials; Big Spring; Abilene, TX; Bowie, TX; Bonham, TX; Paris, TX; Texarkana, AR; Pine Bluff, AR; Marvell, AR; to Holly Springs, MS. From Shelbyville, TN; Hinch Mountain, TN; Volunteer, TN; Holston Mountain, TN; Pulaski, VA; Roanoke, VA; Lynchburg, VA; Flat Rock, VA; to Richmond, VA. From Smyrna, DE; Cedar Lake, NJ; Coyle, NJ; INT Coyle 036° and Kennedy, NY, 209° radials; Kennedy; INT Kennedy 040° and Calverton, NY 261° radials; Calverton; to INT Calverton, NY, 044° and Madison, CT, 142° radials. The airspace within Mexico and the airspace below 2,000 feet MSL outside the United States is excluded. The airspace within Restricted Areas R–5002A, R–5002C, and R–5002D is excluded during their times of use.

* * * * *

Issued in Washington, DC, on November 17, 2023.

Karen L. Chiodini,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2023–25851 Filed 11–22–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 71**

[Docket No. FAA–2023–1329; Airspace Docket No. 23–AEA–2]

RIN 2120–AA66

Establishment of United States Area Navigation (RNAV) Routes T–440, T–455, T–457, T–459, and T–476, and Amendment of RNAV Routes T–358, T–416, and T–445; Eastern United States

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes United States Area Navigation (RNAV) routes T–440, T–455, T–457, T–459, and T–476, and amends RNAV routes T–358, T–416, and T–445 in support of the FAA’s Very High Frequency Omnidirectional Range (VOR) Minimum Operational Network (MON) Program. The purpose is to enhance the efficiency of the National Airspace System (NAS) by transitioning from ground-based navigation aids to a satellite-based navigation system.

DATES: Effective date 0901 UTC, January 25, 2024. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: A copy of the Notice of Proposed Rulemaking (NPRM), all comments received, this final rule, and all background material may be viewed online at www.regulations.gov using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year.

FAA Order JO 7400.11H, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at www.faa.gov/air_traffic/publications/. You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Brian Vidis, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA’s authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it will expand the availability of RNAV routing in the eastern United States and improve the efficient flow of air traffic within the NAS by lessening the dependency on ground-based navigation.

History

The FAA published a NPRM for Docket No. FAA–2023–1329 in the **Federal Register** (88 FR 37177; June 7, 2023), proposing to establish 5 low-altitude RNAV routes and amend 3 low-altitude RNAV routes in support of transitioning the NAS from a ground-based to a satellite-based navigation. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Differences From the NPRM

Subsequent to the NPRM, a minor amendment was made to the geographic coordinates for the GABRS, NJ, Waypoint (WP). The GABRS, NJ, WP was moved 1.25 nautical miles (NM) south from its proposed location due to required route geometry and does not substantively alter the proposed route of T–457. The GABRS, NJ, WP is updated from “lat. 39°38’15.91” N, long. 075°04’15.96” W” to “lat. 39°37’14.11” N, long. 075°03’20.87” W.”

Incorporation by Reference

United States Area Navigation Routes are published in paragraph 6011 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. FAA Order JO 7400.11H is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next update to FAA Order JO 7400.11.

FAA Order JO 7400.11H lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This action amends 14 CFR part 71 by establishing RNAV routes T-440, T-455, T-457, T-459, and T-476, and amend RNAV routes T-358, T-416, and T-445 in the eastern United States to support the VOR MON Program and the transition of the NAS from ground-based navigation to satellite-based navigation. The routes are described below.

T-358: T-358 is an amended route that extends to the northeast between the AVALO, NJ, WP and the Augusta, ME (AUG), VOR/Distance Measuring Equipment (VOR/DME). T-358 overlays VOR Federal airway V-268 between the AVALO WP and the BURDY, MA, WP; and between the LBSTA, MA, WP and the Augusta VOR/DME. The MOYRR, MD, WP name is replaced by the HAMRR, MD, WP at the same location due to similar sounding WP names.

T-416: T-416 is an amended route that moves the RIDNG, NJ, WP 1.83 NM southwest of its current location to align with a standard instrument departure procedure.

T-440: T-440 is a new route that extends from the Elmira, NY (ULW), VOR/DME to the TALLI, PA, WP. T-440 overlays VOR Federal airway V-147 from the Elmira VOR/DME to the Wilkes-Barre, PA (LVZ), VOR/Tactical Air Navigation (VORTAC); and VOR Federal airway V-116 from the Wilkes-Barre VORTAC to the TALLI WP.

T-445: T-445 is an amended route that removes the segment from the Westminster, ME (EMI), VORTAC to the Harrisburg, PA (HAR), VORTAC. Further, the Elmira, NY (ULW), VOR/DME replaces the STUBN, NY, WP.

T-455: T-455 is a new route that extends from the Allentown, PA (FJC), VORTAC to the WIGGZ, PA, WP. T-455 overlays VOR Federal airway V-613 from the Allentown VORTAC to the Wilkes-Barre, PA (LVZ), VORTAC, and overlays VOR Federal airway V-188 from the Wilkes-Barre VORTAC to the Slate Run, PA (SLT), VORTAC.

T-457: T-457 is a new route that extends from the JIIMS, NJ, WP to the BOOCH, PA, WP.

T-459: T-459 is a new route that extends from the JIIMS, NJ, WP to the DOGGR, PA, WP.

T-476: T-476 is a new route that extends from the TUNDR, MD, WP to the WIMKA, NJ, WP.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action of establishing RNAV routes T-440, T-455, T-457, T-459, and T-476, and amend RNAV routes T-358, T-416, and T-445 in the eastern United States, to provide additional RNAV routing within the NAS in support of transitioning it from ground-based to satellite-based navigation, qualifies for categorical exclusion under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations at 40 CFR part 1500, and in accordance with FAA Order 1050.1F, “Environmental Impacts: Policies and Procedures,” paragraph 5–6.5a, which categorically excludes from further environmental impact review rulemaking actions that designate or modify classes of airspace areas, airways, routes, and reporting points (see 14 CFR part 71, Designation of Class A, B, C, D, and E Airspace Areas;

Air Traffic Service Routes; and Reporting Points); and paragraph 5–6.5b, which categorically excludes from further environmental impact review “Actions regarding establishment of jet routes and Federal airways (see 14 CFR 71.15, *Designation of jet routes and VOR Federal airways*) . . .”. As such, this airspace action is not expected to cause any potentially significant environmental impacts. In accordance with FAA Order 1050.1F, paragraph 5–2 regarding Extraordinary Circumstances, the FAA has reviewed this action for factors and circumstances in which a normally categorically excluded action may have a significant environmental impact requiring further analysis. Accordingly, the FAA has determined that no extraordinary circumstances exist that warrant preparation of an environmental assessment or environmental impact study.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p.389.

§71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and effective September 15, 2023, is amended as follows:

Paragraph 6011 United States Area Navigation Routes.

* * * * *

T-358 Martinsburg, WV (MRB) to Augusta, ME (AUG) [Amended]

Martinsburg, WV (MRB)	VORTAC	(Lat. 39°23′08.06″ N, long. 077°50′54.08″ W)
CPTAL, MD	WP	(Lat. 39°32′16.02″ N, long. 077°41′55.65″ W)
TWIRK, MD	WP	(Lat. 39°34′36.70″ N, long. 077°12′44.75″ W)
HAMRR, MD	WP	(Lat. 39°30′03.42″ N, long. 076°56′10.84″ W)
DANII, MD	WP	(Lat. 39°17′46.42″ N, long. 076°42′19.36″ W)
OBWON, MD	WP	(Lat. 39°11′54.69″ N, long. 076°32′04.84″ W)
SWANN, MD	WP	(Lat. 39°09′05.28″ N, long. 076°13′43.94″ W)
Smyrna, DE (ENO)	VORTAC	(Lat. 39°13′53.93″ N, long. 075°30′57.49″ W)
AVALO, NJ	WP	(Lat. 39°16′54.52″ N, long. 074°30′50.75″ W)
MANTA, NJ	WP	(Lat. 39°54′07.01″ N, long. 073°32′31.63″ W)
ORCHA, NY	WP	(Lat. 40°54′55.46″ N, long. 072°18′43.64″ W)

Sandy Point, RI (SEY)	VOR/DME	(Lat. 41°10'02.77" N, long. 071°34'33.91" W)
BURDY, MA	WP	(Lat. 41°57'19.14" N, long. 070°57'07.45" W)
HAVNS, OA	WP	(Lat. 42°17'55.00" N, long. 070°27'42.00" W)
GRGIO, MA	WP	(Lat. 42°35'09.36" N, long. 070°33'54.40" W)
LBSTA, MA	WP	(Lat. 42°48'00.00" N, long. 070°36'48.70" W)
MESHL, ME	WP	(Lat. 43°19'12.07" N, long. 070°09'48.03" W)
Augusta, ME (AUG)	VOR/DME	(Lat. 44°19'12.07" N, long. 069°47'47.63" W)

* * * * *

T-416 Smyrna, NJ (ENO) to PREPI, OA [Amended]

Smyrna, NJ (ENO)	VORTAC	(Lat. 39°13'53.93" N, long. 075°30'57.49" W)
TEBEE, NJ	WP	(Lat. 39°30'13.97" N, long. 075°19'37.19" W)
LULOO, NJ	WP	(Lat. 39°36'35.96" N, long. 075°12'57.43" W)
RIDNG, NJ	WP	(Lat. 39°43'56.08" N, long. 075°07'12.86" W)
ALBEK, NJ	WP	(Lat. 39°46'39.92" N, long. 074°54'25.99" W)
Coyle, NJ (CYN)	VORTAC	(Lat. 39°49'02.42" N, long. 074°25'53.85" W)
PREPI, OA	WP	(Lat. 39°48'41.06" N, long. 073°15'40.70" W)

* * * * *

T-440 Elmira, NY (ULW) to TALLI, PA [New]

Elmira, NY (ULW)	VOR/DME	(Lat. 42°05'38.96" N, long. 077°01'29.30" W)
WLKES, PA	WP	(Lat. 41°16'22.57" N, long. 075°41'21.60" W)
TALLI, PA	WP	(Lat. 41°19'01.60" N, long. 075°06'43.17" W)

* * * * *

T-445 Harrisburg, PA (HAR) to AIRCO, NY [Amended]

Harrisburg, PA (HAR)	VORTAC	(Lat. 40°18'08.06" N, long. 077°04'10.41" W)
Selinsgrove, PA (SEG)	VOR/DME	(Lat. 40°47'27.09" N, long. 076°53'02.55" W)
LYKOM, PA	WP	(Lat. 41°20'18.75" N, long. 076°46'30.30" W)
Elmira, NY (ULW)	VOR/DME	(Lat. 42°05'38.96" N, long. 077°01'29.32" W)
BEEPS, NY	WP	(Lat. 42°49'13.26" N, long. 076°59'04.84" W)
Rochester, NY (ROC)	VOR/DME	(Lat. 43°07'04.65" N, long. 077°40'22.06" W)
AIRCO, NY	WP	(Lat. 43°12'36.66" N, long. 078°28'57.00" W)

* * * * *

T-455 Allentown, PA (FJC) to WIGGZ, PA [New]

Allentown, PA (FJC)	VORTAC	(Lat. 40°43'36.07" N, long. 075°27'17.08" W)
WLKES, PA	WP	(Lat. 41°16'22.57" N, long. 075°41'21.60" W)
LYKOM, PA	WP	(Lat. 41°20'18.75" N, long. 076°46'30.30" W)
WIGGZ, PA	WP	(Lat. 41°30'51.00" N, long. 077°58'52.00" W)

* * * * *

T-457 JIMMS, NJ to BOOCH, PA [New]

JIMMS, NJ	WP	(Lat. 39°32'15.62" N, long. 074°58'01.72" W)
GABRS, NJ	WP	(Lat. 39°37'14.11" N, long. 075°03'20.87" W)
RIDNG, NJ	WP	(Lat. 39°43'56.08" N, long. 075°07'12.86" W)
BOJID, PA	WP	(Lat. 40°03'20.87" N, long. 075°12'16.25" W)
BOOCH, PA	WP	(Lat. 40°14'09.24" N, long. 075°16'08.52" W)

* * * * *

T-459 JIIMS, NJ to DOGGR, PA [New]

JIIMS, NJ	WP	(Lat. 39°32'15.62" N, long. 074°58'01.72" W)
LULOO, NJ	WP	(Lat. 39°36'35.96" N, long. 075°12'57.43" W)
DOGGR, PA	WP	(Lat. 40°08'12.25" N, long. 075°27'07.50" W)

* * * * *

T-476 TUNDR, MD to WIMKA, NJ [New]

TUNDR, MD	WP	(Lat. 38°44'37.73" N, long. 076°15'38.97" W)
FILRO, MD	WP	(Lat. 38°57'51.42" N, long. 075°56'45.51" W)
TWANE, MD	WP	(Lat. 39°10'57.10" N, long. 075°57'34.19" W)
EYEUP, MD	WP	(Lat. 39°18'30.83" N, long. 075°51'56.10" W)
COHLE, DE	WP	(Lat. 39°20'26.55" N, long. 075°34'36.79" W)
WIMKA, NJ	WP	(Lat. 39°25'22.02" N, long. 075°08'32.67" W)

* * * * *

Issued in Washington, DC, on November 16, 2023.

Karen L. Chiodini,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2023–25852 Filed 11–22–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Docket No. FAA–2023–2041; Airspace Docket No. 23–ASO–30]

RIN 2120–AA66

Renaming of Restricted Areas R–3002A, R–3002B, R–3002C, R–3002D, R–3002E, R–3002F, and R–3002G; Fort Benning, GA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action is an administrative change to rename restricted areas R–3002A, R–3002B, R–3002C, R–3002D, R–3002E, R–3002F, and R–3002G; Fort Benning, GA, and to update the using agency description to reflect the change. This action partially implements recommendations of the Commission on the Naming of Items (Naming Commission) of the Department of Defense (DoD) as established by section 370 of the Fiscal Year (FY) 2021 National Defense Authorization Act (NDAA).

DATES: Effective date 0901 UTC, January 25, 2024.

ADDRESSES: A copy of this final rule, and all background material may be viewed online at www.regulations.gov using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year.

FOR FURTHER INFORMATION CONTACT: Brian Vidis, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it updates the information in the airspace descriptions of restricted areas R–3002A, R–3002B, R–3002C, R–3002D, R–3002E, R–3002F, and R–3002G.

Background

The FY 2021 NDAA directed the DoD to establish a commission relating to assigning, modifying, or removing of names, symbols, displays, monuments, and paraphernalia to assets of the DoD that commemorate the Confederate States of America or any person who served voluntarily with the Confederate States of America.¹ In January 2023, the Secretary of Defense directed all DoD organizations to begin full implementation of the Naming Commission's recommendations. As approved by the Secretary of Defense, the name "Fort Benning, GA" is changed to "Fort Moore, GA." Consequently, this rulemaking action implements the requisite changes to part 73 by updating the airspace descriptions of restricted areas R–3002A, R–3002B, R–3002C, R–3002D, R–3002E, R–3002F, and R–3002G to reflect the new name.

The Rule

This action amends 14 CFR part 73 by updating the airspace titles and using agency descriptions for restricted areas R–3002A, R–3002B, R–3002C, R–3002D, R–3002E, R–3002F, and R–3002G by removing the name "Fort Benning, GA" and replacing it with "Fort Moore, GA." This action consists of administrative name changes only and does not affect the boundaries, altitudes, time of designation, or activities conducted in the airspace. Therefore, notice and public procedure under 5 U.S.C. 553(b) is unnecessary.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under Department of

Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action of making administrative name changes to restricted areas R–3002A, R–3002B, R–3002C, R–3002D, R–3002E, R–3002F, and R–3002G, which do not alter the boundaries, altitudes, or time of designation, qualifies for categorical exclusion under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations at 40 CFR part 1500, and in accordance with FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, paragraph 5–6.5a, which categorically excludes from further environmental impact review rulemaking actions that designate or modify classes of airspace areas, airways, routes, and reporting points (see 14 CFR part 71, Designation of Class A, B, C, D, and E Airspace Areas; Air Traffic Service Routes; and Reporting Points); and paragraph 5–6.5d—Modification of the technical description of special use airspace (SUA) that does not alter the dimensions, altitudes, or times of designation of the airspace (such as changes in designation of the controlling or using agency, or correction of typographical errors). In accordance with FAA Order 1050.1F, paragraph 5–2 regarding Extraordinary Circumstances, the FAA has reviewed this action for factors and circumstances in which a normally categorically excluded action may have a significant environmental impact requiring further analysis. The FAA has determined that no extraordinary circumstances exist that warrant preparation of an environmental assessment or environmental impact study.

List of Subjects in 14 CFR Part 73

Airspace, Prohibited areas, Restricted areas.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73 as follows:

¹ Public Law 116–283, 134 Stat. 3388, Jan. 1, 2021.

PART 73—SPECIAL USE AIRSPACE

■ 1. The authority citation for 14 CFR part 73 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p.389.

§ 73.30 Georgia [Amended]

■ 2. Section 73.30 is amended as follows:

* * * * *

R-3002A, Fort Benning, GA [Removed]

R-3002B, Fort Benning, GA [Removed]

R-3002C, Fort Benning, GA [Removed]

R-3002D, Fort Benning, GA [Removed]

R-3002E, Fort Benning, GA [Removed]

R-3002F, Fort Benning, GA [Removed]

R-3002G, Fort Benning, GA [Removed]

R-3002A Fort Moore, GA [New]

Boundaries. Beginning at lat. 32°31'12" N, long. 84°50'11" W; to lat. 32°19'03" N, long. 84°41'42" W; thence along the Central of Georgia Railroad; to lat. 32°19'09" N, long. 84°42'27" W; to lat. 32°19'14" N, long. 84°42'52" W; to lat. 32°19'23" N, long. 84°43'18" W; to lat. 32°19'35" N, long. 84°43'49" W; to lat. 32°19'43" N, long. 84°44'29" W; to lat. 32°19'55" N, long. 84°45'06" W; to lat. 32°20'13" N, long. 84°45'54" W; to lat. 32°20'30" N, long. 84°46'32" W; to lat. 32°20'53" N, long. 84°46'55" W; to lat. 32°20'55" N, long. 84°47'38" W; to lat. 32°15'25" N, long. 84°47'32" W; to lat. 32°15'26" N, long. 84°48'37" W; to lat. 32°15'17" N, long. 84°48'37" W; thence along River Bend Road; to lat. 32°15'17" N, long. 84°48'48" W; to lat. 32°15'06" N, long. 84°49'08" W; to lat. 32°14'48" N, long. 84°49'26" W; to lat. 32°14'38" N, long. 84°49'53" W; to lat. 32°14'32" N, long. 84°50'15" W; to lat. 32°14'22" N, long. 84°50'30" W; to lat. 32°14'12" N, long. 84°50'36" W; to lat. 32°14'22" N, long. 84°52'22" W; to lat. 32°15'07" N, long. 84°52'21" W; to lat. 32°15'06" N, long. 84°52'38" W; to lat. 32°15'33" N, long. 84°52'37" W; to lat. 32°15'34" N, long. 84°53'11" W; to lat. 32°20'15" N, long. 84°58'36" W; thence along Dixie Rd./First Division Rd; to lat. 32°20'36" N, long. 84°58'15" W; to lat. 32°20'53" N, long. 84°57'55" W; to lat. 32°21'03" N, long. 84°57'40" W; to lat. 32°21'11" N, long. 84°57'24" W; to lat. 32°21'08" N, long. 84°56'55" W; to lat. 32°21'13" N, long. 84°56'04" W; to lat. 32°21'33" N, long. 84°55'35" W; to lat. 32°21'50" N, long. 84°55'16" W; to lat. 32°21'53" N, long. 84°55'00" W; to lat. 32°22'06" N, long. 84°54'41" W; to lat. 32°23'01" N, long. 84°55'44" W; to lat. 32°24'48" N, long. 84°52'52" W; to lat. 32°25'36" N, long. 84°52'52" W; to lat.

32°25'44" N, long. 84°53'30" W; to lat. 32°26'19" N, long. 84°53'31" W; to lat. 32°26'20" N, long. 84°53'54" W; to lat. 32°27'19" N, long. 84°53'53" W; to lat. 32°27'17" N, long. 84°52'10" W; to lat. 32°28'46" N, long. 84°52'08" W; to lat. 32°28'44" N, long. 84°50'47" W; to lat. 32°29'43" N, long. 84°50'59" W; to lat. 32°30'35" N, long. 84°50'50" W; to lat. 32°30'39" N, long. 84°50'23" W; thence to the point of beginning.

Designated altitudes. Surface to 4,000 feet MSL.

Time of designation. Intermittent, 0600–0200 local time, daily; other times by NOTAM 6 hours in advance.

Controlling agency. FAA, Atlanta TRACON.

Using agency. U.S. Army, Commanding General, Infantry Center and Fort Moore, GA.

R-3002B Fort Moore, GA [New]

Boundaries. Beginning at lat. 32°31'12" N, long. 84°50'11" W; to lat. 32°19'03" N, long. 84°41'42" W; thence along the Central of Georgia Railroad; to lat. 32°19'09" N, long. 84°42'27" W; to lat. 32°19'14" N, long. 84°42'52" W; to lat. 32°19'23" N, long. 84°43'18" W; to lat. 32°19'35" N, long. 84°43'49" W; to lat. 32°19'43" N, long. 84°44'29" W; to lat. 32°19'55" N, long. 84°45'06" W; to lat. 32°20'13" N, long. 84°45'54" W; to lat. 32°20'30" N, long. 84°46'32" W; to lat. 32°20'53" N, long. 84°46'55" W; to lat. 32°20'55" N, long. 84°47'38" W; to lat. 32°15'25" N, long. 84°47'32" W; to lat. 32°15'26" N, long. 84°48'37" W; to lat. 32°15'17" N, long. 84°48'37" W; thence along River Bend Road; to lat. 32°15'17" N, long. 84°48'48" W; to lat. 32°15'06" N, long. 84°49'08" W; to lat. 32°14'48" N, long. 84°49'26" W; to lat. 32°14'38" N, long. 84°49'53" W; to lat. 32°14'32" N, long. 84°50'15" W; to lat. 32°14'22" N, long. 84°50'30" W; to lat. 32°14'12" N, long. 84°50'36" W; to lat. 32°14'22" N, long. 84°52'22" W; to lat. 32°15'07" N, long. 84°52'21" W; to lat. 32°15'06" N, long. 84°52'38" W; to lat. 32°15'33" N, long. 84°52'37" W; to lat. 32°15'34" N, long. 84°53'11" W; to lat. 32°20'15" N, long. 84°58'36" W; thence along Dixie Rd./First Division Rd; to lat. 32°20'36" N, long. 84°58'15" W; to lat. 32°20'53" N, long. 84°57'55" W; to lat. 32°21'03" N, long. 84°57'40" W; to lat. 32°21'11" N, long. 84°57'24" W; to lat. 32°21'08" N, long. 84°56'55" W; to lat. 32°21'13" N, long. 84°56'04" W; to lat. 32°21'33" N, long. 84°55'35" W; to lat. 32°21'50" N, long. 84°55'16" W; to lat. 32°21'53" N, long. 84°55'00" W; to lat. 32°22'06" N, long. 84°54'41" W; to lat. 32°23'01" N, long. 84°55'44" W; to lat. 32°24'48" N, long. 84°52'52" W; to lat. 32°25'36" N, long. 84°52'52" W; to lat. 32°25'44" N, long. 84°53'30" W; to lat.

32°26'19" N, long. 84°53'31" W; to lat. 32°26'20" N, long. 84°53'54" W; to lat. 32°27'19" N, long. 84°53'53" W; to lat. 32°27'17" N, long. 84°52'10" W; to lat. 32°28'46" N, long. 84°52'08" W; to lat. 32°28'44" N, long. 84°50'47" W; to lat. 32°29'43" N, long. 84°50'59" W; to lat. 32°30'35" N, long. 84°50'50" W; to lat. 32°30'39" N, long. 84°50'23" W; thence to the point of beginning.

Designated altitudes. 4,000 feet MSL to 8,000 feet MSL.

Time of designation. Intermittent, 0600–0200 local time, daily; other times by NOTAM 6 hours in advance.

Controlling agency. FAA, Atlanta TRACON.

Using agency. U.S. Army, Commanding General, Infantry Center and Fort Moore, GA.

R-3002C Fort Moore, GA [New]

Boundaries. Beginning at lat. 32°31'12" N, long. 84°50'11" W; to lat. 32°19'03" N, long. 84°41'42" W; thence along the Central of Georgia Railroad; to lat. 32°19'09" N, long. 84°42'27" W; to lat. 32°19'14" N, long. 84°42'52" W; to lat. 32°19'23" N, long. 84°43'18" W; to lat. 32°19'35" N, long. 84°43'49" W; to lat. 32°19'43" N, long. 84°44'29" W; to lat. 32°19'55" N, long. 84°45'06" W; to lat. 32°20'13" N, long. 84°45'54" W; to lat. 32°20'30" N, long. 84°46'32" W; to lat. 32°20'53" N, long. 84°46'55" W; to lat. 32°20'55" N, long. 84°47'38" W; to lat. 32°15'25" N, long. 84°47'32" W; to lat. 32°15'26" N, long. 84°48'37" W; to lat. 32°15'17" N, long. 84°48'37" W; thence along River Bend Road; to lat. 32°15'17" N, long. 84°48'48" W; to lat. 32°15'06" N, long. 84°49'08" W; to lat. 32°14'48" N, long. 84°49'26" W; to lat. 32°14'38" N, long. 84°49'53" W; to lat. 32°14'32" N, long. 84°50'15" W; to lat. 32°14'22" N, long. 84°50'30" W; to lat. 32°14'12" N, long. 84°50'36" W; to lat. 32°14'22" N, long. 84°52'22" W; to lat. 32°15'07" N, long. 84°52'21" W; to lat. 32°15'06" N, long. 84°52'38" W; to lat. 32°15'33" N, long. 84°52'37" W; to lat. 32°15'34" N, long. 84°53'11" W; to lat. 32°20'15" N, long. 84°58'36" W; thence along Dixie Rd./First Division Rd; to lat. 32°20'36" N, long. 84°58'15" W; to lat. 32°20'53" N, long. 84°57'55" W; to lat. 32°21'03" N, long. 84°57'40" W; to lat. 32°21'11" N, long. 84°57'24" W; to lat. 32°21'08" N, long. 84°56'55" W; to lat. 32°21'13" N, long. 84°56'04" W; to lat. 32°21'33" N, long. 84°55'35" W; to lat. 32°21'50" N, long. 84°55'16" W; to lat. 32°21'53" N, long. 84°55'00" W; to lat. 32°22'06" N, long. 84°54'41" W; to lat. 32°23'01" N, long. 84°55'44" W; to lat. 32°24'48" N, long. 84°52'52" W; to lat. 32°25'36" N, long. 84°52'52" W; to lat. 32°25'44" N, long. 84°53'30" W; to lat. 32°26'19" N, long. 84°53'31" W; to lat.

32°26'20" N, long. 84°53'54" W; to lat. 32°27'19" N, long. 84°53'53" W; to lat. 32°27'17" N, long. 84°52'10" W; to lat. 32°28'46" N, long. 84°52'08" W; to lat. 32°28'44" N, long. 84°50'47" W; to lat. 32°29'43" N, long. 84°50'59" W; to lat. 32°30'35" N, long. 84°50'50" W; to lat. 32°30'39" N, long. 84°50'23" W; thence to the point of beginning.

Designated altitudes. 8,000 feet MSL to 14,000 feet MSL.

Time of designation. Intermittent by NOTAM 6 hours in advance.

Controlling agency. FAA, Atlanta TRACON.

Using agency. U.S. Army, Commanding General, Infantry Center and Fort Moore, GA.

R-3002D Fort Moore, GA [New]

Boundaries. Beginning at lat. 32°31'12" N, long. 84°50'11" W; to lat. 32°31'52" N, long. 84°50'25" W; to lat. 32°33'05" N, long. 84°45'27" W; thence along the Central of Georgia Railroad; to lat. 32°32'52" N, long. 84°45'00" W; to lat. 32°32'43" N, long. 84°44'08" W; to lat. 32°32'34" N, long. 84°43'40" W; to lat. 32°32'22" N, long. 84°43'13" W; to lat. 32°32'18" N, long. 84°42'53" W; to lat. 32°32'08" N, long. 84°42'38" W; to lat. 32°32'05" N, long. 84°42'26" W; to lat. 32°32'11" N, long. 84°42'12" W; to lat. 32°32'13" N, long. 84°41'54" W; to lat. 32°32'10" N, long. 84°41'38" W; to lat. 32°32'06" N, long. 84°41'25" W; to lat. 32°32'08" N, long. 84°41'17" W; to lat. 32°32'15" N, long. 84°41'01" W; to lat. 32°32'20" N, long. 84°40'56" W; to lat. 32°32'07" N, long. 84°40'44" W; to lat. 32°31'06" N, long. 84°41'43" W; to lat. 32°31'04" N, long. 84°40'54" W; to lat. 32°32'04" N, long. 84°38'16" W; to lat. 32°29'16" N, long. 84°38'17" W; to lat. 32°29'10" N, long. 84°39'25" W; to lat. 32°18'35" N, long. 84°39'30" W; to lat. 32°18'23" N, long. 84°41'09" W; to lat. 32°19'03" N, long. 84°41'42" W; thence to the point of beginning.

Designated altitudes. Surface to 8,000 feet MSL.

Time of designation. Intermittent, 0600–0200 local time, daily; other times by NOTAM 6 hours in advance.

Controlling agency. FAA, Atlanta TRACON.

Using agency. U.S. Army, Commanding General, Infantry Center and Fort Moore, GA.

R-3002E Fort Moore, GA [New]

Boundaries. Beginning at lat. 32°31'12" N, long. 84°50'11" W; to lat. 32°31'52" N, long. 84°50'25" W; to lat. 32°33'05" N, long. 84°45'27" W; thence along the Central of Georgia Railroad; to lat. 32°32'52" N, long. 84°45'00" W; to lat. 32°32'43" N, long. 84°44'08" W; to lat. 32°32'34" N, long. 84°43'40" W; to

lat. 32°32'22" N, long. 84°43'13" W; to lat. 32°32'18" N, long. 84°42'53" W; to lat. 32°32'08" N, long. 84°42'38" W; to lat. 32°32'05" N, long. 84°42'26" W; to lat. 32°32'11" N, long. 84°42'12" W; to lat. 32°32'13" N, long. 84°41'54" W; to lat. 32°32'10" N, long. 84°41'38" W; to lat. 32°32'06" N, long. 84°41'25" W; to lat. 32°32'08" N, long. 84°41'17" W; to lat. 32°32'15" N, long. 84°41'01" W; to lat. 32°32'20" N, long. 84°40'56" W; to lat. 32°32'07" N, long. 84°40'44" W; to lat. 32°31'06" N, long. 84°41'43" W; to lat. 32°31'04" N, long. 84°40'54" W; to lat. 32°32'04" N, long. 84°38'16" W; to lat. 32°29'16" N, long. 84°38'17" W; to lat. 32°29'10" N, long. 84°39'25" W; to lat. 32°18'35" N, long. 84°39'30" W; to lat. 32°18'23" N, long. 84°41'09" W; to lat. 32°19'03" N, long. 84°41'42" W; thence to the point of beginning.

Designated altitudes. 8,000 feet MSL to 14,000 feet MSL.

Time of designation. Intermittent by NOTAM 6 hours in advance.

Controlling agency. FAA, Atlanta TRACON.

Using agency. U.S. Army, Commanding General, Infantry Center and Fort Moore, GA.

R-3002F Fort Moore, GA [New]

Boundaries. Beginning at lat. 32°27'17" N, long. 84°52'10" W; to lat. 32°28'46" N, long. 84°52'08" W; to lat. 32°28'44" N, long. 84°50'47" W; to lat. 32°29'43" N, long. 84°50'59" W; to lat. 32°30'35" N, long. 84°50'50" W; to lat. 32°30'39" N, long. 84°50'23" W; to lat. 32°31'12" N, long. 84°50'11" W; to lat. 32°31'52" N, long. 84°50'25" W; to lat. 32°33'05" N, long. 84°45'27" W; thence along the Central of Georgia Railroad; to lat. 32°32'52" N, long. 84°45'00" W; to lat. 32°32'43" N, long. 84°44'08" W; to lat. 32°32'34" N, long. 84°43'40" W; to lat. 32°32'22" N, long. 84°43'13" W; to lat. 32°32'18" N, long. 84°42'53" W; to lat. 32°32'08" N, long. 84°42'38" W; to lat. 32°32'05" N, long. 84°42'26" W; to lat. 32°32'11" N, long. 84°42'12" W; to lat. 32°32'13" N, long. 84°41'54" W; to lat. 32°32'10" N, long. 84°41'38" W; to lat. 32°32'06" N, long. 84°41'25" W; to lat. 32°32'08" N, long. 84°41'17" W; to lat. 32°32'15" N, long. 84°41'01" W; to lat. 32°32'20" N, long. 84°40'56" W; to lat. 32°32'07" N, long. 84°40'44" W; to lat. 32°31'06" N, long. 84°41'43" W; to lat. 32°31'04" N, long. 84°40'54" W; to lat. 32°32'04" N, long. 84°38'16" W; to lat. 32°29'16" N, long. 84°38'17" W; to lat. 32°29'10" N, long. 84°39'25" W; to lat. 32°18'35" N, long. 84°39'30" W; to lat. 32°18'23" N, long. 84°41'09" W; thence along the Central of Georgia Railroad; to lat. 32°19'09" N, long. 84°42'27" W; to lat. 32°19'14" N, long.

84°42'52" W; to lat. 32°19'23" N, long. 84°43'18" W; to lat. 32°19'35" N, long. 84°43'49" W; to lat. 32°19'43" N, long. 84°44'29" W; to lat. 32°19'55" N, long. 84°45'06" W; to lat. 32°20'13" N, long. 84°45'54" W; to lat. 32°20'30" N, long. 84°46'32" W; to lat. 32°20'53" N, long. 84°46'55" W; to lat. 32°20'55" N, long. 84°47'38" W; thence to the point of beginning.

Designated altitudes. 14,000 feet MSL to FL 250.

Time of designation. Intermittent by NOTAM 6 hours in advance.

Controlling agency. FAA, Atlanta TRACON.

Using agency. U.S. Army, Commanding General, Infantry Center and Fort Moore, GA.

R-3002G Fort Moore, GA [New]

Boundaries. Beginning at lat. 32°20'15" N, long. 84°58'36" W; to lat. 32°15'34" N, long. 84°53'11" W; to lat. 32°15'32" N, long. 84°54'02" W; to lat. 32°15'04" N, long. 84°55'24" W; to lat. 32°14'27" N, long. 84°54'50" W; to lat. 32°14'25" N, long. 84°56'53" W; to lat. 32°14'36" N, long. 84°56'53" W; to lat. 32°14'38" N, long. 84°57'56" W; to lat. 32°16'36" N, long. 84°57'58" W; to lat. 32°16'36" N, long. 84°58'35" W; to lat. 32°17'39" N, long. 84°58'35" W; to lat. 32°17'40" N, long. 84°58'54" W; thence to the point of beginning.

Designated altitudes. Surface to 14,000 feet MSL.

Time of designation. Intermittent, 0600–0200 Eastern time daily; other times by NOTAM 6 hours in advance.

Controlling agency. FAA, Atlanta TRACON.

Using agency. U.S. Army, Commanding General, Infantry Center and Fort Moore, GA.

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Issued in Washington, DC, on November 16, 2023.

Karen L. Chiodini,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2023–25849 Filed 11–22–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Docket No. FAA–2023–0242; Airspace Docket No. 23–ASO–25]

RIN 2120–AA66

Renaming of Restricted Areas R-2103A and R-2103B; Fort Rucker, AL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action is an administrative change to rename restricted areas R-2103A and R-2103B, Fort Rucker, AL, and to update the using agency description to reflect the change. This action partially implements recommendations of the Commission on the Naming of Items (Naming Commission) of the Department of Defense (DoD) as established by section 370 of the Fiscal Year (FY) 2021 National Defense Authorization Act (NDAA).

DATES: Effective date 0901 UTC, January 25, 2024.

ADDRESSES: A copy of this final rule, and all background material may be viewed online at www.regulations.gov using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year.

FOR FURTHER INFORMATION CONTACT: Brian Vidis, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267-8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it updates the information in the airspace descriptions of restricted areas R-2103A and R-2103B.

Background

The FY 2021 NDAA directed the DoD to establish a commission relating to assigning, modifying, or removing of names, symbols, displays, monuments, and paraphernalia to assets of the DoD that commemorate the Confederate States of America or any person who served voluntarily with the Confederate States of America.¹ In January 2023, the Secretary of Defense directed all DoD

organizations to begin full implementation of the Naming Commission's recommendations. As approved by the Secretary of Defense, the name "Fort Rucker, AL" is changed to "Fort Novosel, AL". Consequently, this rulemaking action implements the requisite changes to part 73 by updating the airspace descriptions of restricted areas R-2103A and R-2103B to reflect the new name.

The Rule

This action amends 14 CFR part 73 by updating the airspace titles and using agency descriptions for restricted areas R-2103A and R-2103B by removing the name "Fort Rucker, AL" and replacing it with "Fort Novosel, AL". Additionally, the FAA added the word "statute" to the part 73 description to clarify the unit of measurement for the radius of each volume of airspace. This action consists of administrative name changes only and does not affect the boundaries, altitudes, time of designation, or activities conducted in the airspace. Therefore, notice and public procedure under 5 U.S.C. 553(b) is unnecessary.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action of making administrative name changes to restricted areas R-2103A and R-2103B, which do not alter the boundaries, altitudes, or time of designation, qualifies for categorical exclusion under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations at 40 CFR part 1500, and in accordance with FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, paragraph 5-6.5a, which

categorically excludes from further environmental impact review rulemaking actions that designate or modify classes of airspace areas, airways, routes, and reporting points (see 14 CFR part 71, Designation of Class A, B, C, D, and E Airspace Areas; Air Traffic Service Routes; and Reporting Points); and paragraph 5-6.5d—Modification of the technical description of special use airspace (SUA) that does not alter the dimensions, altitudes, or times of designation of the airspace (such as changes in designation of the controlling or using agency, or correction of typographical errors). In accordance with FAA Order 1050.1F, paragraph 5-2 regarding Extraordinary Circumstances, the FAA has reviewed this action for factors and circumstances in which a normally categorically excluded action may have a significant environmental impact requiring further analysis. Accordingly, the FAA has determined that no extraordinary circumstances exist that warrant preparation of an environmental assessment or environmental impact study.

List of Subjects in 14 CFR part 73

Airspace, Prohibited areas, Restricted areas.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73 as follows:

PART 73—SPECIAL USE AIRSPACE

■ 1. The authority citation for 14 CFR part 73 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959-1963 Comp., p.389.

§ 73.21 Alabama [Amended]

■ 2. Section 73.21 is amended as follows:

* * * * *

R-2103A Fort Rucker, AL [Removed]

R-2103B Fort Rucker, AL [Removed]

R-2103A Fort Novosel, AL [New]

Boundaries. A circular area with a radius of 4 statute miles centered at lat. 31°26'56" N, long. 85°47'45" W.

Designated altitudes. Surface to but not including 10,000 feet. MSL.

Time of designation. Continuous.

Controlling agency. U.S. Army, Cairns Approach Control.

Using agency. Commanding General, U.S. Army Aviation Center, Fort Novosel, AL.

¹ Public Law 116-283, 134 Stat. 3388, Jan. 1, 2021.

R-2103B Fort Novosel, AL [New]

Boundaries. A circular area with a radius of 4 statute miles centered at lat. 31°26'56" N, long. 85°47'45" W.

Designated altitudes. 10,000 feet MSL to 15,000 feet MSL.

Time of designation. By NOTAM 6 hours in advance.

Controlling agency. FAA, Jacksonville ARTCC.

Using agency. Commanding General, U.S. Army Aviation Center, Fort Novosel, AL.

* * * * *

Issued in Washington, DC, on November 17, 2023.

Karen L. Chiodini,

Acting Manager, Airspace Rules and Regulations Group.

[FR Doc. 2023-25850 Filed 11-22-23; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF HOMELAND SECURITY**Coast Guard****33 CFR Part 100**

[Docket No. USCG-2023-0864]

Special Local Regulations; Southern California Annual Marine Events for the Los Angeles—Long Beach Captain of the Port Zone

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Notification of enforcement of regulations.

SUMMARY: The Coast Guard will enforce multiple special local regulations codified in federal regulations for recurring marine events taking place in December 2023 located in the Los Angeles—Long Beach Captain of the Port Zone. This action is necessary and intended to provide for the safety of life and property on navigable waterways during these events. During the enforcement periods, the operator of any vessel in the regulated area must comply with directions from the Patrol Commander or any official patrol vessels displaying a Coast Guard ensign.

DATES: The Coast Guard will enforce the regulations listed in 33 CFR 100.1104, for the locations described in event (5) through (16) in Table 1 to § 100.1104 during December 2023, according to the schedule listed in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, contact LCDR Kevin Kinsella, U.S. Coast Guard

Sector Los Angeles—Long Beach at telephone (310) 467-2099 or email *D11-SMB-SectorLALB-WWM@uscg.mil*.

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce multiple special local regulations for annual events in the Captain of the Port Los Angeles—Long Beach Zone listed in 33 CFR 100.1104 Table 1—To § 100.1104 for events occurring in the month of December as listed:

1. Entry (5) Morro Bay Holiday Boat Parade (a.k.a. Morro Bay Lighted Boat Parade), From 4 p.m. to 9 p.m. on December 2, 2023.

2. Entry (6) Santa Barbara Holiday Boat Parade (a.k.a. Annual Boat Parade of Lights), From 6:30 p.m. to 7 p.m. on December 10, 2023.

3. Entry (7) Ventura Harbor Holiday Boat Parade (a.k.a. Ventura Harbor Parade of Lights), From 6:30 p.m. to 8 p.m. December 15, 2023, through December 16, 2023.

4. Entry (8) Channel Islands Harbor Holiday Boat Parade (a.k.a. Channel Islands Harbor Parade of Lights), From 7 p.m. to 9 p.m. on December 9, 2023.

5. Entry (9) Marina Del Rey Holiday Boat Parade, From 6 p.m. to 8 p.m. on December 9, 2023.

6. Entry (10) King Harbor Holiday Boat Parade, From 5:30 p.m. to 8 p.m. on December 9, 2023.

7. Entry (11) Port of Los Angeles Holiday Boat Parade (a.k.a. Los Angeles Harbor Holiday Afloat Parade), From 5:30 p.m. to 9:30 p.m. on December 2, 2023.

8. Entry (12) Parade of 1,000 Lights (a.k.a. Shoreline Yacht Club Annual Christmas Boat Parade), From 5:30 p.m. to 7:30 p.m. on December 9, 2023.

9. Entry (13) Naples Island Holiday Boat Parade (a.k.a. Naples 77th Annual Holiday Boat Parade), From 5 p.m. to 10 p.m. on December 16, 2023.

10. Entry (14) Huntington Harbor Holiday Boat Parade (a.k.a. 61st Annual Huntington Harbor Boat parade), From 5 p.m. to 9 p.m. December 9, 2023, through December 10, 2023.

11. Entry (15) Newport Beach Holiday Boat Parade (a.k.a. Newport Beach Christmas Boat Parade), From 6:30 p.m. to 9 p.m. December 13, 2023, through December 17, 2023.

12. Entry (16) Dana Point Holiday in the Harbor (a.k.a. 48th Annual Dana Point Harbor Boat Parade of Lights), From 6:30 p.m. to 8:30 p.m. December 8, 2023, through December 10, 2023.

Pursuant to 33 CFR 100.1104, all persons and vessels not registered with the sponsor as participants or as official patrol vessels are considered spectators. The “official patrol” consists of any Coast Guard asset; other Federal, state,

or local law enforcement; and any public or sponsor-provided vessels assigned or approved by the cognizant Coast Guard Sector Commander to patrol each event. No spectator shall anchor, block, loiter, nor impede the through transit of participants or official patrol vessels in the regulated areas during all applicable effective dates and times unless cleared to do so by or through an official patrol vessel. When hailed and/or signaled by an official patrol vessel, any spectator located within a regulated area during all applicable effective dates and times shall come to an immediate stop. The Patrol Commander (PATCOM) is empowered to control the movement of all vessels in the regulated area or to restrict vessels from entering the regulated area. The Patrol Commander shall be designated by the cognizant Coast Guard Sector Commander; will be a U.S. Coast Guard commissioned officer, warrant officer, or petty officer to act as the Sector Commander’s official representative; and will be located aboard the lead official patrol vessel. As the Sector Commander’s representative, the PATCOM may terminate the event any time it is deemed necessary for the protection of life and property. PATCOM may be reached on VHF-FM Channel 13 (156.65MHz) or 16 (156.8MHz) when required, by the call sign “PATCOM.” The Patrol Commander may, upon request, allow the transit of commercial vessels through regulated areas when it is safe to do so. The Coast Guard may be assisted by other Federal, state, or local agencies.

This notice of enforcement is issued under authority of 33 CFR 100.1104 and 5 U.S.C. 552(a). In addition to this notification of enforcement in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via the Local Notice to Mariners, marine information broadcasts, and Broadcast Notice to Mariners. If the Captain of the Port Los Angeles—Long Beach determines that the Special Local Regulations need not to be enforced for the full duration stated in this notice, the Captain of the Port may use a Broadcast Notice to Mariners to reflect the change.

Dated: November 17, 2023.

R.D. Manning,

Captain, U.S. Coast Guard, Captain of the Port Los Angeles—Long Beach.

[FR Doc. 2023-25994 Filed 11-22-23; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0908]

RIN 1625–AA00

Safety Zone; Lake Charles, Lake Charles, LA

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for all navigable waters within a 1,000-foot radius of a fireworks launch barge in Lake Charles, LA. This safety zone is necessary to protect persons and vessels from hazards associated with a fireworks display. This regulation prohibits persons and vessels from entering the safety zone unless authorized by the Captain of the Port, Marine Safety Unit Port Arthur, or a designated representative.

DATES: This rule is effective from 7 p.m. until 10 p.m. on November 25, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG–2023–0908 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 Lieutenant Mache Mason, U.S. Coast Guard; telephone 337–912–0073, email msulcwwm@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port Marine Safety Unit Port Arthur
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 NPRM process would delay the establishment of the safety zone until after the fireworks event on November 25, 2023, and compromise public safety. The Coast Guard must establish this temporary safety zone immediately and lacks sufficient time to provide a reasonable comment period and then 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 this rule would be impracticable because the Coast Guard must establish this safety zone by November 25, 2023, to respond to the potential safety hazards associated with the fireworks event.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 700034. The Captain of the Port Marine Safety Unit Port Arthur (COTP) has determined that potential hazards associated with the fireworks display at this location would be a safety concern for spectator craft and vessels in the vicinity of the designated launch location. The purpose of this rule is to ensure safety of vessels and the navigable waters in the safety zone before, during, and after the scheduled event.

IV. Discussion of the Rule

This rule establishes a safety zone from 7 p.m. until 10 p.m. on November 25, 2023. The safety zone will cover all navigable waters within a 1000-foot radius of a fireworks launch barge located at 30°13'45" N and 93°13'34" W. The duration of the safety zone is intended to protect participants, spectators, and other persons and vessels, in the nearby navigable waters during the fireworks display.

No vessel or person will 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 size, location, and duration of the safety zone. Smaller vessel traffic will be able to safely transit around this safety zone which would impact a small, designated area of Lake Charles for 3 hours. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone, and the rule would allow vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this 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 lasting only 3 hours that will prohibit entry within a 1000-foot radius of a fireworks launch barge. 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.T08-0908 to read as follows:

§ 165.T08-0908 Safety Zone; Lake Charles, Lake Charles, LA

(a) *Location.* All navigable waters within a 1000-ft radius of the fireworks barge anchored in approximate position 30°13'45" N and 093°13'34" W, on Lake Charles.

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, 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 Marine Safety Unit Port Arthur

(COTP) in the enforcement of the safety zone.

(c) *Regulations.* (1) Under the general safety zone regulation in subpart C of this part, entry of vessels or persons into this zone is prohibited unless authorized by the COTP or a designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative on VHF-FM channel 13 or 16, or by phone at telephone at 337-912-0073.

(3) The COTP or a designated representative may forbid and control the movement of all vessels in the regulated area. When hailed or signaled by an official patrol vessel, a vessel shall come to an immediate stop and comply with the directions given. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

(4) The COTP or a designated representative may terminate the event or the operation of any vessel at any time it is deemed necessary for the protection of life or property.

(d) *Enforcement period.* This section will be enforced from 7 p.m. to 10 p.m. on November 25, 2023.

(e) *Informational broadcasts.* The COTP or a designated representative will inform the public of the effective period for the safety zone as well as any changes in the dates and times of enforcement through Broadcast Notices to Mariners and/or Marine Safety Information Bulletins as appropriate.

Dated: November 17, 2023.

A.R. Migliorini,

Captain, U.S. Coast Guard, Captain of the Port Marine Safety Unit Port Arthur.

[FR Doc. 2023-25981 Filed 11-22-23; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900-AR76

Reevaluation of Claims for Dependency and Indemnity Compensation

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) amends its adjudication regulations concerning certain awards of Dependency and Indemnity Compensation (DIC). Under this amendment, relevant claimants will be eligible to elect to have certain previously denied DIC claims

reevaluated pursuant to changes that establish or modify a presumption of service connection. Any award as a result of the reevaluation may be made retroactive as if the establishment or modification of the presumption of service connection had been in effect on the date of the submission of the original claim. This amendment incorporates legislative changes enacted by the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022 and will bring Federal regulations into conformance with those changes.

DATES: This rule is effective January 23, 2024. Federal law requires VA to set the effective date of major rules such as this rule no sooner than 60 days after publication in the **Federal Register**. 5 U.S.C. 801(a)(3).

FOR FURTHER INFORMATION CONTACT: Eric Baltimore, Management and Program Analyst, Pension and Fiduciary Service (21PF), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 632-8863. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: In a document published in the **Federal Register** on March 22, 2023, at 88 FR 17166, VA proposed to amend its adjudication regulations concerning certain awards of DIC. Under this amendment, relevant claimants will be eligible to elect to have certain previously denied DIC claims reevaluated pursuant to changes that establish or modify a presumption of service connection. Any award as a result of the reevaluation may be made retroactive as if the establishment or modification of the presumption of service connection had been in effect on the date of the submission of the original claim. This amendment incorporates legislative changes enacted by section 204 of the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022, or the Honoring our PACT Act of 2022, Public Law 117-168 (herein referred to as “the PACT Act”). The 60-day public comment period ended on May 22, 2023.

VA received three comments. While VA appreciates the commenters’ concerns, several of the comments are unrelated to the reevaluation of claims for DIC under section 204 of the PACT Act. VA will not make any changes to the rule as proposed based on these comments. Nevertheless, VA provides the following responses and highlights the limitations of this rule based on section 204 of the PACT Act.

The first commenter urged the necessity of proposed bill H.R. 3518, the “Victims of Agent Orange Relief Act of 2021.” In particular, the commenter emphasized that “[t]here is a growing group of daughters of [A]gent [O]range male Veterans that have been ignored for years!” According to Congress.gov, H.R. 3518 was introduced in the House and referred to the Committees on Veterans’ Affairs, Foreign Affairs, and Energy and Commerce on May 25, 2021. The Committee on Energy and Commerce then referred the resolution to the Subcommittee on Health on May 26, 2021, which was the most recent action. As noted in the resolution’s summary, “[u]nder the bill, certain benefits will be made available to the children of male Vietnam veterans who are affected by certain birth defects. Currently, these benefits are only available to the children of women Vietnam veterans.”¹ Precisely, according to its text, the bill sought, in relevant part, to amend subchapter II of chapter 18 of 38 U.S.C. by striking all references to “women” Vietnam Veterans, a change that would have the effect of expanding eligibility to the children of male Vietnam Veterans as noted in the summary. The bill has so far not been enacted, and therefore it can have no bearing on this or any other VA rulemaking.

The second commenter praised the benefits of the PACT Act but highlighted three areas where the proposed rule was “underinclusive:” (1) only DIC claims, and not Veteran’s disability claims, can be awarded retroactive to the original filing date following a reevaluation; (2) only previously denied DIC claims where a reevaluation was elected, and not pending claims for DIC, may be afforded a retroactive award; and (3) the reevaluation process may only be initiated by the original claimant. The third commenter also raised the issue of DIC claims, and not live Veterans’ disability claims, being eligible for the special retroactive treatment. To address these concerns, VA provides the following responses and highlights the limitations of this proposed rule based on section 204 of the PACT Act.

First, the new regulation codified by this final rule, 38 CFR 3.33, focuses solely on reevaluations of previously denied DIC claims as discussed in section 204 of the PACT Act. Therefore, understanding the limitations of section 204 of the PACT Act, this regulation

cannot extend retroactivity to the original filing date following a reevaluation for a Veteran’s disability claim. Of note, VA intends to implement the PACT Act’s provisions on disability benefits in a separate rulemaking. See *Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions—Fall 2022*, 88 FR 10966, 11120 (Feb. 22, 2023) (“Updating VA Adjudication Regulations for Disability or Death Benefits Based on Toxic Exposure.”). The separate rulemaking on disability benefits would have its own notice-and-comment period.

Second, the retroactive provisions within the new regulation are limited to the reevaluation of a previously denied claim for DIC and do not apply to retroactivity for a pending DIC claim received by VA but not yet decided. This conforms to the application of the requirements within 38 U.S.C. 1305(a)(3), as added by section 204(a) of the PACT Act. Retroactive application is not authorized for the additional presumptive diseases prescribed within the PACT Act outside of section 204. We note that this commenter raised the concern of a DIC claimant whose claim is awaiting review by the Board of Veterans’ Appeals at the time the new presumption goes into effect, potentially losing multiple years’ worth of benefits. The commenter’s concern proceeds from the premise that a claim cannot qualify for special retroactive treatment under section 204 of the PACT Act while the claim is pending on appeal. The statute requires only that the claim have been “denied,” not that the denial have become final due to either passage of the appellate review period or final denial on appeal. We do not believe there is any textual ambiguity on this point. However, to the extent some may disagree, VA notes that disqualifying a DIC claim from special retroactive treatment due to a pending appeal would have the perverse effect of disincentivizing claimants from pursuing their appellate rights. This is particularly concerning in light of the fact that a claimant would have to be making the decision of whether to appeal before he or she knew with certainty whether the new presumption would in fact go into effect. Accordingly, VA now clarifies that an initial denial at the regional office level is all that is needed. We acknowledge that even under this interpretation, the commenter’s concern retains some force in the context of a claim that is awaiting a decision when the presumption goes into effect. This outcome is unavoidable, however, as in this

¹ Text—H.R. 3518—117th Congress (2021–2022): Victims of Agent Orange Relief Act of 2021, H.R. 3518, 117th Cong. (2021), available at <https://www.congress.gov/bills/117/congress/house-bill/3518/text>.

situation there is no denial available to trigger application of the statutory language. VA notes that in this scenario, the effective date difference between the original claim date and the effective date of the new presumption ordinarily should be minimal.

Third, as noted in the proposed rulemaking, the PACT Act is silent on the accrued benefits or substitution processes as they relate to the reevaluation of previously denied DIC claims. As such, VA must utilize the existing processes regarding accrued benefits and substitution contained in 38 U.S.C. 5121 and 5121A. Thus, a claimant may request to be substituted for the original claimant for the purposes of processing a DIC reevaluation claim to completion, but only if the original claimant elected to have the previously denied DIC claim reevaluated.

Of note, federal law allows substitution only for claims that are already pending at the time of the claimant's death. 38 U.S.C. 5121A(a)(1). Consistent with that restriction, the PACT Act expressly allows reevaluation only "at the election of *the claimant*." 38 U.S.C. 1305(a)(2) (*italics added*). So, if a DIC claimant dies before requesting reevaluation under the PACT Act, there is no mechanism available allowing the claim to be reevaluated by a party secondary to the DIC claimant. VA makes no changes to the rule based on these comments.

The third commenter offered general observations on the PACT Act's implications for "retroactive disability payments" and "original effective dates," and requested retroactive benefits for himself based on the PACT Act effective to the original date of his claims for disability compensation that VA previously denied. These comments are unrelated to the reevaluation of claims for DIC under section 204 of the PACT Act, as such they will not result in any changes being made to the rule. As noted, VA intends to implement the PACT Act's provisions on disability benefits in a separate rulemaking.

Of note, when VA grants an award based on a change in law (like the PACT Act), federal law generally limits the effective date of that award to no earlier than the effective date of the change in law. 38 U.S.C. 5110(g). That same law also provides that "[i]n no event" may the effective date of an award granted because of a change in law be earlier than one year before the date of the associated claim or the date of the administrative determination of entitlement, whichever date is earlier. Therefore, if a Veteran files a PACT Act claim and VA grants the claim, the

Veteran could still obtain these limited periods of retroactivity, but the law limits the effective date of that grant to no earlier than one year before the Veteran filed the claim, and no earlier than the effective date of the change in law.

VA recognizes the concern that the second and third commenters have raised regarding the different retroactive effective date treatments between DIC claims and disability compensation claims for live Veterans. It is understandable that a Veteran who has been living with a disability for some time before that disability became subject to presumptive service connection would object to this difference, as these two commenters have. Congress has determined that claims for service-connected death should receive special retroactive effective dates, while compensation claims for living Veterans must continue to be subject to traditional effective date rules.

VA does not have authority to contradict ordinarily applicable statutory effective date law. As the U.S. Supreme Court explained in January 2023, the effective date provisions in section 5110 of title 38, United States Code, are not only time constraints, but they also express Congress's intent to limit, subject to enumerated exceptions, the amounts of payments Veterans may receive. *Arellano v. McDonough*, 143 S. Ct. 543, 549 (2023). The constraints in 38 U.S.C. 5110(g) therefore apply unless displaced by a specific statutory effective date mechanism, as Congress did here for DIC. We note that if a DIC claim (or any claim) was pending when the PACT Act went into effect, VA will, and indeed must, complete the processing of that claim to determine if an earlier effective date on a direct basis (as distinguished from a presumptive basis) is possible.

Executive Orders 12866, 13563, and 14094

Executive Order 12866 (Regulatory Planning and Review) directs agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 (Executive Order on Modernizing

Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), and Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review). The Office of Information and Regulatory Affairs has determined that this rulemaking is a significant regulatory action under Executive Order 12866, Section 3(f)(1), as amended by Executive Order 14094. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601–612). Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This final rule includes provisions constituting a revised collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) that require approval by the Office of Management and Budget (OMB). Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review and approval. OMB has reviewed and approved this revised collection of information.

Congressional Review Act

Under the Congressional Review Act, this regulatory action may result in an annual effect on the economy of \$100 million or more, 5 U.S.C. 804(2), and so is subject to the 60-day delay in effective date under 5 U.S.C. 801(a)(3). In accordance with 5 U.S.C. 801(a)(1), VA will submit to the Comptroller General and to Congress a copy of this

Regulation and the Regulatory Impact Analysis (RIA) associated with the Regulation.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, signed and approved this document on November 16, 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.

Luvenia Potts,

Regulation Development Coordinator, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 3 as set forth below:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

- 1. The authority citation for part 3, subpart A, continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

- 2. Remove the undesignated center heading “General” following § 3.32 and add § 3.33 to read as follows:

§ 3.33 Reevaluation of Claims for Dependency and Indemnity Compensation Involving Presumptions of Service Connection Following Enactment of Public Law 117–168.

(a) *Purpose.* This section states effective date and election rules based on amendments made under Public Law 117–168, which provides for the reevaluation of certain previously denied dependency and indemnity compensation (DIC) claims when a law establishes or modifies a presumption of service connection.

(b) *Definitions.* For purpose of this section:

(1) *Law* means any law, regulation, or Federal court decision or settlement establishing or modifying a presumption of service connection.

(2) *Relevant claimant* means an individual who submitted a claim for DIC to VA that was evaluated and denied by VA before the date on which such a provision of law went into effect and might have been evaluated differently had the establishment or modification of the service connection

presumption been applicable to the claim.

(c) *Election of review*—(1) *General.* VA will not reevaluate under this section any previously denied claim for DIC prior to election by the relevant claimant.

(2) *Form of election.* Reevaluation of a previously denied DIC claim must be at the election of the relevant claimant on a prescribed form pursuant to § 3.152(a).

(d) *Effective date of award.* If a relevant claimant is found entitled to DIC based on the establishment or modification of a presumption of service connection, the effective date of the award will be as follows:

(1) If VA denied a claim for DIC prior to a law defined under (b)(1) of this section that establishes or modifies a presumption of service connection on or after August 10, 2022 (the date of enactment of Pub. L. 117–168), the effective date of the award will be determined as if the establishment or modification of the presumption of service connection had been in effect on the date of the submission of the original claim.

(2) If the requirements of paragraph (d)(1) are not met, the effective date of the award shall be determined in accordance with §§ 3.114 and 3.400.

(e) *Outreach and identification of relevant claimants.* (1) VA will conduct the following efforts to inform relevant claimants that they may elect to have a claim reevaluated in light of the establishment or modification of a presumption of service connection:

(i) Publish on the internet website of the Department a notice that such claimants may elect to have a claim so reevaluated;

(ii) Notify, in writing or by electronic means, veterans service organizations of the ability of such claimants to elect to have a claim so reevaluated; and

(iii) Notify each such claimant in the same manner that the Department last provided notice of a decision.

(Authority 38 U.S.C. 501, 1305)

[FR Doc. 2023–25836 Filed 11–22–23; 8:45 am]

BILLING CODE 8320–01–P

POSTAL SERVICE

39 CFR Part 111

Domestic Competitive Products Pricing and Mailing Standards Changes

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service is amending *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM®), to reflect changes to prices and mailing standards for competitive products.

DATES: Effective January 21, 2024.

FOR FURTHER INFORMATION CONTACT:

Steven Jarboe at (202) 268–7690, Catherine Knox (202) 268–5636, or Garry Rodriguez at (202) 268–7281.

SUPPLEMENTARY INFORMATION: This final rule describes new prices and product features for competitive products, by class of mail, established by the Governors of the United States Postal Service®. New prices are available under Docket Number CP2024–52 on the Postal Regulatory Commission PRC website at <http://www.prc.gov>, and on the Postal Explorer® website at <http://pe.usps.com>.

The Postal Service will revise *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM), to reflect changes to certain prices and mailing standards for the following competitive products:

- Priority Mail Express®.
- Priority Mail®.
- USPS Ground Advantage™.
- Parcel Select®.
- Extra Services.
- Return Services.
- Mailer Services.
- Recipient Services.
- Other.

Competitive product prices and changes are identified by product as follows:

Priority Mail Express

Prices

Overall, Priority Mail Express prices will increase 5.9 percent. Priority Mail Express will continue to offer zoned and Flat Rate, Retail and Commercial pricing.

Retail prices will increase an average of 5.9 percent. The Flat Rate Envelope price will increase to \$30.45, the Legal Flat Rate Envelope will increase to \$30.65, and the Padded Flat Rate Envelope will increase to \$31.20.

Commercial prices will increase an average of 5.9 percent.

Priority Mail

Prices

Overall, Priority Mail prices will increase 5.7 percent. Priority Mail will continue to offer zoned and Flat Rate, Retail and Commercial pricing.

Retail prices will increase an average of 5.6 percent. The Flat Rate Envelope price will increase to \$9.85, the Legal Flat Rate Envelope will increase to

\$10.15, and the Padded Flat Rate Envelope will increase to \$10.60. The Small Flat Rate Box price will increase to \$10.40, and the Medium Flat Rate Boxes will increase to \$18.40. The Large Flat Rate Box will increase to \$24.75 and the APO/FPO/DPO Large Flat Rate Box will increase to \$23.00.

Commercial prices will increase an average of 5.8 percent.

USPS Ground Advantage

Prices

Overall, USPS Ground Advantage prices will increase 5.4 percent.

USPS Ground Advantage—Retail prices will increase 5.2 percent.

USPS Ground Advantage—Commercial prices will increase 5.4 percent.

Parcel Select

Prices

The prices for Parcel Select Destination Entry will increase an average of 5.9 percent.

The prices for USPS Connect® Local will remain the same.

Parcel Select Destination Entry Pricing Enhancement

The Postal Service is revising the Parcel Select Destination Entry pricing structure to add ounce pricing increments. Parcel Select Destination Entry pricing will have 4-ounce, 8-ounce, and 12-ounce price increments (e.g., if an item weighs 12.1 ounces, the next weight (price) increment is 1 pound).

Parcel Select Lightweight Discontinued

As a result of the July 9, 2023, structural price change to Parcel Select Destination Entry and Parcel Select Lightweight to have the same four pricing entry components, Destination Delivery Unit (DDU), Destination Hub (DHub), Destination Sectional Center Facility (DSCF), and Destination Network Distribution Center (DNDC), and the new enhancement to Parcel Select Destination Entry to add 4-ounce, 8-ounce, and 12-ounce pricing increments, the Postal Service is discontinuing the Parcel Select Lightweight product.

Parcel Select Destination Entry Nonmachinable Parcel

The Postal Service is updating the dimensions (22" x 18" x 15") and weight (25 lbs.) of when a parcel becomes a nonmachinable parcel under Parcel Select Destination Entry that was inadvertently omitted.

Extra Services

Adult Signature Service

Adult Signature Required and Adult Signature Restricted Delivery service prices are increasing 3.3 and 3.2 percent respectively. The price for Adult Signature Required will increase to \$9.35 and Adult Signature Restricted Delivery will increase to \$9.65.

Return Services

USPS Returns

USPS Returns Intelligent Mail Package Barcode and Label Compliance

The Postal Service is providing a clarification on Intelligent Mail® package barcode (IMpb®) compliance regarding USPS Returns, and a correction to USPS Returns label noncompliance.

The DMM currently provides that all commercial, Priority Mail Express, Priority Mail, and USPS Ground Advantage, pieces must bear a correct IMpb or will be assessed an IMpb noncompliance fee. The Postal Service is providing notice that the assessment of the IMpb noncompliance fee will be activated for USPS Returns effective January 21, 2024, but will delay the implementation of the collection of the IMpb noncompliance fee until May 31, 2024.

In addition, DMM subsection 505.3.1.5, *Noncompliant Labels*, currently provides that when noncompliant labels, including discontinued labels, are affixed to USPS Returns service packages, the permit holder will be assessed the appropriate retail USPS Ground Advantage price. With the July 9, 2023, introduction of Priority Mail Express Return service, the retail USPS Ground Advantage pricing is no longer applicable. As a result, the Postal Service is revising this subsection to provide the permit holder may be assessed the appropriate USPS Returns class of mail retail price (i.e., a Priority Mail Express Return piece will be assessed the retail Priority Mail Express price) or the IMpb noncompliance fee.

Mailer Services

Pickup on Demand Service

The Pickup on Demand® service fee will remain the same.

USPS Tracking Plus Service

The USPS Tracking Plus® service prices will remain the same.

USPS Label Delivery Service

The USPS Label Delivery Service™ prices will remain the same.

Recipient Services

Post Office Box Service

The competitive Post Office Box™ service prices will increase an average of 3.0 percent within the updated price ranges.

Premium Forwarding Service

Premium Forwarding Service® (PFS®) prices will increase between 2.9 and 3.0 percent depending on the specific price element. The enrollment fee paid at the retail counter for PFS-Residential will increase to \$26.20 and the PFS-Residential, PFS-Commercial, and PFS-Local enrollment fee paid online will increase to \$24.10 per application. The price of the weekly shipment charge for PFS-Residential and per container charge for PFS-Local will increase to \$26.20.

USPS Package Intercept

The USPS Package Intercept® fee will increase 2.9 percent to \$17.50.

Other

Address Enhancement Service

Address Enhancement Service competitive product prices will increase between 2.9 and 3.1 percent.

Small Parcel Forwarding Fee

The small parcel forwarding fee will remain the same.

eVS Unmanifested Fee

The Postal Service is renaming the “eVS Unmanifested Fee” as “Unmanifested Fee” under the applicable products.

Resources

The Postal Service provides additional resources to assist customers with this price change for competitive products. These tools include price lists, downloadable price files, and **Federal Register** Notices, which may be found on the Postal Explorer® website at <http://pe.usps.com>.

The Postal Service adopts the described changes to *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM), incorporated by reference in the *Code of Federal Regulations*.

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

Accordingly, 39 CFR part 111 is amended as follows:

PART 111—[AMENDED]

■ 1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

■ 2. Revise *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM) as follows:

Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM)

* * * * *

200 Commercial Letters, Cards, Flats, and Parcels

201 Physical Standards

* * * * *

8.0 Additional Physical Standards by Class of Mail

* * * * *

8.5 Parcel Select

* * * * *

8.5.2 Nonmachinable Parcel Select

[Revise the text of 8.5.2 to read as follows:]

Parcel Select Destination Entry mailpieces are nonmachinable if they meet any of the following criteria:

* * * * *

[Revise the text of item a to read as follows:]

a. A parcel more than 22 inches long, 18 inches wide, or 15 inches high.

* * * * *

[Revise the text of item c to read as follows:]

c. A parcel that weighs less than 6 ounces or more than 25 pounds, except under 7.5.2 for lightweight parcels.

* * * * *

[Delete item g and renumber items h through j as items g through i.]

* * * * *

[Delete 8.5.3, Parcel Select Lightweight, in its entirety and renumber 8.5.4 as 8.5.3.]

* * * * *

202 Elements on the Face of a Mailpiece

* * * * *

3.0 Placement and Content of Mail Markings

* * * * *

3.7 Parcel Select, Bound Printed Matter, Media Mail, and Library Mail Markings

3.7.1 Basic Markings

[Revise the first sentence in the introductory text of 3.7.1 to read as follows:]

The basic required marking (*i.e.*, “Parcel Select”, “USPS Connect Local”,

“Bound Printed Matter”, “Media Mail”, “Library Mail”) must be printed on each piece claimed at the respective price.

* * *

* * * * *

3.7.2 Parcel Select Markings

* * * The following product markings are required:

* * * * *

[Delete item b and renumber item c as item b.]

* * * * *

204 Barcode Standards

* * * * *

3.0 Standards for Barcoded Tray Labels, Sack Labels, and Container Labels

* * * * *

3.2.4 3-Digit Content Identifier Numbers

* * * * *

Exhibit 3.2.4 [1–22–23] 3-Digit Content Identifier Numbers

Class and mailing	CIN	Human-readable content line

* * * * *

Parcel Select

* * * * *

[Delete the “Parcel Select Lightweight Machinable Parcels” and “Parcel Select Lightweight Irregular Parcels” entries in their entirety.]

* * * * *

210 Commercial Mail Priority Mail Express

213 Prices and Eligibility

1.0 Prices and Fees

* * * * *

[Revise the heading and text of 1.7 to read as follows:]

1.7 Unmanifested Fee

Eligible Priority Mail Express pieces omitted from the manifest are subject to the unmanifested fee (see Notice 123—Price List), unless the piece is subject to

the IMpb noncompliance fee specified in 3.2.

* * * * *

3.0 Basic Eligibility Standards for Priority Mail Express

* * * * *

3.2 IMpb Standards

[Revise the first sentence of 3.2 to read as follows:]

All Priority Mail Express pieces (outbound and returns), unless inducted through a retail transaction or a USPS self-service kiosk, or those bearing postage meter imprints and using Label 11–B, must bear an Intelligent Mail package barcode (IMpb) prepared under 204.2.0. * * *

* * * * *

220 Commercial Mail Priority Mail

223 Prices and Eligibility

1.0 Prices and Fees

* * * * *

[Revise the heading and text of 1.9 to read as follows:]

1.9 Unmanifested Fee

Eligible Priority Mail pieces omitted from the manifest are subject to the unmanifested piece fee (see Notice 123—Price List), unless the piece is subject to the IMpb noncompliance fee specified in 3.2.

* * * * *

3.0 Basic Eligibility Standards for Priority Mail

* * * * *

3.2 IMpb Standards

[Revise the first sentence of 3.2 to read as follows:]

Unless authorized to use a unique IMb on Priority Mail letters and flats prepared in high-speed environments, all Priority Mail pieces (outbound and returns) must bear an Intelligent Mail

package barcode prepared under
204.2.0. * * *

* * * * *

250 Commercial Mail Parcel Select

253 Prices and Eligibility

1.0 Prices and Fees

* * * * *

1.1.2 Price Categories

Parcel Select mail price categories are as follows:

* * * * *

[Delete item b and renumber item c as item b.]

* * * * *

1.1.3 Price Application

The following price applications apply:

[Revise the text of 1.1.3 to read as follows:]

a. Prices for Destination Entry DNDC and Ground are based on the weight increment of each addressed piece, and the zone to which the piece is addressed as follows:

1. The price is charged at the 4-ounce, 8-ounce, 12-ounce increments. Any fraction of an ounce over the 4-ounce, 8-ounce, 12-ounce increments is rounded to the next price increment. For example, if an item weighs 4.1 ounces, the next weight (price) increment is 8 ounces, if an item weighs 12.1 ounces, the next weight (price) increment is 1 pound.

2. Per pound from 1 pound through 70 pounds. Any fraction of a pound is considered a whole pound. For example, if an item weighs 1.25 pounds, the weight (postage) increment is 2 pounds.

* * * * *

[Delete item d in its entirety.]

* * * * *

1.3 Computing Postage

1.3.1 Determining Single-Piece Weight

[Revise the third sentence of 1.3.1 to read as follows:]

* * * Except for mailers using eVS, when determining single-piece weight for Parcel Select mailpieces, express all weights in decimal pounds rounded off to two decimal places. * * *

* * * * *

[Revise the heading and text of 1.4 to read as follows:]

1.4 Unmanifested Fee

Eligible Parcel Select pieces omitted from the manifest are subject to the

unmanifested fee (see Notice 123—Price List), unless the piece is subject to the IMpb noncompliance fee specified in 3.3.

* * * * *

1.7 Nonstandard Fees

[Revise the text of 1.7 to read as follows:]

A Parcel Select Destination Entry or USPS Connect Local mailpiece is subject to a nonstandard fee (see Notice 123—Price List) as follows:

* * * * *

[Revise the heading of 4.0 to read as follows:]

4.0 Price Eligibility for Parcel Select

* * * * *

[Delete 4.2, Parcel Select Lightweight, in its entirety and renumber 4.3 through 4.5 as 4.2 through 4.4.]

* * * * *

[Delete renumbered 4.4, Hold For Pickup, in its entirety.]

* * * * *

254 Postage Payment and Documentation

* * * * *

[Delete 1.1.2, Parcel Select Lightweight, in its entirety and renumber 1.1.3 as 1.1.2.]

* * * * *

255 Mail Preparation

* * * * *

[Delete 6.0, Preparing Parcel Select Lightweight, in its entirety.]

* * * * *

256 Enter and Deposit

* * * * *

2.0 Deposit

* * * * *

2.18 DNDC Parcel Select—Acceptance at Designated SCF

* * * The following standards apply:

* * * * *

[Revise the text of item b to read as follows:]

b. Bound Printed Matter machinable parcels under 266.4.4, and USPS Marketing Mail machinable parcels under 705.6.0 may be included.

* * * * *

260 Commercial Mail Bound Printed Matter

* * * * *

266 Enter and Deposit

* * * * *

4.0 Destination Network Distribution Center (DNDC) Entry

* * * * *

4.3 Acceptance at Designated SCF—Mailer Benefit

* * * The following standards apply:

* * * * *

[Revise the text of item c to read as follows:]

c. Parcel Select machinable parcels under 256.2.6, and USPS Marketing Mail machinable parcels under 705.6.0 may be included.

* * * * *

280 Commercial Mail USPS Ground Advantage—Commercial

283 Prices and Eligibility

1.0 Prices and Fees

* * * * *

[Revise the heading and text of 1.6 to read as follows:]

1.6 Unmanifested Fee

Eligible USPS Ground Advantage—Commercial pieces omitted from the manifest are subject to the unmanifested fee (see Notice 123—Price List), unless the piece is subject to the IMpb noncompliance fee specified in 3.4.

* * * * *

3.0 Basic Eligibility Standards for USPS Ground Advantage—Commercial

* * * * *

3.4 IMpb Standards

[Revise the first sentence of 3.4 to read as follows:]

All USPS Ground Advantage—Commercial parcels (outbound and returns) must bear an Intelligent Mail package barcode (IMpb) prepared under 204.2.0. * * *

* * * * *

500 Additional Mailing Services

503 Extra Services

* * * * *

1.4 Eligibility for Extra Services

* * * * *

1.4.1 Eligibility—Domestic Mail

* * * * *

Exhibit 1.4.1 Eligibility—Domestic Mail

Extra service	Eligible mail	Additional combined extra services

* * * * *

Insurance

[Under “Insurance” delete *Parcel Select Lightweight* in the ‘Eligible Mail’ column.]

* * * * *

Certificate of Bulk Mailing

[Under “Certificate of Bulk Mailing” delete *Parcel Select Lightweight* in the ‘Eligible Mail’ column.]

* * * * *

Return Receipt

[Under “Return Receipt” delete *Parcel Select Lightweight* in the ‘Eligible Mail’ column.]

* * * * *

Signature Confirmation

[Under “Signature Confirmation” delete *Parcel Select Lightweight* in the ‘Eligible Mail’ column.]

* * * * *

Signature Confirmation Restricted Delivery

[Under “Signature Confirmation Restricted Delivery” delete *Parcel Select Lightweight* in the ‘Eligible Mail’ column.]

* * * * *

Adult Signature Required

[Under “Adult Signature Required” delete *Parcel Select Lightweight* in the ‘Eligible Mail’ column.]

* * * * *

4.0 Insured Mail

* * * * *

[Revise the heading of 4.4 to read as follows:]

4.4 Bulk Insurance for USPS Marketing Mail**4.4.1 Eligibility**

[Revise the introductory text of 4.4.1 to read as follows:]

To mail at the bulk insurance prices, for USPS Marketing Mail (except Marketing Parcels) mailers must obtain an authorization under 4.4.2 and meet the following criteria:

* * * * *

505 Return Services

* * * * *

3.0 USPS Returns Service**3.1 Basic Standards**

* * * * *

3.1.5 Noncompliant Labels

[Revise the text of 3.1.5 to read as follows:]

USPS Returns service account holders must use USPS-certified labels meeting the standards in 3.1.4. When noncompliant labels, including discontinued labels, are affixed to USPS Returns service packages, the permit holder may be assessed the appropriate USPS Returns class of mail retail price (i.e., Priority Mail Express Return will be assessed the retail Priority Mail Express price) calculated from the package’s initial entry point (first physical scan) in the USPS network to its delivery address or the IMpb noncompliance fee.

* * * * *

5.0 Bulk Parcel Return Service

* * * * *

5.2 Basic Standards**5.2.1 Description**

[Revise the first sentence of 5.2.1 to read as follows:]

Bulk parcel return service (BPRS) allows mailers of large quantities of USPS Marketing Mail machinable parcels that are either undeliverable-as-addressed or un-opened and refused by addressees to be returned to designated postal facilities. * * *

5.2.2 Availability

A mailer may be authorized to use BPRS when the following conditions apply:

[Revise the text of items a and b to read as follows:]

a. All returned parcels are initially prepared as regular or Nonprofit USPS Marketing Mail, and are machinable parcels as defined in 201.7.5.

b. At least 10,000 USPS Marketing Mail machinable parcels will be returned to a designated postal facility during a 12-month period.

* * * * *

[Revise the text of item i to read as follows:]

i. USPS Marketing Mail parcels that qualify for a Media Mail or Library Mail price under the applicable standards, and that contain the name of the Package Service price in the mailer’s ancillary service endorsement (507.1.5.3d), are not eligible for BPRS.

* * * * *

5.2.4 Application Process

To obtain a BPRS permit, a mailer must send a written request to the Postmaster at each Post Office where parcels are to be returned that includes the following:

* * * * *

[Revise the text of item b to read as follows:]

b. Information pertinent to each requested delivery point that document either the receipt of, or that there are reasonable grounds to expect, at least 10,000 machinable parcels originally mailed at regular or non-profit USPS Marketing Mail prices during the past, or next, 12 months.

* * * * *

507 Mailer Services

* * * * *

1.0 Treatment of Mail

* * * * *

1.5 Treatment for Ancillary Services by Class of Mail

* * * * *

[Revise the heading and introductory text of 1.5.3 to read as follows:]

1.5.3 USPS Marketing Mail

Undeliverable-as-addressed (UAA) USPS Marketing Mail pieces are treated as described in Exhibit 1.5.3, with these additional conditions:

[Revise the text in item a to read as follows:]

a. USPS Marketing Mail pieces are forwarded only to domestic addresses.

* * * * *

[Revise the text in items c through f to read as follows:]

c. The endorsement “Change Service Requested” is not permitted for USPS Marketing Mail pieces containing hazardous materials under 601.8.0. USPS Marketing Mail pieces containing hazardous materials must bear the endorsement “Address Service Requested,” “Forwarding Service Requested,” or “Return Service Requested.”

d. USPS Marketing Mail pieces can be forwarded or returned at the appropriate Media Mail or Library Mail price if the content of the mail qualifies as Media Mail or Library Mail under 173 or 273 and the mail is marked “Media Mail” or “Library Mail” directly below the ancillary service endorsement.

e. If a USPS Marketing Mail piece including any attachment to that piece is not opened by the addressee and the piece is endorsed “Address Service Requested,” “Forwarding Service Requested,” or “Return Service Requested,” the addressee may refuse delivery of the piece and have it returned to the sender without affixing postage. If a USPS Marketing Mail piece, or any attachment to that piece, is opened by the addressee, the addressee must affix the required postage to return the piece to the sender, except for Bulk Parcel Return Service (BPRS) pieces under 505.5.2.1.

f. USPS Marketing Mail pieces with bulk insurance must be endorsed “Address Service Requested,” “Forwarding Service Requested,” or “Return Service Requested.” USPS Marketing Mail pieces, except for Marketing parcels, with USPS Tracking must be endorsed “Address Service Requested,” “Forwarding Service Requested,” “Return Service

Requested,” or “Change Service Requested”.

* * * * *

[Revise the heading of Exhibit 1.5.3 to read as follows:]

Exhibit 1.5.3 Treatment of Undeliverable USPS Marketing Mail

Mailer endorsement	USPS treatment of UAA pieces
No Endorsement 1	In all cases:

[Revise the “Restrictions” under “No Endorsement” to read as follows:]

RESTRICTIONS:

USPS Marketing Mail pieces containing hazardous materials must bear a permissible endorsement (see 507.1.5.3c).

* * * * *

“Change Service Requested” 1 4.

OPTION 1

(Valid for all pieces, including ACS participating pieces)

If no change-of-address order on file, or if change-of-address order is on file:

* * * * *

Restrictions:

The following restrictions apply:

[Revise item 2 under “Change Service Requested Option 1” “Restrictions” to read as follows:]

(2) This endorsement is not permitted for USPS Marketing Mail pieces containing hazardous materials.

[Revise the parenthetical across from the “Option 2” heading to read as follows:]

OPTION 2 (Available via ACS only; for USPS Marketing Mail (all shapes))

If change-of-address order on file:

[Revise the first bullet under “Change Service Requested”, “Option 2”, “If change-of-address order on file:” to read as follows:]

■ Months 1 through 12: Piece forwarded; postage due charged to the mailer at applicable Forwarding Fee based on the piece shape for USPS Marketing Mail; separate notice of new address provided (electronic ACS fee charged).

* * * * *

1.5.4 Package Services, and Parcel Select

[Revise the introductory text of 1.5.4 to read as follows:]

Undeliverable-as-addressed (UAA) Package Services, and Parcel Select mailpieces are treated as described in Exhibit 1.5.4, with these additional conditions:

* * * * *

2.0 Forwarding

* * * * *

2.3 Postage for Forwarding

* * * * *

[Revise the heading of 2.3.5 to read as follows:]

2.3.5 USPS Marketing Mail

[Revise the first and second sentence of 2.3.5 to read as follows:]

Generally, USPS Marketing Mail is subject to collection of additional postage from the mailer when forwarding service is provided by charging the USPS Marketing Mail weighted fee on all returns. Shipper Paid Forwarding/Return (under 4.2.9) provides mailers of USPS Marketing Mail parcels an option of paying forwarding postage on those parcels, or return postage if undeliverable, at the applicable single-piece First-Class Mail, USPS Ground Advantage—Retail, or Priority Mail price, instead of the addressee paying postage due charges.

* * *

2.3.6 Package Services, and Parcel Select

[Delete the second sentence of 2.3.6 referencing Parcel Select Lightweight.]

* * * * *

3.0 Hold For Pickup

* * * * *

3.2 Basic Information

* * * * *

3.2.2 Basic Eligibility

[Revise the last sentence in the introductory text of 3.2.2 to read as follows:]

* * * It is also available with commercial mailings of Priority Mail Express presented under 213.4.2 or 213.4.3, Priority Mail, USPS Ground Advantage—Commercial, and Bound Printed Matter parcels, when:

* * * * *

3.2.3 Additional Eligibility Standards

Parcels must meet these additional physical requirements:

* * * * *

[Revise the text of 3.2.3 by deleting item b in its entirety and renumbering item c as item b.]

* * * * *

4.0 Address Correction Services

* * * * *

4.2 Address Change Service (ACS)

* * * * *

4.2.9 Shipper Paid Forwarding/Return

[Revise the first sentence of 4.2.9 to read as follows:]

Shipper Paid Forwarding/Return is an ACS fulfillment vehicle which allows mailers of USPS Marketing Mail, Package Services and Parcel Select parcels to pay forwarding and/or return charges via approved ACS participant code(s) when used with “Address Service Requested” or “Change Service Requested” endorsements. * * *

* * * * *

508 Recipient Services

* * * * *

7.0 Premium Forwarding Services

* * * * *

7.2 Premium Forwarding Service Residential

* * * * *

7.2.6 Weekly Priority Mail Shipments

* * * * *

b. Mailpieces that do not fit in the shipment container, or that require a scan or signature at delivery, are scanned (when applicable) and then rerouted separately to the temporary address, subject to the following:

* * * * *

[Revise the text of item b2 to read as follows:]

2. USPS Marketing Mail parcels are rerouted separately and charged postage due at the appropriate 1-pound USPS Ground Advantage—Retail price.

* * * * *

600 Basic Standards for All Mailing Services

* * * * *

602 Addressing

* * * * *

5.0 Move Update Standards**5.1 Basic Standards**

[Revise the last sentence in the introductory text of 5.1 to read as follows:]

* * * Each address, except for mail bearing an alternative address format (under 3.0), in a mailing at commercial First-Class Mail presorted or automation prices, or USPS Marketing Mail, prices is subject to the Move Update standard and must meet these requirements:

* * * * *

[Revise the text of item b to read as follows:]

b. The Move Update standard is met when an address used on a mailpiece in a mailing at any class of mail is updated under 5.2, and the same address is used in a First-Class Mail, or USPS Marketing Mail, mailing within 95 days after the address has been updated.

* * * * *

6.0 ZIP Code Accuracy Standards**6.1 Basic Standards**

[Revise the introductory text of 6.1 to read as follows:]

Except for mail bearing a simplified address, addresses used on pieces in a mailing at all commercial First-Class Mail, nonbarcoded presorted Periodicals, USPS Marketing Mail, and Bound Printed Matter presorted and carrier route prices are subject to the ZIP Code accuracy standard and must meet these requirements:

* * * * *

604 Postage Payment Methods and Refunds

* * * * *

5.0 Permit Imprint (Indicia)

* * * * *

5.3 Indicia Design, Placement, and Content

* * * * *

5.3.7 USPS Marketing Mail, Parcel Select and Package Services Format

[Revise the first sentence of 5.3.7 to read as follows:]

A USPS Marketing Mail, Parcel Select, or Package Services permit imprint indicia must contain the same information required in 5.3.6, except that the USPS Marketing Mail (Standard Mail), the Parcel Select, or the applicable Package Services (Bound Printed Matter, Media Mail or Library Mail) marking must be used instead of "First-Class Mail." * * *

* * * * *

5.3.11 Indicia Formats

* * * * *

Exhibit 5.3.11 Indicia Formats for Official Mail and Other Classes

* * * * *

Parcel Select

[Delete the "Parcel Select Lightweight" indicia example.]

* * * * *

608 Postal Information and Resources

* * * * *

7.0 Trademarks and Copyrights of the USPS**7.1 USPS Trademarks**

[Delete "Parcel Select Lightweight" from the list of trademarks in 7.1.]

* * * * *

700 Special Standards

* * * * *

705 Advanced Preparation and Special Postage Payment Systems

* * * * *

6.0 Combining Mailings of USPS Marketing Mail, Package Services, and Parcel Select Parcels**6.1 Basic Standards for Combining Parcels****6.1.1 Basic Standards**

[Revise the introductory text of 6.1.1 to read as follows:]

USPS Marketing Mail parcels, Package Services parcels, and Parcel Select parcels in combined mailings must meet the following standards:

* * * * *

6.2 Combining Parcels—DNDC Entry

[Revise the text of 6.2 to read as follows:]

Mailers may combine USPS Marketing Mail machinable parcels, and USPS Marketing Mail Marketing parcels weighing 6 or more ounces, with Package Services and Parcel Select machinable parcels for entry at a NDC when authorized by the USPS under 6.1.4.

6.2.1 Eligible Prices

[Revise the first sentence of 6.2.1 to read as follows:]

Combined parcels may be eligible for USPS Marketing Mail, Parcel Select DNDC/ASF, single-piece and Presorted Media Mail, single-piece and Presorted Library Mail, Bound Printed Matter DNDC, and Nonpresorted and Presorted Bound Printed Matter prices. * * *

6.2.2 Additional Standards

[Revise the introductory text of 6.2.2 to read as follows:]

USPS Marketing Mail machinable parcels, USPS Marketing Mail Marketing parcels (6 ounces or more), and Package Services and Parcel Select machinable parcels prepared for DNDC entry must meet the following conditions in addition to the basic standards in 6.1:

* * * * *

6.3 Combining Parcels—DSCF and DDU Prices**6.3.1 Qualification**

Combination requirements for specific discounts and prices are as follows:

[Revise the text of items a and b to read as follows:]

a. When claiming DSCF prices, Parcel Select, USPS Marketing Mail, and Bound Printed Matter parcels may be combined with other Package Services parcels under 6.3.

b. All USPS Marketing Mail parcels may be combined with Package Services, and Parcel Select, parcels prepared for DDU prices under 6.3.

6.3.2 Preparation and Prices

Combined parcels must be prepared as follows:

* * * * *

[Revise the last sentence in the introductory text of 6.3.2b to read as follows:]

b. Parcel Select or Bound Printed Matter Qualifying for DSCF Prices. * * * All other requirements for Parcel Select DSCF prices, and USPS Marketing Mail prices, as applicable, must be met.

[Revise the last sentence of item b1 to read as follows:]

1. * * * After the minimum sack volume has been met, USPS Marketing Mail parcels may be included in the sack or in overflow sacks.

[Revise the last sentence of item b2 to read as follows:]

2. * * * After the minimum pallet volume has been met, USPS Marketing Mail parcels may be included on the pallet or in overflow sacks.

[Revise the text of items b3 and b4 to read as follows:]

3. If palletized under the alternate pallet preparation where no pallet may contain fewer than 35 pieces and 200 pounds provided the average number of pieces on pallets qualifying for the DSCF price is at least 50, USPS Marketing Mail parcels may not be combined with Package Services and Parcel Select parcels.

4. If palletized under the option to prepare 5-digit scheme or 5-digit pallets

under the 36-inch-high (mail only) pallet minimum, any combination of USPS Marketing Mail, Package Services, and Parcel Select parcels may be used to meet the minimum pallet height requirement.

* * * * *

[Revise the text of item b6 to read as follows:]

6. USPS Marketing Mail parcels are eligible for presorted prices according to 243 and 253.4.3 respectively.

[Revise the introductory text of item c to read as follows:]

c. Package Services, Parcel Select, and USPS Marketing Mail, parcels qualifying for DDU prices:

* * * * *

6.4 Combining Package Services, Parcel Select, and USPS Marketing Mail—Optional 3-Digit SCF Entry

6.4.1 Entry at Designated SCFs

[Revise the text of 6.4.1 to read as follows:]

Mailers may deposit pieces otherwise eligible for the Package Services, Parcel Select, and USPS Marketing Mail, prices and the USPS Marketing Mail DSCF price at an SCF designated by the USPS for destination ZIP Codes listed in labeling list L607.

6.4.2 Qualification and Preparation

[Revise the introductory text of 6.4.2 to read as follows:]

Parcel Select and Bound Printed Matter machinable parcels, and USPS Marketing Mail parcels, may be prepared for entry at designated SCFs under these standards:

[Revise the text of item a to read as follows:]

a. USPS Marketing Mail parcels that weigh less than 2 ounces or that are tubes, rolls, triangles, and similar pieces may not be included.

* * * * *

[Revise the text of item d to read as follows:]

d. USPS Marketing Mail machinable parcels, and USPS Marketing Mail Marketing parcels weighing 6 ounces or more are eligible for the NDC presort level, DNDC price; USPS Marketing Mail Marketing parcels weighing less than 6 ounces and irregular USPS Marketing Mail parcels are eligible for the 3-digit presort level, DSCF price.

* * * * *

8.0 Preparing Pallets

* * * * *

8.6 Pallet Labels

* * * * *

8.6.5 Line 2 (Content Line)

* * * * *

b. *Codes.* The codes shown below must be used as appropriate on Line 2 of sack, tray, and pallet labels.

Content type	Code

[Delete the Parcel Select Lightweight entry in its entirety.]

* * * * *

8.10 Pallet Presort and Labeling

* * * * *

[Revise the heading of 8.10.3 to read as follows:]

8.10.3 USPS Marketing Mail—Bundles, Sacks, or Trays

[Delete the sixth sentence in the introductory text of 8.10.3 referencing Parcel Select Lightweight.]

* * * * *

[Revise the first sentence of item f to read as follows:]

f. *SCF*, required, permitted for bundles, trays, and sacks (irregular parcels only). The pallet may contain carrier route, automation price, and/or Presorted price mail for the 3-digit ZIP Code groups in L005. * * * * *

[Revise the text of item f1 to read as follows:]

1. Line 1: L002, Column C.

* * * * *

[Revise the heading of 8.10.7 to read as follows:]

8.10.7 Machinable Parcels—USPS Marketing Mail, Including Marketing Parcels 6 Ounces or More

* * * Label pallets under applicable standards in 8.6 and according to Line 1 and Line 2 information below:

a. *5-digit scheme*, required. * * *

Labeling:

* * * * *

[Revise the text of item a2 to read as follows:]

2. Line 2: “STD 5D.”

b. *5-digit*, required. * * * Labeling:

* * * * *

[Revise the text of item b2 to read as follows:]

2. Line 2: “STD 5D.”

c. *SCF*, optional. * * * Labeling:

* * * * *

[Revise the text of item c2 to read as follows:]

2. Line 2: “STD MACH SCF.”

d. *ASF*, optional. * * * Labeling:

* * * * *

[Revise the text of item d2 to read as follows:]

2. Line 2: “STD MACH ASF.”

e. *NDC*, required. * * * Labeling:

* * * * *

[Revise the text of item e2 to read as follows:]

2. Line 2: “STD MACH NDC.”

f. *Origin NDC*, required. * * *

Labeling:

* * * * *

[Revise the text of item f2 to read as follows:]

2. Line 2: “STD MACH NDC.”

g. *Mixed NDC*, optional. * * *

Labeling:

* * * * *

[Revise the text of item g2 to read as follows:]

2. Line 2: “STD MACH WKG.”

[Revise the heading of 8.10.8 to read as follows:]

8.10.8 Irregular Parcels Weighing 2 Ounces or More—USPS Marketing Mail, Including Marketing Parcels

[Delete the sixth sentence in the introductory text of 8.10.8 referencing Parcel Select Lightweight.]

* * * Preparation sequence and

labeling:

a. *5-digit scheme*, required. * * *

Labeling:

* * * * *

[Revise the text of item a2 to read as follows:]

2. Line 2: “STD IRREG 5D”; followed by “SCHEME” (or “SCH”).

b. *5-digit*, required. * * * Labeling:

* * * * *

[Revise the text of item b2 to read as follows:]

2. Line 2: “STD IRREG 5D.”

c. *SCF*, required. * * * Labeling:

* * * * *

[Revise the text of items c1 and c2 to read as follows:]

1. For Line 1, L002, Column C.

2. Line 2: “STD IRREG SCF.”

d. *ASF*, optional. * * * Labeling:

* * * * *

[Revise the text of item d2 to read as follows:]

2. Line 2: “STD IRREG ASF.”

e. *NDC*, required. * * * Labeling:

* * * * *

[Revise the text of item e2 to read as follows:]

2. Line 2: “STD IRREG NDC.”

f. *Origin NDC*, required. * * *

Labeling:

* * * * *

[Revise the text of item f2 to read as follows:]

2. Line 2: “STD IRREG NDC.”

g. *Mixed NDC*, optional. * * *

Labeling:

* * * * *

[Revise the text of item g2 to read as follows:]

2. Line 2: “STD IRREG WKG.”

* * * * *

21.0 Optional Combined Parcel Mailings
21.1 Basic Standards for Combining Parcel Select, Package Services, and USPS Marketing Mail Parcels

21.1.1 Basic Standards
[Revise the introductory text of 21.1.1 to read as follows:]

Package Services parcels, Parcel Select parcels, and USPS Marketing Mail parcels in a combined parcel mailing must meet the following standards:

* * * * *

d. Combined mailings must meet the following minimum volume requirements:

[Revise the text of item d1 to read as follows:]

1. USPS Marketing Mail—Minimum 200 pieces or 50 pounds of parcels per class.

* * * * *

21.3 Mail Preparation

21.3.1 Basic Standards

Prepare combined mailings as follows:

a. Different parcel types must be prepared separately for combined parcel mailings as indicated below:

[Revise the text of items a1 through a3 to read as follows:]

1. USPS Marketing Mail, Parcel Select, and Package Services machinable parcels. Use “STD/PSVC MACH” for line 2 content labeling.

2. USPS Marketing Mail, Parcel Select, and Package Services irregular parcels at least 2 ounces and up to (but not including) 6 ounces, except for tubes, rolls, triangles, and other similarly irregularly-shaped pieces. Use “STD/PSVC” for line 2 content labeling.

3. USPS Marketing Mail, Parcel Select, and Package Services tubes, rolls, triangles, and similarly irregularly-shaped parcels; and all parcels weighing less than 2 ounces. Use “STD/PSVC IRREG” for line 2 content labeling.

* * * * *

21.3.2 Combining USPS Marketing Mail, Parcel Select, and Package Services Machinable Parcels

[Revise the introductory text of 21.3.2 to read as follows:]

Prepare and enter USPS Marketing Mail, Parcel Select, and Package Services machinable parcels, and USPS Marketing Mail Marketing parcels 6 ounces or more, as combined machinable parcels as shown in the table below.

* * * * *

21.3.3 Combining USPS Marketing Mail, Parcel Select, and Package Services APPS-Machinable Parcels

[Revise the introductory text of 21.3.3 to read as follows:]

Prepare and enter USPS Marketing Mail, Parcel Select, and Package Services irregular parcels, and USPS Marketing Mail Marketing parcels (weighing at least 2 ounces, but less than 6 ounces, that are not tubes, rolls, triangles, or similarly irregularly shaped parcels) as combined APPS-machinable parcels as shown in the table below.

* * * * *

21.3.4 Combining USPS Marketing Mail, Parcel Select, and Package Services Parcels (Not APPS-Machinable)

[Revise the introductory text of 21.3.4 to read as follows:]

Prepare and enter USPS Marketing Mail, Parcel Select, and Package Services, and USPS Marketing Mail Marketing parcels under 2 ounces, as combined not APPS-machinable parcels as shown in the table below.

* * * * *

Index

* * * * *

P

* * * * *

Parcel Select

* * * * *

[Delete the “Lightweight, 253.4.0” entry.]

* * * * *

Notice 123 (Price List)

[Revise competitive prices as applicable.]

* * * * *

Sarah Sullivan,
Attorney, Ethics & Legal Compliance.
[FR Doc. 2023–25648 Filed 11–22–23; 8:45 am]
BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2022–0597; FRL–11426–01–OCSP]

Oxathiapiprolin; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a tolerance for residues of oxathiapiprolin

in or on peanut, hay. Syngenta Crop Protection requested this tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective November 24, 2023. Objections and requests for hearings must be received on or before January 23, 2024, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2022–0597, is available at <https://www.regulations.gov> or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room and the OPP Docket is (202) 566–1744. For the latest status information on EPA/DC services and docket access, visit <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT: Charles Smith, Director, Registration Division (7505T), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (202) 566–1030; email address: RDfRNtices@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA’s tolerance regulations at 40 CFR part 180 through the Office of the Federal Register’s e-

CFR site at <https://www.ecfr.gov/current/title-40>.

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a(g), any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA-HQ-OPP-2022-0597 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before January 23, 2024. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA-HQ-OPP-2022-0597, by one of the following methods:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.

- **Mail:** OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001.

- **Hand Delivery:** To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at <https://www.epa.gov/dockets/where-send-comments-epa-dockets>.

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at <https://www.epa.gov/dockets>.

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of August 30, 2022 (87 FR 52868) (FRL-9410-04-OCSPP), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 2F8997) by

Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419. The petition requested that 40 CFR 180.685 be amended by establishing tolerances for residues of the fungicide oxathiapiprolin, 1-[4-[4-[5-(2,6-difluorophenyl)-4,5-dihydro-3-isoxazolyl]-2-thiazolyl]-1-piperidinyl]-2-[5-methyl-3-(trifluoromethyl)-1H-pyrazol-1-yl]-ethanone, in or on the following commodity: peanut hay at 0.15 parts per million (ppm). This document referenced a summary of the petition prepared by Syngenta Crop Protection, LLC, the registrant, which is available in the docket, <https://www.regulations.gov>. No comments were received on the notice of filing.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is “safe.” Section 408(b)(2)(A)(ii) of FFDCA defines “safe” to mean that “there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.” This includes exposure through drinking water and in residential settings but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to “ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .”

Consistent with FFDCA section 408(b)(2)(D), and the factors specified therein, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for oxathiapiprolin, including exposure resulting from the tolerance established by this action. EPA’s assessment of exposures and risks associated with oxathiapiprolin follows.

As indicated in the **Federal Register** for previous tolerances established for residues of oxathiapiprolin (see 81 FR 87463, FRL-9954-69, December 6, 2016), the toxicity database for oxathiapiprolin supports a decision to conduct a qualitative risk assessment, due to the lack of treatment-related effects and limited toxicity. While dietary exposure to oxathiapiprolin may

occur through food and drinking water, no risks of concern are anticipated due to the lack of toxicity at anticipated human exposure levels. While residential post-application exposures may occur through the registered uses on turf and ornamentals, no risks of concern are anticipated due to the lack of toxicity at anticipated human exposure levels. While dietary and residential exposures may occur through the registered and proposed uses for oxathiapiprolin, no aggregate risks of concern are anticipated due to the lack of toxicity at anticipated human exposure levels.

Therefore, based on the lack of toxicity at anticipated human exposure levels, EPA concludes there is a reasonable certainty that no harm will result to the general population, or to infants and children, from aggregate exposure to oxathiapiprolin residues. More detailed information on the subject action to establish tolerances for indirect or inadvertent residues of oxathiapiprolin in or on peanut, hay can be found in the document entitled, “Oxathiapiprolin. Human Health Risk Assessment to Support a Label Amendment to Reduce the Plant Back Interval for Peanut and Sugarcane and Establish a Tolerance for Peanut, Hay” in docket ID number EPA-HQ-OPP-2022-0597 at <https://www.regulations.gov>.

IV. Other Considerations

A. Analytical Enforcement Methodology

Analytical method DuPont-30422, Supplement 1 is a high performance liquid chromatography with tandem mass spectrometry (HPLC-MS/MS) method available for the quantitation of oxathiapiprolin residues in plant matrices. Analytical method DuPont-31138 is an HPLC-MS/MS method available for the analytical enforcement of oxathiapiprolin residues in livestock commodities.

The methods may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755-5350; telephone number: (410) 305-2905; email address: residuemethods@epa.gov.

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as

required by FFDCA section 408(b)(4). The Codex has not established MRLs for residues of oxathiapiprolin in peanut commodities.

V. Conclusion

Therefore, a tolerance is established for indirect or inadvertent residues of oxathiapiprolin, 1-[4-[4-[5-(2,6-difluorophenyl)-4,5-dihydro-3-isoxazolyl]-2-thiazolyl]-1-piperidinyl]-2-[5-methyl-3-(trifluoromethyl)-1H-pyrazol-1-yl]-ethanone, in or on peanut, hay at 0.15 ppm. In addition, EPA adjusted the existing tolerance for indirect or inadvertent residues on “All other food commodities/feed commodities” to exclude commodities covered by higher tolerances for indirect or inadvertent residues, such as the peanut, hay tolerance established by this action, or as a result of use on growing crops.

VI. Statutory and Executive Order Reviews

This action establishes a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled “Regulatory Planning and Review” (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001), or to Executive Order 13045, entitled “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork

Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or Tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or Tribal Governments, on the relationship between the National Government and the States or Tribal Governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian Tribes. Thus, the Agency has determined that Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), and Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000), do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require

Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 16, 2023.

Charles Smith,
Director, Registration Division, Office of Pesticide Programs.

Therefore, for the reasons stated in the preamble, EPA is amending 40 CFR chapter I as follows:

PART 180—TOLERANCES AND EXEMPTIONS FOR PESTICIDE CHEMICAL RESIDUES IN FOOD

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Amend § 180.685 by revising the table in paragraph (d) to read as follows:

§ 180.685 Oxathiapiprolin; tolerances for residues.

* * * * *
(d) * * *

TABLE 2 TO PARAGRAPH (d)

Commodity	Parts per million
All other food commodities/feed commodities (other than those covered by a higher tolerance as a result of use on growing crops or indirect or inadvertent residues)	0.10
Peanut, hay	0.15

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**48 CFR Parts 1832 and 1852**

[Notice: 23–119]

RIN 2700–AE71

Federal Acquisition Regulation Supplement: Revision of the Definition of “Commercial Item” (NFS Case 2022–N003); Corrections**AGENCY:** National Aeronautics and Space Administration.**ACTION:** Correcting amendment.

SUMMARY: On September 19, 2023, the National Aeronautics and Space Administration (NASA) revised its rule concerning the definition of a commercial item for consistency with the FAR. However, that document inadvertently failed to update the dates associated with the NASA FAR Supplement provisions and clauses that were revised as a result of the changes to the commercial item definition and some references were erroneously unchanged. This document corrects the final regulations.

DATES: Effective November 24, 2023.

FOR FURTHER INFORMATION CONTACT: James Becker, NASA HQs, Office of Procurement Management and Policy Division, LP–011, 300 E Street SW, Washington, DC 20456–0001. Telephone 202–358–1286; facsimile 301 286–1296; facsimile 202 358–3082.

SUPPLEMENTARY INFORMATION: The rule was published in the *Federal Register* on September 19, 2023 (88 FR 64385). This document makes corrections to the rule which became effective on October 19, 2023 (88 FR 64835).

List of Subjects in 48 CFR Parts 1832 and 1852

Government procurement.

Accordingly, 48 CFR parts 1832 and 1852 are corrected by making the following correcting amendments:

- 1. The authority citation for parts 1832 and 1852 continues to read as follows:

Authority: 51 U.S.C. 20113(a) and 48 CFR chapter 1.

PART 1832—CONTRACT FINANCING

- 2. Revise the heading for subpart 1832.1 to read as follows:

Subpart 1832.1—Financing for Other Than a Commercial Purchase

- 3. Revise the heading for subpart 1832.2 to read as follows:

Subpart 1832.2—Commercial Product and Commercial Service Purchase Financing**PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

- 4. Amend section 1852.213–70 by the revising the date of the provision to read as follows:

PROPOSAL ADEQUACY CHECKLIST**1852.213–70 Offeror Representations and Certifications—Other Than Commercial Products and Commercial Services.**

* * * * *

Offeror Representations and Certifications—Other Than Commercial Products and Commercial Services (OCT 2023)

* * * * *

- 5. Amend section 1852.213–71 by revising the date of the provision to read as follows:

1852.213–71 Evaluation—Other Than Commercial Products and Commercial Services.

* * * * *

Evaluation—Other Than Commercial Products and Commercial Services (OCT 2023)

* * * * *

- 6. Amend section 1852.215–85 by revising the section heading, date of the provision, and entry 17 of the checklist to read as follows:

1852.215–85 Proposal Adequacy Checklist.

* * * * *

Proposal Adequacy Checklist (OCT 2023)

* * * * *

References	Submission item	Proposal page No.	If not provided explain (may use continuation pages traceable to this checklist)
17. FAR 52.215–20, FAR 2.101, “commercial product and commercial service”.	Has the offeror submitted an exception to the submission of certified cost or pricing data for Commercial Products and Commercial Services proposed either at the prime or subcontractor level, in accordance with provision 52.215–20?		
	a. Has the offeror specifically identified the type of commercial product and commercial service (FAR 2.101 commercial product and commercial service definition) and the basis on which it meets the definition?		
	b. For modified commercial products and commercial services (FAR 2.101 commercial product and commercial service); did the offeror classify the modification(s) as either—		
	i. A modification of a type customarily available in the commercial marketplace (paragraph (3)(i)); or		
	ii. A minor modification (paragraph (3)(ii)) of a type not customarily available in the commercial marketplace made to meet Federal Government requirements not exceeding the thresholds in FAR 15.403–1(c)(3)(iii)(B)?		

PROPOSAL ADEQUACY CHECKLIST—Continued

References	Submission item	Proposal page No.	If not provided explain (may use continuation pages traceable to this checklist)
	c. For proposed commercial products and commercial services “of a type”, or “evolved” or modified (FAR 2.101 commercial product and commercial service definition) did the contractor provide a technical description of the differences between the proposed item and the comparison item(s)?		
*	*	*	*

* * * * *

■ 7. Amend section 1852.223–74 by revising the section heading and date of the clause to read as follows:

1852.223–74 Drug- and Alcohol-Free Workforce.

* * * * *

Drug- and Alcohol-Free Workforce (OCT 2023)

* * * * *

■ 8. Amend section 1852.246–74 by revising the clause heading and date to read as follows:

1852.246–74 Contractor Counterfeit Electronic Part Detection and Avoidance.

* * * * *

Contractor Counterfeit Electronic Part Detection and Avoidance (OCT 2023)

* * * * *

Dated: November 15, 2023.

Erica Jones,
NASA FAR Supplement Manager.

[FR Doc. 2023–25761 Filed 11–22–23; 8:45 am]

BILLING CODE 7510–13–P

Proposed Rules

Federal Register

Vol. 88, No. 225

Friday, November 24, 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.

GOVERNMENT ACCOUNTABILITY OFFICE

4 CFR Part 28

Personnel Appeals Board; Procedural Rules

AGENCY: Government Accountability Office Personnel Appeals Board.

ACTION: Proposed rule.

SUMMARY: The Government Accountability Office Personnel Appeals Board (PAB or Board) proposes to give the PAB General Counsel authority to process certain retaliation claims that have not first undergone GAO's Equal Employment Opportunity (EEO) process, and to hold certain nondiscrimination claims in abeyance if they are related to a claim pending in GAO's EEO process. These proposed changes are in response to an internal query that brought up the need to clarify perceived ambiguities in the existing regulations. The PAB also proposes to update the definition of prohibited discrimination to be consistent with changes in nondiscrimination laws. In addition, the PAB proposes to replace gendered pronouns with gender-neutral ones to reflect current usage practices. The General Accounting Office Personnel Act of 1980 provides authority to make these changes.

DATES: Comments must be received on or before January 23, 2024.

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

Mail: Patricia Reardon-King, Clerk of the Board, Personnel Appeals Board, U.S. Government Accountability Office, Room 1566, 441 G Street NW, Washington, DC 20548.

Email: pab@gao.gov.

FOR FURTHER INFORMATION CONTACT: Stuart Melnick, Executive Director, 202-512-3836 or Kevin Wilson, Solicitor, 202-512-7517, pab@gao.gov.

SUPPLEMENTARY INFORMATION: GAO is not subject to the Administrative Procedure Act and accordingly the

Personnel Appeals Board is not required by law to seek comments before issuing a final rule. However, the Board has decided to invite interested persons to participate in this rulemaking by submitting written comments regarding the proposed revisions. Application of the Administrative Procedure Act to the GAO Personnel Appeals Board is not to be inferred from this invitation for comments.

The Board is authorized by Congress, pursuant to 31 U.S.C. 751-755, to hear and decide cases brought by GAO employees concerning various personnel matters including adverse or performance-based actions, claims of discrimination, alleged prohibited personnel practices, and labor-management relations. The Board also exercises authority over GAO's EEO process at the agency. The Board's procedural regulations applicable to GAO appear at 4 CFR parts 27 and 28. The Board is proposing to revise two sections of these regulations to ensure consistency with current law and to address a process ambiguity in the current language. The Board is also proposing to replace gendered pronouns with gender-neutral pronouns.

The Board proposes to amend section 28.95 by specifically referencing the Equal Pay Act of 1963 (29 U.S.C. 206(d)), the Genetic Information Nondiscrimination Act of 2008 (42 U.S.C. 2000ff-1), and the Pregnancy Workers Fairness Act (42 U.S.C. 2000gg-1) in its definition of prohibited EEO discrimination. The addition of the reference to the Equal Pay Act of 1963 is to clarify that the prohibition on discrimination in wages on the basis of sex derives from Equal Pay Act of 1963's amendment of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)).

The additions of the references to the Genetic Information Nondiscrimination Act of 2008 and the Pregnancy Workers Fairness Act in paragraph (e) and new paragraph (f) of 4 CFR 28.95 reflect types of discrimination that became prohibited on the effective dates of the respective statutes but had not yet been codified into the Board's regulations.

Similarly, the revision of the definition of prohibited discrimination in new paragraph (h) of 4 CFR 28.95 includes a list of activities that may not form the basis for employment actions. Discrimination in retaliation for protected EEO activity became

prohibited on the effective dates of the respective EEO statutes. This proposed revision codifies existing prohibitions and does not create a new cause of action.

These proposed regulations also resolve ambiguity over when retaliation claims related to discrimination on one of the EEO-protected bases, including claims of retaliation under prohibited personnel practices laws like 5 U.S.C. 2302(b)(9), must go through GAO's EEO process pursuant to GAO Order 2713.2 before a charge containing these claims can be filed with the Board's Office of General Counsel and a petition containing them can be filed with the Board. Retaliation claims related to discrimination on one of the EEO-protected bases involving a removal, a suspension of more than 14 days, or a furlough of not more than 30 days would continue to have the option, pursuant to 4 CFR 28.98(c), of filing a discrimination complaint with GAO pursuant to GAO Order 2713.2 or bypassing the EEO process and filing a charge directly with the Board's Office of General Counsel. These proposed revisions would clarify that other retaliation claims related to discrimination on one of the EEO-protected bases may also bypass GAO's EEO process if they are not related to the filing or assisting with a discrimination complaint filed pursuant to GAO Order 2713.2. The Board's General Counsel would be empowered to make a determination of whether retaliation claims related to discrimination on one of the EEO-protected bases are related to filing or assisting with a discrimination complaint filed pursuant to GAO Order 2713.2. If the claims are related to the filing or assisting with a discrimination complaint filed pursuant to GAO Order 2713.2, the General Counsel would inform the individual that they need to file their complaint with GAO pursuant to GAO Order 2713.2 before the Board's Office of General Counsel is permitted to process their charge on these allegations. If the General Counsel determines the claims are not related to filing or assisting with a discrimination complaint pursuant to GAO Order 2713.2, the Board's Office of General Counsel would inform the individual that the charge containing these claims can be processed by the Board's Office of General Counsel without delay. The

purpose of giving this unreviewable discretion to the Board's General Counsel is to give certainty to individuals that their claims may be processed immediately by the Board's Office of General Counsel without fear of having the claims subsequently dismissed for failure to exhaust the administrative remedies contained in GAO Order 2713.2.

Finally, the proposed regulations would allow the Board's Office of General Counsel to hold in abeyance nondiscrimination allegations while related discrimination allegations are being pursued through GAO's EEO process. Once the discrimination complaint resolution process concludes, or the individual opts out of it, both types of claims could then be investigated together. The Board's General Counsel is to utilize this provision when the claims are so related that the Board's General Counsel determines it would be most appropriate to conduct a single investigation into them. The Board's General Counsel would have discretion to revisit this decision at any time and no longer hold a claim in abeyance. For purposes of 4 CFR 28.12(g), the length of time a claim is held in abeyance would count toward the 180-day period after which a charging party may opt out of the Board's Office of General Counsel's investigation and file a petition with the Board. The Board will consider all comments received on or before the closing date for comments. The Board may change the proposed revisions based on the comments received.

List of Subjects in 4 CFR Part 28

Administrative practice and procedure, Claims, Equal employment opportunity, Government employees.

For the reasons stated in the preamble, the Government Accountability Office proposes to amend title 4, chapter I, subchapter B, part 28 of the Code of Federal Regulations as follows:

PART 28—GOVERNMENT ACCOUNTABILITY OFFICE PERSONNEL APPEALS BOARD; PROCEDURES APPLICABLE TO CLAIMS CONCERNING EMPLOYMENT PRACTICES AT THE GOVERNMENT ACCOUNTABILITY OFFICE

■ 1. The authority citation for part 28 continues to read as follows:

Authority: 31 U.S.C. 753.

PART 28 [Amended]

■ 2. Amend part 28 by removing the word or phrase indicated in the left column of the table from wherever it appears in the part and adding the word or phrase indicated in the right column in its place:

Remove	Add
"him or her"	"them".
"him- or herself"	"themselves".
"himself or herself"	"themselves".
"his or her"	"their".
"his/her"	"their".
"he or she has"	"they have".
"he or she is"	"they are".

§ 28.80 [Amended]

■ 3. Amend § 28.80 by removing the words "he or she determines" in the second sentence and adding in their place the words "they determine".

■ 4. Amend § 28.95 by:

- a. Revising paragraph (c);
- b. In paragraph (d) removing the word "or" at the end of the paragraph; and
- c. Redesignate paragraph (e) as paragraph (g); and adding a new paragraph (e) and paragraphs (f) and (h).

The revision and additions read as follows:

§ 28.95 Purpose and scope.

(c) Section 6(d) of the Fair Labor Standard Act of 1938 as amended by the Equal Pay Act of 1963 (29 U.S.C. 206(d)), prohibiting discrimination in wages on the basis of sex;

(e) Section 202 of the Genetic Information Nondiscrimination Act of 2008 (42 U.S.C. 2000ff–1), prohibiting discrimination on the basis of genetic information;

(f) Section 103 of the Pregnant Workers Fairness Act (42 U.S.C. 2000gg–1), prohibiting discrimination on the basis of pregnancy, childbirth or related medical conditions; or

(h) Prohibited discrimination also includes any employment action taken against an employee or applicant for employment for opposing any unlawful employment practice, or for participating in any manner in an investigation, hearing, or in any stage of an administrative or judicial proceeding, under any of the statutes or laws identified in paragraphs (a) through (g) of this section.

■ 5. Amend § 28.98 by:

- a. Revising paragraphs (a), (b) introductory text, (b)(1) and (2);
- b. Revising the paragraph (c) heading;

- c. Adding the words "Office of" between the words "Board's" and "General" in paragraph (c)(1);
- d. Revising the second, third, and fourth sentences of paragraph (c)(2) and revising paragraph (d);
- e. Redesignating paragraph (e) as paragraph (f) and adding a new paragraph (e); and
- f. Adding a heading to newly redesignated paragraph (f) and adding paragraph (f)(3).

The revisions and additions read as follows:

§ 28.98 Individual charges in EEO cases.

(a) *General rule for filing EEO claims.* Except as provided in paragraphs (c) and (e) of this section, an employee or applicant alleging prohibited discrimination (as defined in § 28.95) must first file a complaint with GAO in accordance with GAO Order 2713.2 and may not file directly with the Board's Office of General Counsel.

(b) *Time limits to file EEO claims with PAB/OGC.* After GAO processes a complaint in accordance with GAO Order 2713.2, an employee or applicant for employment may file an individual EEO charge with the Board's General Counsel as follows:

(1) Within 30 days from the receipt by the charging party of a GAO decision rejecting the complaint in whole or part; or

(2) Whenever a period of more than 120 days has elapsed since the complaint was filed, and a final GAO decision has not been issued; or

(c) *Special rules for adverse and performance-based actions.* * * *

(2) * * * If the employee elects to file a complaint of discrimination with GAO, they may still seek Board review of the matter by filing a charge with the Board's Office of General Counsel at the times authorized in paragraph (b) of this section. Where a discrimination complaint filed with GAO relates to one or more non-EEO issues that are within the Board's jurisdiction in addition to an EEO-related allegation, the subsequent charge filed with the Board's Office of General Counsel under paragraph (b) of this section shall be considered a timely appeal of the non-EEO issue(s). An employee will be deemed to have elected the EEO complaint process if they file a timely written complaint of discrimination with GAO before filing a charge with the Board's Office of General Counsel.

(d) *Special rules for RIF-based actions.* An individual alleging discrimination issues in connection with a RIF-based separation may follow

the procedures outlined above in paragraph (c) of this section for adverse and performance-based actions, or may choose instead a third option. In accordance with the provisions of § 28.13, such an individual may challenge that action by filing directly with the PAB, thus bypassing both the Office of Opportunity and Inclusiveness and the Board's Office of General Counsel.

(e) *Special rules in certain retaliation actions.* (1) Except as outlined in paragraph (c) of this section, whenever a charging party raises a claim of retaliation that could be raised under § 28.95(h), including the prohibited personnel practices listed in 5 U.S.C. 2302(b)(9), and that claim has not already been filed pursuant to GAO Order 2713.2, the Board's General Counsel has authority to, and shall determine whether the claim relates to retaliation for filing or assisting with a discrimination complaint filed pursuant to GAO Order 2713.2. The General Counsel's determination shall not be reviewable.

(i) If the General Counsel determines the claim as described in this paragraph (e)(1) relates to retaliation for filing or assisting with a discrimination complaint filed pursuant to GAO Order 2713.2, the Board's Office of General Counsel shall instruct the charging party to file the claim as a complaint of discrimination pursuant to GAO Order 2713.2.

(ii) If the General Counsel determines the claim as described in this paragraph (e)(1) does not relate to retaliation for filing or assisting with a discrimination complaint pursuant to GAO Order 2713.2, the Board's Office of General Counsel shall investigate the claim in accordance with § 28.12.

(2) A charging party who files a claim that could be raised under § 28.95(g) may bring the retaliation claim both as a complaint of discrimination under § 28.95 and as a prohibited personnel practice under 5 U.S.C. 2302(b)(9).

(f) *Claims related to EEO matters pending with EEO.* * * *

(3) Where the Board's General Counsel concludes that one or more claims is sufficiently related to a discrimination complaint filed by the same claimant pursuant to GAO Order 2713.2 and that it would be appropriate to investigate all claims together, the Board's Office of General Counsel may hold the related claim(s) in abeyance until the Board's General Counsel receives a charge pursuant to paragraph (b) of this section with respect to the formal discrimination complaint or

makes a determination that the investigation should resume.

Julia Akins Clark,

Chair, Personnel Appeals Board, U.S. Government Accountability Office.

[FR Doc. 2023–25647 Filed 11–22–23; 8:45 am]

BILLING CODE 1610–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–2227; Project Identifier AD–2022–00113–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 certain The Boeing Company Model 787–8, 787–9, and 787–10 airplanes. This proposed AD was prompted by incidents related to throttle malfunctions during a balked landing with the auto-throttle (A/T) engaged, potential erroneous readings from the low range radio altimeter (LRRA), and possible deficiencies in low airspeed protections and crew alerting systems. This proposed AD would require updating the thrust management (TM) and displays and crew alerting (DCA) operational program software (OPS). The FAA is proposing this AD to address the unsafe conditions on these products.

DATES: The FAA must receive comments on this proposed AD by January 8, 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–2023–2227; 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](https://www.regulations.gov) by searching for and locating Docket No. FAA–2023–2227.

FOR FURTHER INFORMATION CONTACT:

Doug Tsuji, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone: 206–231–3548; email: Douglas.Tsuji@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–2023–2227; Project Identifier AD–2022–00113–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](https://www.regulations.gov), including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this 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 Doug Tsuji, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone: 206–231–3548; email: *Douglas.Tsuji@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 reports of several incidents involving Model 787 airplanes related to a throttle malfunction.

The FAA has received a report indicating that a design review of the dual 787 LRRR system, which included an evaluation of airplane health management (AHM) records, determined that there is an elevated rate of in-service altimeter miscompare events and loss of output events.

The FAA received an in-service report of a Model 787 airplane with flight management function (FMF) Block point (BP) 4.0 software experiencing the throttle returning to IDLE after manual increase of thrust during a balked landing with the A/T engaged.

The FAA has reviewed a report of the investigation of an accident that revealed deficiencies in low airspeed protections and crew alerting systems on Model 777 and 787 series airplanes.

As a result of the above, one or more of the following scenarios could occur.

During landing, erroneous altimeter readings from the LRRR could result in

the A/T not commanding IDLE during flare, and, in combination with improper crew reaction, could result in a runway overrun.

In addition, if the A/T system is engaged during a manual go-around or missed approach and the thrust mode is set to IDLE, manual attempts to override the A/T system by pushing the thrust levers forward will not disconnect the A/T system as expected, resulting in the thrust levers retarding back to IDLE. This unexpected loss of thrust, if not corrected, could result in a loss of altitude and possible controlled flight into terrain (CFIT).

Further, airplanes with versions of FMF software prior to BP 4 are susceptible to situations where the flightcrew may believe the airplane systems will prevent the airplane from having too low an airspeed for its flight condition, when in fact the systems do not offer that protection. This can also result in a CFIT event.

While these conditions may result in a different outcome, they all can be addressed by the same corrective action. These conditions, if not addressed, could result in unsafe conditions.

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 B787–81205–SB310018–00 RB, Issue 002, dated July 15, 2021. This service information specifies procedures for installing updated DCA OPS software and doing a software configuration check.

The FAA also reviewed Boeing Alert Requirements Bulletin B787–81205–SB340053–00 RB, Issue 001, dated November 16, 2022. This service

information specifies procedures for installing updated TM OPS software and doing a software configuration check.

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 as discussed under “Differences Between this Proposed AD and the Service Information,” and except for any differences identified as exceptions in the regulatory text of this proposed AD.

Differences Between This Proposed AD and the Service Information

Although the service information recommends accomplishing certain required actions within 12 months, the FAA has determined that a 12 month interval would not address the identified unsafe condition soon enough to ensure an adequate level of safety for the affected fleet. In developing an appropriate compliance time for this AD, the FAA considered the manufacturer’s recommendation and the degree of urgency associated with the subject unsafe condition. In light of these factors, the FAA finds that a 6-month compliance time represents an appropriate interval of time for affected airplanes to continue to operate without compromising safety.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 125 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
Install and check DCA software	3 work-hours × \$85 per hour = \$255	*\$0	\$255	\$31,875
Install and check TM software	4 work-hours × \$85 per hour = \$340	*0	340	42,500

*Boeing has confirmed that there is no charge for the software.

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–2023–2227; Project Identifier AD–2022–00113–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by January 8, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 787–8, 787–9, and 787–10 airplanes,

certificated in any category, as identified in Boeing Alert Requirements Bulletin B787–81205–SB340053–00 RB, Issue 001, dated November 16, 2022.

(d) Subject

Air Transport Association (ATA) of America Code 31, Instruments; 34, Navigation.

(e) Unsafe Condition

This proposed AD was prompted by incidents related to throttle malfunctions during a balked landing with the auto-throttle (A/T) engaged, potential erroneous readings from the low range radio altimeter (LRRA), and possible deficiencies in low airspeed protections and crew alerting systems. The FAA is issuing this AD to address problems with thrust management (TM) and displays and crew alerting (DCA) operational program software. The unsafe conditions, if not addressed, could result in possible runway overrun or controlled flight into terrain.

(f) Compliance

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

(g) Required Actions

- (1) For airplanes identified in Boeing Alert Requirements Bulletin B787–81205–SB310018–00 RB, Issue 002, dated July 15, 2021: Within 6 months after the effective date of this AD, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin B787–81205–SB310018–00 RB, Issue 002, dated July 15, 2021.

Note 1 to paragraph (g)(1): Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin B787–81205–SB310018–00, Issue 002, dated July 15, 2021, which is referred to in Boeing Alert Requirements Bulletin B787–81205–SB310018–00 RB, Issue 002, dated July 15, 2021.

- (2) For airplanes identified in Boeing Alert Requirements Bulletin B787–81205–SB340053–00 RB, Issue 001, dated November 16, 2022: Within 6 months after the effective date of this AD, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin B787–81205–SB340053–00 RB, Issue 001, dated November 16, 2022.

Note 2 to paragraph (g)(2): Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin B787–81205–SB340053–00, Issue 001, dated November 16, 2022, which is referred to in Boeing Alert Requirements Bulletin B787–81205–SB340053–00 RB, Issue 001, dated November 16, 2022.

(h) 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 (j) 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.

(i) Related Information

For more information about this AD, contact Doug Tsuji, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone: 206–231–3548; email: Douglas.Tsuji@faa.gov.

(j) 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 B787–81205–SB310018–00 RB, Issue 002, dated July 15, 2021.

- (ii) Boeing Alert Requirements Bulletin B787–81205–SB340053–00 RB, Issue 001, dated November 16, 2022.

- (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 17, 2023.

Caitlin Locke,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023–25866 Filed 11–22–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 71**

[Docket No. FAA–2023–2099; Airspace
Docket No. 23–AWP–31]

RIN 2120–AA66

**Modification of Class D Airspace &
Establishment of Class E Airspace;
Camp Pohakuloa, HI**

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking
(NPRM).

SUMMARY: This action proposes to modify the Class D airspace and establish Class E airspace extending upward from 700 feet above the surface at Bradshaw Army Airfield, Camp Pohakuloa, HI. Additionally, this action proposes administrative amendments to update the airport's Class D airspace legal description. These actions would support the safety and management of instrument flight rules (IFR) and visual flight rules (VFR) operations at the airport.

DATES: Comments must be received on or before January 8, 2024.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–2099 and Airspace Docket No. 23–AWP–31 using any of the following methods:

* *Federal eRulemaking Portal:* Go to www.regulations.gov and follow the online instructions for sending your comments electronically.

* *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

* *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

* *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Docket: Background documents or comments received may be read at www.regulations.gov at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FAA Order JO 7400.11H, Airspace Designations and Reporting Points, and

subsequent amendments can be viewed online at www.faa.gov/air_traffic/publications/. You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT:

Nathan A. Chaffman, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198; telephone (206) 231–3460.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would modify Class D airspace and establish Class E airspace to support IFR and VFR operations at Bradshaw Army Airfield, Camp Pohakuloa, HI.

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one time if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the

comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this proposal in light of the comments it receives.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at www.dot.gov/privacy.

Availability of Rulemaking Documents

An electronic copy of this document may be downloaded through the internet at www.regulations.gov. Recently published rulemaking documents can also be accessed through the FAA's web page at www.faa.gov/air_traffic/publications/airspace_amendments/.

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Operations office (see **ADDRESSES** section for address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198.

Incorporation by Reference

Class D and E5 airspace designations are published in paragraphs 5000 and 6005, respectively, of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023 and effective September 15, 2023. These updates would be published in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

FAA Order JO 7400.11H lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 that would modify the Class D airspace and establish Class E airspace extending upward from 700 feet above the surface at Bradshaw Army Airfield, Camp Pohakuloa, HI.

The Class D surface area does not sufficiently contain IFR arrival

operations between the surface and 1,000 feet above the surface on the Area Navigation (RNAV) (Global Positioning System [GPS]) Runway (RWY) 9 approach. A northwest extension to the Class D lateral boundary should be added to appropriately contain the point at which an arriving aircraft is expected to descend to below 1,000 feet above the surface during the procedure.

The Class D surface area does not sufficiently contain IFR departure operations between the surface and the base of adjacent controlled airspace when departing on the RWY 9 obstacle departure procedure (ODP). A southwest extension to the Class D lateral boundary should be added to appropriately contain departing aircraft until reaching the next adjacent airspace.

Restricted Area-3103 overlaps the Class D and proposed Class E airspace. Verbiage should be added to the Class D legal description to exclude the airspace when it is active.

Class E airspace extending upward from 700 feet above the surface does not exist at the airport but must be established to accommodate transitioning aircraft to/from the terminal or enroute environment by containing arriving IFR operations below 1,500 feet above the surface and departing IFR operations until they reach 1,200 feet above the surface. Class E airspace extending upward from 700 feet above the surface should be established within a 6-mile radius of the airport with a westward extension to appropriately contain IFR operations at the airport.

Finally, the FAA proposes administrative modifications to the airport's legal description. The city name on line one of the Class D legal description text header should be updated to read "Camp Pohakuloa" to match the FAA's database. The airport name on line two of the Class D legal description text header should be updated to read "Bradshaw Army Airfield, HI" to match the FAA's database. The geographic coordinates located on line three of the Class D legal description text header should be updated to match the FAA's database. The Class D legal description should be updated to replace the outdated use of the phrases "Notice to Airmen" and "Airport/Facility Directory." These phrases should read "Notice to Air Missions" and "Chart Supplement," respectively, to align with the FAA's current nomenclature.

Regulatory Notices and Analyses

The FAA has determined that this proposed regulation only involves an

established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures" prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and effective September 15, 2023, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

AWP HI D Camp Pohakuloa, HI [Amended]

Bradshaw Army Airfield, HI
(Lat. 19°45'36" N, long. 155°33'14" W)

That airspace extending upward from the surface to and including 8,700 feet MSL within a 4.3-mile radius of the airfield, within 2.5 miles each side of the airfield's 116° bearing extending from the 4.3-mile radius to 5.9 miles southeast of the airfield, and within 0.7 miles north and 1.4 miles

south of the airfield's 299° bearing extending from the 4.3-mile radius to 4.9 miles northwest of the airfield, excluding that airspace within restricted area R-3103 when active. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be continuously published in the Chart Supplement.

* * * * *

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AWP HI E5 Camp Pohakuloa, HI [New]

Bradshaw Army Airfield, HI
(Lat. 19°45'36" N, long. 155°33'14" W)

That airspace extending upward from 700 feet above the surface within a 6-mile radius of the airfield and within 2.6 miles north and 1.8 miles south of the airfield's 281° bearing extending from the 6-mile radius to 6.3 miles west of the airfield, excluding that airspace within restricted area R-3103 when active.

* * * * *

Issued in Des Moines, Washington, on November 16, 2023.

B.G. Chew,

*Group Manager, Operations Support Group,
Western Service Center.*

[FR Doc. 2023–25796 Filed 11–22–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–2189 Airspace
Docket No. 22–AAL–43]

RIN 2120–AA66

Revocation of Colored Federal Airways Amber 3 (A–3), Amber 17 (A–17), and Gold 16 (G–16) in Alaska

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to revoke Colored Federal airways A–3, A–17, and G–16 in Alaska due to the pending decommissioning of the Put River, Evansville, Chandalar Lake, Nuiqsut Village, Browerville, and Wainwright Village Nondirectional Radio Beacons (NDB).

DATES: Comments must be received on or before January 8, 2024.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–2189 and Airspace Docket No. 22–AAL–43 using any of the following methods:

* *Federal eRulemaking Portal:* Go to www.regulations.gov and follow the

online instructions for sending your comments electronically.

* *Mail*: Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

* *Hand Delivery or Courier*: Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

* *Fax*: Fax comments to Docket Operations at (202) 493–2251.

Docket: Background documents or comments received may be read at www.regulations.gov at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FAA Order JO 7400.11H, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at www.faa.gov/air_traffic/publications/. You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Steven Roff, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would modify the route structure as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System (NAS).

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one time if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this proposal in light of the comments it receives.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at www.dot.gov/privacy.

Availability of Rulemaking Documents

An electronic copy of this document may be downloaded through the internet at <https://www.regulations.gov>. Recently published rulemaking documents can also be accessed through the FAA's web page at www.faa.gov/air_traffic/publications/airspace_amendments/.

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the office of the Operations Support Group, Western Service Center, Federal Aviation Administration, 2200 South 216th St., Des Moines, WA 98198.

Incorporation by Reference

Colored Federal airways are published in paragraph 6009 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. These updates would be published in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

FAA Order JO 7400.11H lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Background

In 2003, Congress enacted the Vision 100-Century of Aviation Reauthorization Act (Pub L., 108–176), which established a joint planning and development office in the FAA to manage the work related to the Next Generation Air Transportation System (NextGen). Today, NextGen is an ongoing FAA-led modernization of the nation's air transportation system to make flying safer, more efficient, and more predictable.

In support of NextGen, this proposal is part of an ongoing, large and comprehensive T-route modernization project in the state of Alaska. The project mission statement states: “To modernize Alaska's Air Traffic Service route structure using satellite-based navigation development of new T-routes and optimization of existing T-routes will enhance safety, increase efficiency and access, and will provide en route continuity that is not subject to the restrictions associated with ground-based airway navigation.” As part of this project, the FAA evaluated the existing Colored Airway structure for: (a) direct replacement (*i.e.*, overlay) with an Area Navigation (RNAV) T-route that offers a similar or lower Minimum En route Altitude (MEA) or Global Navigation Satellite System (GNSS) Minimum En route Altitude (MEA); (b) the replacement of the colored airway with a T-route in an optimized but similar geographic area, while retaining similar or lower MEA; or (c) removal with no route structure (T-route) restored in that area because the value was determined to be insignificant.

The aviation industry/users have indicated a desire for the FAA to transition the Alaskan en route navigation structure away from dependency on NDBs and move to

develop and improve the RNAV route structure.

Colored Federal airway A-3 extends between the Evansville and Put River NDB. The decommissioning of the Evansville and Put River NDBs would render A-3 unusable. The FAA proposes to revoke A-3 in its entirety. The loss of A-3 is mitigated by existing RNAV route T-240 and Very High Frequency Omnidirectional Range (VOR) Federal Airway V-504 which directly overlay A-3.

Colored Federal airway A-17 extends between the Chena, AK, NDB and the Put River NDB. The decommissioning of the Chandalar Lake and Put River NDBs would render A-17 unusable. The FAA proposes to revoke A-17 in its entirety. The loss of A-17 is mitigated by existing RNAV route T-227 which is near A-17.

Colored Federal airway G-16 extends between the Point Lay, AK, NDB and the Put River NDB. The decommissioning of the Wainwright Village, Browerville, Nuiqsut Village, and Put River NDBs would render G-16 unusable. The FAA proposes to revoke G-16 in its entirety. The loss of G-16 is mitigated by existing RNAV routes T-366 and T-235 which overlay or are near G-16.

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 to revoke Colored Federal airways A-3, A-17, and G-16 in Alaska due to the pending decommissioning of their supporting Navigational Aids (NAVAID).

Colored Federal airway A-3 extends between the Evansville and Put River NDBs. Colored Federal airway A-17 extends between the Chena and the Put River NDBs. Colored Federal airway G-16 extends between the Point Lay and the Put River NDBs. The FAA proposes to revoke Colored Federal airways A-3, A-17, and G-16 in their entirety.

Regulatory Notices and Analyses

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will

not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, “Environmental Impacts: Policies and Procedures” prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

- 1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

- 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and effective September 15, 2023, is amended as follows:

Paragraph 6009(a) Colored Federal Airways.

* * * * *

G-16 [Remove]

* * * * *

Paragraph 6009(c) Colored Federal Airways.

* * * * *

A-2 [Remove]

A-17 [Remove]

* * * * *

Issued in Washington, DC, on November 17, 2023.

Karen Chiodini,

Acting Manager, Airspace Rules and Regulations Group.

[FR Doc. 2023–25844 Filed 11–22–23; 8:45 am]

BILLING CODE 4910–13–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3030

[Docket No. RM2020–5; Order No. 6801]

RIN 3211–AA27

Market Dominant Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The Commission previously proposed amendments to its regulations concerning rate incentives for Market Dominant products. After the period for filing comments in the instant docket closed, in Docket No. R2023–3, the Postal Service proposed, and the Commission subsequently approved, two Market Dominant rate incentives for Calendar Year (CY) 2024. Because the rule proposals in the instant docket may have a bearing on any future proposals to include these rate incentives in the percentage change in rates calculation, the Commission provides the public with an opportunity to comment on the relationship of the rule proposals in the instant docket and the rate incentives approved for CY 2024 in Docket No. R2023–3.

DATES: *Comments are due:* December 4, 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:

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I. Background

Pursuant to 39 U.S.C. 503 and 3622, the Commission proposed amendments to its regulations concerning rate incentives for Market Dominant products appearing in existing 39 CFR part 3030.¹ The proposed amendments would revise the regulation defining “rate of general applicability” for purposes of Market Dominant rate adjustment proceedings to clarify that,

¹ Notice of Proposed Rulemaking to Amend Rules Regarding Rate Incentives for Market Dominant Products, November 14, 2022 (Order No. 6325).

to qualify as a rate of general applicability, a rate incentive may not be based on historical mail volumes or prior mailer participation in a rate incentive or promotion. *See* Order No. 6325 at 1. Further, the Commission proposed to begin enforcing 39 CFR 3030.123(j) and 39 CFR 3030.128(f)(2)(iv) in their entirety.² Enforcing these rules would add an additional criterion for a rate incentive to be eligible for inclusion in a percentage change in rates calculation and would require that more information concerning Market Dominant rate incentives be included in a notice of rate adjustment. *See* Order No. 6325 at 2.

After the period for filing comments in the instant docket closed, in Docket No. R2023–3, the Postal Service proposed, and the Commission subsequently approved, two Market Dominant rate incentives for Calendar Year (CY) 2024.³ Although the rate incentives were not proposed for inclusion in the percentage change in rates calculation for CY 2024,⁴ the Postal Service stated that it intends to propose including these rate incentives in the percentage change in rates calculation in the future. *See* Docket No. R2023–3 Notice at 9; Order No. 6713 at 2.

II. Invitation To Comment

Because the First-Class Mail Growth Incentive and the Marketing Mail Growth Incentive were proposed after the timeframes for submitting comments in responses to the rule proposals set forth in Order No. 6325 ended, and because those rule proposals may have a bearing on the Postal Service's ability to include those rate incentives in the percentage change in rates calculation, the Commission provides an opportunity for comment on the relationship between the pending rule proposals in the instant proceeding and the First-Class Mail Growth Incentive and the Marketing Mail Growth Incentive. The Commission invites comments from the public on the relationship of these rule proposals and

rate incentives, including on the questions that the Commission raised in Order No. 6713 about whether the First-Class Mail Growth Incentive and the Marketing Mail Growth Incentive would be permitted to be included in the percentage change in rates calculation under the rule proposals in Order No. 6325.

III. Administrative Actions

The Regulatory Flexibility Act requires federal agencies, in promulgating rules, to consider the impact of those rules on small entities. *See* 5 U.S.C. 601 *et seq.* If the proposed or final rules will not, if promulgated, have a significant economic impact on a substantial number of small entities, the head of the agency may certify that the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply. *See* 5 U.S.C. 605(b).

In the context of this rulemaking, the Commission's primary responsibility is in the regulatory oversight of the United States Postal Service. The rules that are the subject of this rulemaking have a regulatory impact on the Postal Service, but do not impose any regulatory obligation upon any other entity. Based on these findings, the Chairman of the Commission certifies that the rules that are the subject of this rulemaking will not have a significant economic impact on a substantial number of small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

Interested persons are invited to provide written comments as discussed in this notice. Comments are due no later than December 4, 2023. All comments received will be available for review on the Commission's website, <http://www.prc.gov>.

Philip T. Abraham will continue to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this docket.

By the Commission.

Erica A. Barker,

Secretary.

[FR Doc. 2023–25933 Filed 11–22–23; 8:45 am]

BILLING CODE 7710–FW–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 158

[EPA–HQ–OPP–2023–0428; FRL–11111–01–OCSPP]

Pesticides; Petition Seeking Rulemaking for Registration of Neonicotinoid Insecticides and Other Systemic Insecticides; Notice of Availability and Request for Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Petition for rulemaking.

SUMMARY: The Environmental Protection Agency (EPA) is announcing the availability of and seeking public comment on a petition received from the Public Employees for Environmental Responsibility (PEER) and the American Bird Conservancy (ABC) requesting that the Agency initiate a rulemaking for neonicotinoid insecticides and other systemic insecticides. PEER and ABC believe the Agency should amend the existing regulations under the Federal Insecticide, Rodenticide, and Fungicide Act (FIFRA) to require all applicants and registrants of neonicotinoid and other systemic insecticides to provide performance (efficacy) data to the Agency in applications for registration and during registration review.

DATES: Comments must be received on or before January 23, 2024.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2023–0428, through <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 or visiting the docket, along with more information about dockets generally, is available at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT: Caleb Hawkins, Office of Chemical Safety and Pollution Prevention, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–1430; email address: hawkins.caleb@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Does this action apply to me?

This action is directed to the public in general and may be of interest to a wide range of stakeholders including pesticide registrants, environmental,

² *See* Order No. 6325 at 1–2, 38; Order Adopting Final Rules Regarding Rate Incentives for Market Dominant Products, May 15, 2020 (Order No. 5510). As discussed further below, although these rules were adopted by Order No. 5510, the Commission subsequently indicated that it did not intend to enforce Order No. 5510 pending reconsideration of it. *See* Notice of Intent to Reconsider, August 26, 2020 (Order No. 5655).

³ *See* Docket No. R2023–3, Order on Market Dominant Price Change Creating Two Incentives, September 27, 2023, at 1–2 (Order No. 6713).

⁴ Docket No. R2023–3, United States Postal Service Notice of Market Dominant Price Change Creating Two Incentives, August 11, 2023, at 8–9 (Docket No. R2023–3 Notice).

human health, and agricultural advocates, pesticide users, and members of the public interested in the use of pesticides. This listing is not intended to be exhaustive but rather provides a guide for readers regarding entities likely to be affected by his action. Because others may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

II. What action is the Agency taking?

EPA requests public comment on a petition received from PEER and ABC that asks EPA to take the following actions:

- Amend 40 CFR 158.400(e)(1) to require the submission of product performance data for neonicotinoid and other systemic insecticides, and
- Amend 40 CFR 158.400(e)(1) to require that, if not already submitted to the Agency, existing registrants of a neonicotinoid or other systemic insecticides submit efficacy within 180 days of the promulgation of the rule.

A copy of the petition is available in the docket.

III. What should I consider as I prepare my comments for EPA?

A. Submitting CBI

Do not submit Confidential Business Information (CBI) to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be 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.

B. Multimedia Submissions

Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system).

C. Tips for Preparing Your Comments

When preparing and submitting your comments, see the commenting tips at <https://www.epa.gov/dockets/commenting-epa-dockets>. Please note that once submitted, comments cannot be edited or removed from the docket. EPA may publish any comment received to its public docket.

Authority: 7 U.S.C. 136 *et seq.*

Dated: November 16, 2023.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2023–25739 Filed 11–22–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 751

[EPA–HQ–OPPT–2023–0376; FRL–9145–01–OCSPP]

RIN 2070–AL02

Decabromodiphenyl Ether and Phenol, Isopropylated Phosphate (3:1); Revision to the Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under the Toxic Substances Control Act (TSCA)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing revisions to the regulations for decabromodiphenyl ether (decaBDE) and phenol, isopropylated phosphate (3:1) (PIP (3:1)), two of the five persistent, bioaccumulative, and toxic (PBT) chemicals addressed in final rules issued under the Toxic Substances Control Act (TSCA) in January 2021. After receiving additional comments following the issuance of the 2021 PBT final rules, the Agency has determined that revisions to the decaBDE and PIP (3:1) regulations are necessary to address implementation issues and to reduce further exposures. As required under TSCA, these proposed requirements would, if finalized, reduce the potential for exposures to humans and the environment to decaBDE and PIP (3:1) to the extent practicable. The Agency is not proposing to revise the existing regulations for the other three PBT chemicals (2,4,6-TTBP, HCB, and PCTP) at this time.

DATES: Comments must be received on or before January 8, 2024.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2023–0376, through <https://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more

information about dockets generally, is available at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT:

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.

For technical information regarding decaBDE, contact: Brooke Porter, Existing Chemicals Risk Management Division (7404M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–6388; email address: porter.brooke@epa.gov.

For technical information regarding PIP (3:1), contact: Scott Drewes, Existing Chemicals Risk Management Division (7404M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–8833; email address: drewes.scott@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

You may be affected by this action if you manufacture (including import), process, distribute in commerce, or use decaBDE or decaBDE-containing products or articles. Such uses for decaBDE may include but are not limited to wire and cable insulation for nuclear power generation facilities, plastic shipping pallets, and imported articles such as replacement parts for aerospace and automotive parts. You may also be affected by this action if you manufacture (including import), process, distribute in commerce, or use PIP (3:1) or PIP (3:1)-containing products or articles. Such uses for PIP (3:1) may include flame retardants in plastics, functional fluids in aerospace and industrial machinery, and plastic articles that are components of electronics or electrical articles.

The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Adhesive Manufacturing (NAICS Code 325520);
- Air and Gas Compressor Manufacturing (NAICS Code 333912);
- Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing (NAICS Code 333415);

- Aircraft Engine and Engine Parts Manufacturing (NAICS Code 336412);
- Aircraft Manufacturing (NAICS Code 336411);
- All Other Basic Organic Chemical Manufacturing (NAICS Code 325199);
- All Other Miscellaneous General Purpose Machinery Manufacturing (NAICS Code 333998);
- All Other Plastics Product Manufacturing (NAICS Code 326199);
- All Other Transportation Equipment Manufacturing (NAICS Code 336999);
- Analytical Laboratory Instrument Manufacturing (NAICS Code 334516);
- Appliance Repair and Maintenance (NAICS Code 811412);
- Audio and Video Equipment Manufacturing (NAICS Code 334310);
- Automobile and Light Duty Motor Vehicle Manufacturing (NAICS Code 336110);
- Automobile and Other Motor Vehicle Merchant Wholesalers (NAICS Code 423110);
- Boat Building (NAICS Code 336612);
- Broadwoven Fabric Mills (NAICS Code 313210);
- Computer and Computer Peripheral Equipment and Software Merchant Wholesalers (NAICS Code 432430);
- Computer Storage Device Manufacturing (NAICS Code 334112);
- Construction Machinery Manufacturing (NAICS Code 333120);
- Current-Carrying Wiring Device Manufacturing (NAICS Code 335931);
- Custom Compounding of Purchased Resins (NAICS Code 325991);
- Electronic Computer Manufacturing (NAICS Code 334111);
- Farm and Garden Machinery and Equipment Merchant Wholesalers (NAICS Code 423820);
- Farm Machinery and Equipment Manufacturing (NAICS Code 333111);
- Guided Missile and Space Vehicle Manufacturing (NAICS Code 336414);
- Guided Missile and Space Vehicle Propulsion Unit Parts Manufacturing (NAICS Code 336415);
- Heavy Duty Truck Manufacturing (NAICS Code 336120);
- Household Appliances, Electric Housewares, and Consumer Electronics Merchant Wholesalers (NAICS Code 423620);
- Industrial Machinery and Equipment Merchant Wholesalers (NAICS Code 423830);
- Industrial Supplies Merchant Wholesalers (NAICS Code 423840);
- Industrial Truck, Tractor, Trailer and Stacker Machinery Manufacturing (NAICS Code 333924);
- Instruments and Related Products Manufacturing for Measuring,

- Displaying, and Controlling Industrial Process Variables (NAICS 334513);
- Lawn and Garden Tractor and Home Lawn and Garden Equipment Manufacturing (NAICS Code 333112);
- Manufacturing and Reproducing Magnetic and Optical Media (NAICS Code 334610);
- Materials Recovery Facilities (NAICS Code 562920);
- Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers (NAICS Code 423450);
- Mining Machinery and Equipment Manufacturing (NAICS Code 333131);
- Miscellaneous Intermediation (NAICS Code 523910);
- Motor and Generator Manufacturing (NAICS Code 335312);
- Motor Vehicle Body Manufacturing (NAICS Code 336211);
- Motor Vehicle Electrical and Electronic Equipment Manufacturing (NAICS Code 336320);
- Motor Vehicle Gasoline Engine and Engine Parts Manufacturing (NAICS Code 336310);
- Motor Vehicle Supplies and New Parts Merchant Wholesalers (NAICS Code 423120);
- Motorcycle, Bicycle and Parts Manufacturing (NAICS Code 336991);
- New Car Dealers (NAICS Code 441110);
- Nuclear Electric Power Generation (NAICS Code 221113);
- Other Aircraft Part and Auxiliary Equipment Manufacturing (NAICS Code 336413);
- Other Basic Inorganic Chemical Manufacturing (NAICS Code 325180);
- Other Chemical and Allied Products Merchant Wholesalers (NAICS Code 424690);
- Other Commercial and Industrial Machinery and Equipment Rental and Leasing (NAICS Code 532490);
- Other Communications and Energy Wire Manufacturing (NAICS Code 335929);
- Other Communications Equipment Manufacturing (NAICS Code 334290);
- Other Electronic Component Manufacturing (NAICS Code 334419);
- Other Electronic Parts and Equipment Merchant Wholesalers (NAICS Code 432690);
- Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing (NAICS Code 336419);
- Other Motor Vehicle Parts Manufacturing (NAICS Code 336390);
- Paint and Coating Manufacturing (NAICS Code 325510);
- Petroleum Lubricating Oil and Grease Manufacturing (324191);
- Petroleum Refineries (NAICS Code 324110);
- Plastics Material and Resin Manufacturing (NAICS Code 325211);

- Plastics Product Manufacturing (NAICS Code 3261);
- Plumbing, Heating, and Air-Conditioning Contractors (NAICS Code 238220);
- Relay and Industrial Control Manufacturing (NAICS Code 335314);
- Semiconductor and Related Device Manufacturing (NAICS Code 334413);
- Semiconductor Machinery Manufacturing (NAICS Code 333242);
- Surface Active Agency Manufacturing (NAICS Code 325613);
- and
- Surgical Appliance and Supplies Manufacturing (NAICS Code 339113).

If you have any questions regarding the applicability of this action to a particular entity, consult the technical information contact listed under **FOR FURTHER INFORMATION CONTACT**.

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

TSCA section 6(h), 15 U.S.C. 2601 *et seq.*, directs EPA to take expedited action to complete TSCA section 6(a) rules on certain PBT chemical substances. EPA must apply one or more of the requirements listed in TSCA section 6(a) to the extent necessary to meet the TSCA section 6(h)(4) statutory standard. More specifically, EPA must take action on those chemical substances identified in the 2014 Update to the TSCA Work Plan for Chemical Assessments (Ref. 1) that, among other factors, EPA has a reasonable basis to conclude are toxic and that with respect to persistence and bioaccumulation score high for one and either high or moderate for the other, pursuant to the TSCA Work Plan Chemicals: Methods Document (Ref. 2).

In response to this directive, in January 2021, EPA promulgated five rules to regulate the following five PBT chemical substances: decaBDE; PIP (3:1); 2,4,6-TTBP (CASRN 732–26–3); HCBP (CASRN 87–68–3); and PCTP (CASRN 133–49–3) (Refs. 3, 4, 5, 6, and 7). With the obligation to promulgate these rules, the Agency also has the authority to amend them (*e.g.*, if circumstances change, including in relation to the receipt of new information). It is well settled that EPA has inherent authority to reconsider, revise, or repeal past decisions to the extent permitted by law so long as the Agency provides a reasoned explanation. See *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Based on information submitted by regulated entities since the publication of the 2021 decaBDE and PIP (3:1) final rules, the Agency has determined that amendments to both rules are necessary to address

implementation issues and to further reduce exposure to these chemical substances to the extent practicable.

C. What action is the Agency taking?

EPA is proposing revisions to the 2021 decaBDE and PIP (3:1) final rules under TSCA. EPA is not proposing revisions to the other three PBT rules issued under TSCA section 6(h) for 2,4,6-TTBP, HCBd, and PCTP at this time.

1. Decabromodiphenyl ether (decaBDE).

DecaBDE is a flame retardant that has been widely used in textiles, plastics, adhesives, and polyurethane foam. In this action, EPA is proposing revisions to the 2021 final rule to require the use of personal protective equipment (PPE) during certain domestic manufacturing and processing of decaBDE and decaBDE-containing products and articles and to require a label on plastic shipping pallets that are known to contain decaBDE. EPA is also proposing to prohibit releases to water from manufacturing, processing, and distribution in commerce of decaBDE. EPA is proposing to extend the compliance date for the phase-out of processing and distribution in commerce of decaBDE-containing wire and cable insulation for nuclear power generation facilities and is proposing to add an export notification requirement for decaBDE-containing wire and cable for nuclear power generation facilities. These proposed revisions are discussed further in Unit III.D.

2. Phenol, isopropylated phosphate (3:1) (PIP (3:1)).

PIP (3:1) is a flame retardant, a plasticizer, and an anti-compressibility and anti-wear additive. It is used in lubricants and hydraulic fluids and in the manufacture of other compounds. For PIP (3:1), EPA is proposing revisions to the 2021 final rule to require the use of PPE for the domestic manufacturing and processing of PIP (3:1) and certain PIP (3:1)-containing products and articles, and to phase-in prohibitions on processing and distribution for certain uses. EPA is also proposing to add new exclusions from the prohibitions on processing and distribution in commerce of PIP (3:1) for use in wire harnesses and electric circuit boards and the processing and distribution in commerce of such PIP (3:1)-containing harnesses and circuit boards. EPA also is proposing a new 5-year compliance timeframe for the prohibition of processing and distribution in commerce of PIP (3:1), so that it may be used as an ingredient of a pesticide product (*i.e.*, a pesticide product registered under the Federal Insecticide,

Fungicide, and Rodenticide Act (FIFRA) for use in anti-fouling paint). EPA is not proposing to revise the October 2024 compliance date for articles not otherwise covered by an exclusion from prohibition or by an existing or newly proposed extension to a phase-out compliance deadline.

D. Why is the Agency taking this action?

In accordance with the Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," (86 FR 7037, January 25, 2021), on September 3, 2021, EPA announced its intention to review the five PBT final rules issued on January 6, 2021. The Agency planned to determine whether the rules were consistent with the Administration's policy to limit exposure to dangerous chemicals and to identify additional actions that could be taken to address implementation issues and to reduce further exposures to these PBT chemicals to the extent practicable, as directed by TSCA section 6(h). At that time, EPA also requested public comment in the **Federal Register** on the five 2021 PBT final rules (Refs. 8 and 9). In particular, EPA sought comment on whether the rules sufficiently reduced exposures to these chemicals, including exposures to potentially exposed or susceptible subpopulations and the environment; on implementation issues associated with the 2021 PBT final rules; on compliance issues associated with the 2021 PBT final rules; and on whether to consider additional or alternative regulatory measures or approaches.

In 2021, shortly after the PBT final rules were published, numerous stakeholders, including, for example, the electronics and electrical manufacturing sector and their customers, raised significant concerns about their ability to meet the March 8, 2021, compliance date for the processing and distribution of PIP (3:1) and PIP (3:1)-containing articles (Ref. 10). In response to stakeholder input, in an immediately effective final rule in September 2021, EPA extended the compliance deadline for processing and distribution in commerce of PIP (3:1) for use in articles and PIP (3:1)-containing articles, unless subject to an exclusion from or phase-in of prohibition, to March 8, 2022 (Ref. 11). In October 2021, EPA proposed a new extended compliance deadline for processing and distribution in commerce of PIP (3:1) for use in articles and PIP (3:1)-containing articles, unless subject to an exclusion from or phase-in of prohibition, to October 31, 2024, and finalized that extended compliance deadline in March

2022 (Refs. 12 and 13). EPA similarly amended the compliance deadline for recordkeeping requirements for articles in those rulemakings. Additionally, EPA responded to the comments received on the March 2021 notification that were relevant to the PIP (3:1) compliance deadline extension and related issues when the Agency extended the compliance deadlines, in both the September 2021 PIP (3:1) final rule and in an October 2021 PIP (3:1) proposed rule (Refs. 11 and 12). EPA reasoned that these extensions would avoid significant disruption in the supply chains for certain articles necessary to the electronics and electrical manufacturing sector, while EPA determined whether any further compliance date extensions are necessary for certain industry sectors, including the semiconductor and manufacture equipment.

EPA also announced in the September 2021 PIP (3:1) final rule, October 2021 PIP (3:1) proposed rule, and the March 2022 PIP (3:1) final rule that the Agency intended to consider any additional information received to further reduce exposures and promote environmental justice to better protect human health and the environment (Refs. 11, 12, and 13).

E. What are the estimated incremental impacts of this action?

EPA's Economic Analysis of the estimated impacts with this rulemaking can be found in the rulemaking docket (Ref. 14). As described in more detail in the Economic Analysis in Unit IV. and is briefly summarized here.

1. Benefits

While EPA was not able to quantify the benefits of reducing human and environmental exposures to decaBDE or PIP (3:1), the Economic Analysis qualitatively discusses the benefits of reducing exposure under this proposed rule, as summarized in Unit IV (Ref. 14). As discussed in the 2021 PBT final rules, and in Unit II.A., and consistent with TSCA section 6(h)(2), EPA did not perform a risk evaluation for decaBDE or PIP (3:1), nor did EPA develop quantitative risk estimates.

2. Costs

Total quantified annualized social costs for this proposed rule are approximately \$389 million at a 3% discount rates, and \$416 million at a 7% discount rate. Of the proposed rule costs, those associated with decaBDE alone were estimated at \$1,700 at a 3% discount rate and \$1,800 at a 7% discount rate. Costs associated with PIP (3:1) were estimated \$389 million and

\$416 million (at 3 and 7% discount rates, respectively.)

3. Small Entity Impacts

This proposed rule, if finalized, would impact approximately 16,205 small businesses, all of which pertained to PIP (3:1) and none for decaBDE. Of these, 1,399 are expected to incur cost impacts between 1% and 3% of their annual revenue. No entities are expected to be impacted above 3% of their annual revenue.

4. Environmental Justice

Since a risk evaluation was not conducted, EPA's understanding of the extent to which reductions in exposure might reduce risks for communities with Environmental Justice (EJ) concerns is limited. In the Economic Analysis accompanying this rule (Ref 14), EPA relied on available relevant data sources for PIP (3:1) and decaBDE, including the U.S. EPA's CDR, the ToxicsStatistics, and others to assess the economic implications of the proposed rule. Data, however, are not sufficiently comprehensive to estimate the extent to which the proposed rule would reduce existing disproportionate impacts on communities with EJ concerns. In addition, only a small subset of the specific facilities (14 facilities reported to 2020 CDR) using decaBDE and PIP (3:1) have been identified, so a proximity analysis examining the characteristics of the communities surrounding the known facilities would not be representative of all exposed communities.

Given the lack of available data, EPA believes that it is not practicable to assess whether this action is likely to result in new disproportionate impacts or exacerbate any existing disproportionate impacts on communities with EJ concerns. EPA also believes that the restrictions placed on decaBDE and PIP (3:1) through this proposed rule would reduce the potential exposures and risks associated with the manufacture, processing, and use of these chemicals. At a minimum EPA believes this proposed rule would not exacerbate any baseline environmental justice concerns and would increase the level of protection for all affected populations without having any disproportionate and adverse human health or environmental effects on any population, including children. Certain exclusions from prohibition and extensions of compliance dates beyond those adopted in the 2021 PBT final rules, however, may partially delay anticipated reductions in exposure.

5. Children's Environmental Health

Under the *2021 EPA Policy on Children's Health*, the Agency considers the risks to infants and children consistently and explicitly during its decision-making process (Ref. 15). This proposed rule, if finalized, would reduce the potential exposures to decaBDE and PIP (3:1) that could occur from activities that would be prohibited under this proposed rule for the general population and for potentially exposed or susceptible subpopulations such as children. Certain exclusions and extensions of compliance dates beyond those adopted in the 2021 PBT final rules or subsequent PIP (3:1) final rules, however, may partially delay these reductions in exposure. More information can be found in the Exposure and Use Assessment document (Ref. 16).

6. Effects on State, Local, and Tribal Governments

This proposed rule, if finalized, would not have any significant or unique effects on small governments, or federalism, or tribal implications.

F. What should I consider as I prepare my comments for EPA?

1. Submitting CBI

Do not submit CBI to EPA through <https://www.regulations.gov> or email. If you wish to include CBI in your comment, please follow the applicable instructions at <https://www.epa.gov/dockets/commenting-epa-dockets#rules> and clearly mark the part or all of the information that you claim to be 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.html>.

II. Background

A. History of this Rulemaking

1. The 2021 PBT Final Rules

a. DecaBDE. EPA published a final rule in the **Federal Register** on January 6, 2021, to address its obligations under TSCA section 6(h) for decaBDE (86 FR 880; FRL-10018-87) (Ref. 3). EPA determined in the final rule that decaBDE met the TSCA section

6(h)(1)(A) criteria for expedited action. In addition, EPA determined, in accordance with TSCA section 6(h)(1)(B), that under the conditions of use, exposure to decaBDE was likely to the general population, to a potentially exposed or susceptible subpopulation, and to the environment. The 2021 decaBDE final rule generally prohibits the manufacture (including import) and processing of decaBDE, and products and articles containing decaBDE, as of March 8, 2021. Distribution in commerce of products and articles to which decaBDE has been added is prohibited as of January 6, 2022. The 2021 decaBDE final rule also included phase-in compliance dates and exclusions from prohibition:

- Allowing 18 months to phase out any manufacture, processing, and distribution in commerce of decaBDE for use in curtains in the hospitality industry, and curtains to which decaBDE has been added.

- Providing two years to phase out any processing and distribution in commerce of decaBDE for use in wire and cable insulation in nuclear power generation facilities, and decaBDE-containing wire and cable insulation.

- Providing three years to phase out any manufacture, processing, and distribution in commerce of decaBDE for use in parts installed in and distributed as part of new aerospace vehicles, and parts for such vehicles to which decaBDE has been added.

- Allowing the import, processing, and distribution in commerce of aerospace vehicles manufactured before January 8, 2024, that contain decaBDE in any part, through the end of the aerospace vehicles' service lives.

- Allowing the manufacturing, processing, and distribution in commerce of aerospace vehicles that contain decaBDE in replacement parts and replacement parts to which decaBDE has been added for such vehicles, through the end of the aerospace vehicles' service lives.

- Allowing the manufacturing, processing, and distribution in commerce of motor vehicles the contain decaBDE in replacement parts and replacement parts to which decaBDE has been added, through the end of the motor vehicles' service lives or 2036, whichever is earlier.

- Allowing the distribution in commerce of plastic shipping pallets manufactured prior to March 8, 2021, that contain decaBDE through the end of the plastic shipping pallets' service lives.

- Excluding from the general prohibition on processing and distribution in commerce for recycling

of decaBDE-containing plastic products and articles (*i.e.*, the plastic to be recycled is from products and articles that were originally made with decaBDE), and for decaBDE-containing products or articles made from such recycled plastic, processing and distributing where no new decaBDE is added during the recycling or production process.

For more information related to the 2021 decaBDE final rule, see 40 CFR 751.405.

b. *PIP (3:1)*. EPA published a final rule for PIP (3:1) in the **Federal Register** on January 6, 2021 (Ref. 4). EPA determined in the final rule that PIP (3:1) met the TSCA section 6(h)(1)(A) criteria for expedited action. In addition, EPA determined, in accordance with TSCA section 6(h)(1)(B), that under the conditions of use, exposure to PIP (3:1) was likely to the general population, to a potentially exposed or susceptible subpopulation, and to the environment. The 2021 PIP (3:1) final rule generally prohibited processing and distribution in commerce of PIP (3:1), and products or articles containing PIP (3:1) after March 8, 2021, for all uses, except for those with different compliance dates or exclusions from prohibition. The 2021 PIP (3:1) final rules also included the following compliance dates:

- Allowing until January 6, 2025, for the processing and distributing in commerce of PIP (3:1) for use in adhesives and sealants, PIP (3:1)-containing products for use in adhesives and sealants, and PIP (3:1)-containing adhesives and sealants; and
- Allowing until January 1, 2022, for the processing and distributing in commerce of PIP (3:1) for use in photographic printing articles and PIP (3:1)-containing photographic printing articles.

In addition, the 2021 PIP (3:1) final rule included the following exclusions from the general prohibition:

- Allowing the processing and distribution in commerce of PIP (3:1) and PIP (3:1)-containing products for use in certain types of hydraulic fluids, such PIP (3:1)-containing hydraulic fluids, and the specified systems to which such hydraulic fluid is added;
- Allowing the processing and distribution in commerce of PIP (3:1) for use in lubricants and greases, PIP (3:1)-containing products for use in lubricants and greases, and PIP (3:1)-containing lubricants and greases;
- Allowing the processing and distribution in commerce of PIP (3:1) and PIP (3:1)-containing products for use in new and replacement parts for motor and aerospace vehicles, the new

and replacement parts to which PIP (3:1) has been added for such vehicles, and the motor and aerospace vehicles that contain new and replacement parts to which PIP (3:1) has been added;

- Allowing the processing and distribution in commerce of PIP (3:1) for use as an intermediate in a closed system to produce cyanoacrylate adhesives;
- Allowing the processing and distribution in commerce of PIP (3:1) for use in specialized engine air filters for locomotive and marine applications, PIP (3:1)-containing products for use in specialized engine air filters for locomotive and marine applications, and PIP (3:1)-containing specialized engine air filters for locomotive and marine applications; and
- Allowing for the recycling of plastics that contained PIP (3:1) before the plastic was recycled, and the finished products or articles made of such recycled plastic, so long as no new PIP (3:1) is added during the production or recycling process.

In addition, the final rule required manufacturers, processors, and distributors of PIP (3:1) and products containing PIP (3:1) to notify their customers of these restrictions. Finally, the rule prohibited releases of PIP (3:1) and PIP (3:1)-containing products to water during manufacturing, processing, and distribution in commerce, and required commercial users of PIP (3:1) and PIP (3:1)-containing products to follow existing regulations and best management practices to prevent releases to water during commercial use (40 CFR 751.407(c)). For more information related to the 2021 PIP (3:1) Final Rule, see 40 CFR 751.407.

2. *The March 2021 notification and request for comments.*

Shortly after the publication of the five 2021 PBT final rules, a wide variety of stakeholders from various sectors began raising concerns regarding the March 8, 2021, compliance date for the prohibition on the processing and distributing in commerce of PIP (3:1) for use in articles and PIP (3:1)-containing articles (Ref. 10). These stakeholders contended that they needed significantly more time to identify whether and where PIP (3:1) might be present in articles in their supply chains, find and certify alternative chemicals, and produce or import new articles that do not contain PIP (3:1). During the development of the rule, EPA conducted extensive outreach, including hosting a public webinar to gather use information on the PBTs, holding two comment periods on the Exposure and Use Assessment, and presenting the notice of proposed

rulemaking for the 2021 PBT rules at a Small Business Roundtable hosted by the Small Business Administration (SBA) Office of Advocacy to elicit public comment. EPA met with numerous stakeholders, including trade associations, entities who report PIP (3:1) under the Chemical Data Reporting Rule, and other sectors where PIP (3:1) use was identified. Despite EPA's extensive outreach, most stakeholders that contacted EPA after the rule was finalized had not commented on its proposal or otherwise engaged with the Agency on the PIP (3:1) rulemaking and did not appear to have previously surveyed their supply chains to determine whether PIP (3:1) was being used (Refs. 4, 8, 11, and 12). These stakeholders requested an extension of the compliance dates in order to clear the existing articles through the supply chain, find and certify an alternative chemical, and produce or import new articles that do not contain PIP (3:1).

On March 8, 2021, EPA issued a No Action Assurance memorandum announcing that EPA will exercise its enforcement discretion to not pursue enforcement actions for certain violations of the prohibitions on processing and distribution of PIP (3:1) for use in articles, and the articles to which PIP (3:1) has been added. Such discretion was conditioned on certain recordkeeping requirements and remained in effect until September 4, 2021. The purpose of the discretion was, among other things, "to avoid widespread disruption of critical supply chains, while OCSPP develops a final agency action to ensure the appropriate timeline to prohibit critical complex articles" (Ref. 52).

In accordance with the Executive Order 13990 "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis" and other relevant executive orders, EPA requested additional public comments on the five 2021 PBT final rules. On March 16, 2021, EPA announced its intent to review the five 2021 PBT final rules and requested public comment (EPA-HQ-OPPT-2021-0202). Specifically, EPA sought comment on whether there are further exposure reductions that could be achieved, including exposure reductions for potentially exposed or susceptible subpopulations and the environment; implementation issues associated with the five 2021 PBT final rules; and whether to consider additional or alternative measures or approaches. EPA specifically asked for comment on issues raised regarding the compliance date for the prohibition on the processing and distribution of PIP

(3:1) for use in articles and PIP (3:1)-containing articles, as well as any implementation issues (see Unit III.D.1 for more information).

According to the comments received prior to and in response to the March 2021 notification and request for comments, a wide range of key consumer and commercial goods are affected by the prohibitions in the 2021 PIP (3:1) final rule such as cellular telephones, laptop computers, and other electronic devices and industrial and commercial equipment used in various sectors including transportation, life sciences, and semiconductor production (Ref. 17). These comments are addressed in EPA's September 2021 PIP (3:1) final rule and October 2021 PIP (3:1) proposed rule (Refs. 11 and 12). EPA received a total of 122 comments in response to the March 2021 notification and request for comments, most of which regarded issues pertaining to PIP (3:1) (Ref. 17).

In addition, several comments received raised issues pertaining to decaBDE. Tribal government commenters recommended further regulation of decaBDE, including narrowing the replacement part exclusion to time-limited critical uses, addressing potential risks from releases to the environment, restricting the disposal of decaBDE and decaBDE-containing products and articles, and addressing potential risks from occupational exposure (EPA-HQ-OPPT-2021-0202). EPA also received a comment requesting the Agency hold a government-to-government consultation with the Yurok Tribal Council (Ref. 26). In November 2022, EPA held a one-on-one tribal consultation with the Yurok Tribal Council. During this consultation, the Agency received additional information that informed the Agency of considerations to reduce potential exposures to decaBDE, including labeling and a prohibition on the releases to water, see Units III.C.1. and III.C.3. for more information. EPA received no comments addressing the need for extensions to compliance dates for decaBDE.

3. *PIP (3:1) compliance date extensions.*

Based on the PIP (3:1)-specific comments received in response to the March 2021 notification and request for comments, EPA issued an immediately effective final rule in September 2021, which extended the compliance dates applicable to the processing and distribution in commerce of certain PIP (3:1)-containing articles and the PIP (3:1) used to make those articles, until March 8, 2022, along with the associated recordkeeping requirements

for manufacturers, processors, and distributors of PIP (3:1)-containing articles (Ref. 11). While most commenters on the March 2021 notification and request for comments requested a longer-term compliance date extension (Ref. 8), EPA determined that a short-term extension was necessary to ensure that the supply chains for these important articles continue uninterrupted in the near term while allowing EPA to conduct notice and comment rulemaking on a longer-term compliance date extension generally.

On March 8, 2022, EPA further extended the compliance deadline established in the September 2021 final rule for the processing and distribution in commerce of PIP (3:1) for use in certain articles and for the processing and distribution in commerce of certain PIP (3:1)-containing articles, from March 8, 2022, to October 31, 2024 (Ref. 13). The compliance date for the recordkeeping requirements for manufacturers, processors, and distributors of PIP (3:1)-containing articles was also extended from March 8, 2022, to October 31, 2024. Articles covered by the phased-in prohibition include any article not otherwise covered by an alternative compliance deadline or exclusion described in 40 CFR 751.407(a)(2)(ii) or (b). EPA reasoned that this further extension would avoid significant disruption in the supply chains for certain articles and would provide the public with regulatory certainty, while EPA determined whether any further compliance date extensions are necessary.

4. *Activities not regulated by this proposed rule.*

EPA is not proposing revisions to the other three PBT rules issued under TSCA section 6(h) for 2,4,6-TTBP, HCBP, and PCTP at this time. EPA is not moving forward with reconsideration of the other three final rules at this time. Due to resource constraints and competing statutory obligations elsewhere in the existing chemicals risk management program, EPA is only proposing amendments to 40 CFR part 751, subpart E for the decaBDE and PIP (3:1) regulations at this time.

B. *EPA's Implementation of TSCA Section 6(h)*

1. *EPA's TSCA section 6(h)(1) findings.*

As previously detailed in the 2021 decaBDE and PIP (3:1) final rules, for chemical substances meeting the requirements of TSCA section 6(h)(1)(A) and (B), TSCA section 6(h)(4) required EPA to issue a final TSCA section 6(a)

rule to "address the risks of injury to health or the environment that the Administrator determines are presented by the chemical substance and reduce exposure to the substance to the extent practicable." EPA made the requisite TSCA section 6(h)(1)(A) and (B) findings for decaBDE and PIP (3:1), triggering the requirement for a TSCA section 6(a) rulemaking under TSCA section 6(h)(4) standard. This proposed rulemaking does not amend these findings.

2. *EPA's approach to TSCA section 6(h)(4).*

In the 2021 PBT final rules, EPA explained that it read the TSCA section 6(h)(4) standard to apply to the chemical substance generally, thus requiring EPA to "address risks" and "reduce exposures" to the chemical substance without focusing on how or whether the measure taken is specific to an activity that might be characterized as a "condition of use" as that term is defined in TSCA section 3(4). Thus, the 2021 final rules address past, present, and future activity involving the chemical substance. In the 2021 PBT final rules, EPA also explained that because there was no existing risk evaluation or assessment for each chemical substance and one was not contemplated by TSCA section 6(h), EPA's implementation of the standard in TSCA section 6(h)(4) focused on applying the TSCA sections 6(a) and (c) requirements in a manner that reduces exposure to the chemical substance to the extent practicable. This proposed rulemaking does not amend these interpretations or EPA's approach for implementing TSCA section 6(h)(4). Rather, this rulemaking is intended to identify further opportunities to reduce risk to the substances to the extent practicable based on additional available information received in the comments to EPA's 2021 request for comment.

As demonstrated by the number of distinct programs addressed in this rulemaking and the structure of this proposed rule in addressing them independently, EPA generally intends the rule's provisions to be severable from each other. EPA expects to provide additional detail on severability in the final rule once the Agency has considered public comments and finalized the regulatory language.

3. *EPA's interpretation of "to the extent practicable" as used in TSCA section 6(h)(4).*

EPA is not changing the general interpretation of the term "practicable" as discussed in the five 2021 PBT final rules (86 FR 866, 86 FR 880, 86 FR 922, 86 FR 894, and 86 FR 911). As

explained in that rulemaking, TSCA section 6(h)(4) provides that EPA shall: (1) “Address the risks of injury to health or the environment that the Administrator determines are presented by the chemical substance” and (2) “reduce exposure to the substance to the extent practicable” which EPA reads to apply generally to the chemical and any potential for exposures within TSCA jurisdiction. With respect to the first requirement, EPA explained that the TSCA section 6(h) standard is distinct from the “unreasonable risk” standard for all other chemicals for which a section 6(a) rule might be issued. However, the phrase is not defined in the statute and there is no legislative history to explain what Congress intended with this text in section 6(h)(4). Given the ambiguity of this text, EPA further noted that it had considered the relevance of other provisions in the statute, *e.g.*, TSCA section 6(c) and concepts in TSCA section 6(g), and, as discussed in the response to comment document for the 2021 PBT Final rules, interprets “reduce exposures to the extent practicable” to consider such factors as “achievability, feasibility, workability and reasonableness,” consistent with dictionary definitions.” Thus, EPA noted that “[w]hether a regulatory option is achievable, feasible, workable, and reasonable inherently takes into consideration circumstances, such as the economic burden and complexities with an option, the utility of the chemical, and whether there are technically and economically feasible alternatives available for the chemical.” EPA further explained that its approach is consistent with dictionary definitions of the term “practicable” which inherently includes considerations outlined in TSCA section 6(c)(2) and 6(g), such as health effects, magnitude of exposure, and the relative costs and benefits of the action.

This interpretation of “to the extent practicable” for purposes of TSCA section 6(h)(4) is not amended. The application of this interpretation was informed by what the Agency could consider during an expedited rulemaking process and the body of information available to determine whether a prohibition would be practicable. EPA has collected additional information and reconsidered its application of this interpretation, focusing particularly on whether additional practicable requirements can reduce occupational exposures, including those associated with previously broadly-stated exclusions.

4. EPA's position on directly regulating occupational exposures.

EPA did not use its TSCA section 6(a) authorities to directly regulate occupational exposures in the 2021 decaBDE or PIP (3:1) final rules. As a matter of policy at that time, EPA assumed compliance with federal and state requirements, such as worker protection standards, unless case-specific facts indicated otherwise. For example, the Occupational Safety and Health Administration (OSHA) has not established a permissible exposure limit (PEL) for decaBDE and PIP (3:1). However, EPA assumed that employers would require, and workers would use, appropriate PPE consistent with general OSHA standards, considering employer-based assessments, in a manner sufficient to prevent occupational exposures that are capable of causing injury. EPA also stated that given the time allotted for the TSCA section 6(h) rulemakings and that no risk evaluation or assessment was required or feasible in the time available under the statute, EPA could not identify additional engineering or process controls or PPE requirements that would be appropriate to each chemical-specific circumstance, and that imposing such measures without sufficient analysis could inadvertently result in conflicting or confusing requirements and make it difficult for employers to understand their obligations. For these reasons, EPA determined that it was not practicable to regulate worker exposures in the 2021 rules through engineering or process controls or PPE requirements. However, due to an increased focus on worker safety and a change in EPA's assumptions regarding the use of worker protection measures such as PPE, the Agency is reconsidering the practicability of requiring worker protections.

For purposes of determining whether worker protection measures are practicable under TSCA section 6(h)(4), EPA no longer believes it is appropriate to assume as a general matter that an applicable OSHA requirement or industry practice is consistently or always properly applied. This change in assumption should not be viewed as an indication that the Agency believes there are no occupational safety protections in place at any location, or that there is widespread noncompliance with applicable OSHA standards. Rather, it reflects the Agency's recognition that its interpretation of the TSCA section 6(h)(4) standard “to reduce exposure . . . to the extent practicable” calls for worker protection measures to reduce the potential for exposure to PBTs generally, considering what is achievable, feasible, workable,

and reasonable, in light of the circumstances. This is the case even in the absence of a risk evaluation or risk assessment and even if existing OSHA requirements might apply, such as those under the General Duty Clause of the Occupational Safety and Health Act (29 U.S.C. 654(a)) or OSHA's Respiratory Protection standard (29 CFR 1910.134).

However, TSCA section 9(d) requires EPA to consult and coordinate TSCA activities with OSHA and other relevant Federal agencies for the purpose of achieving the maximum applicability of TSCA while avoiding the imposition of duplicative requirements. OSHA requires that employers provide safe and healthful working conditions through enforcement of the General Duty Clause and by setting and enforcing occupational safety and health standards under 29 U.S.C. 655. OSHA also provides training, outreach, education, and assistance. Where EPA has reason to believe that there might be the potential for exposure to workers to decaBDE and PIP (3:1), the Agency considers it practicable to require worker protections in addition to applicable OSHA regulations (*e.g.*, fit testing and training requirements). To determine what worker protections measures are practicable, the Agency reconsidered the reasonably available information on the use of industry worker protection measures, including best practices, and considered new information received after the 2021 PBT final rules gathered during engagements with industry stakeholders and from the March 2021 notification and request for public comment period to propose these requirements (Ref. 18). This information was used to inform the proposed requirements for inhalation and dermal PPE to reduce worker exposure to decaBDE and PIP (3:1).

EPA also considered the National Institute for Occupational Safety and Health (NIOSH) hierarchy of controls (*i.e.*, prioritization of exposure control strategies from most protective and preferred to least protective and preferred techniques). In order of precedence, this hierarchy of controls includes elimination of the hazard, substitution with a less hazardous substance, engineering controls, administrative controls (*e.g.*, training or exclusion zones with warning signs), and, finally, use of PPE (Ref. 19). Under the hierarchy of controls, the use of respirators should only be considered after all other measures have been taken to reduce exposures, and then under the context of the OSHA Respiratory Protection Standard at 29 CFR 1910.134. Under OSHA's standards, the various exposure controls are prioritized

equally, followed by PPE requirements when necessary. When formulating the proposed worker protection requirements on the limited time allotted for the TSCA section 6(h) rulemakings, no risk evaluation or assessment was required or feasible and an already existing risk assessment was not available to support calculation of safe exposure levels for these two chemicals, which would be necessary for EPA to establish a workplace chemical protection program. Thus, EPA is proposing specific engineering controls and PPE for one industry sector, specifically, the use of PIP (3:1) as an intermediate in cyanoacrylate adhesives in which the Agency had additional information about existing practice. EPA is requesting comment on the practicability of worker protection measures that are higher in the hierarchy of controls (e.g., engineering, and administrative controls) due to the lack of existing available information.

C. Overview of TSCA Sections 6(c) and 26 Considerations

Unless explicitly stated, the following overview is meant to be a summary of information previously provided by EPA in the 2021 decaBDE and PIP (3:1) final rules regarding TSCA sections 6(c) and 26 considerations. It is not intended to serve as a new proposal of findings under or interpretations of TSCA section 6(h)(4).

1. TSCA section 6(c)(2) considerations.

TSCA section 6(c)(2) requires EPA to consider and publish a statement based on reasonably available information with respect to the:

- Health effects of the chemical substance(s) or mixture(s) and the magnitude of human exposure;
- Environmental effects of the chemical substance(s) or mixture(s) and the magnitude of exposure to the environment;
- Benefits of the chemical substance(s) or mixture(s) for various uses; and
- Reasonably ascertainable economic consequences of the rule, including: the likely effect of the rule on the national economy, small business, technological innovation, the environment, and public health; the costs and benefits of the proposed and final rule and of the one or more primary alternative regulatory actions that EPA considered; and cost effectiveness of the proposed rule and of the one or more primary alternative regulatory actions that the Agency considered.

In selecting among prohibitions and other restrictions available under TSCA section 6(a), EPA must factor in, to the

extent practicable, these considerations. Further, in deciding whether to prohibit or restrict the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture in a manner that substantially prevents a specific condition of use of a chemical substance or mixture, and in setting an appropriate transition period for such action, EPA must consider, to the extent practicable, whether technically and economically feasible alternatives that benefit health or the environment would be reasonably available as a substitute when the proposed prohibition or other restriction takes effect.

EPA's summary of the health and environmental effects of and the potential for exposure to the two PBT chemicals subject to this proposed action can be found in the 2021 PBT final rules for each chemical, the support documents for those final rules (e.g., the Exposure and Use Assessment (Ref. 16) and the Hazard Summary (Ref. 20)).

The costs and benefits of this proposal and the alternatives EPA considered, as well as the impacts on small businesses, are presented in the economic analysis document (Ref. 14). However, the Agency was not able to quantitatively estimate the benefits of this proposal and the alternatives, due to the absence of a risk evaluation, and has instead qualitatively described such benefits. EPA requests comment on all aspects of the benefits attributable to these proposed regulations.

EPA considered the estimated costs to regulated entities, as well as the cost to administer and enforce the options. EPA considered reasonably available information about the functionality and performance efficacy of the regulatory options and the ability to implement the use of chemical substitutes or other alternatives. A discussion of the costs EPA considered can be found in Unit IV., along with a discussion of the alternatives that the Agency considered. A discussion of the impacts on small businesses can also be found in Unit IV.

With respect to the cost-effectiveness of this proposed regulatory action, EPA is unable to perform a traditional cost-effectiveness analysis of the options and alternative options for decaBDE and PIP (3:1). The cost-effectiveness of a policy option would properly be calculated by dividing the annualized costs of the option by a final outcome, such as cancer cases avoided, or to intermediate outputs, such as tons of emissions of a pollutant curtailed. Without the supporting analyses from an existing risk evaluation or assessment, the Agency is unable to calculate either a

health-based or environment-based denominator. Thus, EPA is unable to perform a quantitative cost-effectiveness analysis of the regulatory action. However, by evaluating the practicability of the policy options, the Agency believes that it has considered elements related to the cost-effectiveness of the actions, including the cost and the effect on human and environmental exposure to decaBDE and PIP (3:1).

2. TSCA section 26(h) considerations.

In accordance with TSCA section 26(h) and considering the requirements of TSCA section 6(h), EPA used scientific information, technical procedures, measures, and methodologies that are fit for purpose and consistent with the best available science to inform the 2021 PBT final rules. EPA based its determination that human and environmental exposures to both decaBDE and PIP (3:1) are likely in its 2020 Exposure and Use Assessment (Ref. 16), which underwent a peer review and public comment process, and used best available science and methods sufficient to make that determination. The extent to which the various information, procedures, measures, and methodologies, as applicable, used in the Agency's decision-making have been subject to independent verification or peer review is adequate to justify their use, collectively, in the record for this proposed rule. In addition, in accordance with TSCA section 26(i), and considering the requirements of TSCA section 6(h), EPA has made scientific decisions based on the weight of the scientific evidence.

D. Overview, Health Effects, and Exposure

For the 2019 PBT proposed rule, EPA prepared an Exposure and Use Document, summarizing the information the Agency obtained in its own research or in response to feedback prior to and during the rulemaking process on the types of exposures that might be relevant to a TSCA section 6(a) rulemaking under the TSCA section 6(h)(4) standard. As noted in the 2021 PBT final rules, the Exposure and Use Assessment identified the types of exposures that could occur, but such information was not intended to identify "conditions of use." As EPA explained in the 2021 PBT final rules, the Agency did not perform a systematic review or a weight of the scientific evidence assessment for the hazard characterization of these chemicals. As a result, EPA explained that the hazard characterizations are not definitive or comprehensive. Other hazard

information on these chemicals may exist in addition to the description in the 2021 PBT final rules and studies summarized in the Hazard Summary (Ref. 20). The following sections summarize the hazard and Exposure and Use information in the 2021 decaBDE and PIP (3:1) final rules.

1. *DecaBDE*.

As EPA explained in the 2021 decaBDE final rule, decaBDE is used as an additive flame retardant in plastic enclosures for televisions, computers, audio and video equipment; textiles and upholstered articles; wire and cables for communication and electronic equipment; and other applications (Ref. 21). DecaBDE is also used as a flame retardant for multiple applications for aerospace and automotive vehicles, including replacement parts for aircraft and cars (Refs. 22 and 23). Exposure information for decaBDE is detailed in EPA's Exposure and Use Assessment and the 2021 decaBDE final rule (Refs. 3 and 16). As EPA explained in that rule, there is potential for exposure to decaBDE under the conditions of use at all stages of its lifecycle (*i.e.*, manufacturing, processing, distribution in commerce, use [industrial, commercial, and consumer], and disposal) of the chemical. DecaBDE was produced and released at higher levels in the past, but releases from manufacturing and processing activities have declined over time, as are releases associated with use, disposal, and recycling activities (Ref. 16). This decline is in part due to a voluntary phase out by the largest producers and suppliers of decaBDE in the United States, that committed to end their production, imports, and sales for all uses of decaBDE by the end of 2013 (Ref. 14).

As described in the 2021 decaBDE final rule, exposure assessments on decaBDE have been conducted by EPA (including industry-supplied information as part of the Voluntary Children's Chemical Evaluation Program), the National Academy of Sciences, and international governments. These assessments describe exposure potential for polybrominated diphenyl ethers (PBDEs), including decaBDE, through a variety of pathways. Adult and child exposures can occur via dust ingestion, dermal contact with dust, and dietary exposures (such as dairy consumption). Household consumer products have been identified as the main source of PBDEs (including decaBDE) in house dust. The next highest exposure pathways included dairy ingestion and inhalation of indoor air (via dust). Infant and child exposures can occur via

breastmilk ingestion and mouthing of hard plastic toys and fabrics. Occupational exposures for breastfeeding women were highest in women engaged in activities resulting in direct dermal and inhalation contact with decaBDE (Ref. 16).

Finally, as summarized in the 2021 decaBDE final rule, decaBDE is toxic to aquatic invertebrates, fish, and terrestrial invertebrates. Data indicate the potential for developmental, neurological, and immunological effects, general developmental toxicity, and liver effects in mammals. There is some evidence of genotoxicity and carcinogenicity. The 2021 decaBDE final rule and Hazard Summary provide more information on these hazardous endpoints (Ref. 20).

For the 2020 Chemical Data Reporting (CDR) submission period, calendar years 2016–2019, data indicate that three companies manufactured (including imported) decaBDE in the United States (Refs. 14 and 24). The 2020 CDR data indicate a production volume of less than 1 million pounds annually from 2016 thru 2019, however, EPA notes that domestic production has ceased, and the identified importers have likely since stopped using decaBDE (Ref. 24).

2. *PIP (3:1)*.

As explained in the 2021 PBT final rules, PIP (3:1) is used as a plasticizer, a flame retardant, an anti-wear additive, or an anti-compressibility additive in hydraulic fluid, lubricating oils, lubricants, greases, various industrial coatings, adhesives, sealants, and plastic articles. As a chemical that can perform several functions simultaneously, sometimes under extreme conditions, it has several distinctive applications. For example, in lubricating oils, PIP (3:1) is a flame retardant, anti-wear additive, anti-compressibility additive, or some combination of the three. In adhesives and sealants, PIP (3:1) is a plasticizer and flame retardant (Ref. 16). PIP (3:1) is also added to paints, coatings, and plastic components, where it is a plasticizer or flame-retardant additive. In the past, some plastic components to which PIP (3:1) may have been added included those intended for use by children. EPA has received comments that PIP (3:1) acts as a flame-retardant gel in filters surrounding engines in some marine and locomotive applications (EPA–HQ–OPPT–2019–0080–0569).

Exposure information for PIP (3:1) is detailed in EPA's Exposure and Use Assessment and is summarized here (Ref. 16). There is potential for exposure to PIP (3:1) under the conditions of use at all stages of its lifecycle (*i.e.*, manufacturing, processing, distribution

in commerce, use [industrial, commercial, and consumer], and disposal). PIP (3:1) is manufactured, processed, distributed, and used domestically. For the 2012 CDR submission period, data indicate that four sites manufactured (including imported) PIP (3:1) in the United States. The total volume of PIP (3:1) manufactured (including imported) in the United States was 14,904,236 lbs. in 2011; 3,191,017 lbs. in 2012; 2,968,861 lbs. in 2013; 5,632,272 lbs. in 2014; and 5,951,318 in 2015 (Ref. 24). For the 2020 CDR submission period, calendar years 2016–2019, data indicate that nine sites manufactured (including imported) PIP (3:1) in the United States and manufacture (including import) held steady at between 1 and 10 million pounds (Refs. 14 and 24). The total volume of PIP (3:1) manufactured (including imported) in the United States was 14,904,236 lbs. in 2011; 3,191,017 lbs. in 2012; 2,968,861 lbs. in 2013; 5,632,272 lbs. in 2014; and 5,951,318 in 2015 (Ref. 24).

PIP (3:1) is toxic to aquatic plants, aquatic invertebrates, sediment invertebrates, and fish. Data indicate the potential for reproductive and developmental effects, neurological effects, and effects on systemic organs, specifically the adrenal glands, liver, ovaries, and heart in mammals. The studies presented in the 2019 Hazard Summary, titled “Environmental and Human Health Hazards of Five Persistent, Bioaccumulative and Toxic Chemicals,” describe these hazardous endpoints (Ref. 25).

III. Proposed Regulatory and Alternative Regulatory Actions

A. *Regulatory Approach*

In this action, EPA is proposing revisions to the 2021 decaBDE final rule and the 2021 and 2022 PIP (3:1) final rules. EPA has collected additional information and reconsidered its application of its interpretation of the TSCA section 6(h)(4) direction that the Agency “reduce exposures to the substance to the extent practicable,” focusing particularly on whether additional practicable requirements can reduce occupational exposures (see Unit II.B.3. and Unit II.B.4. for additional details), including those associated with exclusions. As described throughout this Unit, EPA has considered the practicability of the proposed and alternative regulatory actions. EPA considered how potential restrictions on the use of PIP (3:1) and decaBDE and the compliance timeframes associated with certain actions could impact supply chains, including those

prioritized in Executive Order 14017 America's Supply Chains.

B. Activities EPA Did Not Reevaluate for This Rulemaking

As explained in the 2021 decaBDE and PIP (3:1) final rules, at this time, EPA is not proposing to use its TSCA section 6(a) authorities to regulate all activities or exposures to decaBDE and PIP (3:1), although its Exposure and Use Assessment identified potential for exposures (Ref. 16). One such activity is disposal. As described in the 2021 PBT rulemakings, regulations promulgated under the authority of the Resource Conservation and Recovery Act (RCRA) govern the disposal of hazardous and non-hazardous wastes. Although decaBDE and PIP (3:1) are not listed or characteristic hazardous wastes under RCRA, they are subject to the requirements applicable to solid waste under Subtitle D of RCRA. This means there is a general prohibition on open dumping, which includes a prohibition on open burning (e.g. the subtitle D ban on open dumping is at 42 U.S.C. 6945). Wastes containing chemicals that do not otherwise meet the criteria for hazardous waste would be disposed of in municipal solid waste landfills (MSWLFs), industrial nonhazardous landfills, or, in a few instances, construction/demolition landfills. Non-hazardous solid waste is regulated under Subtitle D of RCRA, and states play a lead role in ensuring that the federal requirements are met (see 40 CFR part 239). The requirements for MSWLFs are discussed in further detail in the 2021 PBT final rules. In those rules, EPA also explained that establishing an entirely new disposal program for decaBDE-containing and PIP (3:1)-containing wastes would be not practicable. Both 2021 decaBDE and PIP (3:1) final rules discuss how this type of program would be difficult to establish and administer, as well as costly. In addition, treating these wastes in a manner similar to wastes listed as hazardous wastes would have impacts on hazardous waste treatment and disposal capacity and have resource impacts for states and local governments, as well as for affected industries (Refs. 3 and 4). Taking this into account, EPA did not reevaluate the practicability of further exposure reductions relating to disposal of decaBDE and PIP (3:1), as well as decaBDE- and PIP (3:1)-containing wastes.

As also explained in the 2021 PBT final rules, EPA did not propose regulations relating to commercial use of products and articles containing the PBT chemicals, such as televisions and

computers, because such regulation would both require testing, which may not be commercially available for a chemical, and be extremely burdensome, necessitating the development of a test method to allow for the identification of products containing PBT chemicals, including decaBDE and PIP (3:1), and the disposal of countless products and articles that would have to be replaced. If EPA prohibited the continued commercial use of these items, widespread economic impacts, and disruption in channels of trade could occur while the prohibited items were identified and replaced. EPA also acknowledged, based on additional information provided by industry stakeholders after the 2021 PIP (3:1) final rule, that international supply chains are complex, and that complexity creates challenges for identifying and finding alternatives to PIP (3:1) in international supply chains. Taking this into account, EPA did not reevaluate the practicability of further exposure reductions relating to continued commercial use of products and articles containing decaBDE and PIP (3:1) at this time.

Finally, in the 2021 PBT final rules, EPA explained that it did not propose to use its TSCA section 6(a) authorities to restrict recycling activities generally. EPA explained that it recognized the importance and impact of recycling, which contributes to the protection of our environment, and that it would be overly burdensome and not practicable to impose restrictions on the recycling of plastics that may contain decaBDE or PIP (3:1), or on the use of such recycled plastic in plastic articles. EPA also explained that decaBDE and PIP (3:1), if present, are typically present in such articles at low levels and that banning the recycling of plastics containing decaBDE or PIP (3:1) would require decaBDE- and PIP (3:1)-containing plastic to be identified through prohibitively expensive and complicated testing, and separated from other types of plastic before recycling, which is usually done manually (Ref. 27). EPA concluded that it would be difficult to make plastic sorting for this purpose cost-effective, and that it would be overly burdensome and not practicable to prohibit recycling of decaBDE- and PIP (3:1)-containing plastic in the United States. Taking this into account, EPA did not reevaluate the practicability of further exposure reductions relating to a prohibition of, or further regulatory restrictions on, the general recycling of decaBDE- and PIP (3:1)-containing plastic in the United States at this time. As noted in Unit

III.C., the one exception relates to the 2021 decaBDE final rule authorization for the continued recycling and distribution in commerce of existing plastic shipping pallets already known to contain decaBDE for the extent of the pallets' service life because EPA believes it is practicable to regulate when the expensive testing is not necessary to determine the chemical's presence in the article.

C. DecaBDE—Proposed Revisions to 40 CFR 751.405

1. Require a label on existing plastic shipping pallets that contain decaBDE.

a. Description of the proposed regulatory action. EPA is proposing to require a label on existing plastic shipping pallets that contain decaBDE. As mentioned in Unit II.A., after holding an additional tribal consultation, EPA received comments requesting the Agency to label plastics that contain decaBDE (Ref. 28). New plastic shipping pallets containing newly added decaBDE are prohibited under the 2021 decaBDE final rule (40 CFR 751.405(b)). EPA determined it is practicable to label existing plastic shipping pallets containing decaBDE because all plastic shipping pallets are owned by a single company, and such company is aware of and tracks, as part of normal business operations, each decaBDE-containing plastic shipping pallet. No new decaBDE has been added to the company's plastic shipping pallets since 2012 (Ref. 23). EPA is not proposing additional testing requirements to determine if decaBDE is present in the plastic shipping pallets.

The proposed label would provide notice to workers that PPE is required to be worn during recycling, refurbishing, or processing of existing plastic shipping pallets that contain decaBDE, which would reduce potential exposures to decaBDE, see Unit III.C.2 for more information on specific PPE requirements. EPA is proposing that the label must be securely attached to the plastic shipping pallet that is known to contain decaBDE and is requesting comment on whether the labels should be required to be available in multiple languages if necessary (e.g., notice would be in a language that the potentially exposed person understands, including a non-English language version representing the language(s) of the largest group(s) of workers who cannot readily comprehend or read English). EPA understands that the company typically attaches a label when it has possession of a plastic pallet in its inventory (i.e., after a pallet is returned from being rented out) as part of normal business practice. EPA is proposing that

the labeling information must show clearly, prominently, and in an easily readable font size, the following text: “This pallet contains decabromodiphenyl ether (decaBDE) (CASRN 1163–19–5), a chemical that has been identified as persistent, bioaccumulative, and toxic (PBT) by the U.S. Environmental Protection Agency. All persons who recycle or process this pallet are required to wear personal protective equipment, per regulations at 40 CFR 751.405(e). The use of decaBDE is restricted under 40 CFR 751.405: All persons are prohibited from all manufacturing (including importing), processing, or distribution in commerce of decaBDE or decaBDE-containing products or articles, except for select uses, including those for plastic shipping pallets at 40 CFR 751.405(a)(2)(v) and (b). After the end of the pallets’ service life, all persons are prohibited from all distribution in commerce of plastic shipping pallets that contain decaBDE and were manufactured prior to March 8, 2021.” EPA is requesting comment on the practicability of the proposed label and the language EPA has proposed to require on each label.

b. *Description of the primary alternative regulatory option considered.* As a primary alternative regulatory option, EPA considered requiring a label on all recycled plastic articles that may contain decaBDE to aid in directions for worker protections. EPA considered this option because of a government-to-government consultation with the Yurok Tribal Council and comments received after this consultation (Ref. 28). However, EPA considered it would not be practicable to label all recycled plastic articles that may contain decaBDE (*e.g.*, replacement parts for aerospace or motor vehicles). As mentioned in Unit II.D., domestic manufacture of decaBDE has ceased; however, decaBDE-containing articles may still be imported into the United States. Although decaBDE’s use has been largely phased out, the Truck and Engine Manufacturers Association (EMA), in comments on the 2019 proposed PBT rule, cautioned EPA that their member manufacturers’ supply chains are very complex, and chemicals may be introduced into a part “as many as seven layers deep into the supply chain” (Ref. 29). Due to the complexity of supply chains, it is difficult to identify whether and where decaBDE is added in an article, hence making it difficult to determine where a label would be attached.

2. *Require use of PPE for certain activities involving decaBDE.*

a. *Description of the proposed regulatory action.* To ensure minimal potential for exposure to workers during domestic manufacturing and processing of decaBDE and decaBDE-containing products and articles, EPA is broadly proposing certain PPE requirements to address potential respiratory and dermal exposure to occupational workers during permitted ongoing activities involving decaBDE, with several proposed exclusions, including those which are being phased out. Due to the broad prohibition on manufacturing and processing in the 2021 decaBDE final rule and that several permitted uses will be phased out before rule finalization, the proposed protections would generally be required for certain ongoing uses listed at 40 CFR 751.405(a)(2) and 751.405(b).

For recycling activities, EPA is proposing to require respiratory and dermal PPE, NIOSH-approved N95 respirator with an assigned protection factor (APF) of 10 and gloves that are chemically resistant to decaBDE, only during the recycling process of plastic shipping pallets that are known to contain decaBDE. After EPA considered additional information on industry use of PPE, the Agency concluded that it is practicable to require PPE during the manufacturing and processing of certain decaBDE and decaBDE-containing products and articles. EPA believes based on comments that it is practicable to require PPE for the processing of existing plastic shipping pallets because it is already industry practice (Ref. 23). For other all other recycling activities, due to the difficulty in identifying whether and where decaBDE is present in an article, EPA maintains that it would be impracticable to establish a testing program to determine if decaBDE is present.

EPA is not proposing to require PPE for processing of decaBDE-containing wire and cable for use in nuclear power generation facilities, the processing of new and replacement parts to which decaBDE has been added for motor and aerospace vehicles, and the motor and aerospace vehicles that contain new and replacement parts to which decaBDE has been added. This is because the Agency believes the processing of these articles would result in minimal potential for worker exposure because, once formulated, decaBDE is encased in the cured coating and the potential for worker exposure is minimal (Ref. 16). EPA is also not proposing to require PPE for distribution in commerce of decaBDE or decaBDE-containing products or articles, since the distribution in commerce of these decaBDE-containing products or articles

would result in minimal potential for exposure. Lastly, because EPA generally believes the potential for exposure is low during importation, the Agency is not proposing to require worker protections for import of decaBDE and decaBDE-containing products and articles. Addressing such minimal potential for exposure through worker protections would not be practicable considering the additional costs and resource burdens (Ref. 16).

For the activities subject to the proposed PPE requirements and to reduce potential occupational exposure during the recycling process of plastic shipping pallets known to contain decaBDE, EPA is proposing to require, at a minimum, a NIOSH-approved N95 respirator with an assigned protection factor (APF) of 10 and gloves that are chemically resistant to decaBDE with activity-specific training where dermal contact with decaBDE is possible.

EPA is proposing to require implementation of a PPE program in alignment with certain elements of OSHA’s General Requirements for PPE at 29 CFR 1910.132 and Respiratory Protection requirements in 29 CFR 1910.134. EPA is proposing to require that owners and operators ensure that each potentially exposed person who is required to wear PPE use and maintain PPE in a sanitary, reliable, and undamaged condition. Owners and operators would be required to select and provide PPE that properly fits each potentially exposed person who is required to use PPE. For N95 respirators with an APF 10, EPA is proposing that the owner or operator must ensure that all respirators used in the workplace are NIOSH-approved as listed on the NIOSH Certified Equipment List (Refs. 30 and 31). In choosing appropriate gloves, EPA expects owners and operators would consider the effectiveness of the glove type when preventing exposures from decaBDE alone, and in likely combination with other chemical substances used in the work area, the degree of dexterity required to perform tasks, and the temperature, as identified in the Hand Protection section of OSHA’s PPE guidance (Ref. 32). Owners and operators would also be required to communicate PPE selections (*e.g.*, demonstration that each item of PPE selected prevents exposure during expected duration and conditions of exposure) to each affected person.

EPA is proposing to require each owner or operator to comply with OSHA’s general PPE training requirements at 29 CFR 1910.132(f) when using respirators and gloves. EPA is proposing that owners and operators

provide PPE training to each potentially exposed person who is required to wear PPE prior to or at the time of initial assignment to a job involving potential exposure to decaBDE.

EPA is also proposing to require implementation of a respiratory protection program in alignment with 29 CFR 1910.134(a) through (l), which requires each owner or operator to select respiratory protection in accordance with the guidelines for proper respirator use, maintenance, fit-testing, medical evaluation, and training. EPA is also proposing that owners or operators who would be required to administer a respiratory protection program be required to supply a respirator selected in accordance with 29 CFR 1910.134(d)(1).

EPA proposes to require that owners and operators document respiratory protection used and PPE program implementation and retain those records for five years. EPA proposes to require that owners and operators document and keep records of the following information on the PPE program, as applicable, and make it available to the Agency upon request:

(A) The name, workplace address, work shift, job classification, and work area of each person reasonably likely to directly handle decaBDE or handle equipment or materials on which decaBDE may be present and the type of PPE selected to be worn by each of these persons;

(B) The basis for PPE selection (*e.g.*, demonstration based on permeation testing or manufacturer specifications that each item of PPE selected provides an impervious barrier to prevent exposure during expected duration and conditions of exposure, including the likely combinations of chemical substances to which the PPE may be exposed in the work area); and

(C) Documentation that the selection appropriately sized PPE and training on proper application, wear, and removal of PPE, and proper care/disposal of PPE occurred.

EPA is proposing to require that each owner or operator supply PPE, selected in accordance with 40 CFR 751.405(e), to each potentially exposed person within 60 days after publication of the final rule.

b. *Description of the primary alternative regulatory option considered.* As a primary alternative regulatory option, EPA considered requiring respiratory and dermal PPE during all recycling processes of decaBDE-containing plastic products and articles. However, as stated in Unit III.B. and in the 2021 PBT final rules, EPA did not propose to use its TSCA

section 6(a) authorities to restrict recycling activities generally. EPA did not reevaluate the practicability of further exposure reductions relating to prohibiting, or further regulatory restrictions on, the general recycling of decaBDE-containing plastic in the United States. As mentioned in the 2021 response to comment document, in order to determine if decaBDE is present in plastics at recycling facilities, a testing program would need to be established (Ref. 33). EPA further explained that that it would also be difficult to make plastic sorting for this purpose cost-effective, and that it would be overly burdensome and not practicable to prohibit recycling of decaBDE-containing plastic in the United States. EPA continues to expect, as mentioned in the 2021 response to comment document, that the amount of recycled plastic that contains decaBDE from recycled plastic to decline due to compliance with the prohibitions in the 2021 decaBDE final rule and as substitute flame retardants replace existing products that contained decaBDE (Ref. 33).

3. *Prohibit the release to water.*

EPA is proposing to prohibit the releases to water during the manufacturing, processing, and distribution in commerce of decaBDE, decaBDE-containing products, and all persons are required to follow any regulations that may apply and best management practices for preventing the release of decaBDE to water. Applicable regulations related this proposed prohibition on releases to water may include restrictions on discharges under the Federal Water Pollution Control Act (commonly known as the CWA)), Safe Drinking Water Act (SDWA), or analogous State laws. As mentioned in Unit II.A., after holding an additional tribal consultation, EPA received comments requesting the Agency prohibit releases of decaBDE to water (Ref. 28). Although EPA is aware of studies showing decaBDE in surface water, there have been no reported releases to water to the Toxics Release Inventory (TRI) since 2012 (Ref. 34). After reconsidering the practicability of prohibiting releases to water due to the tribe's comments, and the potential for releases to water, even though there are no reported such releases, EPA is proposing to prohibit the release to water to prevent any potential future releases of decaBDE and protect exposed populations (*e.g.*, subsistent fishers) (Ref. 16). EPA is requesting comments on additional details of how a prohibition on releases to water could best be achieved through best management practices, such as

engineering controls, process changes, work practices, emergency procedures, or other measures to prevent releases.

While it is EPA's understanding that releases of decaBDE to water are not occurring, prohibiting releases to water highlights the importance of preventing environmental releases of chemicals regulated by TSCA section 6(h) and reducing potential exposures. As mentioned in the Exposure and Use Assessment, TRI data show a decrease in releases that are reported in each industry sector using decaBDE. As of 2016, the number of manufacturing facilities, textile manufacturing facilities, wire and cable manufacturing facilities, and other facilities reporting TRI releases has decreased from several dozen to only one manufacturer and 23 other facilities (Ref. 16). Specifically, the one manufacturer that released to water prior to 2012, is now prohibited from manufacturing decaBDE under the 2021 decaBDE final rule. According to the most recent (2021) TRI data, there were zero releases of decaBDE to water (Ref. 34). TRI reporting is required only for facilities within specific NAICS codes who have 10 or more full-time employees, so it is possible that there were releases outside of the reporting requirements, but EPA believes this is unlikely. Prohibiting releases to water during manufacture, processing, and distribution in commerce of decaBDE and decaBDE-containing products would prevent future releases of decaBDE to the water from permissible ongoing activities, reducing the overall potential for exposures. While in some cases EPA has determined that it is not practicable to exercise its TSCA section 6(a) authorities to regulate certain exposures under TSCA section 6(h), as outlined in Unit II.B., this is not the case for releases of decaBDE to water.

EPA is not proposing to extend this requirement to include a prohibition on the release to water for the processing and distribution in commerce of decaBDE-containing articles, including recycled materials that may contain decaBDE, with the exception of plastics shipping pallets known to contain decaBDE. As described in more detail in the 2021 decaBDE final rule and the 2021 response to comment document, it would be extremely burdensome to identify articles containing decaBDE to determine if a facility that recycles articles is subject to this proposed release to water prohibition (Ref. 33).

4. *Extend the compliance extension for processing and distribution in commerce of decaBDE-containing wire and cables insulation for use in nuclear power generation facilities.*

DecaBDE has been used in Class 1E cables, which are qualified to meet industry standards and the Nuclear Regulatory Commission's (NRC) requirements in 10 CFR 50.49, "Environmental qualification of electric equipment important to safety for nuclear power plants," including the Institute of Electrical and Electronics Engineers 383 ("IEEE 383") standard for instrumentation and power cable insulation. Recognizing this, and in response to stakeholder feedback and engagements with the only known supplier of decaBDE-containing wire and cable, EPA established an extended compliance deadline of January 6, 2023, in the 2021 decaBDE final rule, after which all processing and distribution in commerce of decaBDE for use in wire and cable insulation in nuclear power generation facilities, and decaBDE-containing wire and cable insulation is prohibited (40 CFR 751.405(a)(2)(ii)). EPA interprets the term "nuclear power generation facilities" to include nuclear reactors as defined by the NRC in 10 CFR 50.2, production facilities, test and research reactors, other utilization facilities not specifically designed for or used primarily for the formation of plutonium or U-233, and reactors operated under the oversight of the Department of Energy and has added text to the exclusion in 40 CFR 751.405(a)(2)(ii) for clarification. In addition, EPA is clarifying that 40 CFR 751.405(a)(2)(ii) and new (a)(2)(vi) are not limited to a specific level of power generation and that the exclusion includes "electrical equipment important to safety" as defined in 10 CFR 50.49(b) and materials required for the safe operation of "Alternate ac source" and "Basic components" as defined in 10 CFR 50.2 which include decaBDE-containing wire and cable. EPA requests comment on if there are any additional points of clarification related to the description of the excluded activity.

After the January 6, 2023, extended compliance deadline in the 2021 decaBDE final rule, EPA received multiple requests and letters of concern regarding decaBDE in wire and cable insulation used in the nuclear power sector (Refs. 35 and 36). These inquiries and outreach came shortly after the supplier of this decaBDE-containing wire and cable discontinued processing and distribution in commerce and notified its customers of its inability to continue supplying their wire and cable due to the January 6, 2023, compliance date. Due to the lack of communication and engagement between the primary supplier and their customers, as well as

with EPA, the industry reported to EPA that they were at risk of not having qualified wire and cable available, which could negatively affect both scheduled maintenance outages and unplanned equipment failures and, ultimately, could force multiple nuclear power plants to be temporarily taken offline. In response to this, on April 20, 2023, EPA's Office of Chemical Safety and Pollution Prevention (OCSPP) requested that the Office of Enforcement and Compliance Assurance (OECA) issue an enforcement statement regarding certain entities that are subject to the prohibitions on processing and distribution in commerce of decaBDE-containing wire and cable insulation for nuclear power generation facilities as a bridge to a final rule addressing this use.

In response to this request, EPA's OECA issued a temporary "Enforcement Statement" on May 2, 2023, which indicates that the Agency does not intend to pursue enforcement for violations of the prohibition on processing and distribution in commerce of decaBDE-containing wire and cable insulation for nuclear power generation facilities, including those component and safety systems which contain the decaBDE-containing wire and cable insulation, that went into effect on January 6, 2023, as long as the entities involved are diligently working to qualify their alternative components in accordance with NRC regulations and guidance (Ref. 37).

After considering feedback from the industry and federal partners, including the U.S. Department of Energy and NRC, EPA is proposing to extend the compliance date, limited to processing and distribution in commerce of decaBDE-containing wire and cable insulation and the components containing the wire and cable in nuclear power generation facilities (including research and test reactors), until after the end of the service life of the wire and cable and the component containing the wire and cable (see 40 CFR 751.405(a)(2)(vi)). Stakeholders have indicated that existing decaBDE-containing wire and cable insulation and components containing the wire and cable may need to be distributed and processed for refurbishment, maintenance, and repair until the wire and cable is replaced. In addition, EPA's "Exposure and Use Assessment of Five Persistent, Bioaccumulative, and Toxic Chemicals" indicates that although releases of decaBDE could occur during the processing of decaBDE to make the wire and cable (Ref. 16), once formulated into the wire and cable, decaBDE is encased in the cured coating and the potential for worker exposure is

minimal (Ref. 16). Therefore, EPA concluded allowing this use to continue is necessary and practicable, while being unlikely to result in exposure to decaBDE.

EPA is not proposing to allow resumption of processing and distribution in commerce of raw or compounded decaBDE for use in wire and cable insulation in nuclear power generation facilities. The only known supplier of this has been permitted to resume these activities for a limited time under a settlement agreement that provides a mechanism for the continued availability of decaBDE-containing wire and cable insulation, while the nuclear power generation facilities industry undergoes transition to a decaBDE-free alternative (Ref. 38). The termination conditions of the settlement agreement states that it shall remain in place for five years following the effective date unless terminated earlier, while the company's customers Transition to receipt of Class 1E cable that is decaBDE-free.

5. Require export notification for decaBDE-containing wire and cable for nuclear power generation facilities.

As discussed in the 2021 decaBDE final rule, decaBDE is listed on Annex A of the Stockholm Convention on Persistent Organic Pollutants (the POPs Convention), which prohibits the production, use, import, and export of decaBDE and decaBDE-containing products and articles for Parties to the listing decision for decaBDE, unless otherwise subject to a specific exemption (Ref. 39). There is no specific exemption under the POPs Convention for decaBDE-containing wire and cable for nuclear power plant generation facilities, and thus, EPA did not expect import or export for this use to occur. However, EPA recently learned that there is a need for export of decaBDE-containing articles for this purpose. Therefore, although articles are generally exempt under 40 CFR 707.60(b) for notices of export under TSCA section 12(b), EPA is proposing to amend the current rule to require a TSCA section 12(b) export notice for export of decaBDE-containing wire and cable for nuclear power generation facilities. Such notice requirement is triggered 30 days after publication of this proposed rule, pursuant to TSCA section 12(b) and 40 CFR 707.65(a)(1)(i) and (b). The proposed notification to EPA of such intent to export would not provide consent by the importing countries for import of the shipment; the importing countries may choose not to permit import of such shipment. Consistent with subpart A of Part 751, the provisions of subpart D of 40 CFR

part 707 still apply to any export notifications required for decaBDE and PIP (3:1) under TSCA section 6(h). EPA is not requiring export notification for any other articles.

EPA is requesting comment on whether additional downstream notification requirements for products and articles known to contain decaBDE would reduce the potential for exposure to decaBDE. The downstream notification for which the Agency is requesting comment would include additional text in sections 1 and 15 of a safety data sheet (SDS) or specific language on the label of the decaBDE-containing product or article in question.

6. Extend recordkeeping requirements from three to five years and remove timeframe to make records available.

In the 2021 decaBDE final rule, EPA required that all persons who manufacture, process, or distribute in commerce decaBDE and products and articles containing decaBDE maintain ordinary business records related to compliance with the prohibitions and restrictions for three years and to make records available within 30-days upon request. EPA is proposing to increase the recordkeeping requirement from three to five years and to remove the 30-day timeframe to make records available for decaBDE and PIP (3:1). Due to the additional requirements being proposed in this rulemaking, specifically those pertaining to worker safety, EPA believes that the five-year timeframe regarding recordkeeping and removal of the 30-day timeframe to make records available is more appropriate. Furthermore, this is consistent with the timeframe associated with other TSCA section 6(a) rulemakings which include worker protection requirements. EPA believes extending each rule's recordkeeping requirement to a consistent five-year requirement will facilitate regulated entities' compliance with minimal impact to regulatory burden. In addition, removal of the 30-day time frame to make records available is critical to the Agency's ability to promptly identify and correct noncompliance. EPA believes that the regulated entities should have the records demonstrating compliance readily available.

D. PIP (3:1)—Proposed Revisions to 40 CFR 751.407

1. Modify existing exclusions and add new exclusions.

EPA reviewed the determinations underlying the exclusions from prohibition in the January 2021 PIP (3:1) final rule to consider whether to adopt new restrictions for activities currently

excluded, consistent with the statutory directive to reduce exposure to the extent practicable (Refs. 12 and 33). For many of the exclusions, EPA determined there were no technically feasible alternatives or that the time and cost to identify, research, and replace PIP (3:1) in supply chains were impracticable. During the comment period following the March 6, 2021, notification, many stakeholders from the auto, aerospace, semiconductor, heavy machinery, and other sectors provided additional information on time frames that they determined would allow those industries a reasonable period to transition from PIP (3:1) to alternatives (EPA-HQ-OPPT-2021-0202). Where EPA received information that transition from PIP (3:1) to an alternative has already occurred or could occur within a reasonable transition period, EPA proposes such modifications. In other instances, where commenters were not able to provide similar information for determining a reasonable period for such transition, EPA did not propose extending the phase-out deadline. EPA is requesting comment on the practicability of these proposed modifications.

a. Description of the proposed regulatory action. EPA is proposing to modify several exclusions from prohibition finalized in the January 6, 2021, PIP (3:1) final rule (Ref. 4). These proposed modifications include narrowing the scope of certain exclusions, adding prohibition phase-in dates, and in some cases creating new exclusions from prohibition for certain uses. In narrowing the scope of certain exclusions EPA is also proposing to prohibit the import of the PIP (3:1)-containing articles and PIP (3:1)-containing products for those uses. This is to restrict the ability for these prohibited PIP (3:1)-containing articles and PIP (3:1)-containing products for those uses to be imported where they are no longer allowed to be produced in the United States. EPA is not proposing to generally prohibit the manufacturing of PIP (3:1), consistent with the 2021 PBT rulemaking, due to the number of excluded activities which EPA has found it impracticable to prohibit.

i. Lubricants and greases.

EPA is proposing to narrow the exclusion from prohibition in 40 CFR 751.407(b)(1)(ii) for processing and distribution in commerce of PIP (3:1) for use in lubricants and greases, PIP (3:1)-containing products for use in lubricants and greases, and PIP (3:1)-containing lubricants and greases. Under this proposal, the exclusion from prohibition would be narrowed to allow only for the processing and distribution

in commerce of PIP (3:1), PIP (3:1)-containing products, and PIP (3:1)-containing lubricants and greases for use in aerospace and turbine applications. The processing and distribution in commerce of PIP (3:1), PIP (3:1)-containing products, and PIP (3:1)-containing lubricants and greases for all other uses, including but not limited to use in motor vehicles and industrial machinery, would be subject to a 5-year phased-in prohibition. EPA has acknowledged (Ref. 4) and continues to acknowledge the degree to which PIP (3:1) is a crucial anti-wear component for aerospace lubricants and greases, which is needed to perform at a wide range of temperatures and pressures. EPA understands there are some non-aerospace uses of these lubricants and greases where PIP (3:1) is a crucial anti-wear component, such as turbines used in power generation or in marine settings (Ref. 40). However, as discussed in the 2021 PIP (3:1) proposed rule (Ref. 12), uses in non-aircraft machinery and non-turbine equipment may not be subject to these same environmental stresses or safety and performance requirements from industry and government as the uses in the aerospace sector and turbines. As discussed in the 2020 Economic Analysis (Ref. 41), several potential chemical substitutes for PIP (3:1) exist. Three unique chemical substitutes of PIP (3:1) have been confirmed and an additional ten potential chemical substitutes have been identified, including some for non-aerospace and non-turbine lubricants and greases that are currently available on the market.

Following EPA's announcement to reconsider the PBT rules (Ref. 8), the Agency met with stakeholders to discuss their ongoing need for PIP (3:1)-containing lubricants and greases to meet performance standards and due to the lack of suitable alternatives. In addition, during the March 2021 notification and comment period, EPA received five comments either stating that no alternative existed or requesting the Agency maintain the existing exclusion for lubricants and greases. Two stakeholders indicated that they were working to identify alternatives to and/or eliminate PIP (3:1) from lubricant and grease formulation, while acknowledging for some applications they might not be able to find a replacement. At least one stakeholder requested a 5-year transition period to move away from PIP (3:1) for their applications (Ref. 42). Because there are available alternatives to the use of PIP (3:1) and given the absence of comment with specific information on the need

for PIP (3:1) to meet performance standards for non-aerospace, non-turbine lubricants and greases, EPA is proposing a 5-year phased-in prohibition. EPA is requesting comment on whether there are performance requirements that might impact compliance with this transition period, or whether there are other considerations that would impact EPA's conclusion that the phase-out is practicable, the suitability of alternatives to meet any performance requirements for non-aerospace and non-turbine uses, as well as the reasonableness of the proposed time period for the prohibition phase-in for those uses. In addition, EPA is requesting comment on the economic and technical feasibility of alternatives, and whether it would be practicable, where alternatives are not technically and economically feasible, to reduce exposures through worker protections alone. EPA is also requesting comment on whether the exclusion should be modified in another way, specifically as it relates to certain turbine uses.

ii. *New and replacement parts for motor vehicles.*

EPA is proposing to repeal the exclusion from prohibition for new and replacement parts for motor and aerospace vehicles in existing 40 CFR 751.407(b)(1)(iii). The aspects of this exclusion that relate to aerospace vehicles and wire harnessing and electric circuit boards are addressed in Unit III.D.1.a.iii and Unit III.D.1.a.iv, respectively. As to motor vehicles, EPA is proposing to repeal the existing exclusion at 40 CFR 751.407(b)(1)(iii) for use of PIP (3:1) and PIP (3:1)-containing products in new and replacement parts for motor vehicles and is proposing to replace it with a prohibition that would begin in 15 years. The proposed prohibition states that no later than 15 years from publication of the final rule, processing, and distribution in commerce of PIP (3:1), and the manufacturing, processing, and distribution in commerce of PIP (3:1)-containing products, for use in parts for new motor vehicles, including heavy machinery, and the parts to which PIP (3:1) has been added for such vehicles would be prohibited. Similarly, after such time, the manufacturing, processing, and distribution in commerce of new motor vehicles, including heavy machinery with PIP (3:1)-containing parts would be prohibited per 40 CFR 751.407(a)(2)(iv). This proposed prohibition would not apply to PIP (3:1)-containing parts that would be subject to a new exclusion, if adopted as proposed (e.g., wire harnesses and circuit boards).

Consistent with the discussion in the January 6, 2021, PIP (3:1) and decaBDE final rules, EPA continues to interpret TSCA section 6(c)(2)(D) to be inapplicable to TSCA section 6(h) rulemakings. Specifically, TSCA sections 6(c)(2)(D) and (E) require a risk finding pursuant to a TSCA section 6(b) risk evaluation to regulate replacement parts and articles. Yet, TSCA section 6(h) neither compels nor contemplates a risk evaluation to precede or support the compelled regulatory action to "address the risks . . ." and "reduce exposures to the substance to the extent practicable". While this interpretation has not changed, EPA has reviewed the practicability of regulating replacement parts and articles in accordance with the statutory directive in TSCA section 6(h)(4) to reduce exposures to the PBT chemicals to the extent practicable.

Stakeholders representing manufacturers of new original equipment and aftermarket components, systems, and materials for use in passenger cars and light trucks indicated that, under the assumption that an alternative to PIP (3:1) could be found in the next three to four years, the industry could transition out of using PIP (3:1) within a seven-to-ten-year time frame (Ref. 43). EPA acknowledges that the timeframe contains many contingencies, which could delay the adoption of PIP (3:1) alternatives. Nevertheless, based on the industry's own description of their experience with transitioning from a different chemical, albeit under different circumstances, and the time frames provided, EPA believes a 15-year phase-in prohibition of processing and distribution in commerce of PIP (3:1) and PIP (3:1)-containing products for use in parts for new motor vehicles (*i.e.*, newly produced vehicles) and a 30-year phase-in prohibition on processing and distribution in commerce for replacement parts and the motor vehicles with PIP (3:1)-containing parts, as discussed below, is practicable.

EPA is also proposing in new 40 CFR 751.407(a)(2)(v) to allow processing and distribution in commerce for an additional 15 years (*i.e.*, until 30 years after the publication date of the final rule) of PIP (3:1) and the manufacturing, processing, and distribution in commerce of PIP (3:1)-containing products for use in replacement parts for motor vehicles, including heavy machinery, the PIP (3:1)-containing replacement parts themselves for such vehicles, and such vehicles with PIP (3:1)-containing parts for 30 years after the publication date of the final rule. EPA's proposal does not impact the existing "end user" example at 40 CFR

751.401. EPA is proposing this 30-year period, to ensure that the option provided to vehicle manufacturers by 49 U.S.C. 30120 to remedy the defect or noncompliance by repairing the vehicle or the equipment (*i.e.*, part) remains available. EPA acknowledges that 49 U.S.C. 30120 does not require manufacturers to supply replacement parts, but rather to provide a remedy, which may include either replacing the equipment with identical or reasonably equivalent equipment, or by refunding the purchase price.

Lastly, as explained in the March 2022 PIP (3:1) final rule extending the PIP (3:1) compliance date, EPA generally interprets the term "motor vehicle" to mean a transport vehicle that is propelled or drawn by mechanical power, such as cars, trucks, motorcycles, boats, and construction, agricultural, and industrial machinery. EPA is proposing to include a reference to "heavy machinery" in the exclusion to clarify this.

iii. *New and replacement parts for aerospace vehicles.*

EPA is proposing to repeal the exclusion from prohibition for new and replacement parts for aerospace vehicles described currently in 40 CFR 751.407(b)(1)(iii). EPA is proposing to replace the exclusion from prohibition with a prohibition at 40 CFR 751.407(a)(2)(vi) that would begin 30 years after the publication of the final rule on the processing and distribution in commerce of PIP (3:1) and the manufacturing, processing, and distribution in commerce of PIP (3:1)-containing products, for use in parts installed in and distributed as part of new aerospace vehicles, and the parts to which PIP (3:1) has been added for such vehicles. In addition, EPA is proposing that, after the end of the aerospace vehicles' service lives, the importing, processing, and distribution in commerce, of aerospace vehicles (*i.e.*, those permissibly manufactured before the compliance timeframe ends) that contain PIP (3:1) in any part would be prohibited. EPA is also proposing at 40 CFR 751.407(a)(2)(vi) to prohibit manufacturing, processing, and distribution in commerce of PIP (3:1), PIP (3:1)-containing products for use in replacement parts, and PIP (3:1)-containing replacement parts, after the end of the aerospace vehicle service lives. These new prohibitions would not apply to PIP (3:1)-containing parts that would be subject to a new exclusion from prohibition, if adopted as proposed (e.g., wire harnesses and circuit boards).

As discussed in the January 2021 PIP (3:1) final rule, EPA concluded a similar reasoning applied to the use of PIP (3:1)

in new and replacement parts for motors vehicles readily transfers to a review of the justifications for the use of PIP (3:1) for new and replacement parts in aerospace vehicles. EPA acknowledges the regulatory and safety requirements for the aerospace industry are as stringent or more stringent than those for motor vehicles. In particular, industry stakeholders noted the time required to identify an alternative, and to test and certify its use in parts, to meet safety requirements, as well as a lengthy Federal Aviation Administration approval process. Given these considerations, EPA is proposing longer time periods for the phase-in prohibitions for the use of PIP (3:1) in new and replacement parts for aerospace vehicles. EPA request comment on the appropriateness of a 30-year time period for this phased-in prohibition or whether the length of time should be longer (*e.g.*, 40 years).

iv. Wire harnesses and circuit boards.

EPA is proposing a new exclusion from the prohibition at 40 CFR 751.407(b)(1)(iii) for the processing and distribution in commerce of PIP (3:1) and PIP (3:1)-containing products for use in wire harnesses and circuit boards, and wire harnesses and circuit boards containing PIP (3:1). This proposed exclusion is based on industry comments provided in response to the March 2021 notification opening a comment period. EPA has proposed that wire harnesses include a broad class of articles, including but not limited to terminal and fuse covers, cable sleeves, casings, connectors and tapes, used in a variety of applications, from defense to aerospace and motor vehicle applications, to medical instrumentation and more. In these articles, PIP (3:1) is used as a plasticizer and flame retardant. EPA also understands that PIP (3:1) use in electronic component manufacturing includes the use of PIP (3:1) in circuit boards as well as the use of PIP (3:1)-containing products for the encapsulation of electronics components added to circuit boards and as resins in overmolding, dip molding, insert molding applications, or conformal coatings. Hence, EPA is also proposing to exclude from prohibition the processing and distribution in commerce of PIP (3:1) and PIP (3:1)-containing products for use in circuit boards. Commenters have stated that these components, namely circuit boards and wire harnesses, are required to meet certain mandatory regulatory and voluntary industry safety standards (Refs. 44 and 45). According to commenters, alternatives to PIP (3:1) for use as a flame retardant and/or

plasticizer in wire harnesses and circuit boards have not been identified (Ref. 8).

Due to information from commenters and engagement with stakeholders, EPA is not aware of a replacement for PIP (3:1) for use in wire harnesses and circuit boards that combines its properties as a plasticizer, a fire retardant, and an anti-wear additive. Hence, EPA agrees with commenters that the replacement for PIP (3:1) in these uses would likely not be a direct substitute but might require multiple chemicals. EPA acknowledges that the process of replacing PIP (3:1) with separate chemicals for each function would likely be time consuming and costly to certify new end-use products and articles (Refs. 45 and 46). EPA is not aware of a technically and economically feasible alternative for PIP (3:1) that would meet the performance requirements and voluntary and regulatory safety standards for these articles. EPA and commenters are not aware of industry efforts to identify or qualify an alternative. For these reasons, EPA is proposing to determine that it is impracticable to prohibit the processing and distribution in commerce of PIP (3:1) for use in wire harnesses and circuit boards and PIP (3:1)-containing products for use in wire harnesses and circuit boards, and for wire harnesses and circuit boards containing PIP (3:1). EPA requests comment on the availability of potential alternatives for PIP (3:1) for use in wire harnesses and circuit boards that would ensure that these products and articles would meet performance requirements and voluntary and regulatory safety standards.

v. Marine antifouling coating product.

EPA is proposing, at new 40 CFR 751.407(a)(2)(vii), to add a five-year compliance deadline for the prohibition of processing and distribution of PIP (3:1) for use in a FIFRA-registered marine antifouling coating product for Department of Defense uses only. The January 2021 prohibition on processing and distribution of PIP (3:1) has resulted in the inability of the U.S. Navy to obtain a PIP (3:1)-containing FIFRA-registered marine antifouling coating product. This compliance date extension will allow the U.S. Navy to continue to procure PIP (3:1)-containing coating while it identifies an alternative PIP (3:1)-free formulation.

PIP (3:1) is used as a plasticizer in the formulation of the marine antifouling coating product and is an inert ingredient under FIFRA. In discussion with the U.S. Navy, it indicated that this antifouling coating falls under the “mission critical” category because hull corrosion on ships can have significant

impacts on ship performance. The U.S. Navy also indicated that it would need five years to develop a suitable alternative formulation and undergo U.S. Navy qualification and testing and the FIFRA approval process. Because no technically feasible alternative is currently available for the U.S. Navy’s aluminum-hulled ships due to the U.S. Navy’s specific performance requirements, EPA considers it impracticable to continue prohibiting the processing and distribution of PIP (3:1) for use in this marine antifouling coating product while an alternative is being developed. EPA believes there are suitable alternatives for commercial users, and so is limiting this exclusion to this U.S. Department of Defense application. EPA is proposing this new, 5-year compliance deadline under TSCA section 6(h), not TSCA section 6(g).

vi. Manufacturing equipment and semiconductor manufacturing industry.

Based on comments received after the March 16, 2021, notification and request for comments, EPA is proposing to revise 40 CFR 751.407(a)(2)(viii) to add a compliance deadline extension of 10 years for processing and distribution in commerce of certain PIP (3:1)-containing articles and the PIP (3:1) used to process those articles, namely for use in manufacturing equipment and in the semiconductor manufacturing industry. As discussed in Unit II.A.2., after the January 2021 PIP (3:1) final rule was published, a number of stakeholders from a variety of industrial sectors, including electronics and electrical manufacturing, semiconductor manufacturing, and manufacturing equipment, requested an extension of the compliance date to allow time to clear the existing articles through the supply chain, to find and certify an alternative chemical, and to produce or import new articles or complex goods that do not contain PIP (3:1) (Ref. 10). These stakeholders informed EPA of new information regarding the use of PIP (3:1) as a flame retardant and plasticizer in plastic components such as wire covers and casings. Other components that were identified include, but are not limited to, polyvinyl chloride tubes, harnesses, cables, covers, sleeves, and casings, as well as internal components of high-tech robotics and manufacturing equipment. Stakeholders have identified PIP (3:1) in components in scanning electron microscopes utilized in research, national laboratories, academia; in manufacturing and electronic components utilized for electronic design and assembly; and in electronics and semiconductor

manufacturing equipment (Ref. 44). Commenters also indicated that a wide range of key consumer and commercial goods were affected by the prohibitions in the 2021 PIP (3:1) final rule such as cellular telephones, laptop computers, and other electronic devices and industrial and commercial equipment used in various sectors including transportation, life sciences, and semiconductor production (Ref. 8, docket no., EPA-HQ-OPPT-2021-0202). EPA subsequently amended 40 CFR 751.407(a)(iii) to extend the compliance deadline for the phase-out of the processing and distribution in commerce of PIP (3:1) for use in articles and PIP (3:1)-containing articles until October 31, 2024 (Ref. 13).

EPA is now proposing to revise the compliance deadline at current 40 CFR 751.407(a)(2)(iii) to allow an additional 10 years for the processing and distribution in commerce of PIP (3:1) for use in articles and of PIP (3:1)-containing articles for use in manufacturing equipment and in semiconductor manufacturing. EPA is not proposing to further extend the existing October 31, 2024, compliance deadline for most other articles (see Unit III.D.4). EPA received stakeholder comments providing detailed information regarding timeframes to identify, replace, and recertify PIP (3:1)-containing articles in use within their often-complex supply chains and these comments suggest that a 10-year phase-out for use in manufacturing equipment and in semiconductor manufacturing is practicable and provides a reasonable transition period (Refs. 46, 47, and 48). EPA also received a comment in which a semiconductor industry stakeholder group stated that “[w]e have not learned of any situation where a reduction or elimination of PIP (3:1) or decaBDE was not technically possible” (Refs. 57). The commenter also stated that “we have found in our investigations that it is generally feasible for the suppliers of components containing PIP (3:1) or decaBDE to redesign the components for compliance.” However, this commenter also provided additional recommendations which EPA is taking comment on in Unit V. Several commenters note that there are difficulties in identifying PIP (3:1) in supply chains and additional time is needed to identify, test, certify, and adopt alternative parts, components, and finished products, as well as time to modify the manufacturing processes to accommodate an alternative substance. However, comments provide timeframes consistent with a 10-year period for transition and thus EPA does

not believe that a shorter time frame would be practicable or reasonable.

EPA is requesting comment on the scope and timeframe of this compliance date extension and the narrower scope of uses covered by this more limited extension beyond 2024. While EPA expects that in several industries, such as the textile (Ref. 51) and consumer product (Ref. 53) industries, the existing compliance timeframe for processing and distribution in commerce of PIP (3:1) for use in articles and PIP (3:1)-containing articles ending October 31, 2024 is sufficient, EPA also recognizes the challenges described by commenters with complex supply chains and the potential need for a longer compliance date extension in certain other industries and is choosing the ten year period as a practicable length of time during which the manufacturing equipment and semiconductor industries should be able to move to alternatives.

b. Description of the primary alternative regulatory action.

EPA is also considering longer phase-in timeframes for certain existing exclusions from prohibition. EPA considered a 30-year time limit on processing and distribution in commerce of PIP (3:1) and PIP (3:1)-containing products for use in lubricants and greases for aerospace and turbine applications, and PIP (3:1)-containing lubricants and greases for aerospace and turbine applications. As previously mentioned, stakeholders indicated that they were working to move away from the use of PIP (3:1), but that there could be applications where they might not be able to find a replacement. EPA is requesting comment on the timeframe needed to transition to PIP (3:1)-free lubricant and greases for this use and whether there are other industries, other than for aerospace and turbine applications, that may also need more time.

EPA also considered a longer phase-out timeframe of 20 years for the prohibition of processing and distribution in commerce of PIP (3:1) and PIP (3:1)-containing products for use in wire harnesses and electric circuit boards, manufacturing equipment, and in the semiconductor industry. The 2021 OCSPP request for a “No Action Assurance” (Ref. 49) outlines the many articles in which PIP (3:1) is used. In order to clear supply chains and ensure an effective transition to alternatives, EPA considered a 20-year transition period for these PIP (3:1) containing articles. Articles with an end use in new and replacement parts for vehicles would be excluded from this time limit.

2. Require PPE during manufacturing and processing of PIP (3:1).

EPA is proposing to require inhalation and dermal PPE during domestic manufacturing and processing of PIP (3:1) and certain PIP (3:1)-containing products and articles. As discussed in Unit II. and in this Unit III.C.2. for decaBDE, EPA believes there is potential for reduction in worker exposure to PIP (3:1) by requiring PPE where EPA is aware of employers in specific sectors that are already providing appropriate PPE to their employees. EPA is proposing PPE requirements to address potential respiratory and dermal exposure to occupational workers during certain ongoing domestic manufacturing or processing activities involving PIP (3:1), including those which EPA is proposing phase out periods. Because EPA generally believes the potential for exposure is low during importation, the Agency is not proposing to require worker protections for import of PIP (3:1) and PIP (3:1)-containing products and articles. The Agency is also not proposing to require worker protection for the processing of certain PIP (3:1)-containing products and articles: PIP (3:1)-containing adhesives and sealants, new and replacement parts to which PIP (3:1) has been added for motor and aerospace vehicles, and the motor and aerospace vehicles that contain new and replacement parts to which PIP (3:1) has been added, PIP (3:1)-containing specialized engine filters for locomotive and marine applications, and the products or articles described in 40 CFR 751.405 (b)(1)(vi) and (vii). EPA is also excluding processing of PIP (3:1) and PIP (3:1)-containing products for use as an intermediate to produce cyanoacrylate adhesives when contained in a closed system under new 40 CFR 751.407(f)(8)(iii). This is consistent with the practices of the one company using PIP (3:1) for this use and EPA believes it is protective due to proposed requirements under new 40 CFR 751.407(f)(6) which would address PIP (3:1) through engineering controls.

EPA is proposing to require implementation of a PPE program in alignment with certain elements of OSHA’s General Requirements for Personal Protective Equipment at 29 CFR 1910.132 and Respiratory Protection requirements in 29 CFR 1910.134. EPA is proposing to require owners and operators ensure each potentially exposed person who is required to wear PPE to use and maintain PPE in a sanitary, reliable, and undamaged condition. Owners and operators would be required to select and provide PPE that properly fits each

potentially exposed person who is required to use PPE and to communicate PPE selections (e.g., demonstration that each item of PPE selected provides prevents exposure during expected duration and conditions of exposure) to each affected person.

While EPA is proposing implementation of a PPE program in alignment with OSHA's, the Agency is also prescribing the level of PPE that must be worn based on the reasonably available information the Agency has regarding the adoption of those levels by industry. Where EPA is prescribing the use of PPE, the Agency is not supplanting OSHA requirements but clarifying the level of PPE that the Agency considers is practicable under TSCA section 6(h). For all activities covered under the worker protection proposed regulations, EPA is proposing that owners or operators be required to provide gloves that are chemically resistant to PIP (3:1) with activity-specific training where dermal contact with PIP (3:1) is possible. For the manufacturing and processing of PIP (3:1) and PIP (3:1)-containing products for use in new and replacement parts for motor vehicles, including heavy machinery, and aerospace vehicles, EPA is proposing respiratory protection which must be at least as protective as a NIOSH-approved N95 respirator (APF 10). For processing of PIP (3:1) and PIP (3:1)-containing products for use in the manufacturing of cyanoacrylate adhesives, EPA is proposing respiratory protection which must be at least as protective as a NIOSH-approved APF 50 respirator, except when the PIP (3:1) or PIP (3:1)-containing product is contained in a closed-system. For all other activities covered under the proposed PPE regulations, EPA is proposing respirators that are at least as protective as a NIOSH-approved APF 10 air-purifying half mask respirator. Based on stakeholder comments (Ref. 33) and OSHA-required Safety Data Sheets, EPA believes these levels of protection are already typically used as industry best practices, although the Agency lacks reasonably available information to determine the scale of adoption.

EPA is proposing that the owner or operator must ensure that all respirators used in the workplace are NIOSH-approved as listed on the NIOSH Certified Equipment List. In choosing appropriate gloves, EPA expects owners and operators would consider effectiveness of glove type when preventing exposures from PIP (3:1) alone and in likely combination with other chemical substances used in the work area, the degree of dexterity required to perform tasks, and the

temperature, as identified in the Hand Protection section of OSHA's Personal Protective Equipment guidance (Ref. 32).

EPA is proposing to require each owner or operator to comply with OSHA's general PPE training requirements at 29 CFR 1910.132(f) when using respirators and gloves. EPA is proposing that owners and operators would provide PPE training to each potentially exposed person who is required to wear PPE prior to or at the time of initial assignment to a job involving potential exposure to PIP (3:1).

EPA proposes to require that owners and operators document respiratory protection used and PPE program implementation and retain those records for five years. EPA proposes to require that owners and operators document in the PPE program the following information, as applicable, and make it available to the Agency upon request:

(A) The name, workplace address, work shift, job classification, and work area of each person reasonably likely to directly handle PIP (3:1) or handle equipment or materials on which PIP (3:1) may present and the type of PPE selected to be worn by each of these persons;

(B) The basis for PPE selection (e.g., demonstration based on permeation testing or manufacturer specifications that each item of PPE selected provides an impervious barrier to prevent exposure during expected duration and conditions of exposure, including the likely combinations of chemical substances to which the PPE may be exposed in the work area); and

(C) Appropriately sized PPE and training on proper application, wear, and removal of PPE, and proper care/disposal of PPE.

3. *Require engineering controls for processing of PIP (3:1) and PIP (3:1)-containing products as an intermediate processing aid in the manufacturing of cyanoacrylate adhesives.*

Based on information gathered during consultations with industry stakeholders (Ref. 50), EPA is proposing, at new 40 CFR 751.407(f)(6), to require engineering controls for the processing of PIP (3:1) as an intermediate processing aid in the manufacturing of cyanoacrylate adhesives. According to stakeholders, the production process using PIP (3:1) is carried out in an automated batch distillation plant and in a closed system.

EPA previously maintained that it was not practicable to prescribe engineering controls that were duplicative of those required under OSHA (OSHA 29 CFR 1910.134(a)(1)),

which requires the use of feasible engineering controls to prevent atmospheric contamination. As discussed in Unit II.B.4., for purposes of determining whether worker protection measures are practicable under TSCA section 6(h)(4), EPA no longer believes it is appropriate to assume as a general matter that an applicable OSHA requirement is consistently or always properly applied, and the Agency considered when worker protection measures higher up the NIOSH hierarchy of controls than PPE could practicably be required. For the processing of PIP (3:1) as an intermediate processing aid in the manufacturing of cyanoacrylate adhesives, EPA has reasonably available information submitted by an industry participant regarding the use of engineering controls. Based on that information, EPA is proposing to require engineering controls for the processing of PIP (3:1) as an intermediate processing aid in the manufacturing of cyanoacrylate adhesives such that the processing of PIP (3:1) must take place in a closed loop system with general and local exhaust ventilation provided. EPA believes that only one company is currently processing PIP (3:1) for this use, and the proposed engineering controls are the current practice of the company. Thus, there were no costs for this proposed requirement (Ref. 14). EPA is requesting comment on whether all processing of PIP (3:1) as an intermediate processing aid in the manufacturing of cyanoacrylate adhesives uses this type of system and the feasibility of the cyanoacrylate adhesive industry to implement engineering controls.

4. *Extend recordkeeping requirements from three to five years and remove timeframe to make records available.*

In the 2021 PIP (3:1) final rule, EPA required that all persons who manufacture, process, or distribute in commerce PIP (3:1) and products and articles containing PIP (3:1) maintain ordinary business records related to compliance with the prohibitions and restrictions for three years and to make records available within 30-days upon request. EPA is proposing to increase the recordkeeping requirement from three to five years and to remove the 30-day timeframe to make records available. Due to the additional requirements being proposed in this rulemaking, specifically those pertaining to worker safety, EPA believes that the five-year timeframe regarding recordkeeping and removal of the 30-day timeframe to make records available is more appropriate. Furthermore, this is consistent with the

timeframe associated with other TSCA section 6(a) rulemakings which include worker protection requirements. EPA believes extending each rule's recordkeeping requirement to a consistent five-year requirement will facilitate regulated entities' compliance with minimal impact to regulatory burden. In addition, removal of the 30-day timeframe to make records available is critical to the Agency's ability to promptly identify and correct noncompliance. EPA believes that regulated entities should have the records demonstrating compliance readily available.

IV. The Reasonably Ascertainable Economic Consequences of the Proposed Rule

A. Overview of Cost Methodology

EPA has evaluated the potential costs of the proposed rule. Industry costs may arise from implementing measures to protect from exposure or switching from the manufacture or use of the chemical to a substitute. These costs included: reformulation of prohibited products using alternative chemicals to manufacture the product, or the price differential of available substitute products that do not contain PIP (3:1), providing workers with the required personal protective equipment (*e.g.*, respirators, gloves, and/or goggles), product or article labeling to indicate that it contains the regulated chemical(s), rule familiarization and recordkeeping based on burdens estimated for other similar rulemakings. Costs were annualized over a 30-year period. Other potential costs include, but are not limited to, those associated with testing, release prevention, imported articles, and some portion of potential revenue loss.

B. Estimated Costs of This Proposed Rule

Total quantified annualized industry costs for the proposed rule are estimated to be \$389 million at a 3% discount rate and \$416 million at a 7% discount rate annualized over 30 years. Of the proposed rule costs, those associated with decaBDE alone were approximately \$1,700 at a 3% discount rate and \$1,800 at a 7% discount rate. Costs associated with PIP (3:1) were \$389 million and \$416 million (at 3 and 7% discount rates, respectively.) Of this total, worker protection (PPE) costs under the proposed regulatory option annualized at a 3% discount rate is \$355 million and \$392 million at a 7% discount rate with PIP (3:1) accounting for all costs. The reason for the large disparity in the costs between decaBDE

and PIP (3:1) results from the difference in the number of firms using each chemical under the proposed rule's regulated activities. There are only two firms known to be using decaBDE that would be impacted by the proposed rule. Substantially more firms (up to 19,018) could potentially be impacted by the PIP (3:1) proposed rule requirements based on the sectors impacted. Prohibition costs for PIP (3:1) annualized at a 3% discount rate were estimated at \$33 million and \$24 million annualized at a 7% discount rate. For the economic analyses for the 2021 PBT final rules, EPA estimated that it would need one full-time equivalent (FTE) employee for implementation (*e.g.*, compliance assistance and enforcement) activities under both the 2021 decaBDE and PIP (3:1) final rules (two FTE employees total). This proposed rule would modify the existing rules. Therefore, EPA does not expect that it will require any additional (incremental) Agency staff time to implement the rules under the proposed revisions (proposed or primary alternative options).

1. Benefits.

A qualitative discussion of the potential benefits associated with the proposed action for decaBDE and PIP (3:1) is provided. PIP (3:1) is a neurotoxicant and aquatic toxicant with high persistence and high potential for bioaccumulation. DecaBDE has been found to have an association with liver cancer and benign liver tumors in rats and mice and had hepatic, renal, immune, and reproductive toxicity concerns in animal studies. Research has also indicated that decaBDE is acutely toxic to fish and aquatic invertebrates. As a result of this proposed rule, prohibition and PPE requirements, EPA anticipates decreased potential for occupational exposures and reduced potential for exposures to the general population, potentially exposed or susceptible subpopulations, and the environment.

2. Cost effectiveness and effect on national economy, small business, and technological innovation.

With respect to the cost effectiveness of the proposed regulatory action and the primary alternative regulatory action, EPA is unable to perform a traditional cost-effectiveness analysis of the actions and alternatives for the PBT chemicals. As discussed in the proposed rule, the cost effectiveness of a policy option would properly be calculated by dividing the annualized costs of the option by a final outcome, such as cancer cases avoided, or to intermediate outputs such as tons of emissions of a pollutant curtailed. Without the

supporting analyses for a risk determination, EPA is unable to calculate either a health-based or environment-based denominator. Thus, EPA is unable to perform a quantitative cost-effectiveness analysis of the primary and alternative regulatory actions. However, by evaluating the practicability of the final and alternative regulatory actions, EPA believes that it has considered elements related to the cost effectiveness of the actions, including the cost and the effect on exposure to the PBT chemicals of the primary and alternative regulatory actions.

EPA considered the anticipated effect of this proposed rule on the national economy and concluded that this rule is highly unlikely to have any measurable effect on the national economy (Ref. 14). EPA analyzed the expected impacts on small business and found that no small entities are expected to experience impacts of more than 1% of revenues (Ref. 54). Finally, EPA has determined that this rule is unlikely to have significant impacts on technological innovation, although the rule may create some incentives for chemical manufacturers to develop new chemical alternatives to PIP (3:1).

V. Request for Comments

EPA requests comment on all aspects of this proposal, including the proposed regulatory actions, the compliance dates for all the actions in this proposal, the primary alternative regulatory actions, and any other options that EPA has considered or should consider for both decaBDE and PIP (3:1). EPA is requesting comment on whether the Agency's proposed regulatory actions achieve the statutory directives to "reduce exposure to the substance to the extent practicable" (15 U.S.C. 2605(h)(4)). In addition, as previously noted, EPA's understanding of the extent to which reductions in exposure might reduce risks for communities with EJ concerns is limited. EPA is therefore interested in any feedback or data that could aid in the quantification of human health impacts to exposed populations, in order to assess the extent to which impacts to communities with environmental justice concerns are reduced by the proposed rule.

EPA requests comment on the performance requirements and the suitability of alternatives to meet any performance requirements for non-aviation and non-turbine uses, as well as the reasonableness of the proposed time period for the prohibition phase-in for those uses. In addition, EPA requests comment on the economic and technical

feasibility of alternatives, and whether it would be practicable, where alternatives are not technically and economically feasible, to reduce exposures through worker protections alone. EPA is also requesting comment on whether the exclusion from prohibition could be further narrowed, specifically as it related to certain turbine uses.

EPA requests comment on the availability of potential alternatives for PIP (3:1) for use in wire harnesses and circuit boards that would ensure that these products and articles would meet performance requirements and voluntary and regulatory safety standards.

EPA is requesting comment on the scope and timeframe of the 10-year compliance date extension for processing and distribution in commerce of certain PIP (3:1)-containing articles and the PIP (3:1), and PIP (3:1) products used in those articles for use in manufacturing equipment and in the semiconductor manufacturing industry, including information on whether and why a longer timeframe or exclusion may be necessary especially for replacement parts in order to account for complex supply chains and to clear channels of trade.

In addition, in a more recent letter to EPA dated August 4, 2023, a semiconductor industry stakeholder group provided additional comments to EPA: including a recommendation that EPA adopt a threshold limit of no less than 0.001% for the presence of PIP (3:1) and 0.1% for the presence of decaBDE in articles, comments on EPA's interpretation of "article," a recommendation that EPA incorporate a manufactured-by approach to account for the complexity of the global supply chain and the time required to productize components compliant with the rule, and that EPA should incorporate an exclusion for semiconductor manufacturing and related equipment replacement parts (Ref. 57). EPA is also requesting comment on the availability of analytical test detection methods for PIP (3:1) and the practicability of implementing a testing program for the presence of PIP in products and articles. EPA has addressed a portion of these comments in the 2021 rulemaking. For example, EPA has addressed the request for an exclusion for PBTs present at low threshold limits as an unintentional contaminant or present as in *de minimis* quantities (independent of the exclusion for recycled plastics) reasoning that, where it is practicable to reduce exposures, the statute provides no such exceptions. EPA believes that there are any number of reasonable steps that can

be taken to determine whether a product or article is compliant with the PBT regulations, such as contract specifications that describe the chemicals that may not be used, or a statement from the supplier that the articles furnished do not contain specific prohibited chemicals. However, EPA is requesting comment on this as well as the others provided to EPA by this semiconductor stakeholder. EPA requests comment on amending the downstream notification requirement at 40 CFR 751.407(e) for PIP (3:1)-containing products to require language in the Safety Data sheet to notify workers using spray applications of the presence of PIP (3:1), or alternatively to require a warning or other label statement affixed to PIP (3:1)-containing products with spray applications. EPA requests comment on whether notification for workers using spray applications would reduce exposures, the practicability of such requirements, and what notification statements or warning labels would be effective at reducing exposures. This request for comment includes whether the notifications or warning labels should be available in multiple languages, if necessary (e.g., notice would be in a language that the potentially exposed person understands, including a non-English language version representing the language(s) of the largest group(s) of workers who cannot readily comprehend or read English).

EPA requests comment on whether additional downstream notification requirements for products and articles known to contain decaBDE would reduce the potential for exposure for decaBDE, and whether the labels for plastic pallets should also be required to be available in multiple languages if necessary. The downstream notification for which the Agency is requesting comment would include additional text in sections 1 and 15 of an SDS or specific language on the label of the product or article in question.

EPA also requests comment on all aspects of the Economic Analysis accompanying this action. In taking final action on this proposal, following review of comments, EPA may require exposure reductions beyond those proposed here, or may reduce the scope of the proposed exposure reductions.

VI. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included

in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

1. EPA. TSCA Work Plan for Chemical Assessments: 2014 Update. October 2014.
2. EPA. TSCA Work Plan Chemicals: Methods Document. February 2012.
3. EPA. Decabromodiphenyl Ether (DecaBDE); Regulation of Persistent, Bioaccumulative, and Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h); Final Rule. **Federal Register** (86 FR 880, January 6, 2021) (FRL-10018-87).
4. EPA. Phenol, Isopropylated Phosphate (3:1) (PIP (3:1)); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h); Final Rule. **Federal Register** (86 FR 894, January 6, 2021) (FRL-10018-88).
5. EPA. 2,4,6-tris(tert-butyl) phenol (2,4,6-TTBP); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h); Final Rule. **Federal Register** (86 FR 866, January 6, 2021) (FRL-10018-90).
6. EPA. Hexachlorobutadiene (HCBD); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h); Final Rule. **Federal Register** (86 FR 922, January 6, 2021) (FRL-10018-91).
7. EPA. Pentachlorothiophenol (PCTP); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h); Final Rule. **Federal Register** (86 FR 911, January 6, 2021) (FRL-10018-89).
8. EPA. Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h); Phenol, Isopropylated Phosphate (3:1); Request for Comments. **Federal Register** (86 FR 14398, March 16, 2021) (FRL-10021-08).
9. Executive Order 13990. Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. **Federal Register** (86 FR 7037, January 25, 2021).
10. Letter to EPA from the Consumer Technology Association and the Information Technology Industry Council to EPA on March 15, 2021. Document No. EPA-HQ-OPPT-2021-0202-0015.
11. EPA. Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h); Phenol, Isopropylated Phosphate (3:1); Compliance Date Extension Final Rule. **Federal Register** (86 FR 51823, September 17, 2021) (FRL-6015.5-03-QCSPP).
12. EPA. Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h); Phenol, Isopropylated Phosphate (3:1); Further Compliance Date Extension Proposed Rule. **Federal Register** (86 FR 59684, October 28, 2021) (FRL-6015.6-01-QCSPP).

13. EPA. Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h); Phenol, Isopropylated Phosphate (3:1); Further Compliance Date Extension Final Rule. **Federal Register** (87 FR 12875, March 8, 2022) (FRL–6015.6–02–OCSPP).
14. EPA. Economic Analysis for Regulation of Phenol, isopropylated phosphate (3:1) (PIP (3:1) and Decabromodiphenyl ether (DecaBDE) Under TSCA Section 6(h). November 2023.
15. EPA. 1995 Policy on Evaluating Health Risks to Children. https://www.epa.gov/sites/default/files/201405/documents/1995_childrens_health_policy_statement.pdf.
16. EPA. Exposure and Use Assessment of Five Persistent, Bioaccumulative, and Toxic Chemicals. December 2020. (*For references and supporting documentation, see also EPA–HQ–OPPT–2019–0080*).
17. Comments submitted to EPA. Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h) on March 16, 2021. Docket ID: EPA–HQ–OPPT–2021–0202–0001.
18. Comment from the American Coatings Association (ACA) to EPA on May 21, 2021. Comment ID: EPA–HQ–OPPT–2021–0202–0144.
19. Centers for Disease Control and Prevention (CDC). NIOSH Hierarchy of Controls. <https://www.cdc.gov/niosh/topics/hierarchy/default.html>.
20. EPA. Environmental and Human Health Hazards of Five Persistent, Bioaccumulative and Toxic Chemicals. December 2020. (*For references and supporting documentation, see also EPA–HQ–OPPT–2019–0080*).
21. EPA. Preliminary Information on Manufacturing, Processing, Distribution, Use, and Disposal: Decabromodiphenyl ether. August 2017. Docket No. EPA–HQ–OPPT–2016–0724–0002.
22. Stakeholder Comment from Auto Alliance. February 2018.
23. Stakeholder Comment from iGPS. January 2018.
24. EPA. Access Chemical Data Reporting: 2020 CDR Data. Last updated on May 16, 2022.
25. EPA. Exposure and Use Assessment of Five Persistent, Bioaccumulative, and Toxic Chemicals. June 2019.
26. Yurok Tribe. Public Comment Submitted to EPA RE: Comments on Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h) on May 17, 2021. Comment ID: EPA–HQ–OPPT–2021–0202–0077.
27. Norwegian Environmental Agency. Final Report. Literature Study—DecaBDE in Waste Streams. 2015.
28. Yurok Tribe. Letter to EPA RE: the Tribal Consultation on DecaBDE Risk Management Rule on January 3, 2023.
29. Comment submitted to EPA by the Truck and Engine Manufacturers Association (EMA) on October 29, 2019. Comment ID: EPA–HQ–OPPT–2019–0080–0550.
30. Centers for Disease Control and Prevention (CDC). NIOSH Certified Equipment List. <https://www.cdc.gov/niosh/npptl/topics/respirators/cel/>.
31. Occupational Safety and Health Administration. Assigned Protection Factors for the Revised Respiratory Protection Standard. OSHA 3352–02 2009. <https://www.osha.gov/sites/default/files/publications/3352-APF-respirators.pdf>.
32. Occupational Safety and Health Administration. Personal Protective Equipment. OSHA 3151–02R 2023. <https://www.osha.gov/sites/default/files/publications/osh3151.pdf>.
33. EPA. Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h) RIN 2070–AK34; Response to Public Comments. December 2020.
34. EPA (2021c). TRI Toxics Tracker, U.S. Environmental Protection Agency. <https://edap.epa.gov/public/extensions/TRIToxicsTracker/TRIToxicsTracker.html>.
35. Placeholder: Letter from the Nuclear Regulatory Commission to the EPA on March 31, 2023. (EPA–HQ–OPPT–2023–0376).
36. Placeholder: Email from the Nuclear Energy Institute to the EPA on March 9, 2023, 2023. (EPA–HQ–OPPT–2023–0376).
37. EPA. Enforcement Statement Regarding the Prohibition of Processing and Distribution in Commerce of Decabromodiphenyl Ether (DecaBDE)-Containing Wire and Cable Insulation in Nuclear Power Generation Facilities under 40 CFR 751.405(a)(2)(ii). May 2, 2023. <https://www.epa.gov/system/files/documents/202305/Enforcement%20Statement%20Regarding%20DecaBDE%205%202023.pdf>.
38. EPA. 2023 DecaBDE Settlement: In the Matter of RSCC Wire & Cable LLC. Docket No. TSCA–HQ–2023–5006. May 1, 2023. [https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Unpublished-Final-Orders/8A750189B8B8E14A852589A20072ACCC/\\$File/RSCC%20CAFO%20final%20order%202023.05.01%201510.pdf](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Unpublished-Final-Orders/8A750189B8B8E14A852589A20072ACCC/$File/RSCC%20CAFO%20final%20order%202023.05.01%201510.pdf).
39. United Nations Environmental Program Stockholm Convention on Persistent Organic Pollutants (2015). Risk profile on decabromodiphenyl ether. Report of the Persistent Organic Pollutants Review Committee on the work of its eleventh meeting.
40. EPA. Stakeholder Meeting Notes with Akin Gump on September 27, 2018. Docket No. EPA–HQ–OPPT–2019–0080–0017.
41. EPA. Economic Analysis for Regulation of Phenol, Isopropylated Phosphate (3:1) (PIP (3:1)) Under TSCA Section 6(h). December 16, 2020.
42. Comment submitted to EPA from the National Elevator Industry, Inc. on March 24, 2021. Comment ID: EPA–HQ–OPPT–2021–0202–0131.
43. Comment submitted to EPA from the Motor & Equipment Manufacturers Association and the Alliance for Automotive Innovation on May 20, 2021. Comment ID: EPA–HQ–OPPT–2021–0202–0110.
44. Comment to EPA from the Consumer Technology Association, IPC, and Information Technology Industry Council on May 24, 2021. Comment ID: EPA–HQ–OPPT–2021–0202–0148.
45. Comment submitted to EPA from The Boeing Company on May 20, 2021. Comment ID: EPA–HQ–OPPT–2021–0202–0102.
46. Comment submitted to EPA from the Association of Equipment Manufacturers on May 14, 2021. Comment ID: EPA–HQ–OPPT–2021–0202–0053.
47. Comment submitted to EPA from SEMI and the Semiconductor Equipment Association of Japan on May 20, 2021. Comment ID: EPA–HQ–OPPT–2021–0202–0121.
48. Comment submitted to EPA from the Power Tool Institute, Inc. on May 18, 2021. Comment ID: EPA–HQ–OPPT–2021–0202–0067.
49. Comment submitted to EPA from Leonhardt Environmental, PC on May 6, 2021. Comment ID: EPA–HQ–OPPT–2021–0202–0035.
50. Comment submitted to EPA by Japan Agricultural Machinery Manufacturers Association on May 20, 2021. Comment ID: EPA–HQ–OPPT–2021–0202–0112.
51. Comment submitted to EPA by Chemical Users Coalition on May 24, 2021. Comment ID: EPA–HQ–OPPT–2021–0202–0135.
52. EPA. Letter from EPA’s Office of Chemical Safety and Pollution Prevention to EPA’s Office of Enforcement and Compliance Assurance RE: Request for No Action Assurance Regarding the Prohibition of Processing and Distribution of Phenol Isopropylated Phosphate (3:1), PIP (3:1), for Use in Articles and PIP (3:1) containing Articles under 40 CFR 751.407(a)(1). March 8, 2021. https://www.epa.gov/sites/default/files/2021-03/documents/10021-08_memo_freedhoff_to_starfield_tscapip_31_naa_signed_2021-03-08.pdf.
53. Comment submitted to EPA from Daniel D. Masakowski, Director of Materials Development, RSCC on the Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h) on January 29, 2020. Comment ID: EPA–HQ–OPPT–2019–0080–0583.
54. Keweenaw Bay Indian Community. Re: Notification of Consultation and Coordination on a Rulemaking Under the Toxic Substances Control Act: Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h). September 25, 2018.
55. Harper, Barbara and Ranco, Darren, in collaboration with the Maine Tribes. Wabanaki Traditional Cultural Lifeways Exposure Scenario. July 9, 2009. Referenced in the 2021 Final PBT Rule.
56. EPA. Supporting Statement for an Information Collection Request (ICR) under the Paperwork Reduction Act (PRA); Decabromodiphenyl Ether and Phenol, Isopropylated Phosphate (3:1); Revision to the Regulation of Persistent, Bioaccumulative, and Toxic Chemicals under the Toxic Substances Control Act (TSCA); Proposed Rule (RIN 2070–AL02). EPA ICR No. 2779.01 and OMB Control No. 2070–NEW. November 2023.

57. Comment submitted to EPA by SEMI on August 4, 2023. Comment ID; TBA

VII. Statutory and Executive Order Reviews

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

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

This action is a “significant regulatory action” as defined in section 3(f)(1) of Executive Order 12866 (58 FR 51735, October 4, 1993), as amended by Executive Order 14094 (88 FR 21879, April 11, 2023). Accordingly, EPA, submitted this action to OMB for review under Executive Order 12866. Documentation of any changes made in response to the Executive Order 12866 review is available in the docket.

EPA prepared an economic analysis of the potential costs and benefits associated with this proposed rule (Ref. 14). A copy of this economic analysis is also available in the docket and is briefly summarized in Unit I.E. and discussed in Unit IV.

B. Paperwork Reduction Act (PRA)

The information collection activities in this proposed rule have been submitted for approval to OMB under the PRA, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR No. 2779.01 (Ref. 56). You can find a copy of the ICR in the docket for this rulemaking and it is briefly summarized here.

Respondents/affected entities: See Unit I.A.

Respondent's obligation to respond: Mandatory under TSCA section 6(h) and 40 CFR 751.407.

Estimated number of respondents: 19,020 (13,550 manufacturers/importers/processors, and 5,470 distributors).

Frequency of response: On occasion.

Total estimated burden: 34,497 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$2,640,103 (per year), includes \$0 annualized capital or operation and maintenance costs.

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 OMB control numbers for EPA regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the

accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden to EPA using the docket identified at the beginning of this rule. EPA will respond to any ICR-related comments in the final rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs using the interface at <https://www.reginfo.gov/public/do/PRAMain>. Find this ICR by selecting “Currently under Review—Open for Public Comments” or by using the search function. OMB must receive comments no later than December 26, 2023.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA, 5 U.S.C. 601, *et seq.* The small entities subject to the requirements of this action are small businesses that manufacture/import, process, or distribute the chemicals subject to this proposed rule. The Agency has determined that this proposed rule, if finalized, would impact approximately 16,205 small businesses of which 1,399 are expected to incur cost impacts between 1% and 3% of their annual revenue, all of which were for PIP (3:1) and none for decaBDE. The cost per small entity ranged from \$4,254 to \$1,134,821 (with an average of \$124,650) at a 3% discount rate and ranged from \$4,227 to \$1,134,786 (with an average of \$124,651, at a 7% discount rate). No entities for either chemical are expected to be impacted above 3% of their annual revenue. Details of this analysis are presented in the Economic Analysis (Ref. 14), which is in the public docket for this action.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The requirements of this proposed rule are not expected to affect state, local, or Tribal governments because the rule impacts only entities that manufacture (including import), process, distribute in commerce, use, or dispose decaBDE and PIP (3:1), and government entities are not engaged in these activities.

E. Executive Order 13132: Federalism

This action does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it will not have substantial direct effects on the states,

on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action does not have tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9, 2000), because it will not have substantial direct effects on tribal governments, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, the Agency consulted with tribal officials during the development of this action. EPA consulted with representatives of Tribes via teleconference on August 31, 2018, and September 6, 2018, concerning the prospective regulation of these five PBT chemicals under TSCA section 6(h). Tribal members were encouraged to provide additional comments after the teleconferences. EPA received two comments from the Keweenaw Bay Indian Community and Maine Tribes (Refs. 54 and 55). EPA also met with the National Tribal Toxics Council (NTTC) in Washington, DC. During the NTTC meeting, the Agency provided background information on the available regulatory options under 6(a) and a summary of the information gathered on the five PBT chemicals. Officials from NTTC expressed support for EPA regulations to reduce exposures to the general population and susceptible subpopulations. On November 7, 2022, EPA held a one-on-one tribal consultation with the Yurok Tribal Council, where the Agency received additional information that informed the Agency of considerations to reduce potential exposures to decaBDE, a summary of this consultation is provided in Unit II.A.2.

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

Executive Order 13045 (62 FR 19885, April 23, 1997) directs federal agencies to include an evaluation of the health and safety effects of the planned regulation on children in federal health and safety standards and explain why the regulation is preferable to potentially effective and reasonably feasible alternatives. This action is subject to Executive Order 13045

because it is a significant regulatory action under section 3(f)(1) of Executive Order 12866, and the EPA believes that the environmental health or safety risk addressed by this action may have a disproportionate effect on children. While EPA believes that this action addresses the health and environmental risks presented by the PBT chemicals subject to this action that may have a disproportionate effect on children, EPA did not perform a risk assessment or risk evaluation of these PBT chemicals. However, the proposed requirements would reduce potential exposure to these PBT chemicals for the general population and for susceptible subpopulations such as workers and children. EPA's evaluation of the exposure potential of these PBT chemicals (Ref. 16) and summary of the health and environmental hazards that may be presented by these chemical substances (Ref. 20) are in the docket. In addition, as briefly discussed in Unit I.E.5., EPA's Policy on Children's Health also applies to this action. See also the other discussions about the risks presented by the PBT chemicals subject to this action that are provided throughout this preamble.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution or use of energy.

I. National Technology Transfer and Advancement Act (NTTAA)

This action does not involve technical standards under the NTTAA section 12(d), 15 U.S.C. 272.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

EPA believes that it is not practicable to assess whether this action is likely to result in new disproportionate impacts or exacerbate any existing disproportionate impacts on communities with EJ concerns in accordance with Executive Order 12898 (59 FR 7629, February 16, 1994) and Executive Order 14096 (88 FR 25251, April 26, 2023). Since a risk evaluation was not conducted, EPA's understanding of the extent to which reductions in exposure might reduce risks for communities with

environmental justice concerns is limited. Data are not sufficiently comprehensive to estimate the extent to which the proposed rule would reduce existing disproportionate impacts on communities with EJ concerns. Data on the worker composition of affected industries, presented in Sections 6.5.1 and 6.5.2 of the Economic Analysis (Ref. 14), provides a general indication of how different demographic groups in the worker population may be affected. Certain exclusions and extensions of compliance dates beyond the onset of the rule may partially delay addressing these impacts. EPA believes that the restrictions that would be placed on decaBDE and PIP (3:1) with adoption of this proposed rule would reduce the potential exposures, and therefore, reduce any potential risks, associated with the manufacture, processing and use of these chemicals. EPA cannot confirm which specific subpopulations are at a disproportionate risk from exposure nor make a quantified estimate of the change in exposure that will result from the rule. In addition, only a small subset of the specific facilities using decaBDE and PIP (3:1) have been identified, so a proximity analysis examining the characteristics of the communities surrounding the known facilities might not be representative of all exposed communities. Some workers will receive PPE with adoption of the rule, while others will no longer be exposed to decaBDE and PIP (3:1). As companies reformulate with chemical alternatives, some workers may be exposed to these alternatives. Local communities will be also less exposed to decaBDE and PIP (3:1), though exposure to chemical alternatives may increase. EPA does not know which chemical alternatives industry will ultimately use. Some alternatives are less toxic and some are comparably toxic to decaBDE and PIP (3:1).

List of Subjects 40 CFR Part 751

Environmental protection, Chemicals, Export Notification, Hazardous substances, Import certification, Reporting and recordkeeping.

Michael S. Regan,
Administrator.

Therefore, for the reasons set forth in the preamble, EPA proposes to amend 40 CFR chapter I as follows:

PART 751—REGULATION OF CERTAIN CHEMICAL SUBSTANCES AND MIXTURES UNDER SECTION 6 OF THE TOXIC SUBSTANCES CONTROL ACT

■ 1. The authority citation for part 751 continues to read as follows:

Authority: 15 U.S.C. 2605, 15 U.S.C. 2625(l)(4).

■ 2. Amend § 751.403 by adding in alphabetical order the term "regulated area" to read as follows:

§ 751.403 Definitions.

* * * * *

Regulated area means an area established by the regulated entity to demarcate areas where airborne concentrations or direct dermal contact of a specific chemical substance can reasonably be expected.

* * * * *

■ 3. Amend § 751.405 by:

■ a. Revising paragraph (a)(2)(ii);

■ b. Adding paragraphs (a)(2)(vi);

■ c. Revising paragraphs (c)(1)(i) and (iii); and

■ d. Adding paragraphs (d), (e), (f), and (g).

The revision and additions read as follows:

§ 751.405 DecaBDE.

(a) * * *

(2) * * *

(ii) After January 6, 2023, all persons are prohibited from all processing and distribution in commerce of decaBDE for use in wire and cable insulation in nuclear power generation facilities (including research and test reactors).

* * * * *

(vi) After the end of the wire and cables' service life, all persons are prohibited from all processing and distribution in commerce of decaBDE-containing wire and cable insulation for nuclear power generation facilities (including research and test reactors).

* * * * *

(c) * * *

(1) * * *

(i) These records must be maintained for a period of five years from the date the record is generated.

* * * * *

(iii) These records must be made available to EPA upon request.

* * * * *

(d) *Labeling.*

(1) After [DATE 1 YEAR AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], all persons who process, including recycle, plastic shipping pallets that are known to contain decaBDE must securely attach a label to each pallet. For purposes of this section, "securely attach" shall mean that a label can reasonably be expected to remain affixed during the foreseeable conditions and period of use. Each label must show clearly, prominently, and in an easily readable font size the following text:

This shipping pallet contains decabromodiphenyl ether (decaBDE) (CASRN

1163–19–5), a chemical that has been identified as persistent, bioaccumulative, and toxic (PBT) by the U.S. Environmental Protection Agency. All persons who recycle or process this pallet are required to wear personal protective equipment, per regulations at 40 CFR 751.405(e). The use of decaBDE is restricted under 40 CFR 751.405, all persons are prohibited from all manufacturing (including importing), processing, or distribution in commerce of decaBDE or decaBDE-containing products or articles, except for select uses, including those for plastic shipping pallets at 40 CFR 751.405(a)(2)(v) and (b). After the end of the pallets' service life, all persons are prohibited from all distribution in commerce of plastic shipping pallets that contain decaBDE and were manufactured prior to March 8, 2021.

(e) *Workplace protection.*

(1) *Applicability.* After [DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], the provisions of paragraph (e) of this section apply to any workplaces, engaged in manufacturing and processing of decaBDE and decaBDE-containing products and articles, except for those identified in paragraph (e)(7) of this section.

(2) *Regulated areas.* Owners or operators must establish and maintain regulated areas as defined in 40 CFR 751.403 wherever a potentially exposed person's exposure to airborne concentrations or direct dermal contact of decaBDE can reasonably be expected.

(i) The owner or operator must limit access to regulated areas to authorized persons.

(ii) The owner or operator must demarcate regulated areas from the rest of the workplace in a manner that adequately establishes and alerts persons to the boundaries of the regulated area and minimizes the number of authorized persons exposed to decaBDE within the regulated area.

(iii) The owner or operator must supply a respirator that complies with the requirements of paragraph (e) of this section and must ensure that all persons within the regulated area are using the provided respirators whenever exposures to airborne concentrations of decaBDE can reasonably be expected.

(iv) The owner or operator must ensure that while persons are wearing respirators in the regulated area, they do not engage in activities which interfere with respirator seal or performance.

(v) Whenever any direct dermal contact with decaBDE may occur within the regulated area the owner or operator must supply and ensure all persons are using dermal PPE that complies with the requirements of paragraph (e) of this section.

(vi) The owner or operator must ensure that, within a regulated area,

persons do not engage in non-work activities that may increase exposure to decaBDE.

(3) *Respiratory protection.* The owner or operator must provide respiratory protection to all potentially exposed persons in the regulated area as demarcated in accordance with paragraph (e)(2) of this section, and according to the provisions outlined in 29 CFR 1910.134(a) through (l) and as specified in this paragraph for potentially exposed persons to decaBDE during expected time of use.

(i) The type of respiratory protection that regulated entities must select and provide to potentially exposed persons must be at least as protective as a NIOSH-approved N95 respirator (APF 10).

(ii) [Reserved]

(4) *Dermal protection.* Owners or operators must require the donning of gloves that are chemically resistant to decaBDE with activity-specific training where dermal contact with decaBDE is possible.

(5) *Training.* The owner or operator must provide PPE training in accordance with 29 CFR 1910.132(f) to all persons required to use PPE under this subsection. The training shall be provided prior to or at the time of initial assignment to a job involving potential exposure to decaBDE.

(6) *Workplace protection records.* (i) The owner or operator subject to the requirements described in this section must retain records of:

(A) The name, workplace address, work shift, job classification, work area of each person reasonably likely to directly handle decaBDE or handle equipment or materials on which decaBDE may be present, the type of PPE selected by the owner or operator for use by each of these persons, the respiratory protection used by each potentially exposed person, and PPE program implementation, including fit-testing and training;

(B) The basis for PPE selection (e.g., demonstration based on permeation testing or manufacturer specifications that each item of PPE selected provides an impervious barrier to prevent exposure during expected duration and conditions of exposure, including the likely combinations of chemical substances to which the PPE may be exposed in the work area); and

(C) Appropriately sized PPE and training on proper application, wear, and removal of PPE, and proper care/disposal of PPE.

(ii) These records must be maintained for a period of five years from the date the record is generated.

(iii) These records must be made available to EPA upon request.

(7) *Exclusions.* The following are not subject to the provision of paragraph (e) of this section:

(i) Import of decaBDE and decaBDE-containing products and articles.

(ii) Processing for recycling of decaBDE-containing plastic from products or articles and decaBDE-containing products or articles made from such recycled plastic, where no new decaBDE is added during the recycling or production processes, except for those identified in paragraph (a)(2)(v) of this section.

(iii) Processing addressed in paragraph (a)(2)(vi) of this section of decaBDE-containing wire and cable insulation for use in nuclear power generation facilities.

(iv) Processing of new and replacement parts to which decaBDE has been added for motor and aerospace vehicles, and the motor and aerospace vehicles that contain new and replacement parts to which decaBDE has been added.

(f) *Export notification for decaBDE-containing products and articles.* After [DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], all persons intending to export decaBDE-containing wire and cable for nuclear power generation facilities (including research and test reactors) are required to notify EPA under TSCA section 12(b) and the provisions of subpart D of 40 CFR part 707. The exemption at 40 CFR 707.60(b) does not apply to decaBDE-containing wire and cable for nuclear power generation facilities.

(g) *Prohibition on releases to water.* After [DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], all persons are prohibited from releasing decaBDE to water during manufacturing, processing, and distribution in commerce of decaBDE, decaBDE-containing products, and all persons are required to follow any applicable regulations and best management practices for preventing the release of decaBDE.

■ 4. Amend § 751.407 by:

■ a. Revising paragraphs (a)(2)(iii) and adding paragraphs (a)(2)(iv) through (ix); and

■ b. Revising paragraphs (b)(1)(ii) and (iii), (d)(1) and (3); and

■ c. Adding paragraph (f).

The revisions and additions read as follows:

§ 751.407 PIP (3:1).

(a) * * *

(2) * * *

(iii) After October 31, 2024, except as provided in paragraphs (a)(2)(ii),

(a)(2)(ix), and (b) of this section, all persons are prohibited from all processing and distribution in commerce of PIP (3:1) for use in articles and PIP (3:1)-containing articles.

(iv) After [DATE 5 YEARS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], except as provided in paragraph (b)(1)(ii) of this section, all persons are prohibited from all processing and distribution in commerce of PIP (3:1) and manufacturing, processing, and distribution of PIP (3:1)-containing products for use in lubricants and greases and PIP (3:1)-containing lubricants and greases.

(v) After [DATE 15 YEARS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], all persons are prohibited from all processing and distribution in commerce of PIP (3:1) for use in parts for new motor vehicles, including heavy machinery, and manufacturing, processing, and distribution in commerce of PIP (3:1)-containing products for use in parts for new motor vehicles, including heavy machinery, PIP (3:1)-containing parts for such new vehicles, and the new motor vehicles, including heavy machinery in any parts.

(vi) After [DATE 30 YEARS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], all persons are prohibited from all processing and distribution in commerce of PIP (3:1) and manufacturing, processing, and distribution in commerce of PIP (3:1)-containing products for use in replacement parts for motor vehicles, including heavy machinery, PIP (3:1)-containing replacement parts, and the motor vehicles, including heavy machinery, that contain such replacement parts.

(vii) After [DATE 30 YEARS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], all persons are prohibited from all processing and distribution in commerce of PIP (3:1) and manufacturing, processing, and distribution in commerce of PIP (3:1)-containing products for use in parts installed in and distributed as part of new aerospace vehicles, and PIP (3:1)-containing parts for such vehicles. After the end of the aerospace vehicles service lives, all persons are prohibited from all importing, processing, and distribution in commerce of aerospace vehicles manufactured before [DATE 30 YEARS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**] that contain PIP (3:1) in any part. After the end of the aerospace vehicles service lives, all persons are prohibited from all manufacturing, processing, and distribution in commerce of PIP (3:1)

and PIP (3:1)-containing products for use in replacement parts for aerospace vehicles, and the replacement parts to which PIP (3:1) has been added for such vehicles.

(viii) After [DATE 5 YEARS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], all persons are prohibited from processing and distribution in commerce of PIP (3:1) and manufacturing, processing, and distribution in commerce of PIP (3:1)-containing products for use in marine antifouling coating products that are registered under the Federal, Insecticide, Fungicide, Rodenticide Act and that meet U.S. Department of Defense specification requirements.

(ix) After November 25, 2033, all persons are prohibited from processing, and distribution in commerce of PIP (3:1), and manufacturing, processing, and distribution of PIP (3:1)-containing products and articles for use in manufacturing equipment and in the semi-conductor industry.

* * * * *

(b) * * *

(1) * * *

(ii) PIP (3:1) for use in lubricants and greases for aerospace and turbine uses, PIP (3:1)-containing products for use in lubricants and greases for aerospace and turbine use, and PIP (3:1)-containing lubricants and greases for aerospace and turbine uses;

(iii) PIP (3:1) and PIP (3:1)-containing products for use in circuit boards and wire harnesses, including but not limited to terminal and fuse covers, cable sleeves, casings, connectors and tapes, and PIP (3:1)-containing circuit boards and wire harnesses including but not limited to terminal and fuse covers, cable sleeves, casings, connectors and tapes;

* * * * *

(d) * * *

(1) After March 8, 2021, Persons who manufacture, process, or distribute in commerce PIP (3:1) or PIP (3:1)-containing products or articles must maintain ordinary business records, such as invoices and bills-of-lading, related to compliance with the prohibitions, restrictions, and other provisions of this section. These records must be maintained for a period of five years from the date the record is generated.

* * * * *

(3) These records must be made available to EPA upon request.

* * * * *

(f) *Workplace protection.*

(1) *Applicability.* After January 23, 2024, the provisions of this paragraph (f) apply to workplaces engaged in the

manufacturing and processing of PIP (3:1) and PIP (3:1)-containing products and articles, except as provided in paragraph (f)(8) of this section.

(2) *Regulated areas.* Owners or operators must establish and maintain regulated areas as defined in 40 CFR 751.403 wherever a potentially exposed person's exposure to airborne concentrations or direct dermal contact of PIP (3:1) can reasonably be expected.

(i) The owner or operator must limit access to regulated areas to authorized persons.

(ii) The owner or operator must demarcate regulated areas from the rest of the workplace in a manner that adequately establishes and alerts persons to the boundaries of the regulated area and minimizes the number of authorized persons exposed to PIP (3:1) within the regulated area.

(iii) The owner or operator must supply a respirator that complies with the requirements of paragraph (f) of this section and must ensure that all persons within the regulated area are using the provided respirators whenever exposures to airborne concentrations of PIP (3:1) can reasonably be expected.

(iv) The owner or operator must ensure that while persons are wearing respirators in the regulated area, they do not engage in activities which interfere with respirator seal or performance.

(v) Whenever any direct dermal contact with PIP (3:1) may occur within the regulated area the owner or operator must supply and ensure all persons are using dermal PPE that complies with the requirements of paragraph (f) of this section.

(vi) The owner or operator must ensure that, within a regulated area, persons do not engage in non-work activities that may increase exposure to PIP (3:1).

(3) *Respiratory protection.* The owner or operator must provide respiratory protection to all potentially exposed persons in the regulated area as demarcated in accordance with paragraph (f)(2) of this section, and according to the provisions outlined in 29 CFR 1910.134(a) through (l) and as specified in this paragraph for potentially exposed persons to PIP (3:1) during expected time of use.

(i) The type of respiratory protection that regulated entities must select and provide to potentially exposed persons must be at least as protective as a NIOSH-approved APF 10 air-purifying half mask respirator except for those uses identified in paragraph (f)(3)(ii) and (iii) of this section.

(ii) The type of respiratory protection that regulated entities must select and provide to potentially exposed persons

must be at least as protective as a NIOSH-approved N95 respirator (APF 10) for the manufacturing and processing of PIP (3:1), and PIP (3:1)-containing products for use in new and replacement parts for motor vehicles, including heavy machinery, and aerospace vehicles.

(iii) The type of respiratory protection that regulated entities must select and provide to potentially exposed persons must be at least as protective as a NIOSH-approved APF 50 purifying respirator for use as an intermediate to produce cyanoacrylate adhesives when PIP (3:1) and PIP (3:1)-containing products are not contained in a closed system (*i.e.*, except as described in paragraph (f)(8)(iii) of this section).

(4) *Dermal protection.* Owners or operators must require the donning of gloves that are chemically resistant to PIP (3:1) with activity-specific training where dermal contact with PIP (3:1) is possible.

(5) *Training.* The owner or operator must provide PPE training in accordance with 29 CFR 1910.132(f) to all persons required to use PPE under this subsection. The training shall be provided prior to or at the time of initial assignment to a job involving potential exposure to PIP (3:1).

(6) *Engineering controls.* Owners or operators manufacturing cyanoacrylate adhesives using PIP (3:1) as an

intermediate processing aid must use the following engineering controls:

(i) Must take place in a closed loop system, and

(ii) General and local exhaust ventilation must be provided.

(7) *Workplace protection records.*

Owners or operators subject to requirements described in this section must retain records of:

(A) The name, workplace address, work shift, job classification, work area of each person reasonably likely to directly handle PIP (3:1) or handle equipment or materials on which PIP (3:1) may be present, the type of PPE selected to be worn by each of these persons, the respiratory protection used by each potentially exposed person and PPE program implementation, including fit-testing and training;

(B) The basis for PPE selection (*e.g.*, demonstration based on permeation testing or manufacturer specifications that each item of PPE selected provides an impervious barrier to prevent exposure during expected duration and conditions of exposure, including the likely combinations of chemical substances to which the PPE may be exposed in the work area); and

(C) Appropriately sized PPE and training on proper application, wear, and removal of PPE, and proper care/disposal of PPE.

(ii) These records must be maintained for a period of five years from the date the record is generated.

(iii) These records must be made available to EPA upon request.

(8) *Exclusions.*

(i) Import of PIP (3:1) and PIP (3:1)-containing products and articles are not subject to the provision of paragraph (f) of this section.

(ii) Processing of certain PIP (3:1)-containing products and articles: PIP (3:1)-containing adhesives and sealants, new and replacement parts to which PIP (3:1) has been added for such motor and aerospace vehicles, and the motor and aerospace vehicles that contain new and replacement parts to which PIP (3:1) has been added, PIP (3:1)-containing specialized engine filters for locomotive and marine applications, and the products or articles described in paragraph (b)(1)(vi) and (vii) of this section are not subject to the provisions of paragraph (f) of this section.

(iii) Processing of PIP (3:1) and PIP (3:1)-containing products for use as an intermediate to produce cyanoacrylate adhesives when PIP (3:1) and PIP (3:1)-containing products are contained in a closed system as described in paragraph (f)(6) of this section are not subject to the provision of paragraph (f)(3) and (4) of this section.

* * * * *

[FR Doc. 2023-25714 Filed 11-22-23; 8:45 am]

BILLING CODE 6560-50-P

Notices

Federal Register

Vol. 88, No. 225

Friday, November 24, 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

Agricultural Marketing Service

[Doc. No. AMS–TM–23–0076]

Notice of Availability of the Programmatic Environmental Assessment for AMS Organic Market Development Grant Program; Correction

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of availability; correction.

SUMMARY: The Agricultural Marketing Service (AMS) published a notice in the **Federal Register** of November 20, 2023, concerning the availability of the Draft Programmatic Environmental Assessment (PEA) for the Organic Market Development Grant Program (OMDG) for public review and comments. The notice contained an incorrect link to the Draft PEA.

FOR FURTHER INFORMATION CONTACT: Betsy Rakola, Associate Deputy Administrator, Transportation and Marketing Program; Telephone: (202)–690–1300; Email: OMDG@usda.gov.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of November 20, 2023, in FR Doc. 2023–20564, on page 80688, in the second column, in the third paragraph, correct the program website address where the Draft PEA is available for online review to read “<https://www.ams.usda.gov/services/grants/omdg>.”

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2023–26061 Filed 11–21–23; 4:15 pm]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

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

Comments regarding this information collection received by December 26, 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.

Food and Nutrition Service

Title: Generic Clearance for Stakeholder Feedback and Surveys as Part of FNS Planning: Regulatory Actions, Semi-annual Regulatory Agenda, Program Changes, Research Studies, Outreach, Training and/or Development of Guidance.

OMB Control Number: 0584–NEW.

Summary of Collection: The proposed information collection provides a means to garner qualitative and quantitative stakeholder feedback, feedback from state, local and/or Tribal agencies and implementers, feedback from program participants, and existing administrative data, in an efficient and timely manner.

Need And Use of the Information: This collection allows for ongoing, two-way collaborative and actionable communications between the Agency and its state, local and/or Tribal partners, program participants, and stakeholders. It also allows feedback to contribute directly to the improvement and planning of research studies, program changes, regulatory activities, guidance, outreach and/or training activities. As individual collections occur under this generic umbrella, consideration will be given to the appropriate data sharing, equity issues and transparency per collection.

Description of Respondents: Individuals and Households, Businesses and Organizations, State, Local or Tribal Government.

Number of Respondents: 40,575.

Frequency of Responses: Reporting: On Occasion.

Total Burden Hours: 43,360.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–25932 Filed 11–22–23; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Proposed New Recreation Fee Site

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice.

SUMMARY: The Superior National Forest is proposing to establish a new recreation fee site. Recreation fee revenues collected at the new recreation fee site would be used for operation, maintenance, and improvement of the site. An analysis of nearby recreation fee sites with similar amenities shows the recreation fee that would be charged at the new recreation fee site is reasonable and typical of similar recreation fee sites in the area.

DATES: If approved, the new recreation fee would be implemented no earlier

than six months following the publication of this notice in the **Federal Register**.

ADDRESSES: Superior National Forest, 8901 Grand Avenue Place, Duluth, MN 55808.

FOR FURTHER INFORMATION CONTACT: Tim Engrav, Acting Recreation Fee Manager, 218-666-0025 or timothy.engrav@usda.gov.

SUPPLEMENTARY INFORMATION: The Federal Lands Recreation Enhancement Act (16 U.S.C. 6803(b)) requires the Forest Service to publish a six-month advance notice in the **Federal Register** of establishment of new recreation fee sites. In accordance with Forest Service Handbook 2309.13, chapter 30, the Forest Service will publish the proposed new recreation fee site in local newspapers and other local publications for public comment. Most of the new recreation fee revenues would be spent where they are collected to enhance the visitor experience at the new recreation fee site. An expanded amenity recreation fee of \$150 per night would be charged for rental of Wolf Island Cabin.

Expenditures from recreation fee revenues collected at the new recreation fee site would enhance recreation opportunities, improve customer service, and address maintenance needs. Once public involvement is complete, the new recreation fee will be reviewed by a Recreation Resource Advisory Committee prior to a final decision and implementation. Reservations for Wolf Island Cabin could be made online at www.recreation.gov or by calling 877-444-6777. Reservations would cost \$8.00 per reservation.

Dated: November 17, 2023.

Jacqueline Emanuel,
Associate Deputy Chief, National Forest System.

[FR Doc. 2023-25868 Filed 11-22-23; 8:45 am]

BILLING CODE 3411-15-P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

[DOCKET #: RBS-23-BUSINESS-0019]

Notice of Revision of a Currently Approved Information Collection

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 the Rural Business-Cooperative Service (RBCS) announces its intention to request a revision for a currently

approved information collection package for Rural Cooperative Development Grant (RCDG) program.

DATES: Comments on this notice must be received by January 23, 2024 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically by the Federal eRulemaking Portal, <http://www.regulations.gov>.

Other Information: Additional information about Rural Development and its programs is available on the internet at <https://www.rd.usda.gov>.

FOR FURTHER INFORMATION CONTACT: Katherine Anne Mathis, Rural Development Innovation Center—Regulations Management Division, U.S. Department of Agriculture, 1400 Independence Avenue SW, Washington, DC 20250, Telephone: 202-713-7565, email: Katherine.mathis@usda.gov.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget's (OMB) regulation (5 CFR part 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104-13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies an information collection that the Agency is submitting to OMB for extension.

Comments are invited on (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be submitted electronically by the Federal eRulemaking Portal, <http://www.regulations.gov>. In the "Search for dockets and documents on agency actions" box enter the Docket No. RBS-12-BUSINESS-0019 and click the "Search" button. From the search results, click on or locate the document title: "Notice of Revision of a Currently Approved Information Collection" and select the "Comment" button. Before inputting comments, commenters may

review the "Commenter's Checklist" (optional). Insert comments under the "Comment" title, click "Browse" to attach files (if available), input email address and select "Submit Comment." Information on using *Regulations.gov*, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's "FAQ" link.

All comments will be available for public inspection online at the Federal eRulemaking Portal (<https://www.regulations.gov>).

Title: Rural Cooperative Development Grant program.

OMB Control Number: 0570-0006.

Type of Request: Revision of a currently approved information collection under 7 CFR part 4284 Subpart F.

Abstract: The primary purpose of RCDG is to promote understanding, use, and development of the cooperative form of business as a viable option for enhancing the income of agricultural producers and other rural residents. The primary objective of the RCDG program is to improve the economic condition of rural areas through cooperative development. Grants will be awarded on a competitive basis to nonprofit corporations and institutions of higher education based on specific selection criteria.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 11.9 hours per response.

Respondents: Nonprofit corporations and institutions of higher education.

Estimated Number of Respondents: 41.

Estimated Number of Responses per Respondent: 12.78.

Estimated Number of Responses: 524.

Estimated Total Annual Burden on Respondents: 6,259 hours.

Copies of this information collection can be obtained from Katherine Anne Mathis, Rural Development Innovation Center—Regulations Management Division, at (202) 713-7565. Email: katherine.mathis@usda.gov.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Karama Neal,
Administrator, Rural Business-Cooperative Service, USDA Rural Development.

[FR Doc. 2023-25876 Filed 11-22-23; 8:45 am]

BILLING CODE 3410-XY-P

DEPARTMENT OF COMMERCE**Foreign-Trade Zones Board****[B-60-2023]****Foreign-Trade Zone (FTZ) 32,
Notification of Proposed Production
Activity; KMP USA LLC; (Automotive
Parts); Doral, Florida**

KMP USA LLC submitted a notification of proposed production activity to the FTZ Board (the Board) for its facility in Doral, Florida within Subzone 32E. The notification conforming to the requirements of the Board's regulations (15 CFR 400.22) was received on November 13, 2023.

Pursuant to 15 CFR 400.14(b), FTZ production activity would be limited to the specific foreign-status material(s)/ component(s) and specific finished product(s) described in the submitted notification (summarized below) and subsequently authorized by the Board. The benefits that may stem from conducting production activity under FTZ procedures are explained in the background section of the Board's website—accessible via www.trade.gov/ftz.

The proposed finished products include: camshaft bushing kits; camshaft kits; connecting rods (con rod) and main bearings kits; con rod bearings kits; con rod bolt kits; crankshaft kits; crankshaft thrust washers kits; cylinder head assemblies; cylinder head bolt kits; cylinder liner and seal kits; engine filter kits; engine overhaul gasket kits; engine long block assemblies; engine oil pump kits; engine overhaul kits; engine piston and liner kits; engine sensor kits; engine short block assemblies; engine valve collet kits; engine valve kits; engine valve seal kits; engine valvetrain kits; excavator bucket pin and bushing kits; expansion plug kits; fuel injector seal kits; fuel line kits; fuel solenoid kits; hydraulic cylinder seal kits; engine brake gasket kits; engine valve guide kits; main bearing kits; piston kits; piston kit and connecting rod assemblies; piston pin and retainer kits; piston ring sets; spindle repair kits; transmission oil pump kits; turbocharger gasket kits; V-belt sets; water pump kits; and, water pump repair kits (duty rate ranges from duty-free to 5.8%).

The proposed foreign-status materials and components include: balancer shafts (cast iron); ball bearings (steel); bolts, studs or screws (steel); copper and aluminum bushings for balance shaft, camshafts (piece or set), connecting rods, crankshafts, equipment arm or bucket links, front cover or accessory drives, hydraulic cylinder rod ends and,

spindles; camshafts (cast iron and steel); steel circlips; clutch alignment tools (plastic); clutch assemblies (aluminum and steel); clutch plates (aluminum, fiber and, steel); clutch release levers (copper and steel); clutch tension springs (copper and steel); coil solenoids (cast iron and steel); connecting rods (steel); half, pair or, set of connecting rod bearings (standard, undersize or oversize) (copper and aluminum); connecting rod end slipper bearing kits (copper, aluminum); pressure plate and cover assemblies (aluminum and steel); crankshafts (cast iron and steel); cylinder blocks (cast iron); bare or assembled cylinder heads (cast iron and steel); cylinder head injector sleeves (brass, copper and, steel); engine block cylinder liners (cast iron and steel); engine mounted air compressor cylinder liners (cast iron and steel); cylinder liner seals (rubber and plastic); cylinder liner shims (brass and steel); dowel pins (steel); dowel pin alignment inserts, dowel rings (steel); air, fuel, oil and, water engine filters (plastic, aluminum and, steel); engine oil cooler cores (aluminum, cast iron, copper and, steel); engine oil pumps (aluminum, cast iron and, steel); engine overhaul gasket kit; engine piston: body, crown, pins, skirts and, rings (compression, oil control or set) (aluminum, cast iron and, steel); engine push rods (steel); engine pressure and temperature sensors (plastic and brass); engine intake or exhaust valves (steel); engine valve crossheads (cast iron); engine intake or exhaust valve guides (steel); engine valve lash caps (steel); engine valve lock half: collet or keepers (steel); engine valve rotators (steel); engine intake or exhaust valve seals (plastic and steel); engine intake or exhaust valve seats (steel); inner or lower engine intake or exhaust valve springs (steel); upper or lower engine valve spring retainers (steel); engine water pumps, impeller, shafts and spacers (aluminum, cast iron, plastic and, steel); exhaust manifold sleeves (steel); expansion plugs (steel); fuel lines (aluminum and steel); fuel priming pumps, mechanical engine transfer pumps (aluminum, cast iron, steel and, plastic); gaskets for accessory drives, blower end plates, brake and cam follower housings, cylinder heads, drain plugs, engine mounted compressors, exhaust manifold, flanges, front covers, fuel pumps, injector sleeves, oil cooler covers, oil coolers, oil pans, oil pick up tubes, oil pumps, pre-combustion chambers, rear covers, rear housing rope seals, turbocharger oil drains, turbochargers, valve covers, and water pumps made from paper, rubber, steel,

copper and, graphite; gear (balancer, camshaft, crankshaft, idler pump drive) (steel); grease fittings (aluminum and steel); rubber hoses; hour meter gauges (aluminum, plastic, glass and, steel); hydraulic cylinder seals (back up rings, buffer rings, dust seals, packing, piston rings, rings) (rubber and plastic); hydraulic cylinder wear rings (plastic); aluminum and steel hose clips; liquid gasket makers (plastic); steel lockwire; standard, undersize or oversize main bearings (aluminum, copper); water pump mechanical seals (steel and plastic); steel needle roller bearings; steel and plastic nuts; front or rear crankshaft/cover oil seals (steel, rubber and, plastic); rubber and plastic O-rings; equipment arm, cylinder rod or bucket link steel pins; engine mounted air compressor piston assemblies (aluminum, cast iron and, steel); piston cooling nozzles (steel, plastic and, cast iron); pre-combustion chambers (steel); engine oil cooler housing pressure relief plungers (steel and plastic); socket, ball or adjuster rocker arm inserts (steel and plastic); rocker arm rollers, pins and, supports (cast iron, brass and steel); intake or exhaust rocker levers (cast iron and steel); rocker lever shafts (cast iron, steel); steel roller bearings; rubber and plastic seals; engine block and cylinder head steel spacer plates; camshaft follower tappets (steel, brass and, cast iron); thermostat engine coolant regulator (aluminum, brass and, steel); standard, undersize or oversize thrust bearings (aluminum, copper and steel); crankshaft thrust blocks (brass and steel); steel thrust plates; standard, undersize or oversize thrust washers (aluminum, copper and, steel); transmission oil pumps (aluminum, cast iron and, steel); turbochargers (aluminum, cast iron, steel and, plastic); universal joint assemblies (cast iron and steel); engine mounted air compressor unloader valve caps and bodies (aluminum and cast iron); single or set rubber V-belts; aluminum and steel valves (part of engine mounted air compressor); steel and brass washers; water temperature gauges (aluminum, plastic, glass and, steel); steel wear plates (part of engine mounted air compressor); steel wear sleeves; and, steel woodruff keys (duty rate ranges from duty-free to 9%). The request indicates that certain materials/ components are subject to duties under section 301 of the Trade Act of 1974 (section 301), depending on the country of origin. The applicable section 301 decisions require subject merchandise to be admitted to FTZs in privileged foreign status (19 CFR 146.41).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary and sent to: ftz@trade.gov. The closing period for their receipt is January 3, 2024.

A copy of the notification will be available for public inspection in the "Online FTZ Information System" section of the Board's website.

For further information, contact Christopher Wedderburn at Chris.Wedderburn@trade.gov.

Dated: November 17, 2023.

Elizabeth Whiteman,

Executive Secretary.

[FR Doc. 2023-25926 Filed 11-22-23; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Regulations and Procedures Technical Advisory Committee; Notice of Partially Closed Meeting-Hybrid

The Regulations and Procedures Technical Advisory Committee (RPTAC) will meet December 12, 2023, 9:00 a.m., Eastern Standard Time, in the Herbert C. Hoover Building, Room 3884, 1401 Constitution Avenue NW, Washington, DC (enter through Main Entrance on 14th Street between Constitution and Pennsylvania Avenues). The Committee advises the Office of the Assistant Secretary for Export Administration on implementation of the Export Administration Regulations (EAR) and provides for continuing review to update the EAR as needed.

Agenda

Public Session

1. Opening remarks by the Chairman
2. Opening remarks by the Bureau of Industry and Security
3. Presentations of Papers by the Public
4. Regulations Update
5. Working Group Reports
6. Automated Export System Update

Closed Session

7. Discussion of matters determined to be exempt from the open meeting and public participation requirements found in sections 1009(a)(1) and 1009(a)(3) of the Federal Advisory Committee Act (FACA) (5 U.S.C. 1001-1014). The exemption is authorized by Section 1009(d) of the FACA, which permits the closure of advisory committee meetings, or portions thereof, if the head of the agency to which the advisory committee reports determines such meetings may be closed to the public in accordance with subsection (c) of the Government

in the Sunshine Act (5 U.S.C. 552b(c)). In this case, the applicable provisions of 5 U.S.C. 552b(c) are subsection 552b(c)(4), which permits closure to protect trade secrets and commercial or financial information that is privileged or confidential, and subsection 552b(c)(9)(B), which permits closure to protect information that would be likely to significantly frustrate implementation of a proposed agency action were it to be disclosed prematurely. The closed session of the meeting will involve committee discussions and guidance regarding U.S. Government strategies and policies.

The open session will be accessible via teleconference. To join the conference, submit inquiries to Ms. Yvette Springer at Yvette.Springer@bis.doc.gov, no later than December 5, 2023.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on April 24, 2023, pursuant to 5 U.S.C. 1009(d) of the FACA, that the portion of the meeting dealing with pre-decisional changes to the Commerce Control List and the U.S. export control policies shall be exempt from the provisions relating to public meetings found in 5 U.S.C. 1009(a)(1) and 1009(a)(3). The remaining portions of the meeting will be open to the public.

For more information, contact Ms. Springer via email.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2023-25975 Filed 11-22-23; 8:45 am]

BILLING CODE 3510-JT-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-533-838]

Carbazole Violet Pigment 23 From India: Preliminary Results of New Shipper Review; 2021-2022

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

DATES: Applicable November 24, 2023.

FOR FURTHER INFORMATION CONTACT:

Dennis McClure at (202) 482-5973 or Henry Wolfe at (202) 482-0574, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On December 29, 2004, the U.S. Department of Commerce (Commerce) published in the **Federal Register** the antidumping duty order on carbazole violet pigment 23 (CVP-23) from India.¹ On January 27, 2023, we initiated a new shipper review (NSR) based on a timely request from Sudarshan Chemical Industries Limited (Sudarshan).²

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

Scope of the Order

The product covered by the Order is carbazole violet pigment 23. The

¹ See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Carbazole Violet Pigment 23 from India, 69 FR 77988 (December 29, 2004) (Order).

² See Carbazole Violet Pigment 23 from India: Initiation of Antidumping Duty New Shipper Review, 88 FR 5309 (January 27, 2023).

³ See Memorandum, "Decision Memorandum for the Preliminary Results of New Shipper Review of the Antidumping Duty Order on Carbazole Violet Pigment 23 from India; 2021-2022," dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

merchandise subject to the Order is classifiable under subheading 3204.17.9040 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of this Order is dispositive. For a complete description of the scope of the Order, see the Preliminary Decision Memorandum.

Methodology

Commerce conducted this review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act). For a full description of the methodology underlying the preliminary determination, see the Preliminary Decision Memorandum.

Verification

As provided in 19 CFR 351.307(b)(iv), Commerce intends to verify the information submitted by Sudarshan in advance of the final results of the review.

Preliminary Results

As a result of this NSR, Commerce preliminarily determines the following weighted-average dumping margin exists for the period, December 1, 2021, through November 30, 2022.

Producer/exporter	Weighted-average dumping margin (percent)
Sudarshan Chemical Industries Limited	0.00

Disclosure and Public Comment

Commerce intends to disclose the calculations performed in connection with these preliminary results to interested parties within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Interested parties will be notified of the deadline for the submission of case briefs at a later date.⁴ Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.⁵ Parties who submit case or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief

summary of the argument; and (3) a table of authorities.⁶ Executive summaries should be limited to five pages total, including footnotes.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. Requests should contain the following information: (1) the party's name, address, and telephone number; (2) the number of participants; (3) whether any participant is a foreign national; and (4) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. If a request for a hearing is made, Commerce intends to notify parties of the time and date for the hearing.

An electronically filed hearing request must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5:00 p.m. Eastern Time within 30 days after the date of publication of this notice.⁷ Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).⁸

Commerce intends to issue the final results of this NSR, including the results of its analysis of issues raised in any written briefs, no later than 90 days after the date of issuance of the preliminary determination of this notice, unless extended, pursuant to section 751(a)(2)(B)(iii) of the Act.

Assessment Rates

Upon issuing the final results of this review, Commerce will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review.⁹ If the respondent's weighted-average dumping margin is zero or *de minimis* in the final results of this review, Commerce will instruct U.S. Customs and Border Protection (CBP) not to assess antidumping duties on any of its entries in accordance with the *Final Modification for Reviews*.¹⁰ If the respondent's weighted-average dumping margin is above *de minimis* (i.e., 0.5 percent) in the final results of this review, Commerce will calculate

importer-specific assessment rates on the basis of the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those sales, in accordance with 19 CFR 351.212(b)(1). If an importer-specific rate is zero or *de minimis*, Commerce will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

Cash Deposit Instructions

The following cash deposit requirements will be effective upon publication of the final results of this review for shipments of the subject merchandise from India entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) for subject merchandise produced and exported by Sudarshan, the cash deposit rate will be the rate established for Sudarshan in the final results of this NSR (except, if the rate is zero or *de minimis*, then no cash deposit will be required);¹¹ (2) for subject merchandise exported by Sudarshan, but not produced by Sudarshan, the cash deposit rate will be the producer's rate, or the all others rate (i.e., 27.48 percent)¹² if the producer does not have its own rate; and (3) for subject merchandise produced by Sudarshan, but not exported by Sudarshan, the cash deposit rate will be the rate applicable to the exporter, or the all other's rate if the exporter does not have its own rate. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

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

⁶ See 19 CFR 351.309(c)(2) and (d)(2).

⁷ See 19 CFR 351.310(c).

⁸ See APO and Service Final Rule.

⁹ See 19 CFR 351.212(b).

¹⁰ In these preliminary results, Commerce applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*).

¹¹ See *Certain Cut-To-Length Carbon-Quality Steel Plate Products from The Republic of Korea: Preliminary Results of Antidumping Duty Administrative and New Shipper Reviews and Rescission of Administrative Review, In Part*; 2014–2015, 81 FR 12870 (March 11, 2016).

¹² See *Order*, 69 FR at 77989.

⁴ See 19 CFR 351.309(c)(1)(ii).

⁵ See 19 CFR 351.309(d)(1) and (2); see also *Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings; Final Rule*, 88 FR 67069 (September 29, 2023) (*APO and Service Final Rule*).

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(2)(B) and 777(i)(1) of the Act and 19 CFR 351.214.

Dated: November 17, 2023.

Abdelali Elouaradia, Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

- I. Summary
- II. Background
- III. Scope of the Order
- IV. Discussion of Methodology
- V. Currency Conversion
- VI. Recommendation

[FR Doc. 2023–25935 Filed 11–22–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Announcement of Approved International Trade Administration Trade Mission

AGENCY: International Trade Administration, Department of Commerce.

SUMMARY: The United States Department of Commerce, International Trade Administration (ITA), is announcing one upcoming trade mission that will be recruited, organized, and implemented by ITA. This mission is: Asia Tech x Singapore 2024—ICT Business Development Mission to Singapore—May 27–30, 2024. A summary of the mission is found below. Application information and more detailed mission information, including the commercial setting and sector information, can be found at the trade mission website: <https://www.trade.gov/trade-missions>. For each mission, recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (<https://www.trade.gov/trade-missions-schedule>) and other internet websites, press releases to general and trade media, direct mail, broadcast fax, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows.

FOR FURTHER INFORMATION CONTACT: Jeffrey Odum, Events Management Task Force, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington DC 20230; telephone: (202) 482–6397 or email Jeffrey.Odum@trade.gov.

SUPPLEMENTARY INFORMATION:

The Following Conditions for Participation Will Be Used for the Mission

Applicants must submit a completed and signed mission application and supplemental application materials, including adequate information on their products and/or services, primary market objectives, and goals for participation that is adequate to allow the Department of Commerce to evaluate their application. If the Department of Commerce receives an incomplete application, the Department of Commerce may either: reject the application, request additional information/clarification, or take the lack of information into account when evaluating the application. If the requisite minimum number of participants is not selected for a particular mission by the recruitment deadline, the mission may be cancelled.

Each applicant must also certify that the products and services it seeks to export through the mission are either produced in the United States, or, if not, are marketed under the name of a U.S. firm and have at least fifty-one percent U.S. content by value. In the case of a trade association or organization, the applicant must certify that, for each firm or service provider to be represented by the association/organization, the products and/or services the represented firm or service provider seeks to export are either produced in the United States or, if not, marketed under the name of a U.S. firm and have at least 51% U.S. content by value.

A trade association/organization applicant must certify and agree to the above for every company it seeks to represent on the mission. In addition, each applicant must:

- Certify that the products and services that it wishes to market through the mission would be in compliance with U.S. export controls and regulations;
- Certify that it has identified any matter pending before any bureau or office in the Department of Commerce;
- Certify that it has identified any pending litigation (including any administrative proceedings) to which it is a party that involves the Department of Commerce; and
- Sign and submit an agreement that it and its affiliates (1) have not and will not engage in the bribery of foreign officials in connection with a company's/participant's involvement in this mission, and (2) maintain and enforce a policy that prohibits the bribery of foreign officials.

In the case of a trade association/organization, the applicant must certify that each firm or service provider to be represented by the association/organization can make the above certifications.

The Following Selection Criteria Will Be Used for the Mission

Targeted mission participants are U.S. firms, services providers and trade associations/organizations providing or promoting U.S. products and services that have an interest in entering or expanding their business in the mission's destination country. The following criteria will be evaluated in selecting participants:

- Suitability of the applicant's (or in the case of a trade association/organization, represented firm's or service provider's) products or services to these markets;
- The applicant's (or in the case of a trade association/organization, represented firm's or service provider's) potential for business in the markets, including likelihood of exports resulting from the mission; and
- Consistency of the applicant's (or in the case of a trade association/organization, represented firm's or service provider's) goals and objectives with the stated scope of the mission. Balance of company size and location may also be considered during the review process.

Referrals from a political party or partisan political group or any information, including on the application, containing references to political contributions or other partisan political activities will be excluded from the application and will not be considered during the selection process. The sender will be notified of these exclusions.

Mission List: (additional information about trade missions can be found at <https://www.trade.gov/trade-missions>).

Asia Tech x Singapore 2024—ICT Business Development Mission to Singapore—May 27–30, 2024

Summary

The United States Department of Commerce, International Trade Administration (ITA), is organizing an ICT Business Development Mission to Singapore from May 27–May 30, 2024. This mission will be run in conjunction with the Asia Tech x Singapore 2024 (ATxSG 2024) trade show and forum whose dates are from May 29–May 31, 2024.

The purpose of the mission is to expand opportunities for U.S. companies in Singapore and the

Southeast Asian region at the intersection of telecommunications services, 5G, SaaS applications, cybersecurity and the digital economy. This mission will also be part of delivering and advancing U.S. technology, standards and commercial interests in this vital region of the world.

The objective is to identify, where appropriate and in line with U.S. policy objectives, trade promotion opportunities that will help cement U.S. technology organizations as global leaders in this rapid-growth industry, while also creating new commercial opportunities and encouraging strong regulation and supervision worldwide.

The mission is designed for U.S. firms and organizations who play a part in the technology industry, especially those

with products in the following categories: Telecommunications & 5G

- Cybersecurity
- Artificial Intelligence
- Digital Economy
- Smart Cities Technology Applications

This list is not intended to be exhaustive of all opportunities but shows best prospect sectors.

Applications from companies selling products or services within the scope of this mission, but not specifically identified, will be considered, and evaluated by the International Trade Administration on a case-by-case basis.

Other Products and Services

The foregoing analysis of the technology opportunities in Singapore is not intended to be exhaustive, but illustrative of the many opportunities available to U.S. businesses.

Applications from companies selling products or services within the scope of this mission, but not specifically identified, will be considered and evaluated by the U.S. Department of Commerce. Companies whose products or services do not fit the scope of the mission may contact their local U.S. Export Assistance Center (USEAC) to learn about other business development missions and services that may provide more targeted export opportunities. Companies may go to <https://trade.gov> to obtain such information.

Proposed Timetable:

*** Note:** The final schedule and potential site visits will depend on the availability of host government and business officials, specific goals of mission participants, and ground transportation.

Sunday, May 26, 2024	• Arrive in Singapore.
Monday May 27, 2024	• Official Trade Mission programming begins.
	• Welcome Remarks & Introductions.
	• Embassy Briefing.
	• B2B Meetings.
Tuesday May 28, 2024	• Site visit to Singaporean companies looking to do business with U.S. companies.
	• Capability assessment of what U.S. technology firms can provide.
	• Evening reception at an Official Residence.
Wednesday May 29, 2024	• ATxSG 2024 trade show participation.
	• On-site showtime business-to-government and business-to-business meeting program.
Thursday May 30, 2024	• ATxSG 2024 trade show participation.
	• On-site showtime business-to-government and business-to-business meeting program.

Participation Requirements

All parties interested in participating in the trade mission must complete and submit an application package for consideration by the DOC. All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. A minimum of 10 and maximum of 15 firms and/or trade associations will be selected to participate in the mission from the applicant pool.

Fees and Expenses

After a firm or trade association has been selected to participate on the mission, a payment to the Department of Commerce in the form of a participation fee is required. The participation fee for the ATxSG 2024 Trade Mission to Singapore will be \$3,200 for small or medium-sized enterprises (SME),¹ and

\$4,500 for large firms or trade associations. The fee for each additional firm representative (large firm or SME/trade organization) is \$1,000. Expenses for travel, lodging, meals, and incidentals will be the responsibility of each mission participant. Interpreter and driver services can be arranged for additional cost. Delegation members will be able to take advantage of U.S. Embassy rates for hotel rooms. If and when an applicant is selected to participate on a particular mission, a payment to the Department of Commerce in the amount of the designated participation fee below is required. Upon notification of acceptance to participate, those selected have 5 business days to submit payment or the acceptance may be revoked.

Participants selected for a trade mission will be expected to pay for the cost of personal expenses, including, but not limited to, international travel, lodging, meals, transportation, communication, and incidentals, unless otherwise noted. Participants will, however, be able to take advantage of U.S. Government rates for hotel rooms. In the event that a mission is cancelled, no personal expenses paid in anticipation of a mission will be

reimbursed. However, participation fees for a cancelled mission will be reimbursed to the extent they have not already been expended in anticipation of the mission. If a visa is required to travel on a particular mission, applying for and obtaining such a visa will be the responsibility of the mission participant. Government fees and processing expenses to obtain such a visa are not included in the participation fee. However, the Department of Commerce will provide instructions to each participant on the procedures required to obtain business visas.

Trade Mission members participate in trade missions and undertake mission-related travel at their own risk. The nature of the security situation in a given foreign market at a given time cannot be guaranteed. The U.S. Government does not make any representations or guarantees as to the safety or security of participants. The U.S. Department of State issues U.S. Government international travel alerts and warnings for U.S. citizens available at <https://travel.state.gov/content/passports/en/alertswarnings.html>. Any question regarding insurance coverage must be resolved by the participant and

¹ For purposes of assessing participation fees, an applicant is a small or medium-sized enterprise (SME) if it qualifies under the Small Business Administration's (SBA) size standards (<https://www.sba.gov/document/support-table-size-standards>), which vary by North American Industry Classification System (NAICS) Code. The SBA Size Standards Tool (<https://www.sba.gov/size-standards/>) can help you determine the qualifications that apply to your company.

its insurer of choice. Travel and in-person activities are contingent upon the safety and health conditions in the United States and the mission countries. Should safety or health conditions not be appropriate for travel and/or in-person activities, the Department will consider postponing the event or offering a virtual program in lieu of an in-person agenda. In the event of a postponement, the Department will notify the public and applicants previously selected to participate in this mission will need to confirm their availability but need not reapply. Should the decision be made to organize a virtual program, the Department will adjust fees, accordingly, prepare an agenda for virtual activities, and notify the previously selected applicants with the option to opt-in to the new virtual program.

Definition of Small- and Medium-Sized Enterprise

For purposes of assessing participation fees, an applicant is a small or medium-sized enterprise (SME) if it qualifies as a “small business” under the Small Business Administration’s (SBA) size standards (<https://www.sba.gov/document/support—table-size-standards>), which vary by North American Industry Classification System (NAICS) Code. The SBA Size Standards Tool (<https://www.sba.gov/size-standards>) can help you determine the qualifications that apply to your company.

Timeframe for Recruitment and Applications

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (<http://export.gov/trademissions>) and other internet websites, press releases to general and trade media, direct mail, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows. Recruitment for the mission will begin immediately and conclude no later than January 31, 2024. The U.S. Department of Commerce will review applications and inform applicants of selection decisions on a rolling basis. Applications received after January 31, 2024, will be considered only if space and scheduling constraints permit.

Contacts

Project Lead

Andrey Piroozgar, International Trade Specialist, Chicago, IL/U.S. Field, Email: Andrey.Piroozgar@trade.gov.

Recruitment Lead

Molly Ho, Global Technology Team Leader, Denver, CO/U.S. Field, Email: Molly.Ho@trade.gov.

Christian Koschil, Digital Attaché, Singapore/CS Singapore, Email: Christian.Koschil@trade.gov.

Amelia Yeo, Commercial Specialist, Singapore/CS Singapore, Email: Amelia.Yeo@trade.gov.

Gemal Brangman, Director, ITA Events Management Task Force. [FR Doc. 2023–25958 Filed 11–22–23; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–863]

Forged Steel Fittings From Taiwan: Final Results of Antidumping Duty Administrative Review; 2021–2022

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that Both-Well Steel Fittings Co., Ltd. (Bothwell), a producer/exporter of forged steel fittings from Taiwan, did not sell subject merchandise at prices below normal value during the period of review (POR) September 1, 2021 through August 31, 2022.

DATES: Applicable November 24, 2023.

FOR FURTHER INFORMATION CONTACT: Dennis McClure, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5973.

SUPPLEMENTARY INFORMATION:

Background

On September 29, 2023, Commerce published in the **Federal Register** the *Preliminary Results* of the administrative review of the antidumping duty order on forged steel fittings from Taiwan.¹ This review

¹ See *Forged Steel Fittings from Taiwan: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022*, 88 FR 67238 (September 29, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

covers one producer/exporter of the subject merchandise, Bothwell. We invited parties to comment on the *Preliminary Results*.² No interested party submitted comments. Commerce conducted this administrative review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order³

The merchandise subject to the *Order* are carbon and alloy forged steel fittings, whether unfinished (commonly known as blanks or rough forgings) or finished. The subject merchandise is currently classifiable under subheadings 7307.99.1000, 7307.99.3000, 7307.99.5045, and 7307.99.5060 of the Harmonized Tariff Schedule of the United States (HTSUS). While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this *Order* is dispositive. For a complete description of the scope of the *Order*, see the Preliminary Decision Memorandum.⁴

Final Results of Review

As a result of this review, Commerce determines the following weighted-average dumping margin exists for the period, September 1, 2021, through August 31, 2022.

Producer or exporter	Weighted-average dumping margin (percent)
Both-Well Steel Fittings Co., Ltd	0.00

Disclosure

Because Commerce received no comments on the *Preliminary Results*, we have not modified our analysis, and no decision memorandum accompanies this **Federal Register** notice. We are adopting the *Preliminary Results* as the final results of this review. Consequently, there are no new calculations to disclose in accordance with 19 CFR 351.224(b) for these final results of review.

Assessment Rates

Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review, pursuant to

² *Id.*

³ See *Forged Steel Fittings from Taiwan: Antidumping Duty Order*, 83 FR 48280 (September 24, 2018) (*Order*).

⁴ See *Preliminary Results* PDM.

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

Because we calculated a zero weighted-average dumping margin for Bothwell in the final results of this review, we intend to instruct CBP to liquidate the appropriate entries without regard to antidumping duties. For entries of subject merchandise during the POR produced by Bothwell and for which Bothwell did not know its merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate established in the final determination of the less-than-fair-value investigation (*i.e.*, 116.17 percent),⁵ if there is no rate for the intermediate company(ies) involved in the transaction.⁶

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of the notice of these final results for all shipments of forged steel fittings from Taiwan entered, or withdrawn from warehouse, for consumption on or after the publication date as provided by section 751(a)(2) of the Act: (1) the cash deposit rate for Bothwell will be zero; (2) for merchandise exported by companies not covered in this review but covered in a completed prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation but the producer is, the cash deposit rate will be the rate established for the most recently completed segment for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 116.17 percent, the all-others rate established in the less-than-fair-value investigation. These cash deposit requirements, when imposed, shall remain in effect until further notice.

⁵ See *Forged Steel Fittings from Taiwan: Final Determination of Sales at Less Than Fair Value*, 83 FR 36519 (July 30, 2018).

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

Notification to Importers

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

Administrative Protective Order (APO)

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

Notification to Interested Parties

We intend to issue and publish these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213(h) and 351.221(b)(5).

Dated: November 17, 2023.

Abdelali Elouaradia,
Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–25929 Filed 11–22–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–824]

Polyethylene Terephthalate Film, Sheet, and Strip From India: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review; 2021–2022; 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** on August 3, 2023, in which Commerce announced the preliminary results of the

antidumping duty (AD) administrative review and the partial rescission of the AD administrative reviews of the AD order on polyethylene terephthalate film, sheet, and strip from India. This notice incorrectly rescinded the review for Polyplex Corporation Ltd. (Polyplex).

FOR FURTHER INFORMATION CONTACT:

Jacqueline Arrowsmith, AD/CVD Operations, Office VII, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5255.

SUPPLEMENTARY INFORMATION:

Correction

On August 3, 2023, in the **Federal Register**, in FR Doc. 2023–16543, volume 88, page 52199, in the third column, we mistakenly did not assign Polyplex the 0.00 percent dumping margin that we assigned Jindal in the section titled “Company Not Selected for Individual Review,” which should be “Companies Not Selected for Individual Review.” With the publication of this notice, we will preliminarily assign both Jindal and Polyplex a dumping margin of 0.00 percent. The final dumping margins for both Jindal and Polyplex will be determined by the final results that we calculate for SRF Limited.

Partial Rescission

Commerce initiated a review of eight companies in this proceeding. We are rescinding this administrative review with respect to only five of these companies and not six as listed in the original *Preliminary Results*.¹ The five companies for which we are rescinding the administrative review are: (1) Ester Industries Ltd.; (2) Garware Polyester Ltd.; (3) MTZ Polyesters Ltd.; (4) Uflex Ltd.; and (5) Vacmet India, pursuant to 19 CFR 351.213(d)(1), because all review requests for these companies were timely withdrawn. Accordingly, the companies that remain subject to the instant review are Jindal, Polyplex, and SRF.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended and 19 CFR 351.221(b)(4).

¹ See *Polyethylene Terephthalate Film, Sheet, and Strip from India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2021–2022*, 88 FR 51298 (August 3, 2023).

Dated: November 16, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement & Compliance.

[FR Doc. 2023-25931 Filed 11-22-23; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

National Artificial Intelligence Advisory Committee

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: The National Institute of Standards and Technology (NIST) announces that the National Artificial Intelligence Advisory Committee (NAIAC or Committee) will hold an open meeting via web conference on Wednesday, December 13, 2023, from 1:00 p.m.–2:00 p.m. Eastern time. The primary purpose of this meeting is for the Committee to share and discuss updates on each working group's goals and deliverables. The Committee will also deliberate on draft findings and recommendations. The final agenda will be posted to the NAIAC website: ai.gov/naiac/.

DATES: The meeting will be held on Wednesday, December 13, 2023 from 1 p.m.–2 p.m. eastern time.

ADDRESSES: The meeting will be held via web conference. For instructions on how to attend and/or participate in the meeting, please see the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT:

Alicia Chambers, Committee Liaison Officer, National Institute of Standards and Technology, 100 Bureau Drive, MS 1000, Gaithersburg, MD 20899, alicia.chambers@nist.gov or 301-975-5333. Please direct any inquiries to naiac@nist.gov.

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C 1001 *et seq.*, notice is hereby given that the NAIAC will meet on Wednesday, December 13, 2023, from 1 p.m.–2 p.m. eastern time. The meeting will be open to the public and will be held via web conference. The primary purpose of this meeting is for the Committee to share and discuss updates on each working group's goals and deliverables. The Committee will also deliberate on draft findings and recommendations. The final agenda will be posted to the NAIAC website: ai.gov/naiac/.

The NAIAC is authorized by section 5104 of the National Artificial Intelligence Initiative Act of 2020 (Pub. L. 116-283, Div. E), in accordance with the provisions of the Federal Advisory Committee Act, as amended (FACA), 5 U.S.C. 1001 *et seq.* The Committee advises the President and the National Artificial Intelligence Initiative Office on matters related to the National Artificial Intelligence Initiative. Additional information on the NAIAC is available at ai.gov/naiac/.

Comments: Individuals and representatives of organizations who would like to offer comments and suggestions related to items on the Committee's agenda for this meeting are invited to submit comments in advance of the meeting. Approximately ten minutes will be reserved for public comments, which will be read on a first-come, first-served basis. Please note that all comments submitted via email will be treated as public documents and will be made available for public inspection. All comments must be submitted via email with the subject line "December 13, 2023, NAIAC Meeting Comments" to naiac@nist.gov by 5:00 p.m. Eastern Time, Tuesday, December 12, 2023. NIST will not accept comments accompanied by a request that part or all of the comment be treated confidentially because of its business proprietary nature or for any other reason. Therefore, do not submit confidential business information or otherwise sensitive, protected, or personal information, such as account numbers, Social Security numbers, or names of other individuals.

Virtual Admittance Instructions: The meeting will be broadcast via web conference. Registration is required to view the web conference. Instructions to register will be made available on ai.gov/naiac/#MEETINGS. Registration will remain open until the conclusion of the meeting.

Alicia Chambers,

NIST Executive Secretariat.

[FR Doc. 2023-25954 Filed 11-22-23; 8:45 am]

BILLING CODE 3510-13-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Understanding the Human Response to Water Hazards: A Social Network Analysis

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before January 23, 2024.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at NOAA.PRA@noaa.gov. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or specific questions related to collection activities should be directed to Ji Sun Lee, Director, Social, Behavioral, & Economic Sciences Program, National Weather Service, 1325 East West Highway, Silver Spring, MD 20910, 301-349-6175, and jisun.lee@noaa.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

This is a request for a new collection of information. The Social, Behavioral, and Economic Sciences Program (SBES) in the Office of Science and Technology Integration for the National Weather Service (NWS) is sponsoring this data collection effort.

Under the Bipartisan Infrastructure Law, the NWS SBES Program was provided funding to better understand the human responses to water hazard services and products. This project seeks to understand and mitigate flooding outcomes for riverine

communities, especially those that rank high on the Centers for Disease Control's (CDC's) Social Vulnerability Index (SVI), by conducting a Social Network Analysis (SNA) to study how stakeholders within 2 selected communities, Roanoke, Virginia and Greenbrier County, West Virginia. Based on interviews with local government leaders and faith/community-based organizations (FCBOs) along with a survey of residents, the resulting SNA will map how messages are created and distributed, how they are accessed and understood, and how the information affects the decisions of emergency and water resource managers, first responders, community partners, and the general public as they prepare for, respond to, and recover from flooding events. While the NWS possesses some anecdotal knowledge of the dissemination and use of flood forecasts, a more complete accounting and formal analysis of the individuals and groups within these networks are needed. Ideally, the findings from the SNA in relation to the water hazard products and services will not only improve the NWS's understanding of who the stakeholders are, but also how they use the information provided and what they believe are the benefits for their constituents.

The primary driver for this project comes from the direction of NOAA leadership to develop a social behavioral infrastructure with data that supports the NWS in providing equitable service delivery for all of its products and services. Based on *H.R.3684 Infrastructure Investment and Jobs Act (IIJA), Provision 3*: funding shall be used for coastal and inland flood and inundation mapping and forecasting, next-generation water modeling activities such as modernized precipitation frequency and probable maximum studies, and transformative foundational social science research that build infrastructure and supports equitable service delivery to all communities. This project also aligns with Goal 3 of the NWS Strategic Plan to transform our Agency to meet current and future needs of society by (3.6) delivering actionable inland and coastal water resource and inundation information across all time scales to address the growing risk of flooding, drought, and low water flow as well as immediate and long range water management and planning; and by (3.8) understanding and applying the best social, behavioral, and economic sciences to clearly communicate information with communities in multiple languages and deliver

equitable service for those historically underserved and socially vulnerable to attain the desired response to high impact events.

Semi-structured interviews will be utilized to collect information from state and local government leaders, as well as FCBO leaders. A survey will be provided to residents of both communities, along with an in-person intercept survey provided to residents of Greenbrier County based on interviews with the FCBO leaders.

The SNA maps derived from the data collected will be utilized by the following NWS offices:

- Community Engagement Program to support outreach and engagement activities with specific groups and the organizations that serve these populations.
- The Decision Support Integration Branch of the Analyze, Forecast, and Support Office to help them identify and recruit organizations, businesses, and individuals who may be well poised to become Weather-Ready Ambassadors. The raw data collected will be used by:
- The Social, Behavioral, and Economic Sciences (SBES) Program in the Office of Science and Technology Integration in developing an Agent Based Model (ABM) that can demonstrate, describe, and potentially anticipate evacuation and mobility behaviors within a prescribed system for inland flooding events. If possible, the application of an ABM will support the development of mitigation efforts that stakeholders can test to understand how the actions of specific agents within a system could possibly alter outcomes of flooding events for a community.

II. Method of Collection

The semi-structured interviews will be conducted, either face-to-face or via video conferencing technology based on schedules and participant preference. The survey responses will be collected via a web platform called REDCap, while the intercept surveys will be fielded by the contractor and conducted face-to-face during invited community events.

III. Data

OMB Control Number: 0648–XXXX.

Form Number(s): None.

Type of Review: Regular submission, new information collection.

Affected Public: Local government, Not-for profit, and individuals or households.

Estimated Number of Respondents: 790.

Estimated Time per Response: Semi-structured interviews: 1 hour; Survey: 15 minutes.

Estimated Total Annual Burden Hours: 227.50 hours.

Estimated Total Annual Cost to Public: \$6744.40.

Respondent's Obligation: Voluntary.

Legal Authority: *H.R.3684 Infrastructure Investment and Jobs Act (IIJA), Provision 3*: funding shall be used for coastal and inland flood and inundation mapping and forecasting, next-generation water modeling activities such as modernized precipitation frequency and probable maximum studies, and transformative foundational social science research that build infrastructure and supports equitable service delivery to all communities.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may 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.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–25977 Filed 11–22–23; 8:45 am]

BILLING CODE 3510-KE-P

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration**

[RTID 0648–XD547]

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Notice of availability of a draft environmental assessment; request for comments.

SUMMARY: Notice is hereby given that NMFS has prepared a draft Environmental Assessment under the National Environmental Policy Act (NEPA) describing the potential effects of the continued operation of one hatchery program in the San Joaquin River Basin of California. The Hatchery and Genetic Management Plan (HGMP) for the program was prepared and submitted by the United States Fish and Wildlife Service (USFWS) and the California Department of Fish and Wildlife (CDFW). All comments and other information received will become part of the public record and will be available for review.

DATES: Comments or requests for a public hearing on the applications must be received at the appropriate address or fax number (see **ADDRESSES**) no later than 5 p.m. Pacific standard time on December 26, 2023.

ADDRESSES: Written comments on the application should be addressed to the NMFS California Central Valley Office, 650 Capitol Mall, Suite 5–100, Sacramento, CA 95814. Comments may also be submitted via email to Meiling.Colombano@noaa.gov. Include in the subject line of the email comment the following identifier: Comments on SJRRP 10(a)(1)(A) Enhancement Permit EA. When commenting on the draft environmental assessment, please refer to the specific page number and line number of the subject of your comment.

FOR FURTHER INFORMATION CONTACT: Meiling Colombano, Sacramento, CA, at phone number: (916) 930–3695, or via email: Meiling.Colombano@noaa.gov.

SUPPLEMENTARY INFORMATION:**ESA-Listed Species Covered in This Notice**

Chinook salmon (*Oncorhynchus tshawytscha*): threatened, naturally produced and artificially propagated Central Valley spring-run (CVSR).

Steelhead (*O. mykiss*): threatened, naturally produced and artificially

propagated California Central Valley (CCV).

Green sturgeon (*Acipenser medirostris*): threatened, naturally produced southern distinct population segment (sDPS).

Background

The USFWS and CDFW, under the auspices of the San Joaquin River Restoration Program (SJRRP), are working to restore a CVSR Chinook salmon population in the San Joaquin River. The reintroduced CVSR Chinook salmon, taken from one or more out-of-basin stocks, are designated as a non-essential, experimental population under Section 10(j) of the ESA, and have associated 4(d) take provisions (78 FR 79622; December 31, 2013). The SJRRP determined that a conservation hatchery would be the preferred and primary strategy for reintroducing CVSR Chinook salmon to the San Joaquin River. The San Joaquin River Salmon Conservation and Research Program (Conservation Program) involves the operation of two facilities: the Salmon Conservation and Research Facility (SCARF) currently under construction, with completion expected in 2024, and an interim SCARF (Interim Facility) currently in operation. The Conservation Program is operated as an Integrated-Recovery hatchery program, intended to help meet fisheries management objectives while achieving restoration and recovery goals.

This CVSR Chinook salmon HGMP submitted by the USFWS and CDFW, pursuant to section 10(a)(1)(A) of the ESA (16 U.S.C. 1531 *et seq.*) and regulations governing listed fish and wildlife permits (50 CFR 222), provides guidance on the management and operation of the SCARF and Interim Facility in the San Joaquin River Basin. The HGMP and the associated Section 10(a)(1)(A) enhancement permit application (20571–2R) were made available for public review and comment on March 7, 2023 (88 FR 14147). On June 26, 2023, NMFS determined that the submitted HGMP was sufficient for consideration under Section 10(a)(1)(A) of the ESA. The draft environmental assessment available for comment evaluates the potential effects of approving the CVSR Chinook salmon HGMP and issuing Section 10(a)(1)(A) Permit 20571–2R to the USFWS and CDFW.

Authority

NEPA requires Federal agencies to conduct an environmental analysis of their proposed actions to determine if the actions may affect the human environment. Therefore, NMFS is

seeking public input on the scope of the required NEPA analysis, including the range of reasonable alternatives and associated impacts of any alternatives.

Dated: November 17, 2023.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–25878 Filed 11–22–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration**

[RTID 0648–XD548]

Endangered Species; File No. 21516

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

ACTION: Issuance of permit modification.

SUMMARY: Notice is hereby given that NMFS has issued a modification to Incidental Take Permit (ITP; No. 21516) to Virginia Electric and Power Company, d.b.a. Dominion Virginia Power (Dominion) pursuant to the Endangered Species Act of 1973 (ESA), as amended, for the incidental take of Atlantic sturgeon (*Acipenser oxyrinchus oxyrinchus*) associated with the otherwise lawful operation of the Dominion Chesterfield Power Station (CPS) in Chesterfield, VA.

ADDRESSES: The modified incidental take permit and other related documents are available on the NMFS Office of Protected Resources website at <https://www.fisheries.noaa.gov/national/endangered-species-conservation/incidental-take-permits>.

FOR FURTHER INFORMATION CONTACT:

Lynn Lankshear, (978) 282–8473, Lynn.Lankshear@noaa.gov.

SUPPLEMENTARY INFORMATION: Section 9 of the ESA and Federal regulations prohibits the “taking” of a species listed as endangered or threatened. The ESA defines “take” to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. NMFS may issue permits, under limited circumstances to take listed species when the take is incidental to, and not the purpose of, otherwise lawful activities. Section 10(a)(1)(B) of the ESA provides for authorizing incidental take of listed species. The regulations for modifying permits and issuing incidental take permits for threatened and endangered species are

promulgated at 50 CFR 222.306 and at 50 CFR 222.307.

Background

NMFS issued Permit No. 21516 to Dominion on December 10, 2020 (86 FR 1945). NMFS published notice in the **Federal Register** on August 2, 2022 (87 FR 47190), that Dominion had requested modification of their ITP to allow for the incidental take of Atlantic sturgeon eggs from the Chesapeake Bay Distinct Population Segment through December 30, 2025, and to modify permit conditions based on anticipated operational changes at the CPS. However, new information regarding take of Atlantic sturgeon eggs at CPS was received after the close of the public comment period. Therefore, Dominion's request for modification of the ITP to allow for the incidental take of Atlantic sturgeon eggs remains in progress.

In the interim, based on the information provided by Dominion and the public comment received, NMFS has modified Permit No. 21516 to: allow entrainment sampling for monitoring to occur at the furthest upriver cooling water intake structure that is operational at CPS at the time monitoring occurs; allow entrainment sampling for monitoring to be paused on the rare occasion that all CPS river circulating pumps are not operating provided that NMFS is notified within 24 hours of Dominion shutting down all water intake at the circulating water pumps, and provided the notification includes information describing the reason(s) for the shutdown and the expected duration of the shutdown; require visual inspections of the cooling water intake structure trash racks (and the immediate area upstream) from September 1 through October 31; require Dominion to annually inspect (*i.e.*, by divers) the intake guards at CPS cooling water intake structures no earlier than March 1 and no later than August 15 to confirm that the guards are intact and capable of excluding any adult Atlantic sturgeon as designed, and make repairs to the guards, as needed, prior to September 1; and require Dominion to clean the trash racks via a mechanical trash rake only as operationally necessary or, in the event a specific intake guard is found to be in jeopardy of not functioning as designed, the trash racks associated with that intact guard must be cleaned via a mechanical trash rake twice per day (once per 12-hour shift during daylight hours) during the fall sturgeon spawning window of September 1 through October 31. Prior to September 1, trash raking must occur at a specific intake guard if it is found to be at risk

of not functioning as designed and adult Atlantic sturgeon are present in the vicinity of CPS as indicated by the real-time telemetry system. Permit condition IV.C.4.g. has also been corrected to reflect the 8-week period from September through October for each year of the permit.

National Environmental Policy Act

Issuing an ESA section 10(a)(1)(B) permit constitutes a Federal action requiring NMFS to comply with the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) as implemented by 40 CFR parts 1500–1508 and NOAA Administrative Order 216–6A, Compliance with the National Environmental Policy Act (2016). NMFS prepared a Supplemental Information Report explaining why the potential impacts to sturgeon and other resources fall within the scope of the 2020 Environmental Assessment (EA) and Finding of No Significant Impact developed in support of the original permit. We concluded that there would be little change in the impacts from this action, relative to those described in the original EA. Further, we concluded that there are no significant new circumstances or information that would result in changes to the impacts of the permit requirements as considered in the previous analyses.

Authority: This notice is provided pursuant to section 10(c) of the ESA (16 U.S.C. 1531 *et seq.*) and NEPA regulations (40 CFR 1506.6).

Dated: November 20, 2023.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–25984 Filed 11–22–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD554]

Pacific 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 Pacific Fishery Management Council's (Pacific Council) Coastal Pelagic Species Management Team (CPSMT), Coastal Pelagic Species Advisory Subpanel (CPSAS), and

Ecosystem Work Group (EWG) will hold an online public meeting.

DATES: The online meeting will be held Monday, January 22, 2024, from 1 p.m. to 3 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, CPSAS, and EWG to discuss matters related to the Pacific Council's fishery ecosystem plan initiative. No management actions will be decided by the CPSMT, CPSAS, or EWG. CPSMT, CPSAS, or EWG recommendations will be considered by the Pacific Council at the March Pacific Council meeting. 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 20, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023-25964 Filed 11-22-23; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XC980]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the U.S. Army Corps of Engineers Unalaska (Dutch Harbor) Channel Deepening Project

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

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued an incidental harassment authorization (IHA) to the United States Army Corps of Engineers (Alaska District) (USACE) for authorization to take marine mammals incidental to Unalaska (Dutch Harbor) Channel Deepening in Iliuliuk Bay, Unalaska, Alaska.

DATES: This Authorization is effective from January 1, 2024 through December 31, 2024.

ADDRESSES: Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at <https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-army-corps-engineers-unalaska-dutch-harbor-channel>. In case of problems accessing these documents, please call the contact listed below.

FOR FURTHER INFORMATION CONTACT: Cara Hotchkin, Office of Protected Resources, NMFS, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who

engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed IHA is provided to the public for review.

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

Summary of Request

On October 31, 2022, NMFS received a request from the United States Army Corps of Engineers—Alaska District (USACE) for an IHA to take marine mammals incidental to deepening the entrance to Iliuliuk Bay, adjacent to Dutch Harbor, Alaska. Following NMFS’ review of the application, USACE submitted supplemental information on November 28, 2022 and January 5, 2023. The application was deemed adequate and complete on March 2, 2023. The notice of the proposed IHA and request for comments was published on April 11, 2023 (88 FR 21630). USACE’s request is for take of harbor seals (*Phoca vitulina richardsi*), Steller sea lions (*Eumetopias jubatus*), harbor porpoise (*Phocoena phocoena*), and humpback whales (*Megaptera novaengliae*) by Level A harassment and Level B Harassment. Neither USACE nor NMFS expect serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

Description of the Specified Activity

The USACE plans to deepen the entrance channel of Iliuliuk Bay by means of dredging and (if necessary) confined blasting of a 42-foot (ft) (12.8 meter (m)) deep “bar” which currently restricts access to the port of Dutch Harbor, Alaska. Dutch Harbor is the only deep draft, year-round ice-free port along the 1,200-mile (1,931 km)

Aleutian Island chain, providing vital services to vessels operating in both the North Pacific and the Bering Sea, and the depth of the bar currently restricts access for large vessels that may need to enter the port, particularly during extreme weather. The purpose of the project is to increase navigational safety and improve economic efficiencies into and out of Dutch Harbor via Iliuliuk Bay.

Removal of the bar will involve dredging (via clamshell dredge or long-reach excavator) an area approximately 600 ft (182.9 m) by 600 ft (182.9 m), moving approximately 182,000 cubic yards (139,150 cubic meters) of sediment. Dredged material will be placed in the water immediately adjacent to the inside of the bar in approximately 100 ft (33.3 m) of water. If required to enable dredging, confined blasting (hereafter “blasting”) involving drilled boreholes and multiple charges with microdelays between blasts will be used to break up the sediment.

Safety restrictions impose some limits on blasting activity and potential mitigations available to protect marine mammals. The explosives cannot “sleep” after being placed for longer than 24 hours without becoming a risk to private property and human health, and they cannot be detonated in the dark. If a marine mammal enters the blast area following the emplacement of charges, detonation will be delayed as long as possible. All other legal measures to avoid injury will be utilized; however, the charges will be detonated when delay is no longer feasible. As discussed in the mitigation section, in order to minimize the chances the charges need to be detonated while animals are present in the vicinity, the IHA includes a mitigation measure requiring explosives to be set as early in the day as possible, and detonated as soon as the pre-clearance zone is clear for 30 minutes.

Sounds resulting from confined blasting may result in the incidental take of marine mammals by Level A and Level B harassment in the form of slight injury (auditory and non-auditory) and behavioral harassment. Dredging and disposal of dredged material are not expected to result in either Level A or Level B harassment due to the low source level and mid-channel location of the dredging activities. If dredging is sufficient to deepen the channel to the required depth, reduced or no blasting may be necessary. The notice for the proposed IHA (88 FR 21630, April 11, 2023) analyzed a conservative scenario requiring blasting approximately 50 percent of the bar area, resulting in

approximately 1,800 drilled boreholes and up to 24 total blasting events.

A detailed description of the planned project is provided in the **Federal Register** notice for the proposed IHA (88 FR 21630, April 11, 2023). Since that time, no changes have been made to the planned activities. Therefore, a detailed description is not provided here. Please refer to that **Federal Register** notice for the detailed description of the specific activity.

Comments and Responses

A notice of NMFS' proposal to issue an IHA to the USACE was published in the **Federal Register** on April 11, 2023 (88 FR 21630). That notice described, in detail, USACE's planned activities, the marine mammal species that may be affected by the activities, and the anticipated effects on marine mammals. In that notice, we requested public input on the request for authorization described therein, our analyses, the proposed authorization, and any other aspect of the notice of proposed IHA, and requested that interested persons submit relevant information, suggestions, and comments. This proposed notice was available for a 30-day public comment period.

NMFS received two non-substantive comments on the proposed IHA: one from the U.S. Geological Survey stating no objections to the project, and one from a private citizen opposed to offshore wind, which is not related to this action.

Changes From the Proposed IHA to Final IHA

Since the **Federal Register** notice of the proposed IHA was published (88 FR 21630, April 11, 2023), NMFS published the final 2022 Alaska and Pacific Stock Assessment Reports (SARs), which describe revised stock structures under the MMPA for humpback whales. In the

notice of proposed IHA, we explained that although we typically consider updated peer-reviewed data provided in draft SARs to be the best available science, and use the information accordingly, we make exception for proposed revised stock structures. Upon finalization of these revised stock structures, we have made appropriate updates, including description of the potentially affected stocks (see table 1), attribution of take numbers to stock (see Estimated Take), and by updating our analyses to ensure the necessary determinations are made for the new stocks (see Negligible Impact Analysis and Determination and Small Numbers).

Additionally, between the publication of the proposed IHA (88 FR 21630, April 11, 2023) and this notice, the USACE requested that the effective dates of the authorization be shifted from November 1, 2023 through October 31, 2024 to January 1, 2024 through December 31, 2024 due to logistical constraints. The analysis presented in the proposed IHA remains valid because the estimated takes were based on year-round monitoring data at the project location. The change to the effective dates of the authorization is reflected in the **DATES** section, above.

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species. NMFS fully considered all of this information, and we refer the reader to these descriptions, incorporated here by reference, instead of reprinting the information. Additional information regarding population trends and threats may be found in NMFS' Stock Assessment Reports (SARs; www.fisheries.noaa.gov/

[national/marine-mammal-protection/marine-mammal-stock-assessments](http://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments)) and more general information about these species (e.g., physical and behavioral descriptions) may be found on NMFS' website (<https://www.fisheries.noaa.gov/find-species>).

Table 1 lists all species or stocks for which take is expected and authorized for this activity, and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no serious injury or mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species or stocks and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' U.S. Alaska and Pacific Ocean SARs. All values presented in table 1 are the most recent available at the time of publication and are available online at: www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.

TABLE 1—SPECIES LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES ¹

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) ²	Stock abundance (CV, N _{min} , most recent abundance survey) ³	PBR	Annual M/SI ⁴
Order Artiodactyla—Infraorder Cetacea—Mysticeti (baleen whales)						
<i>Family Balaenopteridae (rorquals):</i>						
Humpback Whale ⁵	<i>Megaptera novaeangliae</i>	Hawai'i	-, -, N	11,278 (0.56, 7,265, 2020) ...	127	27.09
		Mexico—North Pacific	T, D, Y	918 (0.217, UNK, 2006)	UND	0.57
		Western North Pacific	E, D, Y	1,084 (0.088, 1,007, 2021) ...	3.4	5.82
Odontoceti (toothed whales, dolphins, and porpoises)						
<i>Family Phocoenidae (porpoises):</i>						
Harbor porpoise	<i>Phocoena phocoena</i>	Bering Sea ⁵	-, -, Y	UNK (UNK, N/A, 2008)	UND	0.4
		Gulf of Alaska	-, -, Y	31,046 (0.21, N/A, 1998)	UND	72

TABLE 1—SPECIES LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES¹—Continued

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) ²	Stock abundance (CV, N _{min} , most recent abundance survey) ³	PBR	Annual M/SI ⁴
Order Carnivora—Pinnipedia						
<i>Family Otariidae (eared seals and sea lions):</i>						
Steller Sea Lion	<i>Eumetopias jubatus</i>	Western	E, D, Y	52,932 (N/A, 52,932, 2019) ..	318	254
		Eastern	-, -, N	43,201 (N/A, 43,201, 2017) ..	2592	112
<i>Family Phocidae (earless seals):</i>						
Harbor Seal	<i>Phoca vitulina</i>	Aleutian Islands	-, -, N	5,588 (N/A, 5,366, 2018)	97	90

¹ Information on the classification of marine mammal species can be found on the web page for The Society for Marine Mammalogy's Committee on Taxonomy (<https://marinemammalscience.org/science-and-publications/list-marine-mammal-species-subspecies/>; Committee on Taxonomy (2022)).

² Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

³ NMFS marine mammal stock assessment reports online at: www.nmfs.noaa.gov/pr/sars/. CV is coefficient of variation; Nmin is the minimum estimate of stock abundance. In some cases, CV is not applicable due to lack of recent surveys allowing for accurate assessment of stock abundance.

⁴ These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (e.g., commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

⁵ The best available abundance estimate and Nmin are likely an underestimate for the entire stock because it is based upon a survey that covered only a small portion of the stock's range. PBR for this stock is undetermined due to this estimate being older than 8 years.

A detailed description of the of the species likely to be affected by the Unalaska Channel Deepening project, including brief introductions to the species and relevant stocks as well as available information regarding population trends and threats, and information regarding local occurrence, were provided in the **Federal Register** notice for the proposed IHA (88 FR 21630, April 11, 2023); since that time, we are not aware of any changes in the status of these species and stocks; therefore, detailed descriptions are not provided here. Please refer to that **Federal Register** notice for these descriptions. Please also refer to NMFS' website (<https://www.fisheries.noaa.gov/find-species>) for generalized species accounts.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Not all marine mammal species have equal hearing capabilities (e.g., Richardson *et al.*, 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007, 2019) recommended that marine mammals be divided into hearing groups based on directly measured (behavioral or auditory evoked potential techniques) or estimated hearing ranges

(behavioral response data, anatomical modeling, *etc.*). Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.*, low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in table 2.

TABLE 2—MARINE MAMMAL HEARING GROUPS
[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, <i>Kogia</i> , river dolphins, Cephalorhynchid, <i>Lagenorhynchus cruciger</i> & <i>L. australis</i>).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.*, all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.*, 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range

(Hemilä *et al.*, 2006; Kastelein *et al.*, 2009; Reichmuth *et al.*, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

The effects of underwater noise from USACE's construction activities have the potential to result in behavioral harassment of marine mammals in the vicinity of the blasting area. The notice

of proposed IHA (88 FR 21630, April 11, 2023) included a discussion of the effects of anthropogenic noise on marine mammals and the potential effects of underwater noise from confined blasting activities on marine mammals and their habitat. That information and analysis is incorporated by reference into this final IHA determination and is not repeated here; please refer to the notice of proposed IHA (88 FR 21630, April 11, 2023).

Estimated Take of Marine Mammals

This section provides an estimate of the number of incidental takes authorized through this IHA, which informs both NMFS' consideration of "small numbers," and the negligible impact determinations.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines "harassment" as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would primarily be by Level B harassment, as use of the explosive source (*i.e.*, confined blasting) has the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury and tissue damage (Level A harassment) to result, primarily for cetaceans (humpback whale and harbor porpoise) and phocids because predicted auditory injury zones are larger than for otariids. The mitigation and monitoring measures are expected to minimize the severity of the taking to the extent practicable.

As described previously, no serious injury or mortality is anticipated or

authorized for this activity. While blasting has the potential to result in mortality, when the isopleths within which mortality could occur were calculated, the zones were sufficiently small that the risk of mortality is considered discountable. Below we describe how the take numbers were estimated.

For acoustic impacts, generally speaking, we estimate take by considering: (1) acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) the number of days of activities. We note that while these factors can contribute to a basic calculation to provide an initial prediction of potential takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.*, previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the take estimates.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment). Thresholds have also been developed to identify the pressure levels above which animals may incur different types of tissue damage (non-acoustic Level A harassment or mortality) from exposure to pressure waves from explosive detonation.

Level A harassment—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0)

(Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive (including explosives) or non-impulsive). These thresholds are provided in table 3, below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS' 2018 Technical Guidance, which may be accessed at:

www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.

Explosive sources—Based on the best available science, NMFS uses the acoustic and pressure thresholds indicated in tables 3 and 4 to predict the onset of behavioral harassment, PTS, TTS, tissue damage, and mortality.

For explosive activities using single detonations (*i.e.*, no more than one detonation within a day), such as those described in the planned activity, NMFS uses TTS onset thresholds to assess the likelihood of behavioral harassment, rather than the Level B Harassment threshold for multiple detonations indicated in table 3. While marine mammals may also respond behaviorally to single explosive detonations, these responses are expected to typically be in the form of a startle reaction, rather than a more meaningful disruption of a behavioral pattern. On the rare occasion that a single detonation might result in a behavioral disturbance that qualifies as Level B harassment, it would be expected to be in response to a comparatively higher received level. Accordingly, NMFS considers the potential for these responses to be quantitatively accounted for through the application of the TTS threshold, which, as noted above, is 5 dB higher than the behavioral harassment threshold for multiple explosives.

TABLE 3—EXPLOSIVE THRESHOLDS FOR MARINE MAMMALS FOR PTS, TTS, AND BEHAVIOR
[Multiple detonations]

Hearing group	PTS impulsive thresholds	TTS impulsive thresholds	Behavioral threshold (multiple detonations)
Low-Frequency (LF) Cetaceans	<i>Cell 1:</i> $L_{p,0-pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB.	<i>Cell 2:</i> $L_{p,0-pk,flat}$: 213 dB; $L_{E,LF,24h}$: 168 dB.	<i>Cell 3:</i> $L_{E,LF,24h}$: 163 dB.
Mid-Frequency (MF) Cetaceans	<i>Cell 4:</i> $L_{p,0-pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB.	<i>Cell 5:</i> $L_{p,0-pk,flat}$: 224 dB; $L_{E,MF,24h}$: 170 dB.	<i>Cell 6:</i> $L_{E,MF,24h}$: 165 dB.
High-Frequency (HF) Cetaceans	<i>Cell 7:</i> $L_{p,0-pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB.	<i>Cell 8:</i> $L_{p,0-pk,flat}$: 196 dB; $L_{E,HF,24h}$: 140 dB.	<i>Cell 9:</i> $L_{E,HF,24h}$: 135 dB.
Phocid Pinnipeds (PW) (Underwater)	<i>Cell 10:</i> $L_{p,0-pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB.	<i>Cell 11:</i> $L_{p,0-pk,flat}$: 212 dB; $L_{E,PW,24h}$: 170 dB.	<i>Cell 12:</i> $L_{E,PW,24h}$: 165 dB.

TABLE 3—EXPLOSIVE THRESHOLDS FOR MARINE MAMMALS FOR PTS, TTS, AND BEHAVIOR—Continued
[Multiple detonations]

Hearing group	PTS impulsive thresholds	TTS impulsive thresholds	Behavioral threshold (multiple detonations)
Otariid Pinnipeds (OW) (Underwater)	Cell 13: $L_{p,0-pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB.	Cell 14: $L_{p,0-pk,flat}$: 226 dB; $L_{E,OW,24h}$: 188 dB.	Cell 15: $L_{E,OW,24h}$: 183 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS/TTS onset.

Note: Peak sound pressure (L_{pk}) has a reference value of 1 μ Pa, and cumulative sound exposure level (L_E) has a reference value of 1 μ Pa²s. In this table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, ANSI defines peak sound pressure as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript “flat” is being included to indicate peak sound pressure should be flat weighted or unweighted within the overall marine mammal generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.*, varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

TABLE 4—LUNG AND GI TRACT INJURY THRESHOLDS FOR UNDERWATER EXPLOSIVES

Hearing group	Mortality (severe lung injury) *	Slight lung injury *	GI tract injury
All Marine Mammals	Cell 1: Modified Goertner model; Equation 1.	Cell 2: Modified Goertner model; Equation 2.	Cell 3: $L_{p,0-pk,flat}$: 237 dB.

* Lung injury (severe and slight) thresholds are dependent on animal mass (Recommendation: table C.9 from DON 2017 based on adult and/or calf/pup mass by species).

Note: Peak sound pressure (L_{pk}) has a reference value of 1 μ Pa. In this table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, ANSI defines peak sound pressure as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript “flat” is being included to indicate peak sound pressure should be flat weighted or unweighted within the overall marine mammal generalized hearing range.

Modified Goertner Equations for severe and slight lung injury (pascal-second).

Equation 1: $103M^{1/3}(1 + D/10.1)^{1/6}$ Pa-s.

Equation 2: $47.5M^{1/3}(1 + D/10.1)^{1/6}$ Pa-s.

M animal (adult and/or calf/pup) mass (kg) (table C.9 in DoN 2017).

D animal depth (meters).

Ensonified Area

Here, we describe operational and environmental parameters of the activity that are used in estimating the area ensonified above the acoustic thresholds, including source levels and transmission loss coefficient.

NMFS computed cumulative sound exposure impact zones from the blasting information provided by the USACE. Peak source levels of the confined blasts were calculated based on Hempen *et al.* (2007), and scaled using a distance of 10 ft (3 m) and a weight of 95 lbs (43.1 kg) for a single charge. The total charge weight is defined as the product of the single charge weight and the number of charges. In this case, the number of charges is 75. Explosive energy was then computed from peak pressure of the single maximum charge, using the pressure and time relationship of a shock wave (Urlick, 1983). Due to time and spatial separation of each single charge by a distance of 10 ft (3m), the accumulation of acoustic energy is added sequentially, assuming the transmission loss follows cylindrical

spreading within the matrix of charges. The sound exposure level (SEL) from each charge at its source can then be calculated, followed by the received SEL from each charge. Since the charges will be deployed in a grid of 10 ft (3 m) by 10 ft (3 m) apart, the received SELs from different charges to a given point will vary depending on the distance of the charges from the receiver. Without specific information regarding the layout of the charges, the modeling assumes a grid of 8 by 9 charges with an additional three charges located in three peripheral locations. Among the various total SELs calculated (one at a receiver location corresponding to each perimeter charge), the largest value, SEL_{total} (max) is selected to calculate the impact range. Using the pressure versus time relationship above, the frequency spectrum of the explosion can be computed by taking the Fourier transform of the pressure (Weston, 1960), and subsequently be used to produce hearing range weighted metrics.

Frequency specific transmission loss of acoustic energy due to absorption is computed using the absorption coefficient, α (dB/km), summarized by François and Garrison (1982a, b). Seawater properties for computing sound speed and absorption coefficient were based on NMFS Alaska Fisheries Science Center report of mean measurements in Auke Bay (Sturdevant and Landingham, 1993) and the 2022 average seawater temperature from Unalaska (NOAA, 2023). Transmission loss was calculated using the sonar equation:

$$TL = SEL_{total(m)} - SEL_{threshold}$$

where $SEL_{threshold}$ is the Level A harassment threshold. The distances, R , where such transmission loss is achieved were computed numerically by combining both geometric transmission loss, and transmission loss due to frequency-specific absorption. A spreading coefficient of 20 is assumed to account for acoustic energy loss from the sediment into the water column. The outputs from this model are summarized in table 5, below.

TABLE 5—MODEL RESULTS OF IMPACT ZONES FOR BLASTING IN METERS (m)

Species	Mortality	Slight lung injury	GI tract	PTS: SELcum	PTS: SPLpk	TTS: SELcum	TTS: SPLpk
Low frequency cetacean	4.0	9.2	25.8	*344.66	205.29	*1,918	409.62
High frequency cetacean	20.3	47.5	25.8	1,213.79	*1,453.37	*4,435.57	2,899.86
Otariid	13.8	32.3	25.8	40.00	*91.92	*249.76	183.40
Phocid	18.2	42.5	25.8	164.84	*230.34	*909.10	459.60

*For the dual criteria of SELcum and SPLpk, the largest of the two calculated distances for each species group was used in our analysis. The PTS and TTS distances for Steller sea lions resulting from the model seemed uncharacteristically small when compared to the other thresholds resulting from the model and were doubled to 92 m and 230 m respectively for take estimation, mitigation, and monitoring.

Marine Mammal Occurrence

In this section, we provide information about the occurrence of marine mammals, including density or other relevant information that informed the take calculations. Reliable densities are not available for Iliuliuk Bay, and generalized densities for the North Pacific are not applicable given the high variability in occurrence and density at specific areas around the Aleutian Island chain. Therefore, the USACE consulted previous survey data in and around Iliuliuk Bay and Dutch Harbor to arrive at a number of animals expected to occur within the project area per day. Figure 4–8 and table 4–3 in the IHA application provide further detail on observations of humpback whales, Steller sea lions, and harbor seals in and around Iliuliuk Bay. Harbor porpoise were not addressed in the IHA application; however, NMFS has authorized takes of harbor porpoise take out of an abundance of caution, based on the 2017 sighting of porpoises in the action area by USACE biologists.

Take Estimation

Here we describe how the information provided above is synthesized to produce a quantitative estimate of the take that is reasonably likely to occur.

Since reliable densities are not available, the USACE requested take based on the maximum number of animals that may occur in the blasting area per day multiplied by the number of days of the activity. The applicant varied these calculations based on certain factors. Because of the nature of the planned blasting (*i.e.*, no more than one blasting event per day), the behavioral thresholds associated with the activity are the same as for the onset of TTS for all species. Both behavioral disturbance and TTS may occur.

Humpback whale—Humpback whales are commonly sighted outside the mouth of Iliuliuk Bay, and were most common in August and September between 2 and 8 km from the survey site outside the mouth of the bay. Humpbacks were also spotted within Iliuliuk Bay in much lower numbers

(maximum daily sightings within the bay: 4; outside the bay: 47) (USACE 2022). Based on the previous monitoring efforts in and around Iliuliuk Bay, USACE and NMFS estimated that a maximum of two animals may be present within the Level B harassment threshold for each blasting event. While NMFS expects that the monitoring and mitigation described later in this document will be effective at preventing injurious take of marine mammals, we recognize that humpback whales are common in the area, that animals may enter the blasting area after charges have been set, and that there is a limit on the amount of time detonation may be safely delayed. Humpback whales are highly visible, and their presence would likely be known before charges are laid on a blasting day. We therefore conservatively estimate up to 10 percent of the blasting events may include a humpback whale within the Level A harassment isopleth. With a maximum take of 2 animals per day, multiplied by a maximum of 24 days of blasting, we have authorized up to 48 takes by Level B harassment and up to 3 takes by Level A harassment of humpback whales.

Harbor porpoise—Harbor porpoise were not included in the IHA application. This species typically travels alone or in pairs, but may occasionally be sighted in larger groups. Based on the USACE's observation of a group of eight individuals in the project area in 2017, and other infrequent sightings of harbor porpoise in and around Iliuliuk Bay, NMFS conservatively estimated that two animals may occur within the Level B harassment threshold on up to 25 percent of blasting days. Out of an abundance of caution, and because this species is both very sensitive to noise (meaning the Level A harassment zone is comparatively larger), including explosions (von Benda-Beckmann *et al.*, 2015), and difficult to see in the field, NMFS also proposed that up to two harbor porpoise could be within the Level A harassment threshold for up to 10 percent of the blasting events. Given 24 days of blasting, we have authorized

up to 12 harbor porpoise takes by Level B harassment, and up to 5 harbor porpoise takes by Level A harassment over the course of the activity.

Steller sea lion—During previous monitoring efforts, Steller sea lions were sighted most frequently inside of Iliuliuk Bay, within 4 km of the project area. The maximum number of sightings in a single day was 32, though it is unclear whether this includes multiple sightings of the same large group of 10 to 12 individuals (USACE 2022). Steller sea lions in this area are known to congregate around and follow fishing vessels that regularly transit into and out of Dutch Harbor. Given the previous monitoring data, USACE and NMFS conservatively estimated that a maximum of two animals may be within the Level B harassment threshold for each blast. While NMFS expects that the monitoring and mitigation described later in this document will be effective at preventing injurious take of marine mammals, we recognize that Steller sea lions are common in the area, that animals may enter the blasting area after charges have been set, and that there is a limit on the amount of time detonation may be safely delayed. Steller sea lions may be difficult for observers to detect before charges are laid on a blasting day, and we therefore conservatively estimated up to two Steller sea lions may be within the Level A harassment isopleth for up to 20 percent of the blasting events. With a maximum take of 2 animals per day, multiplied by a maximum of 24 days of blasting, we have authorized up to 48 takes by Level B harassment and up to 5 takes by Level A harassment of Steller sea lions.

Harbor seal—Previous monitoring efforts documented harbor seals close to the shoreline Ulatka Head, on the northeastern side of Iliuliuk Bay between 1 and 4 km from the project area, but they were sighted throughout Iliuliuk Bay in all survey months (April–October) (USACE 2022). They were most frequently sighted in the summer months, with up to 43 sightings on a single day. Based on the high rate of sightings within a few hundred

meters of the Level B harassment isopleth in the previous data, USACE and NMFS conservatively assumed a maximum of 10 seals within the Level B harassment threshold for each blast. While NMFS expects that the monitoring and mitigation described later in this document will be effective at preventing injurious take of marine mammals, we recognize that harbor seals are common in the area, that animals may enter the blasting area after charges have been set, and that there is a limit on the amount of time detonation may be safely delayed. Harbor seals were frequently sighted close to the Level B threshold distance and may be difficult for observers to detect before charges are laid on a blasting day. We therefore conservatively estimated up to two harbor seals may be within the Level A harassment isopleth for up to 20 percent of the blasting events. With a maximum take of 10 animals per day, multiplied by a maximum of 24 days of blasting, we have authorized up to 240 takes by Level B harassment and up to 5 takes by Level A harassment of harbor seals.

Mitigation

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least

practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses. NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, NMFS considers two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat, as well as subsistence uses. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if

implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost and impact on operations.

In addition to the measures described later in this section, the USACE will employ the following standard mitigation measures:

- Conduct a briefing between construction supervisors and crews and the marine mammal monitoring team prior to the start of construction, and when new personnel join the work, to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures;
- For in-water and over-water heavy machinery work, if a marine mammal comes within 10 m, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions;
- Work may only occur during daylight hours, when visual monitoring of marine mammals can be conducted; and
- If take reaches the authorized limit for an authorized species, the blasting activity will be stopped as these species approach the Monitoring zones (table 6) to avoid additional take of them.

TABLE 6—MONITORING AND PRE-CLEARANCE ZONES FOR BLASTING ACTIVITIES FOR SPECIES WITH AUTHORIZED TAKE

	Pre-clearance zones (m)		Monitoring zones (m)
	Level A harassment thresholds (PTS)	Level B harassment thresholds (TTS)	
Humpback whale	345	1,918	2,500
Harbor Porpoise	1,214	4,500	5,000
Steller sea lion	92	250	2,500
Harbor seal	231	910	2,500

The USACE will implement the following mitigation requirements:

Establishment of Pre-clearance and Monitoring Zones—The USACE and NMFS have identified pre-clearance zones associated with the distances within which Level A harassment and Level B harassment are expected to occur. Additionally, monitoring zones that extend beyond the pre-clearance zones have been established. Monitoring zones provide utility for observing by establishing monitoring protocols for areas adjacent to the pre-clearance zones. Monitoring zones enable observers to be aware of and communicate the presence of marine mammals in the project area outside the

Level B harassment pre-clearance zone and thus prepare for a potential cessation of activity should the animal enter the Level A harassment zone (table 6).

Pre-monitoring and Delay of Activities—Prior to the start of daily in-water activity, or whenever a break in activity of 30 minutes or longer occurs, the observers will observe the pre-clearance and monitoring zones for a period of 30 minutes. Pre-clearance zones will be considered cleared when a marine mammal has not been observed within the zone for that 30-minute period. If any marine mammal is observed within the Level A pre-clearance zone, activity cannot proceed

until the animal has left the zone or has not been observed for 15 minutes. If marine mammals are observed within the Level B pre-clearance or monitoring zones but outside of the Level A pre-clearance zones, work may proceed in good visibility conditions. If work ceases for more than 30 minutes, the pre-activity monitoring of both the monitoring zones and pre-clearance zones will commence.

In the event that a large whale for which take is not authorized is sighted within either the monitoring or the Level A or Level B pre-clearance zones during monitoring prior to placement of charges on a planned blast day, USACE will evaluate whether environmental

conditions allow for blasting to be delayed to the following day. If charges have already been laid before the whale is sighted, blasting will not commence until the whale has been positively observed outside of the monitoring zone, subject to the safety restrictions discussed below.

Charges for blasting will not be laid if marine mammals are within the Level A pre-clearance zone or appear likely to enter the Level A pre-clearance zone. However, once charges are placed, they cannot be safely left undetonated for more than 24 hours. For blasting, the monitoring and pre-clearance zones will be monitored for a minimum of 30 minutes prior to detonating the blasts. If a marine mammal is sighted within the Level A or Level B pre-clearance zones following the emplacement of charges, detonation will be delayed until the zones are clear of marine mammals for 30 minutes. This will continue as long as practicable within the constraints of the blasting design but not beyond sunset on the same day as the charges cannot lay dormant for more than 24 hours, which may force the detonation of the blast in the presence of marine mammals. All other legal measures to avoid injury will be utilized; however, the charges will be detonated when delay is no longer feasible.

Charges will be laid as early as possible in the morning and stemming procedures will be used to fill the blasting holes to potentially reduce the noise from the blasts. Blasting will only be planned to occur in good visibility conditions, and at least 30 minutes after sunrise and at least one hour prior to sunset. The zones will also be monitored for 1 hour post-blasting.

If a detonation occurs when a marine mammal is known to be within the Level A or Level B pre-clearance zones, USACE will observe the blast area for two hours after the blasting event, or until visibility or safety conditions decline to the point that monitoring is no longer feasible, to determine as much as possible about the behavior and physical status of the marine mammal affected by the blasting event.

Based on our evaluation of the applicant's planned measures, as well as other measures considered by NMFS, NMFS has determined that the listed mitigation measures provide the means of effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses.

Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present while conducting the activities. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.*, presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.*, source characterization, propagation, ambient noise); (2) affected species (*e.g.*, life history, dive patterns); (3) co-occurrence of marine mammal species with the activity; or (4) biological or behavioral context of exposure (*e.g.*, age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.*, marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and,
- Mitigation and monitoring effectiveness.

Visual Monitoring

Monitoring will be conducted 30 minutes before, during, and 30 minutes after construction activities. In addition, observers must record all incidents of marine mammal occurrence, regardless of distance from activity, and must

document any behavioral reactions in concert with distance from construction activities.

Protected Species Observers (PSOs) will be land- and boat-based. For blasting, three PSOs will be required (two land-based and one boat-based). Observers will be stationed at locations that provide adequate visual coverage for shutdown and monitoring zones. Potential observation locations are depicted in Figure 3–1 of the applicant's Marine Mammal Monitoring and Mitigation Plan. During blasting, pre-blast monitoring, and post-blast monitoring, three observers will be on duty. Optimal observation locations will be selected based on visibility and the type of work occurring. All PSOs will be trained in marine mammal identification and behaviors and are required to have no other project-related tasks while conducting monitoring. In addition, monitoring will be conducted by qualified observers, who will be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown/delay procedures when applicable. Monitoring of construction activities must be conducted by qualified PSOs (see below), who must have no other assigned tasks during monitoring periods. The applicant must adhere to the following conditions when selecting observers:

- Independent PSOs must be used (*i.e.*, not construction personnel);
- At least one PSO must have prior experience working as a marine mammal observer during construction activities;
- Other PSOs may substitute education (degree in biological science or related field) or training for experience;
- Where a team of three or more PSOs are required, a lead observer or monitoring coordinator must be designated. The lead observer must have prior experience working as a marine mammal observer during construction; and
- The applicant must submit PSO curriculum vitae for approval by NMFS.

The applicant must ensure that observers have the following additional qualifications:

- Ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction

operation to provide for personal safety during observations;

- Writing skills sufficient to prepare a report of observations including, but not limited to, the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

At least 24 hours prior to blasting, the USACE will notify the Office of Protected Resources, NMFS Alaska Regional Office, and the Alaska Regional Stranding Coordinator that blasting is planned to occur, as well as notify these parties within 24 hours after blasting that blasting actually occurred. If a marine mammals is known to be within the Level A or Level B pre-clearance zones during a detonation, USACE will report the following information within 24 hours of the blasting event:

- Description of the blasting event;
- PSO positions and monitoring effort for the 24 hours preceding the blast;
- Environmental conditions (*e.g.*, Beaufort sea state, visibility);
- Description of all marine mammal observations in the 24 hours preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

A draft marine mammal monitoring report will be submitted to NMFS within 90 days after the completion of construction activities. It will include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets. Specifically, the report must include:

- Date and time that monitored activity begins or ends;
- Construction activities occurring during each observation period;
- Weather parameters (*e.g.*, percent cover, visibility);
- Water conditions (*e.g.*, sea state, tide state);
- Species, numbers, and, if possible, sex and age class of marine mammals;
- Description of any observable marine mammal behavior patterns, including bearing and direction of travel and distance from construction activity;
- Distance from construction activities to marine mammals and

distance from the marine mammals to the observation point;

- Locations of all marine mammal observations; and
- Other human activity in the area.

If no comments are received from NMFS within 30 days, the draft final report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

In the unanticipated event that the specified activity likely causes the take of a marine mammal in a manner prohibited by the IHA (if issued), such as a serious injury or mortality, the USACE will immediately cease the specified activities and report the incident to the Office of Protected Resources, NMFS Alaska Regional Office, and the Alaska Regional Stranding Coordinator. The report will include the following information:

- Description of the incident;
- Environmental conditions (*e.g.*, Beaufort sea state, visibility);
- Description of all marine mammal observations in the 24 hours preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

Activities will not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with the USACE to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The USACE will not be able to resume their activities until notified by NMFS via letter, email, or telephone.

In the event that the USACE discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.*, in less than a moderate state of decomposition as described in the next paragraph), the USACE will immediately report the incident to the Office of Protected Resources, NMFS Alaska Regional Office, and the Alaska Regional Stranding Coordinator. The report will include the same information identified in the paragraph above. Activities will be able to continue while NMFS reviews the circumstances of the incident. NMFS will work with the USACE to determine whether modifications in the activities are appropriate.

In the event that the USACE discovers an injured or dead marine mammal and the lead PSO determines that the injury or death is not associated with or related

to the activities authorized in the IHA (*e.g.*, previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), the USACE will report the incident to the Office of Protected Resources, NMFS Alaska Regional Office, and the NMFS Alaska Stranding Hotline and/or by email to the Alaska Regional Stranding Coordinator, within 24 hours of the discovery. The USACE will provide photographs, video footage (if available), or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Coordinator.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be "taken" through harassment, NMFS considers other factors, such as the likely nature of any impacts or responses (*e.g.*, intensity, duration), the context of any impacts or responses (*e.g.*, critical reproductive time or location, foraging impacts affecting energetics), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338, September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the baseline (*e.g.*, as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, the discussion of our analysis applies to all the species listed in table 1, given that the anticipated effects of this activity on these different marine mammal stocks are expected to be similar. There is little information about the nature or severity of the impacts, or the size, status, or structure of any of these species or

stocks that would lead to a different analysis for this activity.

As stated in the mitigation section, pre-clearance zones equal to or exceeding Level A isopleths shown in table 6 for blasting will be implemented for all species. Serious injury or mortality is not anticipated nor authorized.

Behavioral disturbances of marine mammals to blasting, if any, are expected to be mild and temporary due to the short-term duration of the noise produced by the source and the fact that only a single blasting event will occur on a given day. Additionally, blasting events will not occur on consecutive days. Given the short duration of noise-generating activities per day and that blasting events would occur on a maximum of 24 days, any harassment would be temporary. For all species except humpbacks, there are no known biologically important areas near the project zone that will be impacted by the construction activities. The project area occupies a small percentage of the humpback whale feeding BIA and Critical Habitat areas, and there is sufficient similar habitat nearby. Acoustic impacts will be short-term and temporary in duration. The region of Iliuliuk Bay where the project will take place is located in a highly trafficked commercial port area with regular marine vessel traffic.

In summary and as described above, the following factors primarily support our determination that the impacts resulting from this activity are not expected to adversely affect any of the species or stocks through effects on annual rates of recruitment or survival:

- No serious injury or mortality is anticipated or authorized;
- Authorized Level A harassment will be very small amounts and of low degree;
- The intensity of anticipated takes by Level B harassment is relatively low for all stocks. Level B harassment will be primarily in the form of behavioral disturbance, resulting in avoidance of the project areas around where blasting is occurring, with some TTS that may limit the detection of acoustic cues for relatively brief amounts of time;
- While a feeding BIA and Critical Habitat for humpback whales exist in the action area, the planned activity occupies a small percentage of the total BIA and of the Critical Habitat, and would occur on a short term, temporary basis.
- The USACE will implement mitigation measures, such as pre-clearance zones, for all in-water and over-water activities; and
- Monitoring reports from similar work in Alaska have documented little to no effect on individuals of the same species impacted by the specified activities (USACE, 2020).

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the monitoring and mitigation measures, NMFS finds that the total marine mammal take from the planned activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted previously, only take of small numbers of marine mammals may

be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

Table 7 presents the number of animals that could be exposed to received noise levels that may result in take by Level A or Level B harassment for the construction at Iliuliuk Bay, Unalaska. Our analysis shows that less than one-third of the best available population estimate of each affected stock could be taken. Therefore, the numbers of animals authorized to be taken for all species would be considered small relative to the relevant stocks or populations even if each estimated taking occurred to a new individual—an extremely unlikely scenario. For harbor seals and Steller sea lions occurring in the vicinity of the project site, there will almost certainly be some overlap in individuals present day-to-day, and these takes are likely to occur only within some small portion of the overall regional stock.

TABLE 7—SUMMARY OF AUTHORIZED INSTANCES OF LEVEL A AND LEVEL B HARASSMENT

Species	DPS/stock	Number of takes by Level B harassment by stock	Number of takes by Level A harassment by stock	Stock abundance	Percent of population
Humpback whale	Western North Pacific	0.96	0	1,107	0.1
	Mexico—North Pacific	3.36	0	4,973	0.1
	Hawaii	43.68	3	10,103	0.5
Harbor seal	Aleutian Island Stock	240	5	5,588	4.4
Harbor porpoise ¹	Bering Sea	12	5	31,046	0.05
	Gulf of Alaska .....	.....	.....	.....	.....
Steller sea lion	Western DPS	48	5	52,932	0.1

¹ There is not enough information available to determine takes for separate stocks for harbor porpoise. Calculations have been based on the best available stock abundance for the Gulf of Alaska stock, as there are no available data for the Bering Sea stock. This number is conservative, because it represents a minimum value of both stocks.

Based on the analysis contained herein of the planned activity (including the mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that

small numbers of marine mammals would be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

In order to issue an IHA, NMFS must find that the specified activity will not have an “unmitigable adverse impact”

on the subsistence uses of the affected marine mammal species or stocks by Alaskan Natives. NMFS has defined “unmitigable adverse impact” in 50 CFR 216.103 as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Subsistence activities in Unalaska have historically included the harvest of pinnipeds and sea otters. However, subsistence harvests of marine mammals declined between 1994 and 2008 (the last year for which data are available) (ADF&G 2022). Additionally, a ban on firearm discharge within the city limits of the City of Unalaska means that current subsistence harvesting typically occurs from skiffs in areas outside of Dutch Harbor and Iliuliuk Bay, including Wide Bay, Kalekta Bay, Bishop Point, Wislow Island, and Beaver Inlet. The planned activity would not impact these areas.

Any impacts to marine mammals from the planned activity are likely to be short-term and temporary, and limited to the area around the blasting site. While a limited number of individuals may experience PTS, there are no expected impacts to the availability of marine mammals for subsistence uses due to the blasting activity.

Based on the description of the specified activity, and the mitigation and monitoring measures, NMFS has determined that there will not be an unmitigable adverse impact on subsistence uses from USACE’s construction activities.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species, in this case with NMFS Alaska Regional Office.

There are two marine mammal species (western DPS Steller sea lion and humpback whale (Mexico and Western North Pacific DPSs)) with confirmed occurrence in the project area that are listed as endangered under the ESA. The NMFS Alaska Regional Office Protected Resources Division issued a Biological Opinion on November 16, 2023 under section 7 of the ESA, on the issuance of an IHA to USACE under section 101(a)(5)(D) of the MMPA by the NMFS Permits and Conservation Division. The Biological Opinion concluded that the action is not likely to jeopardize the continued existence of Western DPS Steller sea lions or humpback whales from either the Mexico or Western North Pacific DPSs, and is not likely to destroy or adversely modify humpback whale critical habitat.

National Environmental Policy Act

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

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of the IHA qualifies to be categorically excluded from further NEPA review.

Authorization

As a result of these determinations, NMFS has issued an IHA to the USACE for conducting confined blasting in Iliuliuk Bay, Unalaska between January 1, 2024 and December 31, 2024, incorporating the previously mentioned mitigation, monitoring, and reporting requirements. The IHA can be found at: <https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-army-corps-engineers-unalaska-dutch-harbor-channel>.

Dated: November 20, 2023.

Kimberly Damon-Randall,
Director, Office of Protected Resources,
National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD512]

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Management Area; Cost Recovery Fee Notice for the Western Alaska Community Development Quota and Trawl Limited Access Privilege Programs

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

ACTION: Notice of standard prices and fee percentage.

SUMMARY: NMFS publishes standard prices and fee percentages for cost recovery for the Amendment 80 Program, the American Fisheries Act (AFA) Program, the Aleutian Islands Pollock (AIP) Program, and the Western Alaska Community Development Quota (CDQ) Program in the Bering Sea Aleutian Islands (BSAI) management area. The fee percentages for 2023 are 1.37 percent for the Amendment 80 Program, 0.26 percent for the AFA inshore cooperatives, 0 percent for the AIP program, and 1.07 percent for the CDQ Program. This notice is intended to provide the 2023 standard prices and fee percentages to calculate the required payment for cost recovery fees due by December 31, 2023.

DATES: The standard prices and fee percentages are valid on November 24, 2023.

FOR FURTHER INFORMATION CONTACT: Charmaine Weeks, Fee Coordinator, 907–586–7231.

SUPPLEMENTARY INFORMATION:

Background

Section 304(d) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) authorizes and requires that NMFS collect cost recovery fees for limited access privilege programs and the CDQ Program. Cost recovery fees include NMFS’ actual costs directly related to its management, data collection, and enforcement of the programs. Section 304(d) of the Magnuson-Stevens Act mandates that cost recovery fees not exceed 3 percent of the annual ex-vessel value of fish harvested under any program subject to a cost recovery fee and that the fee be collected either at the time of landing, filing of a landing report, or sale of such fish during a fishing season or in the last quarter of

the calendar year in which the fish is harvested.

NMFS manages the Amendment 80 Program, AFA Program, and AIP Program as limited access privilege programs. On January 5, 2016, NMFS published a final rule to implement cost recovery for these three limited access privilege programs and the CDQ program (81 FR 150). The designated representative (for the purposes of cost recovery) for each program is responsible for submitting the fee payment to NMFS on or before December 31 of the year in which the landings were made. The total dollar amount of the fee due is determined by multiplying the NMFS published fee

percentage by the ex-vessel value of all landings under the program made during the fishing year. NMFS publishes this notice of the fee percentages for the Amendment 80, AFA, AIP, and CDQ programs in the **Federal Register** by December 1 each year.

Standard Prices

The fee liability is based on the ex-vessel value of fish harvested in each program. For purposes of calculating cost recovery fees, NMFS uses a standard ex-vessel price (standard price) for each species. A standard price is determined using information on landings purchased (volume) and ex-vessel value paid (value). For most

groundfish species, NMFS annually summarizes volume and value information for landings of all fishery species subject to cost recovery to estimate a standard price for each species. The standard prices are described in U.S. dollars per pound for landings made during the year. The standard prices for all species in the Amendment 80, AFA, AIP, and CDQ programs are provided in Table 1. Each landing made under each program is multiplied by the appropriate standard price to arrive at an ex-vessel value for each landing. These values are summed together to arrive at the ex-vessel value of each program (fishery value).

TABLE 1—STANDARD EX-VESSEL PRICES BY SPECIES FOR THE 2023 FISHING YEAR

Species	Gear type	Reporting period	Standard ex-vessel price per pound (\$)
Arrowtooth flounder	All	January to December	0.24
Atka mackerel	All	January to December	0.24
Flathead sole	All	January to December	0.18
Greenland turbot	All	January to December	0.62
CDQ halibut	Fixed gear	January to December	5.25
Pacific cod	Fixed gear	January to December	0.53
	Trawl gear	January to December	0.42
Pacific ocean perch	All	January to December	0.18
Pollock	All	January to December	0.20
Rock sole	All	January to March	0.23
	All	April to December	0.19
Sablefish	Fixed gear	January to December	1.38
	Trawl gear	January to December	0.56
Yellowfin sole	All	January to December	0.18

Fee Percentage

Annually, NMFS calculates the applicable fee percentage for each of the four programs according to the factors and methods described at 50 CFR 679 under §§ 679.33(c)(2) for CDQ, 679.66(c)(2) for AFA, 679.67(c)(2) for AIP, and 679.95(c)(2) for Amendment 80. NMFS determines the fee percentage that applies to landings made during the year by dividing the total costs directly related to the management, data collection, and enforcement of each program (direct program costs) during the year by the fishery value. NMFS captures direct program costs through an established accounting system that allows staff to track labor, travel, contracts, rent, and procurement costs. For 2023, the direct program costs for each program were tracked from October 1, 2022 to September 30, 2023 (the end of the fiscal year). The 2023 fee percentages for the Amendment 80 and CDQ Programs are more than the fee percentages calculated for them in 2022. The 2023 fee percentage for the AFA

Program is less than the fee percentage calculated for it in 2022. The 2023 percentage for the AIP Program is zero because there was no AIP fishery in 2023, thus no associated harvest.

NMFS will provide an annual report that summarizes direct program costs for each of the programs in early 2024. NMFS calculates the values for each fishery as described earlier under the Standard Prices section of this notice.

Amendment 80 Program Standard Prices and Fee Percentage

The Amendment 80 Program allocates total allowable catches (TACs) of groundfish species, other than Bering Sea pollock, to identified trawl catcher/processors fishing in the BSAI. The Amendment 80 Program allocates a portion of the BSAI TACs of six species: Atka mackerel, Pacific cod, flathead sole, rock sole, yellowfin sole, and Aleutian Islands Pacific ocean perch. In recent years, participants in the Amendment 80 sector have established a cooperative to harvest these allocations. Each Amendment 80

cooperative is responsible for payment of the cost recovery fee for fish landed under the Amendment 80 Program. Cost recovery requirements for the Amendment 80 Program are at § 679.95.

For Amendment 80 species other than rock sole, NMFS annually summarizes volume and value information for landings of all fishery species subject to cost recovery in order to estimate a standard price for each fishery species. Regulations specify that for rock sole, NMFS shall calculate a separate standard price for two periods, January 1 through March 31 and April 1 through October 31, which has historically accounted for a substantial difference in estimated rock sole prices during the first quarter of the year relative to the remainder of the year. The volume and value information are obtained from the First Wholesale Volume and Value Report submitted by catcher/processors that harvested Amendment 80 or CDQ species, and the Pacific Cod Ex-Vessel Volume and Value Report submitted by shoreside processors and motherships

that processed landings of BSAI or CDQ Pacific cod.

Using the fee percentage formula described generally above, the estimated percentage of direct program costs to fishery value for the 2023 calendar year is 1.37 percent for the Amendment 80 Program. For 2023, NMFS applied the fee percentage to each Amendment 80 species landing that was debited from an Amendment 80 cooperative quota allocation between January 1 and December 31 to calculate the Amendment 80 fee liability for each Amendment 80 cooperative. The 2023 fee payments must be submitted to NMFS on or before December 31, 2023. Payment must be made in accordance with the payment methods set forth in § 679.95(a)(3)(iv).

AFA Standard Price and Fee Percentages

The AFA Program allocates the Bering Sea directed pollock fishery TAC to three sectors: catcher/processor, mothership, and inshore. Each sector has established cooperatives to harvest the sector's exclusive allocation. In 2023, each cooperative for the inshore sector is responsible for paying the fee for Bering Sea pollock landed under the AFA Program. Cost recovery requirements for the AFA sectors are found at § 679.66.

NMFS calculates the standard price for pollock using the most recent annual value information reported to the Alaska Department of Fish and Game for the Commercial Operator's Annual Report and compiled in the Alaska Commercial Fisheries Entry Commission Gross Earnings data. Due to the time required to compile the data, there is a 1-year delay between the gross earnings data year and the fishing year to which it is applied. For example, NMFS used 2022 gross earnings data to calculate the standard price for 2023 pollock landings.

Under the fee percentage formula described above, the estimated percentage of direct program costs to fishery value for the 2023 calendar year is 0.26 percent for the AFA inshore sector. To calculate the 2023 fee liabilities, NMFS applied the respective fee percentages to the landings of Bering Sea pollock debited from each cooperative's fishery allocation that occurred between January 1 and December 31. The 2023 fee payments must be submitted to NMFS on or before December 31, 2023. Payment must be made in accordance with the payment methods set forth in § 679.66(a)(4)(iv).

AIP Program Standard Price and Fee Percentage

The AIP Program allocates the Aleutian Islands directed pollock fishery TAC to the Aleut Corporation, consistent with the Consolidated Appropriations Act of 2004 (Pub. L. 108–109) and implementing regulations. Annually, prior to the start of the pollock season, the Aleut Corporation provides NMFS with the identity of its designated representative for harvesting the Aleutian Islands directed pollock fishery TAC. The same individual is responsible for the submission of all cost recovery fees for pollock landed under the AIP Program. Cost recovery requirements for the AIP Program are at § 679.67.

NMFS calculates the standard price for pollock using the most recent annual value information reported to the Alaska Department of Fish and Game for the Commercial Operator's Annual Report and compiled in the Alaska Commercial Fisheries Entry Commission Gross Earnings data for Aleutian Islands pollock. As explained above, due to the time required to compile the data, there is a 1-year delay between the gross earnings data year and the fishing year to which it is applied.

For the 2023 fishing year, the Aleut Corporation did not select any participants to harvest or process the Aleutian Islands directed pollock fishery TAC, and most of that TAC was reallocated to the Bering Sea directed pollock fishery TAC. Since there was no fishery for the AIP Program in 2023, the fee percentage is zero.

CDQ Standard Price and Fee Percentage

The CDQ Program was implemented in 1992 to provide access to BSAI fishery resources to villages located in Western Alaska. Section 305(i) of the Magnuson-Stevens Act identifies 65 villages eligible to participate in the CDQ Program and the six CDQ groups to represent these villages. CDQ groups receive exclusive harvesting privileges of the TACs for a broad range of crab species, groundfish species, and halibut. NMFS implemented a CDQ cost recovery program for the BSAI crab fisheries in 2005 (70 FR 10174, March 2, 2005) and published the cost recovery fee percentage for the 2022/2023 crab fishing year on August 3, 2023 (88 FR 51301). This notice provides the cost recovery fee percentage for the CDQ Program with respect to groundfish and halibut. Each CDQ group is subject to cost recovery fee requirements and the designated representative of each CDQ group is responsible for submitting payment for their CDQ group. Cost

recovery requirements for the CDQ Program are at § 679.33.

For most CDQ groundfish species, NMFS annually summarizes volume and value information for landings of all fishery species subject to cost recovery in order to estimate a standard price for each fishery species. The volume and value information are obtained from the First Wholesale Volume and Value Report and the Pacific Cod Ex-Vessel Volume and Value Report. For CDQ halibut and fixed-gear sablefish, NMFS calculates the standard prices using information from the Individual Fishing Quota (IFQ) Ex-Vessel Volume and Value Report, which collects information on both IFQ and CDQ volume and value.

Using the fee percentage formula described above, the estimated percentage of direct program costs to fishery value for the 2023 calendar year is 1.07 percent for the CDQ Program. For 2023, NMFS applied the calculated CDQ fee percentage to all CDQ groundfish and halibut landings made between January 1 and December 31 to calculate the CDQ fee liability for each CDQ group. The 2023 fee payments must be submitted to NMFS on or before December 31, 2023. Payment must be made in accordance with the payment methods set forth in § 679.33(a)(3)(iv).

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

Dated: November 20, 2023.

Kelly Denit,

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

[FR Doc. 2023–25957 Filed 11–22–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD553]

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic and New England Fishery Management Councils (Councils) will hold a public meeting of their joint Northeast Trawl Advisory Panel (NTAP).

DATES: The meeting will be held on Thursday, December 14, 2023, from 12 p.m. to 2 p.m. EDT. For agenda details, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meeting will be held via webinar. Connection information

will be posted to the calendar at www.mafmc.org prior to the meeting.

Council address: Mid-Atlantic Fishery Management Council, 800 N State Street, Suite 201, Dover, DE 19901; telephone: (302) 674-2331; www.mafmc.org.

FOR FURTHER INFORMATION CONTACT:

Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526-5255.

SUPPLEMENTARY INFORMATION: The Councils' NTAP will meet to discuss the new Operational Manual and Orientation Document. The intent of this meeting is to discuss NTAP in detail, including background, organization, purpose, and member expectation. This meeting will be an opportunity for new and existing NTAP members to discuss and learn about the goals and purposes of NTAP.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Shelley Spedden, (302) 526-5251 at least 5 days prior to the meeting date.

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

Dated: November 20, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023-25967 Filed 11-22-23; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD225]

2024 Annual Determination To Implement the Sea Turtle Observer Requirement

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

ACTION: Notification of Annual Determination of fisheries.

SUMMARY: National Marine Fisheries Service (NMFS) is providing notification that the agency will not identify additional fisheries to observe on the 2024 Annual Determination (AD), pursuant to its authority under the Endangered Species Act (ESA). Through the AD, NMFS identifies U.S. fisheries operating in the Atlantic Ocean, Gulf of Mexico, and Pacific Ocean that will be required to take observers upon NMFS'

request. The purpose of observing identified fisheries is to learn more about sea turtle bycatch in a given fishery, evaluate measures to prevent or reduce sea turtle bycatch, and implement the prohibition against sea turtle takes. Fisheries identified on the 2020 and 2023 ADs (see table 1) remain on the AD for a 5-year period and are required to carry observers upon NMFS' request until September 29, 2025, for the 2020 AD and December 31, 2027, for the 2023 AD.

ADDRESSES: Chief, Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT:

Wendy Piniak, Office of Protected Resources, 301-427-8402; Ellen Keane, Greater Atlantic Region, 978-282-8476; Dennis Klemm, Southeast Region, 727-824-5312; Dan Lawson, West Coast Region, 206-526-4740; Irene Kelly, Pacific Islands Region, 808-725-5141. Individuals who use a telecommunications device for the hearing impaired may call the Federal Information Relay Service at 800-877-8339 between 8 a.m. and 4 p.m. Eastern time, Monday through Friday, excluding Federal holidays.

SUPPLEMENTARY INFORMATION:

Purpose of the Sea Turtle Observer Requirement

Under the ESA, 16 U.S.C. 1531 *et seq.*, NMFS has the responsibility to implement programs to conserve marine life listed as endangered or threatened. All sea turtles found in U.S. waters are listed as either endangered or threatened under the ESA. Kemp's ridley (*Lepidochelys kempii*), loggerhead (*Caretta caretta*; North Pacific distinct population segment (DPS)), leatherback (*Dermochelys coriacea*), green (*Chelonia mydas*; Central West Pacific and Central South Pacific DPSs), and hawksbill (*Eretmochelys imbricata*) sea turtles are listed as endangered. Loggerhead (Northwest Atlantic Ocean DPS), green (North Atlantic, South Atlantic, Central North Pacific, and East Pacific DPSs), and olive ridley (*Lepidochelys olivacea*) sea turtles are listed as threatened, except for breeding colony populations of olive ridleys on the Pacific coast of Mexico, which are listed as endangered. Due to the inability to distinguish between populations of olive ridley turtles away from the nesting beach, NMFS considers these turtles endangered wherever they occur in U.S. Pacific waters. While some sea turtle populations have shown signs of

recovery, many populations continue to decline.

Bycatch in fishing gear is the primary anthropogenic source of sea turtle injury and mortality in U.S. waters. Section 9 of the ESA prohibits the take (defined to include harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting or attempting to engage in any such conduct), including incidental take, of endangered sea turtles. Pursuant to section 4(d) of the ESA, NMFS has issued regulations extending the prohibition of take, with exceptions, to threatened sea turtles (50 CFR 223.205 and 223.206). Section 11 of the ESA provides for civil and criminal penalties for anyone who violates the ESA or a regulation issued to implement the ESA. NMFS may grant exceptions to the take prohibitions with an incidental take statement or an incidental take permit issued pursuant to ESA section 7 or 10, respectively. To do so, NMFS must determine that the activity that will result in incidental take is not likely to jeopardize the continued existence of the affected listed species. For some Federal fisheries and most state fisheries, NMFS has not granted an exception for incidental takes of sea turtles primarily because we lack information about fishery-sea turtle interactions.

For most fisheries, the most effective way for NMFS to learn more about bycatch in order to implement the take prohibitions and prevent or minimize take is to place observers aboard fishing vessels. In 2007, NMFS issued a regulation (50 CFR 222.402) establishing procedures to annually identify, pursuant to specified criteria and after notice and opportunity for comment, those fisheries in which the agency intends to place observers (72 FR 43176; August 3, 2007). These regulations specify that NMFS may place observers on U.S. fishing vessels, commercial or recreational, operating in U.S. territorial waters, the U.S. exclusive economic zone, or on the high seas, or on vessels that are otherwise subject to the jurisdiction of the U.S. Failure to comply with the requirements under this regulation may result in civil or criminal penalties under the ESA.

NMFS will pay the direct costs for vessels to carry the required observers. These include observer salary and insurance costs. NMFS may also evaluate other potential direct costs, should they arise. Once selected, a fishery will be required to carry observers, if requested, for a period of 5 years without further action by NMFS. This will enable NMFS to develop appropriate observer coverage and

sampling protocols to investigate whether, how, when, where, and under what conditions sea turtle bycatch is occurring and to evaluate whether existing measures are minimizing or preventing bycatch.

2024 Annual Determination

Pursuant to 50 CFR 222.402(a), NOAA’s Assistant Administrator for Fisheries, in consultation with Regional Administrators and Fisheries Science Center Directors, annually identifies fisheries for inclusion on the AD based on the extent to which:

- (1) The fishery operates in the same waters and at the same time as sea turtles are present;
- (2) The fishery operates at the same time or prior to elevated sea turtle strandings; or
- (3) The fishery uses a gear or technique that is known or likely to result in incidental take of sea turtles based on documented or reported takes in the same or similar fisheries; and
- (4) NMFS intends to monitor the fishery and anticipates that it will have the funds to do so.

NMFS is providing notification that the agency is not identifying additional fisheries to observe on the 2024 AD, pursuant to its authority under the ESA. NMFS is not identifying additional fisheries at this time given lack of dedicated resources to implement new observer programs or expand existing observer programs to focus on sea turtles. The four fisheries identified on the 2020 AD (see table 1) will remain on the AD for a 5-year period and are required to carry observers upon NMFS’ request until September 29, 2025. The two fisheries identified on the 2023 AD (see table 1) will remain on the AD for a 5-year period and are required to carry observers upon NMFS’ request until December 31, 2027.

TABLE 1—STATE AND FEDERAL COMMERCIAL FISHERIES INCLUDED ON THE 2020 AND 2023 ANNUAL DETERMINATIONS

Fishery	Years eligible to carry observers
Trawl Fisheries:	
Southeastern U.S. Atlantic, Gulf of Mexico shrimp trawl	2020–2025
Gulf of Mexico mixed species fish trawl	2020–2025
Gillnet Fisheries:	
Chesapeake Bay inshore gillnet ..	2020–2025
Long Island inshore gillnet	2020–2025
Mid-Atlantic gillnet	2023–2027
Pound Net/Weir/Seine Fisheries:	
Gulf of Mexico menhaden purse seine	2023–2027

Dated: November 20, 2023.
Kimberly Damon-Randall,
*Director, Office of Protected Resources,
National Marine Fisheries Service.*
[FR Doc. 2023–25986 Filed 11–22–23; 8:45 am]
BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD551]

Marine Mammals; File No. 26593

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.
ACTION: Notice; receipt of application for permit amendment.

SUMMARY: Notice is hereby given that Adam Pack, Ph.D., University of Hawaii at Hilo, 200 West Kawili Street, Hilo, HI 96720, has applied for an amendment to Scientific Research Permit No. 26593.
DATES: Written comments must be received on or before December 26, 2023.

ADDRESSES: The application and related documents are available for review by selecting “Records Open for Public Comment” from the “Features” box on the Applications and Permits for Protected Species (APPS) home page, <https://apps.nmfs.noaa.gov>, and then selecting File No. 26593 from the list of available applications. These documents are also available upon written request via email to NMFS.Pr1Comments@noaa.gov.

Written comments on this application should be submitted via email to NMFS.Pr1Comments@noaa.gov. Please include File No. 26593 in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request via email to NMFS.Pr1Comments@noaa.gov. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Carrie Hubbard or Courtney Smith, Ph.D., (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject amendment to Permit No. 26593 is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of

endangered and threatened species (50 CFR parts 222–226).

Permit No. 26593, issued on March 13, 2023 (88 FR 23400, April 17, 2023), authorizes the permit holder to study 29 cetacean species in Hawaiian and Alaskan waters, with a focus on humpback whales (*Megaptera novaeangliae*). The purpose of the research is to examine the behavioral ecology, biology and communication systems of humpback whales as well as the abundance, distribution, behavior, and physiological stress levels of all cetacean species in the study area. Research may be conducted from boats, airplanes, unmanned aircraft systems (UAS), and underwater. Animals may be studied using photo-ID, videogrammetry, passive acoustic recordings, behavioral observations, collection of fecal and skin samples, biopsy sampling, and suction-cup tagging. The permit holder is requesting the permit be amended to add active acoustic playbacks to humpback whales and to authorize suction-cup tagging of an additional 98 humpback whales annually as part of the acoustic research. In addition, Dr. Pack is requesting to add UAS deployment of suction-cup tags as a procedure for humpback whales. The objective of the acoustic playbacks are to examine humpback whale responses to vessel engine noise, conspecific sounds, natural ambient noise, and tonal sounds in Hawaiian waters. The permit expires on April 30, 2028.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: November 20, 2023.
Julia M. Harrison,
*Chief, Permits and Conservation Division,
Office of Protected Resources, National
Marine Fisheries Service.*
[FR Doc. 2023–25920 Filed 11–22–23; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the procurement list.

SUMMARY: This action adds service(s) to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: Date added to the Procurement List: December 24, 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:

Additions

On 9/22/2023, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed additions to 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 material presented to it concerning capability of qualified nonprofit agencies to provide the service(s) and impact of the additions on the current or most recent contractors, the Committee has determined that the service(s) listed below are 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 any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the service(s) to the Government.
2. The action will 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) proposed for addition to the Procurement List.

End of Certification

Accordingly, the following service(s) are added to the Procurement List:

Service(s)

Service Type: Janitorial Service

Mandatory for: Federal Aviation

Administration, Air Traffic Control Tower, North Charleston, SC

Designated Source of Supply: Palmetto Goodwill Services, North Charleston, SC

Contracting Activity: FEDERAL AVIATION ADMINISTRATION, 697DCK REGIONAL ACQUISITIONS SVCS

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2023-25945 Filed 11-22-23; 8:45 am]

BILLING CODE 6353-01-P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting

TIME AND DATE: Wednesday, November 29, 2023-10:00 a.m.

PLACE: Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, MD.

STATUS: Commission Meeting—Open to the Public.

MATTERS TO BE CONSIDERED:

Decisional Matter

Notice of Proposed Rulemaking: Infant Support Cushions. A live webcast of the meeting can be viewed at the following link: <https://cpsc.webex.com/weblink/register/r6d47fc122f8e9168bd8587d051fc5ec8>.

CONTACT PERSON FOR MORE INFORMATION: Alberta E. Mills, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, 301-504-7479 (Office) or 240-863-8938 (Cell).

Dated: November 20, 2023.

Elina Lingappa,

Paralegal Specialist.

[FR Doc. 2023-26120 Filed 11-22-23; 11:15 am]

BILLING CODE 6355-01-P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Policy Board: Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Policy (USDP), Department of Defense (DoD).

ACTION: Notice of Federal advisory committee meeting.

SUMMARY: The DoD is publishing this notice to announce the following Federal advisory committee meeting of the Defense Policy Board (DPB) will take place.

DATES: Closed to the public; Tuesday, December 5, 2023, from 8:30 a.m. to 5:00 p.m. Eastern Standard Time (EST). Closed to the public; Wednesday, December 6, 2023, from 8:00 a.m. to 11:15 a.m. EST.

ADDRESSES: The closed meeting will be held in the Rodman Conference Room, 3D852 at Air Force Mess, 4D881, at The Pentagon, 2000 Defense Pentagon, Washington, DC 20301-2000.

FOR FURTHER INFORMATION CONTACT: Lt Col Jesse Humpal (U.S. Air Force), (571) 256-8395 (Voice), osd.pentagon.rsrcmgmt.list.ousd-policy-defense-board-mbx@mail.mil (Email). Mailing address is 2000 Defense Pentagon, Attn: 5E420, Washington, DC 20301-2000.

SUPPLEMENTARY INFORMATION: Due to circumstances beyond the control of the Designated Federal Officer, the Defense Policy Board was unable to provide public notification required by 41 CFR 102-3.150(a) concerning its December 5-6, 2023 meeting. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102-3.150(b), waives the 15-calendar day notification requirement.

This meeting is being held under the provisions of chapter 10 of title 5, United States Code (U.S.C.) (commonly known as the "Federal Advisory Committee Act" or "FACA"), 5 U.S.C. 552b (commonly known as the "Government in the Sunshine Act"), and 41 CFR 102-3.140 and 102-3.150.

Purpose of the Meeting: To obtain, review, and evaluate classified information related to the DPB's mission to advise on: (a) issues central to strategic DoD planning; (b) policy implications of United States (U.S.) force structure and modernization on DoD's ability to execute U.S. defense strategy; (c) U.S. regional defense policies; and (d) other defense policy topics of special interest to the DoD, as determined by the Secretary of Defense, the Deputy Secretary of Defense, or the USDP.

Agenda: On December 5, 2023, and December 6, 2023, the DPB will receive classified briefings regarding U.S. Defense Policy toward Russia through 2050. The DPB will receive briefings from the following: Lt Col Jesse Humpal, Designated Federal Officer (DFO) for the Defense Policy Board, will discuss the FACA requirements for the DPB and establish the closed meeting rules; The

Honorable (Hon.) Sasha Baker, Acting USDP, will welcome the DPB; The Hon. Mara Karlin, Performing the Duties of the Deputy Under Secretary of Defense for Policy (DUSDP), and The Hon. Celeste A. Wallander, Assistant Secretary of Defense for International Security Affairs, will provide an update on how the Office of the USDP is approaching Russia; Mr. Nicholas R. Berliner, Special Assistant to the President and Senior Director for Russia and Central Asia, National Security Council, will provide an update from the Intelligence Community on how they are approaching Russia; General Charles Q. Brown, Chairman of the Joints Chiefs of Staff, will discuss how he is approaching Russia; General Christopher G. Cavoli, Commander U.S. European Command will provide an update on how the combatant command is approaching Russia; the DPB will provide its advice and recommendations to the Hon. Lloyd James Austin III, Secretary of Defense, and the Hon. Kathleen Hicks, Deputy Secretary of Defense; and the Hon. Mara Karlin, Performing the Duties of the DUSDP, and Mr. Elee Wakim, Military Experts Working Group, will provide their findings related to the War in Ukraine. The meeting will then conclude.

Meeting Accessibility: In accordance with 5 U.S.C. 1009(d) and 41 CFR 102–3.155, the DoD has determined that this meeting shall be closed to the public. The Acting Under Secretary of Defense (Policy), in consultation with the DoD FACA Attorney, has determined in writing that this meeting be closed to the public because the discussions fall under the purview of 5 U.S.C. 552b(c)(1) and are so inextricably intertwined with unclassified material that they cannot reasonably be segregated into separate discussions without disclosing classified material.

Written Statements: In accordance with 5 U.S.C. 1009(a)(3) and 41 CFR 102–3.105(j) and 102–3.140(c), the public or interested organizations may submit written statements to the membership of the DPB at any time regarding its mission or in response to the stated agenda of a planned meeting. Written statements should be submitted to the DPB's DFO, which is listed in this notice or can be obtained from the GSA's FACA Database—<http://www.facadatabase.gov/>. Written statements that do not pertain to a scheduled meeting of the DPB may be submitted at any time. However, if individual comments pertain to a specific topic being discussed at a planned meeting, then these statements must be submitted no later than five

business days prior to the meeting in question. The DFO will review all submitted written statements and provide copies to all members.

Dated: November 16, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–25907 Filed 11–22–23; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF EDUCATION

[Docket ID ED–2023–FSA–0094]

Privacy Act of 1974; Matching Program

AGENCY: Federal Student Aid (FSA), Department of Education.

ACTION: Notice of a new matching program.

SUMMARY: Pursuant to the Privacy Act of 1974, as amended by the Computer Matching and Privacy Protection Act of 1988 and the Computer Matching and Privacy Protection Amendments of 1990 (Privacy Act), and Office of Management and Budget (OMB) guidance on the conduct of matching programs, notice is hereby given of the re-establishment of the matching program between the U.S. Department of Education (Department or ED) (recipient agency) and the U.S. Department of Veterans Affairs (VA) (source agency). The current 18-month Computer Matching Agreement (CMA) between ED and VA was recertified for an additional 12 months on January 3, 2023, and will automatically expire on January 2, 2024.

DATES: This CMA will supersede the current matching program between the parties. The period of this matching program is estimated to cover the 18-month period from December 27, 2023, through June 26, 2025. However, the matching program will become applicable at the later of the following two dates: December 27, 2023, or 30 days after the publication of this notice, on November 24, 2023, unless comments have been received from interested members of the public requiring revision to and republication of the notice. The matching program will continue for 18 months after the applicable date and may be extended for up to an additional 12 months if the respective agency Data Integrity Boards (DIBs) determine that the conditions specified in 5 U.S.C. 552a(o)(2)(D) have been met.

ADDRESSES: Comments must be submitted via the Federal eRulemaking Portal at [regulations.gov](https://www.regulations.gov). However, if you require an accommodation or cannot otherwise submit your

comments via [regulations.gov](https://www.regulations.gov), please contact the program contact person listed under **FOR FURTHER INFORMATION CONTACT**. The Department will not accept comments submitted by fax or by email, or comments submitted after the comment period. To ensure that the Department does not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

Federal eRulemaking Portal: Go to www.regulations.gov to submit your comments electronically. Information on using [Regulations.gov](https://www.regulations.gov), including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under the “FAQ” tab.

Privacy Note: FSA's policy is generally to make comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at www.regulations.gov. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available. FSA's policy is that commenters should not include in their comments any information that identifies other individuals or that permits readers to identify other individuals. If, for example, your comment describes an experience of someone other than yourself, please do not identify that individual or include information that would allow readers to identify that individual. FSA reserves the right to redact at any time any information in comments that identifies other individuals, includes information that would allow readers to identify other individuals, or includes threats of harm to another person.

FOR FURTHER INFORMATION CONTACT:

Gerard Duffey, Management and Program Analyst, U.S. Department of Education, Federal Student Aid, Philadelphia, PA 19107. Telephone: (215) 656–3249.

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: In accordance with the Privacy Act; OMB “Final Guidance Interpreting the Provisions of Public Law 100–503, the Computer Matching and Privacy Protection Act of 1988,” published in the **Federal Register** on June 19, 1989 (54 FR 25818); and OMB Circular No. A–108, “Federal Agency Responsibilities for Review, Reporting, and Publication Under the Privacy Act,” published in the **Federal Register** on

December 23, 2016 (81 FR 94424), notice is hereby provided of the re-establishment of the matching program between ED and VA.

Participating Agencies

ED and VA.

Authority for Conducting the Matching Program

ED is authorized to participate in the matching program under sections 480(c)(1) and 480(d)(1)(D) of the Higher Education Act of 1965, as amended (HEA) (20 U.S.C. 1087vv(c)(1) and (d)(1)(D)). VA is authorized to participate in the matching program under 38 U.S.C. 523.

Purpose(s)

The purpose of this matching program is to assist the Secretary of Education (the Secretary) with verification of a veteran's status during the processing and review of applications for financial assistance under title IV of the HEA.

The Secretary is authorized by the HEA to administer programs under title IV of the HEA and to enforce the terms and conditions of the HEA.

Section 480(c)(1) of the HEA defines the term "veteran" to mean "any individual who—(A) has engaged in the active duty in the United States Army, Navy, Air Force, Marines, or Coast Guard; and (B) was released under a condition other than dishonorable." (20 U.S.C. 1087vv(c)(1)). Under section 480(d)(1)(D) of the HEA, an applicant who is a veteran (as defined in section 480(c)(1) of the HEA) is considered an independent student for purposes of title IV, HEA program assistance eligibility, and, therefore, does not have to provide parental income and asset information to apply for title IV, HEA program assistance. (20 U.S.C. 1087vv(d)(1)(D)).

Categories of Individuals

Individuals who have completed the Free Application for Federal Student Aid (FAFSA®) and have indicated that they are veterans.

Categories of Records

ED will disclose to the VA the Social Security number (SSN), first and last name, and date of birth (DOB) of each applicant for financial assistance under title IV of the HEA who indicates veteran status in their application.

VA will compare these data elements against the first and last name, SSN, and DOB of veterans. As a result of the match, VA will assign one of four values to the applicant records: (1) veteran status confirmed; (2) record found on database, but not a qualifying veteran;

(3) record not found on database; or (4) record found on database, but applicant on active duty. VA then will transmit applicant records back to ED.

System(s) of Records

ED systems of records: (1) Aid Awareness and Application Processing (AAAP) (18–11–21), last fully published in the **Federal Register** on June 15, 2023 (88 FR 39233); and (2) Common Origination and Disbursement (COD) System (18–11–02) last fully published in the **Federal Register** on June 28, 2023 (88 FR 41942). (*Note:* the ED Central Processing System (CPS) and Free Application for Federal Student Aid (FAFSA) Processing System (FPS) are the ED information systems that process FAFSA data from the Aid Awareness and Application Processing system of records. CPS will process this data through September 30, 2024, for Award Year (AY) 2023–24. FPS will become operational on or after December 1, 2023, and begin processing FAFSA data for AY 2024–25. After September 30, 2024, CPS will be decommissioned and will be fully replaced by FPS within AAAP. FPS will process data for all AYs thereafter. ED uses the COD System to determine the amounts and types of Title IV, HEA program assistance that an applicant for Title IV, HEA benefits will receive.)

VA system of records: "Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records—VA" (58VA21/22/28), last fully published in the **Federal Register** at 86 FR 61858 (November 8, 2021).

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at www.govinfo.gov. At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal**

Register by using the article search feature at www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Richard Cordray,

Chief Operating Officer, Federal Student Aid.

[FR Doc. 2023–25999 Filed 11–22–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

National Petroleum Council

AGENCY: Office of Fossil Energy and Carbon Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the National Petroleum Council. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Tuesday, December 12, 2023, 9 a.m. to no later than 11:30 a.m. (EST).

ADDRESSES: Willard InterContinental, 1401 Pennsylvania Avenue NW, Washington, DC 20004. In-person meeting. Information to access a live stream of the meeting proceedings will be available at: www.energy.gov/fecm/national-petroleum-council-npc.

FOR FURTHER INFORMATION CONTACT: Nancy Johnson, U.S. Department of Energy, Office of Resource Sustainability (FECM–30), 1000 Independence Avenue SW, Washington, DC 20585; telephone: (202) 586–6458 or email: nancy.johnson@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

Purpose of the Committee: To provide advice, information, and recommendations to the Secretary of Energy on matters relating to oil and natural gas, and the oil and natural gas industries.

Tentative Agenda:

- Call to Order and Introductory Remarks
- Department of Energy Remarks
- Progress Reports from the NPC Hydrogen Energy and GHG Emissions Committees
- Administrative Matters
- Discussion of Any Other Business Properly Brought Before the National Petroleum Council
- Adjournment

Public Participation: The meeting is open to the public. The Chair of the Council will conduct the meeting to facilitate the orderly conduct of business. Members of the public who

wish to make oral statements pertaining to agenda items should contact Ms. Nancy Johnson at the address or telephone number listed above. Approximately 15 minutes will be reserved for public comments. The time allocated per speaker will depend on the number of requests received, but will not exceed five minutes. Requests for oral statements must be received at least seven days prior to the meeting. Those not able to attend the meeting or having insufficient time to address the Council are invited to send a written statement to nancy.johnson@hq.doe.gov. Any member of the public who wishes to file a written statement to the Council will be permitted to do so, either before or after the meeting.

Minutes: The minutes of the meeting will be available at <https://www.energy.gov/fecm/national-petroleum-council-npc>, or by contacting Ms. Johnson. She may be reached at the above postal address or email address.

Signed in Washington, DC, on November 20, 2023.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2023–25942 Filed 11–22–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 4202–000]

KEI (Maine) Power Management (II) LLC; Notice of Authorization for Continued Project Operation

The license for the Lowell Tannery Hydroelectric Project No. 4202 was issued for a period ending September 30, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires,

until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 4202 is issued to KEI (Maine) Power Management (II) LLC for a period effective October 1, 2023, through September 30, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before September 30, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that KEI (Maine) Power Management (II) LLC is authorized to continue operation of the Lowell Tannery Hydroelectric Project under the terms and conditions of the prior license until the issuance of a subsequent license for the project or other disposition under the FPA, whichever comes first.

Dated: November 17, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–25961 Filed 11–22–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2375–124]

Andro Hydro, LLC; Notice of Application for Amendment of License, Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

- a. *Application Type:* Application for non-capacity amendment of license.
- b. *Project No.:* 2375–124.
- c. *Date Filed:* June 20, 2023.
- d. *Applicant:* Andro Hydro, LLC.
- e. *Name of Project:* Riley-Jay-Livermore Hydroelectric Project.
- f. *Location:* The project is located on the Androscoggin River in Oxford,

Franklin, and Androscoggin Counties in Maine.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Jody Smet, Eagle Creek Renewable Energy, LLC, 7315 Wisconsin Avenue, Suite 1100W, Bethesda, MD 20814, (804) 382–1764, jody.smet@eaglecreekre.com.

i. *FERC Contact:* Maryam Akhavan, (202) 502–6110, Maryam.Akhavan@ferc.gov.

j. *Deadline for filing comments, interventions, and protests:* December 18, 2023.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov, (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. The first page of any filing should include docket number P–2375–124. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears 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. *Description of Request:* Andro Hydro, LLC (applicant), a subsidiary of Eagle Creek Renewable Energy, proposes to replace the existing flashboards at the Riley development with a rubber dam and install gorilla bars on the forebay entrance. The applicant maintains run-of-river operations during construction or after the rubber dam and gorilla bars are installed. In addition, the applicant proposes to replace one existing Unit 6 turbine-generator unit with two new

turbine-generator units at the Jay development and increase the generating capacity from 3.125 Megawatts (MW) to 3.745 MW.

l. *Locations of the Application:* This filing may be viewed on the Commission's website at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. 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, call 1-866-208-3676 or email FERCOnlineSupport@ferc.gov, for TTY, call (202) 502-8659. Agencies may obtain copies of the application directly from the applicant.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* 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, .214, respectively. 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.

o. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE" as applicable; (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 commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor 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 385.2010.

p. 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 17, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-25974 Filed 11-22-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 5867-000]

Alice Falls Hydro, LLC; Notice of Authorization for Continued Project Operation

The license for the Alice Falls Hydroelectric Project No. 5867 was issued for a period ending September 30, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 5867 is issued to Alice Falls Hydro, LLC for a period effective October 1, 2023, through September 30, 2024, or until the issuance of a new license for the project

or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before September 30, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Alice Falls Hydro, LLC is authorized to continue operation of the Alice Falls Hydroelectric Project under the terms and conditions of the prior license until the issuance of a subsequent license for the project or other disposition under the FPA, whichever comes first.

Dated: November 17, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-25966 Filed 11-22-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 10661-000]

Indiana Michigan Power Company; Notice of Authorization for Continued Project Operation

The license for the Constantine Hydroelectric Project No. 10661 was issued for a period ending September 30, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b),

to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 10661 is issued to Indiana Michigan Power Company for a period effective October 1, 2023, through September 30, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before September 30, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Indiana Michigan Power Company is authorized to continue operation of the Constantine Hydroelectric Project under the terms and conditions of a prior license until the issuance of a subsequent license for the project or other disposition under the FPA, whichever comes first.

Dated: November 17, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-25970 Filed 11-22-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR24-1-000]

Holly Energy Partners—Operating, L.P.; Notice of Request for Temporary Waiver

Take notice that on November 9, 2023, Holly Energy Partners—Operating, L.P. filed a petition seeking a temporary waiver of the tariff filing and reporting requirements of sections 6 and 20 of the Interstate Commerce Act and parts 341 and 357 of the Federal Energy Regulatory Commission's regulations (Commission), all as more fully explained in the petition.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to

the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene, or protest must serve a copy of that document on the Petitioner.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://ferc.gov>). From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field. User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. Email the Public Reference Room at public.referenceroom@ferc.gov.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

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.

Comment Date: 5:00 p.m. Eastern time on December 11, 2023.

Dated: November 17, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-25973 Filed 11-22-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23-131-000]

East Tennessee Natural Gas, LLC; Notice of Availability of the Environmental Assessment for the Proposed System Alignment Program Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the System Alignment Program Project (Project), proposed by East Tennessee Natural Gas, LLC (East Tennessee) in the above-referenced docket. East Tennessee requests authorization to construct approximately 16.1 miles of 24-inch-diameter pipeline loop (Boyd's Creek Loop) adjacent to its existing 16-inch-diameter pipeline (Line 3300-1) in Knox and Sevier Counties, Tennessee; a new 6,000-horsepower compressor station (the Talbott Compressor Station) in Jefferson County, Tennessee; a new 19,000-horsepower compressor station in Rockingham County, North Carolina (the Draper Compressor Station); and ancillary facilities in Knox County and Sevier Counties, Tennessee and Washington and Wythe Counties, Virginia. East Tennessee would also replace approximately 6.4 miles of 8-inch-diameter pipeline with new 24-inch-diameter pipeline within its existing right-of-way in Washington County, Virginia and complete a hydrotest of an approximately 1.2-mile-long segment of existing pipeline in Patrick County, Virginia.

The EA assesses the potential environmental effects of the construction and operation of the Project in accordance with the requirements of the National Environmental Policy Act (NEPA). The FERC staff concludes that approval of the Project, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The Commission mailed a copy of this *Notice of Availability* of the EA to federal, state, and local government representatives and agencies; elected officials; non-governmental organizations, environmental, and public interest groups; potentially

interested Indian tribes; affected landowners; and newspapers and libraries in the Project area. The EA is only available in electronic format. It may be viewed and downloaded from the FERC's website (www.ferc.gov), on the natural gas environmental documents page (<https://www.ferc.gov/industries-data/natural-gas/environment/environmental-documents>). In addition, the EA may be accessed by using the eLibrary link on the FERC's website. Click on the eLibrary link (<https://elibrary.ferc.gov/eLibrary/search>), select "General Search" and enter the docket number in the "Docket Number" field, (i.e. CP23–131–000). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at FercOnlineSupport@ferc.gov or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

The EA is not a decision document. It presents Commission staff's independent analysis of the environmental issues for the Commission to consider when addressing the merits of all issues in this proceeding. Any person wishing to comment on the EA may do so. Your comments should focus on the EA's disclosure and discussion of potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. The EA also includes site-specific construction plans for residences within 50 feet of Project workspaces (see appendix J); affected landowners are encouraged to review these plans and provide comments. To ensure consideration of your comments, it is important that the Commission receive your comments on or before 5:00 p.m. Eastern Time on December 18, 2023.

For your convenience, there are three methods you can use to submit your comments to the Commission. The Commission encourages electronic filing of comments and has staff available to assist you at (866) 208–3676 or FercOnlineSupport@ferc.gov. Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the *eComment* feature on the Commission's website (www.ferc.gov) under the link to *FERC Online*. This is an easy method for submitting brief, text-only comments on a project.

(2) You can also file your comments electronically using the *eFiling* feature on the Commission's website (www.ferc.gov) under the link to *FERC*

Online. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on "eRegister." You must select the type of filing you are making. If you are filing a comment on a particular project, please select "Comment on a Filing"; or

(3) You can file a paper copy of your comments by mailing them to the Commission. Be sure to reference the project docket number (CP23–131–000) on your letter. 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.

Filing environmental comments will not give you intervenor status, but you do not need intervenor status to have your comments considered. Only intervenors have the right to seek rehearing or judicial review of the Commission's decision. At this point in this proceeding, the timeframe for filing timely intervention requests has expired. Any person seeking to become a party to the proceeding must file a motion to intervene out-of-time pursuant to Rule 214(b)(3) and (d) of the Commission's Rules of Practice and Procedures (18 CFR 385.214(b)(3) and (d)) and show good cause why the time limitation should be waived. Motions to intervene are more fully described at <https://www.ferc.gov/how-intervene>.

Additional information about the Project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website (<https://www.ferc.gov/>) using the eLibrary link. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

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.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to <https://www.ferc.gov/ferc-online/overview> to register for eSubscription.

Dated: November 17, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–25968 Filed 11–22–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following Complaints and Compliance filings in EL Dockets:

Docket Numbers: EL24–18–000.

Applicants: *Urban Grid Solar Projects, LLC v. PJM Interconnection, L.L.C.*

Description: Complaint of *Urban Grid Solar Projects, LLC v. PJM Interconnection, L.L.C.*

Filed Date: 11/16/23.

Accession Number: 20231116–5164.

Comment Date: 5 p.m. ET 12/6/23.

Docket Numbers: EL24–20–000;

EL24–21–000; ER24–416–000.

Applicants: Northern States Power Company, *Northern States Power Company v. Midcontinent Independent System Operator, Inc.*, Northern States Power Company.

Description: Request for Waiver, Petition for Declaratory Order of Northern States Power Company and Complaint of *Northern States Power Company v. Midcontinent Independent System Operator, Inc.*

Filed Date: 11/16/23.

Accession Number: 20231116–5197.

Comment Date: 5 p.m. ET 12/6/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER23–1771–001.

Applicants: ISO New England Inc., New England Power Pool Participants Committee.

Description: Compliance filing: ISO New England Inc. submits tariff filing per 35: Revisions to Schedule 24 to Comply with Order No. 676–J in Docket No. ER23–1771 to be effective 2/1/2024.

Filed Date: 11/17/23.

Accession Number: 20231117–5132.

Comment Date: 5 p.m. ET 12/8/23.
Docket Numbers: ER23–2741–001.
Applicants: Clearwater Energy Resources LLC.

Description: Tariff Amendment: Clearwater Energy Resources LLC's Response to Deficiency Letter to be effective 11/1/2023.

Filed Date: 11/17/23.

Accession Number: 20231117–5159.

Comment Date: 5 p.m. ET 12/8/23.

Docket Numbers: ER24–417–000.

Applicants: Flat Ridge Interconnection LLC.

Description: § 205(d) Rate Filing: Filing of Revised Rate Schedule, Request for Waivers and Expedited Treatment to be effective 12/31/9998.

Filed Date: 11/17/23.

Accession Number: 20231117–5038.

Comment Date: 5 p.m. ET 12/8/23.

Docket Numbers: ER24–418–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2023–11–17 SA 3920 Duke-IN Solar 1st Rev GIA (J1234 J1235) to be effective 11/7/2023.

Filed Date: 11/17/23.

Accession Number: 20231117–5045.

Comment Date: 5 p.m. ET 12/8/23.

Docket Numbers: ER24–419–000.

Applicants: PacifiCorp.

Description: § 205(d) Rate Filing: OATT Revised Attachment H–1—Attachments 3 and 5 to be effective 1/17/2024.

Filed Date: 11/17/23.

Accession Number: 20231117–5041.

Docket Numbers: ER24–420–000.

Applicants: ISO New England Inc., New England Power Pool Participants Committee.

Description: § 205(d) Rate Filing: ISO New England Inc. submits tariff filing per 35.13(a)(2)(iii): Rev. to Allow Lead Mkt Participants to Reduce Perm. & De-List Bids Prior to FCA to be effective 3/1/2024.

Filed Date: 11/17/23.

Accession Number: 20231117–5042.

Comment Date: 5 p.m. ET 12/8/23..

Docket Numbers: ER24–421–000.

Applicants: JGT2 Energy LLC.

Description: Baseline eTariff Filing: JGT2_Energy_MBRA_App to be effective 12/1/2023.

Filed Date: 11/17/23.

Accession Number: 20231117–5053.

Comment Date: 5 p.m. ET 12/8/23.

Docket Numbers: ER24–422–000.

Applicants: Flat Ridge 2 Wind Energy LLC.

Description: § 205(d) Rate Filing: Certificate of Concurrence, Request for Waiver and Expedited Treatment to be effective 12/31/9998.

Filed Date: 11/17/23.

Accession Number: 20231117–5077.

Comment Date: 5 p.m. ET 12/8/23.

Docket Numbers: ER24–423–000.

Applicants: Tucson Electric Power Company.

Description: § 205(d) Rate Filing: Eleven Mile Solar Center Interconnection Agreement to be effective 1/17/2024.

Filed Date: 11/17/23.

Accession Number: 20231117–5081.

Comment Date: 5 p.m. ET 12/8/23.

Docket Numbers: ER24–424–000.

Applicants: Tucson Electric Power Company.

Description: § 205(d) Rate Filing: Construction Cost Reimbursement Agreement to be effective 11/20/2023.

Filed Date: 11/17/23.

Accession Number: 20231117–5082.

Comment Date: 5 p.m. ET 12/8/23.

Docket Numbers: ER24–425–000.

Applicants: Flat Ridge 4 Wind, LLC.

Description: Initial rate filing: Filing of Common Facilities Agreement to be effective 12/31/9998.

Filed Date: 11/17/23.

Accession Number: 20231117–5085.

Comment Date: 5 p.m. ET 12/8/23.

Docket Numbers: ER24–426–000.

Applicants: Flat Ridge 5 Wind Energy LLC.

Description: Initial rate filing: Filing of Common Facilities Agreement to be effective 12/31/9998.

Filed Date: 11/17/23.

Accession Number: 20231117–5087.

Comment Date: 5 p.m. ET 12/8/23.

Docket Numbers: ER24–427–000.

Applicants: Flat Ridge 3 Wind Energy, LLC.

Description: § 205(d) Rate Filing: Certificate of Concurrence and Request for Expedited Treatment to be effective 12/31/9998.

Filed Date: 11/17/23.

Accession Number: 20231117–5089.

Comment Date: 5 p.m. ET 12/8/23.

Docket Numbers: ER24–428–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2023–11–17 SA 3425 Entergy Arkansas-West Memphis Solar 2nd Rev GIA (J934) to be effective 11/9/2023.

Filed Date: 11/17/23.

Accession Number: 20231117–5095.

Comment Date: 5 p.m. ET 12/8/23.

Docket Numbers: ER24–429–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 6576; Queue No. AD2–062 to be effective 1/17/2024.

Filed Date: 11/17/23.

Accession Number: 20231117–5102.

Comment Date: 5 p.m. ET 12/8/23..

Docket Numbers: ER24–430–000.

Applicants: Alabama Power Company, Georgia Power Company, Mississippi Power Company.

Description: Tariff Amendment: Alabama Power Company submits tariff filing per 35.15: Macon County Solar (Hybrid Project) LGIA Termination Filing to be effective 11/17/2023.

Filed Date: 11/17/23.

Accession Number: 20231117–5112.

Comment Date: 5 p.m. ET 12/8/23.

Docket Numbers: ER24–431–000.

Applicants: Alabama Power Company, Georgia Power Company, Mississippi Power Company.

Description: Tariff Amendment: Alabama Power Company submits tariff filing per 35.15: Midland-Wiregrass Solar (Hybrid Project) LGIA Termination Filing to be effective 11/17/2023.

Filed Date: 11/17/23.

Accession Number: 20231117–5113.

Comment Date: 5 p.m. ET 12/8/23.

Docket Numbers: ER24–432–000.

Applicants: Evergy Kansas Central, Inc.

Description: § 205(d) Rate Filing: Notice of Succession Acquiring Permission Creek to be effective 5/18/2023.

Filed Date: 11/17/23.

Accession Number: 20231117–5125.

Comment Date: 5 p.m. ET 12/8/23.

Docket Numbers: ER24–433–000.

Applicants: Flat Ridge 4 Wind, LLC.

Description: Initial rate filing: Filing of Shared Facilities Agreement to be effective 12/31/9998.

Filed Date: 11/17/23.

Accession Number: 20231117–5130.

Comment Date: 5 p.m. ET 12/8/23.

Docket Numbers: ER24–434–000.

Applicants: Flat Ridge 5 Wind Energy LLC.

Description: Initial rate filing: Filing of Shared Facilities Agreement to be effective 12/31/9998.

Filed Date: 11/17/23.

Accession Number: 20231117–5131.

Comment Date: 5 p.m. ET 12/8/23.

Docket Numbers: ER24–435–000.

Applicants: Black Hills Power, Inc.

Description: § 205(d) Rate Filing: Revisions to Attachment N of JOATT to be effective 1/17/2024.

Filed Date: 11/17/23.

Accession Number: 20231117–5144.

Comment Date: 5 p.m. ET 12/8/23.

Docket Numbers: ER24–436–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendment to ISA, SA No. 5605;

Queue No. AC1–222/AD1–055 (amend)
to be effective 1/17/2024.

Filed Date: 11/17/23.

Accession Number: 20231117–5152.

Comment Date: 5 p.m. ET 12/8/23.

Docket Numbers: ER24–437–000.

Applicants: Midcontinent
Independent System Operator, Inc.,
Ameren Services Company.

Description: § 205(d) Rate Filing:
Midcontinent Independent System
Operator, Inc. submits tariff filing per
35.13(a)(2)(iii): 2023–11–17 SA 2037
Ameren-Wabash Valley (Citizens) 5th
Rev WDS Agreement to be effective 12/
1/2023.

Filed Date: 11/17/23.

Accession Number: 20231117–5156.

Comment Date: 5 p.m. ET 12/8/23.

The filings are accessible in the
Commission's eLibrary system ([https://
elibrary.ferc.gov/idmws/search/
fercgensearch.asp](https://elibrary.ferc.gov/idmws/search/fercgensearch.asp)) by querying the
docket number.

Any person desiring to intervene, to
protest, or to answer a complaint in any
of the above proceedings must file in
accordance with Rules 211, 214, or 206
of the Commission's Regulations (18
CFR 385.211, 385.214, or 385.206) on or
before 5:00 p.m. Eastern time on the
specified comment date. Protests may be
considered, but intervention is
necessary to become a party to the
proceeding.

eFiling is encouraged. More detailed
information relating to filing
requirements, interventions, protests,
service, and qualifying facilities filings
can be found at: [http://www.ferc.gov/
docs-filing/efiling/filing-req.pdf](http://www.ferc.gov/docs-filing/efiling/filing-req.pdf). For
other information, call (866) 208–3676
(toll free). For TTY, call (202) 502–8659.

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 17, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023–25971 Filed 11–22–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 4639–000]

Ampersand Christine Falls Hydro, LLC; Notice of Authorization for Continued Project Operation

The license for the Christine Falls
Hydroelectric Project No. 4639 was
issued for a period ending September
30, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C.
808(a)(1), requires the Commission, at
the expiration of a license term, to issue
from year-to-year an annual license to
the then licensee(s) under the terms and
conditions of the prior license until a
new license is issued, or the project is
otherwise disposed of as provided in
section 15 or any other applicable
section of the FPA. If the project's prior
license waived the applicability of
section 15 of the FPA, then, based on
section 9(b) of the Administrative
Procedure Act, 5 U.S.C. 558(c), and as
set forth at 18 CFR 16.21(a), if the
licensee of such project has filed an
application for a subsequent license, the
licensee may continue to operate the
project in accordance with the terms
and conditions of the license after the
minor or minor part license expires,
until the Commission acts on its
application. If the licensee of such a
project has not filed an application for
a subsequent license, then it may be
required, pursuant to 18 CFR 16.21(b),
to continue project operations until the
Commission issues someone else a
license for the project or otherwise
orders disposition of the project.

If the project is subject to section 15
of the FPA, notice is hereby given that
an annual license for Project No. 4639
is issued to Ampersand Christine Falls
Hydro, LLC for a period effective
October 1, 2023, through September 30,
2024, or until the issuance of a new
license for the project or other
disposition under the FPA, whichever
comes first. If issuance of a new license
(or other disposition) does not take
place on or before September 30, 2024,
notice is hereby given that, pursuant to
18 CFR 16.18(c), an annual license
under section 15(a)(1) of the FPA is
renewed automatically without further
order or notice by the Commission,
unless the Commission orders
otherwise.

If the project is not subject to section
15 of the FPA, notice is hereby given
that Ampersand Christine Falls Hydro,
LLC is authorized to continue operation
of the Christine Falls Hydroelectric
Project under the terms and conditions

of the prior license until the issuance of
a subsequent license for the project or
other disposition under the FPA,
whichever comes first.

Dated: November 17, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023–25963 Filed 11–22–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

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

Filings Instituting Proceedings

Docket Numbers: RP24–162–000.
Applicants: National Fuel Gas Supply
Corporation.

Description: Compliance filing:
TSCA—Informational Filing (November
2023) to be effective N/A.

Filed Date: 11/16/23.

Accession Number: 20231116–5146.

Comment Date: 5 p.m. ET 11/28/23.

Docket Numbers: RP24–163–000.
Applicants: Tallgrass Interstate Gas
Transmission, LLC.

Description: Compliance filing: TIGT
2023–11–17 Pre-filing Settlement
Stipulation and Agreement to be
effective 12/31/9998.

Filed Date: 11/17/23.

Accession Number: 20231117–5080.

Comment Date: 5 p.m. ET 11/29/23.

Any person desiring to intervene, to
protest, or to answer a complaint in any
of the above proceedings must file in
accordance with Rules 211, 214, or 206
of the Commission's Regulations (18
CFR 385.211, 385.214, or 385.206) on or
before 5:00 p.m. Eastern time on the
specified comment date. Protests may be
considered, but intervention is
necessary to become a party to the
proceeding.

Filings in Existing Proceedings

Docket Numbers: RP20–614–008.
Applicants: Transcontinental Gas
Pipe Line Company, LLC.

Description: ALJ Settlement: Transco
Stip & Agrmt.

Filed Date: 11/16/23.

Accession Number: 20231116–5132.

Comment Date: 5 p.m. ET 11/28/23.

Docket Numbers: RP20–618–003.
Applicants: Transcontinental Gas
Pipe Line Company, LLC.

Description: ALJ Settlement: Transco
Stip & Agrmt.

Filed Date: 11/16/23.

Accession Number: 20231116–5129.

Comment Date: 5 p.m. ET 11/28/23.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

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 17, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023–25965 Filed 11–22–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 6951–000]

Tallassee Shoals, LLC; Notice of Authorization for Continued Project Operation

The license for the Tallassee Shoals Hydroelectric Project No. 6951 was issued for a period ending September 30, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of

section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 6951 is issued to Tallassee Shoals, LLC for a period effective October 1, 2023, through September 30, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before September 30, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Tallassee Shoals, LLC is authorized to continue operation of the Tallassee Shoals Hydroelectric Project under the terms and conditions of the prior license until the issuance of a subsequent license for the project or other disposition under the FPA, whichever comes first.

Dated: November 17, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023–25972 Filed 11–22–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL OP–OFA–097]

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 13, 2023 10 a.m. EST
Through November 17, 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. 20230162, Final, USAF, FL, KC–46A Main Operating Base No. 6
Beddown, Review Period Ends: 12/26/2023, Contact: Austin Naranjo 813–263–9331.

EIS No. 20230163, Draft Supplement, USACE, HI, Draft General
Reevaluation Report with Integrated Supplemental Environmental Impact Statement: Ala Wai Canal Flood Risk Management Study, Oahu, Hawaii, Comment Period Ends: 01/08/2024, Contact: Eric Merriam 412–395–7185.

Dated: November 17, 2023.

Julie Smith,

Acting Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2023–25936 Filed 11–22–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2023–0194; FRL–11557–01–OAR]

EPA Determinations of Compliance and Applicability Under CAA 111, 112, and 129 Dashboard: EPA Formal Responses to Inquiries Concerning Compliance With the Clean Air Act Stationary Source Program (Since May 2019)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: This notice announces the availability of applicability determinations, alternative monitoring decisions, and regulatory interpretations made by the Environmental Protection Agency (EPA) with regard to the New Source Performance Standards (NSPS); the National Emission Standards for Hazardous Air Pollutants (NESHAP); the Emission Guidelines and Federal Plan Requirements for existing sources; and/or the Stratospheric Ozone Protection Program.

FOR FURTHER INFORMATION CONTACT: An electronic copy of each complete document posted on the Clean Air Act 111, 112, and 129 Dashboard, which

This notice comprises a list of 173 such documents added to the Clean Air Act 111, 112, and 129 Dashboard on October 2, 2023. This notice lists the title of each letter and memorandum. Complete copies of these documents may be obtained from the Clean Air Act 111, 112 and 129 Dashboard on the internet through the Resources and Guidance Documents for Compliance Assistance page of the Clean Air Act Compliance Monitoring website under “Air” at: <https://www.epa.gov/compliance/resources-and-guidance-documents-compliance-assistance>.

Facility name	Title	Affected subpart	Date of response
East Carolina Regional Solid Waste Landfill	Other Request—Well Decommissioning	Part 62, Subpart OOO	2023–09–12
Eaton Corporation—Auburn Facility	Applicability Determination for Stationary Combustion Engines.	Part 63, Subpart ZZZZ; Part 60, Subpart IIII	2023–09–07
ANR Pipeline Company—LaGrange Compressor Station.	Alternative Monitoring for Stationary Gas Turbines.	Part 63, Subpart YYYY	2023–08–25
ANR Pipeline Company—Sulpher Springs Compressor Station.	Alternative Monitoring for Stationary Gas Turbines.	Part 63, Subpart YYYY	2023–08–25
International Paper (IP)—Columbus Mill	Alternative Monitoring for Pulp and Paper Production.	Part 63, Subpart S	2023–08–10
Valero Renewable Fuels	Applicability Determination for SOCM1 Distillation Operations.	Part 60, Subpart NNN	2023–08–07
Diversified Vapor Technologies	Alternative Monitoring for Petroleum Refineries	Part 60, Subpart J; Part 60, Subpart Ja:	2023–07–27
Xcel Energy—High Bridge	Alternative Monitoring for Stationary Gas Turbines.	Part 63, Subpart YYYY	2023–07–27
Tampa Electric Company—Big Bend Station	Other Request—Approval of a continuous monitoring system (CMS) plan petition.	Part 63, Subpart YYYY	2023–07–25
DVT/Multiple R4 Refineries	Alternative Monitoring for Petroleum Refineries	Part 60, Subpart J; Part 60, Subpart Ja	2023–07–25
Mosaic Fertilizer New Whales Facility	Alternative Monitoring for Phosphate Fertilizer Production Plants.	Part 63, Subpart BB	2023–07–21
Maple Hill Landfill	Alternative Test Method for MSWLF	Part 62, Subpart OOO	2023–07–14
Owl's Head Alloys, Inc	Alternative Test Method for Secondary Aluminum Production.	Part 63, Subpart RRR	2023–07–11
Alyeska TAPS Pump Station #1	Performance Test Extension for Stationary Combustion Turbines.	Part 60, Subpart KKKK	2023–07–10
Carmeuse Americas—Longview	Alternative Monitoring for Lime Manufacturing Plant.	Part 63, Subpart AAAAA	2023–06–21
University of Michigan—Central Power Plant	Other Request—Request for Operating Limits/Monitoring Petition.	Part 63, Subpart YYYY	2023–06–15
Entergy Services LLC	Other Request—Revision to your approved continuous monitoring system (CMS) plan.	Part 63, Subpart YYYY	2023–06–12

**APPLICABILITY DETERMINATIONS, ALTERNATIVE MONITORING PLANS AND REGULATORY INTERPRETATIONS UPLOADED TO
CLEAN AIR ACT 111, 112, AND 129 DASHBOARD ON OCTOBER 2, 2023—Continued**

Facility name	Title	Affected subpart	Date of response
Dominion Energy	Performance Test Waiver for Coal and Oil-Fired Electric Generating Units.	Part 63, Subpart UUUUU	2023-06-12
Advansix Hopewell Virginia	Alternative Monitoring for Miscellaneous Organic Chemical Manufacturing.	Part 63, Subpart FFFF	2023-06-07
Materion Brush Inc	Applicability Determination for Stationary Reciprocating Combustion Engines.	Part 63, Subpart ZZZZ	2023-05-31
XCEL Energy—Riverside Generating Plant	Alternative Test Method for Stationary Gas Turbines.	Part 63, Subpart YYYY	2023-05-23
Texas Eastern Transmission—Somerset	Applicability Determination for Stationary Gas Turbines.	Part 63, Subpart YYYY	2023-05-23
XCEL Energy—High Bridge Combined Cycle	Alternative Monitoring for Stationary Gas Turbines.	Part 63, Subpart YYYY	2023-05-22
Safe Dispose, LLC (SD-40)	Applicability Determination for HMIWI	Part 60, Subpart Ec	2023-05-08
Uwharrie Environmental Landfill	Alternative Monitoring for MSWL	Part 62, Subpart OOO	2023-04-24
Buchanan Marine, LP	Applicability Determination for Nine Metal Fabrication and Finishing Source Categories.	Part 63, Subpart XXXXXX	2023-04-10
City of High Point (Eastside Waste Water Treatment Plant) Revised AMP Resubmittal.	Alternative Monitoring Procedure for Wastewater Treatment Facility.	Part 60, Subpart MMMM	2023-03-23
East Carolina Regional Landfill	Other Request—Well Decommissioning	Part 62, Subpart OOO; Part 63, Subpart AAAA	2023-03-23
Hanes Mill Road Landfill	Other Request—Well Decommissioning	Part 62, Subpart OOO; Part 63, Subpart AAAA	2023-03-23
Safe Dispose, LLC (SD-9 & SD-21)	Applicability Determination for Hospital/Medical/Infectious Waste Incinerators.	Part 60, Subpart Ec	2023-03-23
Kronospan	Other Request—Compliance Option for Plywood and Composite Wood Products.	Part 63, Subpart DDDD	2023-03-23
Duke Energy Florida, LLC, Citrus Combined Cycle Station.	Other Request—Approval of CMS Plan	Part 63, Subpart YYYY	2023-03-17
Florida Power and Light	Other Request—Approval of CMS Plan	Part 63, Subpart YYYY	2023-03-17
Johns Hopkins All Children's Hospital	Regulatory Interpretation for Stationary Reciprocating Internal Combustion Engines.	Part 63, Subpart ZZZZ	2023-03-17
CITGO Corpus Christi East Refinery	Alternative Monitoring for Petroleum Refineries	Part 60, Subpart Ja	2023-03-14
TC Energy (ANR Brownsville Compressor Station, TN).	Other Request—Approval of CMS Plan	Part 63, Subpart YYYY	2023-03-09
South Wake Landfill	Other Request—Well Decommissioning	Part 62, Subpart OOO; Part 63, Subpart AAAA	2023-03-03
Petro Nova Parish Holdings-Capture Plant	Performance Test Extension for Stationary Gas Turbines.	Part 63, Subpart A; Part 63, Subpart YYYY	2023-02-16
Timber Ridge Landfill, Richwoods, MO	Alternative Monitoring for MSWL	Part 62, Subpart OOO	2023-02-08
Capital Region Airport Authority	Applicability Determination for Other Solid Waste Incineration Units.	Part 60, Subpart EEEE	2023-01-27
Safe Dispose, LLC (SD-27)	Applicability Determination for Hospital/Medical/Infectious Waste Incinerators.	Part 60, Subpart Ec	2023-01-19
Transcontinental Gas Pipe Line Company, LLC (Transco), Compressor Station 85.	Other Request—Approval of CMS Plan	Part 63, Subpart YYYY	2023-01-18
Valero Refining—St Charles Refinery	Alternative Monitoring for Petroleum Refineries	Part 60, Subpart Ja	2023-01-13
Transcontinental Gas Pipe Line Company, LLC (Transco) Station 110.	Other Request—Approval of CMS Plan	Part 63, Subpart YYYY	2023-01-13
Nikaichuq Development Site	Performance Test Waiver for Stationary Combustion Turbine.	Part 60, Subpart KKKK	2023-01-05
International Paper ORANGE MILL PLANT	Alternative Monitoring for Pulp and Paper Production.	Part 63, Subpart S	2022-12-19
Consumers Energy Company—Muskegon River Compressor Station.	Performance Test Extension for Stationary Gas Turbine.	Part 63, Subpart YYYY	2022-12-06
Misc Metal Parts and Products Surface Coating Facilities.	Regulatory Interpretation for NESAHM MMMM	Part 63, Subpart MMMM	2022-11-30
ExxonMobil Beaumont Refinery-Flare Vent Gas Composition Monitoring AMP.	Alternative Monitoring for Petroleum Refineries	Part 63, Subpart CC	2022-11-09
Hanes Mill Road Landfill	Other Request—Well Decommissioning	Part 62, Subpart OOO; Part 60, Subpart AAAA	2022-10-25
East Carolina Regional Landfill	Other Request—Well Decommissioning	Part 62, Subpart OOO	2022-10-25
Tesla Salt Lake City	Applicability Determination for Miscellaneous Coating Manufacturing.	Part 63, Subpart HHHHHH	2022-10-14
Pratt & Whitney 1 Aircraft Road Middletown, CT 06457.	Other Request—Petition for Operating Limitations.	Part 63, Subpart YYYY	2022-09-21
Marathon Petroleum Company Garyville Refinery.	Alternative Monitoring Plan for Petroleum Refinery.	Part 60, Subpart Ja	2022-09-07
East Carolina Regional Solid Waste Landfill	Alternative Monitoring for MSWL	Part 62, Subpart OOO	2022-09-06
Giant Cement	Alternative Monitoring for Hazardous Waste Combustor.	Part 63, Subpart EEE	2022-08-30
Artesia Renewable Diesel Company LLC	Performance Test Waiver for VOC Emissions from SOCM Distillation Operations.	Part 60, Subpart NNN; Part 60, Subpart RRR ..	2022-08-30
Choctaw County Generating Plant	Other Request—Approval of CMS Plan	Part 63, Subpart YYYY	2022-08-30
Kansas Department of Health and Environment Packaging Corporation of America Filer City Mill	Regulatory Interpretation for Grain Elevators	Part 60, Subpart DD	2022-08-17
East Carolina Regional Solid Waste Landfill	Performance Test Waiver for Mercury	Part 61, Subpart E	2022-08-01
Georgia Pacific Wood Products	Other Request—Well Decommissioning	Part 62, Subpart OOO; Part 63, Subpart AAAA	2022-07-26
City of High Point (Eastside Waste Water Treatment Plant).	Other Request—Approval of CMS Plan	Part 63, Subpart YYYY	2022-07-26
City of Greensboro (T.Z. Osborne Water Reclamation Facility) Revised AMP Submittal.	Alternative Monitoring Plan for Wastewater Treatment Plant.	Part 60, Subpart MMMM	2022-07-22
Safe Dispose, LLC	Alternative Monitoring Procedure for Sewage Sludge Incineration Unit.	Part 60, Subpart MMMM	2022-07-22
	Applicability Determination for Hospital/Medical/Infectious Waste Incinerators.	Part 60, Subpart Ec	2022-07-14

**APPLICABILITY DETERMINATIONS, ALTERNATIVE MONITORING PLANS AND REGULATORY INTERPRETATIONS UPLOADED TO
CLEAN AIR ACT 111, 112, AND 129 DASHBOARD ON OCTOBER 2, 2023—Continued**

Facility name	Title	Affected subpart	Date of response
American Environmental Inc	Alternative Monitoring for Petroleum Refineries	Part 60, Subpart J; Part 60, Subpart Ja	2022-06-28
EGGER	Regulatory Interpretation for Plywood and Composite Wood Products.	Part 63 Subpart DDDD	2022-06-15
Spectro Alloys Performance Test Extension Furnace 1 Performance.	Performance Test Extension for Secondary Aluminum Production.	Part 61, Subpart RRR	2022-06-07
Taiga Ventures	Applicability Determination for Commercial and Industrial Solid Waste Incineration Units.	Part 60, Subpart CCCC	2022-05-26
Southern Earth Sciences	Alternative Monitoring for Petroleum Refineries	Part 60, Subpart J	2022-05-23
Lynnwood Sewage Sludge Incinerator	Performance Test Extension for Existing Sewage Sludge Incineration Units.	Part 62, Subpart LLL	2022-05-12
US Army Garrison Command, Ft. Knox	Regulatory Interpretation for Stationary Reciprocating Internal Combustion Engines.	Part 63, Subpart ZZZZ	2022-04-27
St. Lucie County Landfill	Alternative Monitoring for MSW Landfill	Part 62, Subpart OOO	2022-04-20
Tampa Electric Big Bend Station	Other Request—Testing Minimum Time Notification Waiver.	Part 63, Subpart YYYY	2022-04-14
Superior Refinery	Alternative Monitoring for Petroleum Refineries	Part 60, Subpart Ja	2022-04-11
Parkchester South Condominium	Applicability Determination for Crude Oil and Natural Gas Facilities.	Part 60, Subpart Db	2022-03-31
EAP Ohio	Regulatory Interpretation for Crude Oil and Natural Gas Facilities.	Part 60, Subpart OOOO; Part 60, Subpart OOOOa.	2022-03-29
U.S. Granules—Henrietta Facility	Applicability Determination for Secondary Aluminum Production.	Part 63, Subpart RRR	2022-03-25
City of Greensboro (T.Z. Osborne Water Reclamation Facility).	Alternative Monitoring for Existing Sewage Sludge Incineration Units.	Part 60, Subpart MMMM; Part 62, Subpart LLL	2022-03-15
Westrock, Florence Mill	Alternative Monitoring for Kraft Pulp Mills	Part 60, Subpart BB	2022-02-16
Toray Composite Materials America, Inc	Alternative Monitoring for Asphalt Processing and Asphalt Roofing.	Part 63, Subpart LLLLLL	2022-02-03
Palmetto Landfill and Recycling Center	Regulatory Interpretation for Municipal Solid Waste Landfills.	Part 62, Subpart OOO; Part 63, Subpart AAAA	2022-02-03
North Dade Landfill	Alternative Monitoring for Municipal Solid Waste Landfills.	Part 62, OOO; Part 63, Subpart AAAA	2022-01-07
United Taconite LLC (Cleveland-Cliffs)	Alternative Monitoring for Taconite Iron Ore Processing.	Part 63, Subpart RRRRR	2021-12-28
Weld County Landfill	Performance Test Waiver for Stationary Spark Ignition Internal Combustion Engines.	Part 60, Subpart JJJJ	2021-12-17
Total Energies-Port Arthur, TX	Alternative Monitoring for Petroleum Refineries	Part 60, Subpart Ja	2021-12-13
Oxy Vinyls Houston Operations—Pasadena Polyvinyl Chloride Plant.	Alternative Monitoring for Polyvinyl Chloride and Copolymers Production.	Part 63, Subpart HHHHHHH	2021-12-06
Urschel Laboratories, Inc	Alternative Monitoring for Calciners and Dryers in Mineral Industries.	Part 60, Subpart UUU	2021-12-03
Battery Builders Inc	Performance Test Waiver for Lead Acid Batter Manufacturing Area Sources.	Part 60, Subpart KK; Part 63, Subpart PPPPPP	2021-11-29
Bituminous Resources, Inc., dba Hopkins County Regional Landfill.	Regulatory Interpretation for MSW Landfills	Part 62, Subpart OOO	2021-11-18
Triangle Rock (A Subsidiary of Vulcan Materials Company).	Applicability Determination for Nonmetallic Mineral Processing Plants.	Part 60, Subpart OOO	2021-11-09
Veolia WWTP Biosolids Warren Michigan Project.	Applicability Determination for New Sewage Sludge Incineration Units.	Part 60, Subpart LLLL	2021-10-28
Nucor Steel Gallatin	Alternative Monitoring for Steel Pickling HCl Process Facilities and Hydrochloric Acid Regeneration Plants.	Part 63, Subpart CCC	2021-10-21
Holcomb Station	Performance Test Waiver for Coal- and Oil-Fired Electric Utility Steam Generating Units.	Part 63, Subpart UUUUU	2021-10-21
Mosaic Fertilizer—Faustina Plant	Alternative Monitoring for Phosphate Fertilizers Production Plants.	Part 63, Subpart BB	2021-10-14
U.S. Air Force Long Range Radar Station—Oliktok, Alaska.	Applicability Determination for Other Solid Waste Incineration Units.	Part 60, Subpart EEEE	2021-09-30
Vapor Point	Alternative Monitoring for Petroleum Refineries	Part 60, Subpart J; Part 60 Subpart Ja	2021-09-30
International Paper—Columbus, MS Mill	Alternative Monitoring for Pulp and Paper Industry.	Part 63, Subpart S	2021-09-29
Ecoremedy	Applicability Determination for New Sewage Sludge Incineration Units.	Part 60, Subpart LLLL	2021-09-09
Clean Harbors Industrial Services	Alternative Monitoring for Petroleum Refineries	Part 60, Subpart J; Part 60 Subpart Ja	2021-09-07
Sterigenics	Alternative Monitoring for Ethylene Oxide Emissions Standards for Sterilization Facilities.	Part 63, Subpart O	2021-08-26
Eastman Chemical Company, Kingsport, Tennessee.	Performance Test Waiver for Commercial and Industrial Solid Waste Incineration Units.	Part 60, Subpart DDDD	2021-08-19
BASF Freeport, TX	Alternative Monitoring for SOCM Air Oxidation Units and Distillation Operations.	Part 60, Subpart III, NNN	2021-08-17
Santee Cooper, Horray Generating Station	Applicability Determination for Stationary Compression Ignition Internal Combustion Engines.	Part 60, Subpart IIII	2021-07-30
Vapor Point LLC	Alternative Monitoring for Petroleum Refineries	Part 60, Subpart J; Part 60 Subpart Ja	2021-07-28
Morehead, Kentucky Landfill	Regulatory Interpretation for Municipal Solid Waste Landfills.	Part 60, Subpart WWW	2021-07-20
Accoya USA, LLC	Alternative Monitoring for Equipment Leaks of VOC in the Synthetic Organic Chemicals Manufacturing Industry.	Part 60, Subpart VVa	2021-07-09
Vapor Point	Alternative Monitoring for Petroleum Refineries	Part 60, Subpart J; Part 60 Subpart Ja	2021-07-09

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Facility name	Title	Affected subpart	Date of response
Marathon St. Paul Park	Alternative Monitoring for Petroleum Refineries	Part 60, Subpart Ja	2021–06–29
Conoco Phillips Alaska Exploration Wells	Alternative Reporting Schedule for Crude Oil and Natural Gas Facilities.	Part 60, Subpart OOOOa	2021–06–28
International Paper- New Bern Mill	Alternative Monitoring for Pulp and Paper Industry.	Part 63, Subpart S	2021–06–25
Domtar AW LLC-Ashdown, AR	Alternative Reporting Schedule for Pulp and Paper Industry.	Part 63, Subpart S	2021–06–25
Crash Champions, multiple facilities in Colorado	Applicability Determination for Miscellaneous Coating Manufacturing.	Part 63, Subpart HHHHHH	2021–06–23
BP Cherry Point	Regulatory Interpretation of Equipment Leaks of VOC in the Synthetic Organic Chemicals Manufacturing Industry.	Part 60, Subpart GGG/GGGa, Part 60, Subpart VV/Vva; Part 63, Subpart CC.	2021–06–07
EPA NESHAP Residential Building Exemption Clarification Request.	Applicability Determination for Asbestos	Part 61, Subpart M	2021–05–26
Vapor Point-La Porte, TX	Alternative Monitoring for Petroleum Refineries	Part 60, Subpart J; Part 60 Subpart Ja	2021–05–25
Covanta Haverhill	Other Request—Alternative Sampling Method ..	Part 60, Subpart WWW	2021–05–11
Complete Auto Body and Paint	Applicability Determination for Miscellaneous Coating Manufacturing.	Part 63, Subpart HHHHHH	2021–05–05
Michael's Auto Body and Glass	Applicability Determination for Miscellaneous Coating Manufacturing.	Part 63, Subpart HHHHHH	2021–05–05
CEMEX Construction Materials Atlantic, Knoxville Cement Plant.	Applicability Determination for Coal Preparation Plants.	Part 60, Subpart Y; Part 63 Subpart LLL	2021–04–30
Florida Department of Environmental Protection	Regulatory Interpretation for Asbestos	Part 61, Subpart M	2021–04–28
Denver Auto Body	Applicability Determination for Miscellaneous Coating Manufacturing.	Part 63, Subpart HHHHHH	2021–04–15
USA DeBusk	Alternative Monitoring for Petroleum Refineries	Part 60, Subpart Ja	2021–04–13
Lhoist North America—Montevallo Plant	Technical Compliance Extension for Lime Manufacturing Plants.	Part 63, Subpart AAAAA	2021–04–09
Accurate Auto Body	Applicability Determination for Miscellaneous Coating Manufacturing.	Part 63, Subpart HHHHHH	2021–04–08
Boulder Bump Shop	Applicability Determination for Miscellaneous Coating Manufacturing.	Part 63, Subpart HHHHHH	2021–04–08
Motiva Enterprises-Port Arthur, TX Refinery	Other Request—Revised Alternative Monitoring Plan.	Part 63, Subpart UUU	2021–04–05
Chevron Salt Lake City Refinery	Performance Test Waiver for Petroleum Refineries.	Part 60, Subpart Ja	2021–03–22
Foley Cellulose, LLC	Alternative Monitoring for Industrial, Commercial, and Institutional Boilers and Process Heaters.	Part 60, Subpart Db; Part 63, Subpart DDDDD	2021–03–19
Arapahoe Collision and Mechanical	Applicability Determination for Miscellaneous Coating Manufacturing.	Part 63, Subpart HHHHHH	2021–03–16
Colorado and Fitzsimons Auto Body	Applicability Determination for Miscellaneous Coating Manufacturing.	Part 63, Subpart HHHHHH	2021–03–16
City of Selawik WTP	Applicability Determination for Other Solid Waste Incineration Units.	Part 60, Subpart EEEE	2021–03–15
BASF Freeport	Performance Test Waiver for Volatile Organic Compound (VOC) Emissions From Synthetic Organic Chemical Manufacturing Industry (SOCMI) Distillation Operations.	Part 60, Subpart NNN and previously approved AMP 02/24/2005.	2021–03–09
Metropolitan Sewerage District of Buncombe County, NC.	Alternative Monitoring for Sewage Sludge Incineration Units.	Part 60, Subpart MMMM	2021–03–05
Lhoist North America of Alabama, LLC—Montevallo Plant.	Alternative Test Method for Lime Manufacturing Plants.	Part 63, Subpart AAAAA	2021–03–03
Perry and Terry Autobody	Applicability Determination for Miscellaneous Coating Manufacturing.	Part 63, Subpart HHHHHH	2021–02–24
Hartford Finishing	Applicability Determination for Miscellaneous Coating Manufacturing.	Part 63, Subpart HHHHHH	2021–02–16
Citation Oil and Gas (Holland & Hart LLP)	Applicability Determination for Stationary Reciprocating Internal Combustion Engines.	Part 63, Subpart ZZZZ	2021–02–11
Palisades Nuclear Station	Applicability Determination for Gasoline Dispensing Facilities.	Part 63, Subpart CCCCCC	2021–02–02
Mainspring Energy	Regulatory Interpretation for Stationary Compression Ignition Internal Combustion Engines.	Part 60, Subparts IIII and JJJJ	2021–01–19
Shelton Services	Alternative Monitoring for Petroleum Refineries	Part 60, Subpart J; Part 60 Subpart Ja	2021–01–19
Westvaco Facility	Applicability Determination for Lime Manufacturing Plants.	Part 63, Subpart AAAAA	2021–01–15
Synergy Solutions of Crisp County, LP	Applicability Determination for Small Municipal Waste Combustion Units.	Part 60, Subpart AAAA	2021–01–15
Mississippi Lime	Alternative Monitoring for Lime Manufacturing Plants.	Part 63, Subpart AAAAA	2021–01–11
Marathon Petroleum Garyville LA Refinery	Alternative Monitoring for Petroleum Refineries	Part 60, Subpart Ja	2020–12–23
Flint Hills Resources Pine Bend Refinery	Alternative Test Method for Petroleum Refineries.	Part 60, Subpart Ja	2020–12–22
Porter Auto Body	Applicability Determination for Miscellaneous Coating Manufacturing.	Part 63, Subpart HHHHHH	2020–12–14
Gerber Collision and Glass	Applicability Determination for Miscellaneous Coating Manufacturing.	Part 63, Subpart HHHHHH	2020–12–14

**APPLICABILITY DETERMINATIONS, ALTERNATIVE MONITORING PLANS AND REGULATORY INTERPRETATIONS UPLOADED TO
CLEAN AIR ACT 111, 112, AND 129 DASHBOARD ON OCTOBER 2, 2023—Continued**

Facility name	Title	Affected subpart	Date of response
Gingerminion DBA Colors on Parade	Applicability Determination for Miscellaneous Coating Manufacturing.	Part 63, Subpart HHHHHH	2020–12–14
Tesla	Applicability Determination for Miscellaneous Coating Manufacturing.	Part 63, Subpart HHHHHH	2020–12–14
KMTX LLC	Alternative Monitoring for VOC Emissions from SOCM Distillation Operations.	Part 60, Subpart NNN, Part 60 Subpart RRR ...	2020–12–02
Barry Industries, Attleboro, MA	Performance Test Waiver for Beryllium	Part 61, Subpart C	2020–12–02
Sewerage & Water Board of New Orleans (SWBNO)—East Bank Sewage Treatment Plant.	Performance Testing Extension Request and Force Majeure Claim.	Part 62, Subpart LLL	2020–11–20
Sewerage & Water Board of New Orleans	Performance Test Extension	Part 62, Subpart LLL	2020–11–20
Anchorage Regional Landfill	Other Request—Alternative Remedy and Timeline.	Part 60, Subpart WWW	2020–11–10
Ascend Performance Materials Operations, LLC, Pensacola, Florida; Pensacola Adipic Acid Plant.	Applicability Determination for Nitric Acid Plant	Part 60, Subpart Ga	2020–11–06
WestRock CP, LLC—Stevenson Mill, Stevenson, Alabama.	Alternative Monitoring for Industrial Stream Generating Units.	Part 60, Subpart Db	2020–10–22
Anchorage Regional Landfill	Alternative Monitoring for Municipal Solid Waste Landfills.	Part 60, Subpart WWW	2020–10–20
Flint Hills Resources Pine Bend Refinery	Alternative Monitoring for Petroleum Refineries	Part 60, Subpart Ja	2020–10–13
Westrock Evadale Mill	Performance Test Extension for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills.	Part 63, Subpart MM	2020–10–01
GVEA Healy	Alternative Test Method for Coal and Oil-Fired Electric Utility Steam Generating Units.	Part 63, Subpart UUUUU	2020–09–29
Providence Kodiak	Applicability Determination for Other Solid Waste Incineration Units.	Part 60, Subpart EEEE	2020–09–23
Manchester Wastewater Treatment Plant	Alternative Test Method for Sewage Sludge Incinerator.	Part 62, Subpart LLL	2020–09–14
Anchorage Regional Landfill	Other Request—Alternative Remedy and Timeline.	Part 60, Subpart WWW	2020–09–01
U.S. Air Force Oliktok Alaska Incinerator	Applicability Determination for Other Solid Waste Incineration Units.	Part 60, Subpart EEEE	2020–08–20
Trecora Chemical-Pasadena, TX	Alternative Monitoring for Synthetic Organic Chemical Manufacturing Industry (SOCMI) Distillation Operations.	Part 60, Subpart NNN	2020–08–17
AMES Copper Group, Formerly IMC Metals	Applicability Determination for Secondary Copper Smelting Area Sources.	Part 63, Subpart FFFFFF	2020–08–14
Jackson Cleaners	Applicability Determination for Perchloroethylene Dry Cleaning Facilities.	Part 63, Subpart M	2020–08–06
Twin Landfill Corporation, Milner Landfill	Applicability Determination for Municipal Solid Waste Landfills.	Part 60, Subpart WWW	2020–07–28
Wake County Solid Waste Management Division—North Wake County Landfill.	Alternative Monitoring for Municipal Solid Waste Landfills.	Part 60, Subpart WWW	2020–07–23
King Systems Corporation	Applicability Determination for Surface Coating Of Miscellaneous Plastic Parts and Products.	Part 63, Subpart PPPP	2020–06–16
Vicor Corporation	Applicability Determination for Nine Metal Fabrication and Finishing Source Categories.	Part 63, Subpart XXXXXX	2020–04–16
HollyFrontier El Dorado Refining	Other Request—Alternating Monitoring Request and Site-Specific NO _x Emission Limit.	Part 60, Subpart Ja	2019–05–22

Panagiotis Tsigotis,
Director, Office of Air Quality Planning and Standards.

[FR Doc. 2023–25950 Filed 11–22–23; 8:45 am]

BILLING CODE 6560–50–P

**ENVIRONMENTAL PROTECTION
AGENCY**

**[EPA–HQ–OPP–2017–0751; FRL–11376–02–
OCSPP]**

**Pesticide Registration Review;
Decisions and Case Closures for
Several Pesticides; Notice of
Availability; Technical Correction**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice, correction.

SUMMARY: In the **Federal Register** of October 18, 2023, EPA issued a notice to announce the availability of EPA's interim registration review decisions for the following chemicals: Citric acid and salts, and linalool; and the closure of the registration review case for triadimenol. That notice incorrectly included a **DATES** section that established a comment deadline of December 18, 2023. A comment period is not necessary or appropriate for that document because the decisions announced in that document are final for triadimenol, and final for the interim phase of the process for citric acid and salts, and linalool. This document corrects that document

by reaffirming the nature of all the decisions announced in that document and by closing the comment period it incorrectly established.

DATES: The comment period established in the **Federal Register** of October 18, 2023, *i.e.*, December 18, 2023, is hereby closed on November 24, 2023.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2017–0751, is available online at <https://www.regulations.gov>. Additional instructions for visiting the docket, along with more information about dockets generally, is available at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT:

For pesticide specific information, contact: The Chemical Review Manager for the pesticide of interest identified in Table 1 in Unit IV. of the original notice (88 FR 71856, October 18, 2023 (FRL–11376–01–OCSPP)).

For general information on the registration review program, contact: Melanie Biscoe, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–0701; email address: biscoe.melanie@epa.gov.

SUPPLEMENTARY INFORMATION: Pursuant to 40 CFR 155.58, EPA issued a notice in the **Federal Register** of October 18, 2023 (88 FR 71856) (FRL–11376–01–OCSPP), to announce the availability of EPA's interim registration review decisions for the following chemicals: Citric acid and salts, and linalool; and the closure of the registration review case for triadimenol. As described in that document, EPA previously sought public comment on the proposed interim registration review decisions as discussed in the pesticide specific interim decisions that were posted to the dockets. In addition, that notice announced the closure of the registration review case for triadimenol (Case Number 7008, Docket ID Number EPA–HQ–OPP–2016–0114) because the last U.S. registrations for this pesticide have been canceled.

Subsequent to the publication of that notice, EPA identified that it incorrectly included a **DATES** section that established a comment deadline of December 18, 2023. A comment period is not necessary or appropriate for that document because the decisions announced in that document are complete. As a result, EPA is issuing this document to reaffirm the nature of the decisions announced in that document and to closing the comment period it incorrectly established.

Background on the registration review program is provided at: <https://www.epa.gov/pesticide-reevaluation>.

Authority: 7 U.S.C. 136 *et seq.*

Dated: November 20, 2023.

Mary Elissa Reaves,

*Director, Pesticide Re-Evaluation Division,
Office of Pesticide Programs.*

[FR Doc. 2023–25941 Filed 11–22–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

[Docket No. OP–1822]

Federal Reserve Bank Services

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notification of 2024 private sector adjustment factor and fee schedules.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) has approved the private-sector adjustment factor (PSAF) for 2024 of \$29.2 million and the 2024 fee schedules for Federal Reserve priced services and electronic access. These actions were taken in accordance with the Monetary Control Act of 1980, which requires that, over the long run, fees for Federal Reserve priced services be established based on all direct and indirect costs, including the PSAF.

DATES: The new fee schedules become effective January 2, 2024.

FOR FURTHER INFORMATION CONTACT: For questions regarding the fee schedules: Ian Spear, Assistant Director, (202) 452–3959; Larkin Turman, Senior Financial Institution Policy Analyst, (202) 657–9306; Division of Reserve Bank Operations and Payment Systems. For questions regarding the PSAF: Rebecca Royer, Associate Director, (202) 736–5662; Kelsey Cassidy, Financial Institution Policy Analyst, (202) 465–6817; Division of Reserve Bank Operations and Payment Systems. For users of TTY–TRS, please call 711 from any telephone, anywhere in the United States. Copies of the 2024 fee schedules for the check services are available from the Board, the Federal Reserve Banks, or the Federal Reserve Financial Services (FRFS) website at www.FRBservices.org.

SUPPLEMENTARY INFORMATION:

I. Private-Sector Adjustment Factor, Priced Services Cost Recovery, and Overview of 2024 Price Changes

A. Overview—Each year, as required by the Monetary Control Act (MCA) of 1980, the Reserve Banks set fees for priced services provided to financial institutions. These fees are set to recover, over the long run, all direct and indirect costs and imputed costs, including financing costs, taxes, and certain other expenses, as well as the return on equity (profit) that would have been earned if a private-sector business provided the services.¹ The imputed

costs and imputed profit are collectively referred to as the private-sector adjustment factor (PSAF).

From 2013 through 2022, the Reserve Banks recovered 102.5 percent of their total expenses (including imputed costs) and targeted after-tax profits or return on equity (ROE) for the mature services. During that period, Check Services, the Fedwire® Funds Service, National Settlement Service (NSS), and Fedwire® Securities Service achieved full cost recovery. The FedACH® Service achieved 98.1 percent cost recovery as a result of the Reserve Banks' development and implementation of a multiyear technology initiative to modernize the capabilities of the FedACH Service processing platform. Although the modernized platform was implemented in 2021, the Reserve Banks are continuing to invest in platform capabilities, as well as resiliency, as part of a broader enhancement strategy. At the same time, the Reserve Banks have made limited changes to existing FedACH Service fees to provide price stability for customers in alignment with pricing policies.²

The Board communicated in its 2019 Notice Federal Reserve Actions to Support Interbank Settlement of Instant Payments ("2019 Notice") that it expects the FedNow® Service to achieve its first instance of long-run cost recovery outside the 10-year time frame typically applied to mature services. New services like the FedNow Service may not initially have stable volumes, costs, and revenues.³ Thus, FedNow

as appropriate for assessing mature services, which are those that have achieved a critical mass of customer participation and generally have stable and predictable volumes, costs, and revenues. The 10-year recovery rate is based on the pro forma income statements for Federal Reserve priced services published in the Board's *Annual Report*. In accordance with Accounting Standards Codification (ASC) 715 *Compensation—Retirement Benefits*, the Reserve Banks recognized a \$590.0 million cumulative reduction in equity related to the priced services' benefit plans through 2022. Including this cumulative reduction in equity from 2013 to 2022 results in cost recovery of 103.8 percent for the 10-year period. This measure of long-run cost recovery is also published in the Board's *Annual Report*.

² In alignment with the Board's *Principles for the Pricing of Federal Reserve Bank Services*, the Reserve Banks will continue to assess the tradeoffs between price stability for customers, investment in technology infrastructure to reflect desirable longer-run improvements in the ACH system, and the expectation of achieving full cost recovery for the FedACH Service over the long run. See Board of Governors of the Federal Reserve System, "Adoption of Fee Schedules and Pricing Principles for Federal Reserve Bank Services," 46 FR 1338, 1343 (Jan. 6, 1981). Available at <https://cdn.loc.gov/service/ll/fedreg/fr046/fr046003/fr046003.pdf>.

³ Application of the 10-year rolling time frame used to evaluate mature services to the FedNow Service would result in prohibitively high or unnecessarily volatile pricing, negatively affecting the Federal Reserve's public policy objectives in

¹ Although the Monetary Control Act does not define "over the long run," the Board has generally measured long-run cost recovery for mature services to be over a 10-year rolling time frame. The Board currently views a 10-year cost recovery expectation

Service revenue and expenses are excluded from the overall performance projections. The FedNow Service is discussed in section G.

Table 1 summarizes 2022 actual, 2023 forecasted, and 2024 budgeted annual cost recovery rates for all mature priced services. Cost recovery is forecasted to

be 104.4 percent in 2023 and forecasted to be 103.0 percent in 2024.

TABLE 1—AGGREGATE MATURE PRICED SERVICES PRO FORMA COST AND REVENUE PERFORMANCE ^a

[Dollars in millions]

Year	Revenue	Total expense	Net income (ROE)	Targeted ROE	Recovery rate after targeted ROE (%)
	1 ^b	2 ^c	3 [1 – 2]	4 ^d	5 ^e [1/(2 + 4)]
2022 (actual)	466.8	462.9	3.9	7.2	99.3
2023 (forecast)	504.9	475.5	29.4	8.3	104.4
2024 (budget)	501.4	477.0	24.4	9.7	103.0

^a Calculations in this table and subsequent pro forma cost and revenue tables may be affected by rounding. Excludes amounts related to the FedNow Service.

^b Revenue includes imputed income on investments when equity is imputed at a level that meets minimum capital requirements and, when combined with liabilities, exceeds total assets (attachment 1). For 2024, the projected revenue assumes implementation of the fee changes.

^c The calculation of total expense includes operating, imputed, and other expenses. Imputed and other expenses include taxes, Board of Governors' priced services expenses, the cost of float, and interest on imputed debt, if any. Credits or debits related to the accounting for pension plans under ASC 715 are also included.

^d Targeted ROE is the after-tax ROE included in the PSAF.

^e The recovery rates in this and subsequent tables do not reflect the unamortized gains or losses that must be recognized in accordance with ASC 715. Future gains or losses, and their effect on cost recovery, cannot be projected.

Table 2 provides an overview of cost recovery budgets, forecasts, and

performance for the 10-year period from 2013 to 2022, 2022 actual, 2023 budget,

2023 forecast, and 2024 budget by mature priced service.

TABLE 2—MATURE PRICED SERVICES COST RECOVERY

[Percent]

Priced service	2013–2022	2022 Actual	2023 Budget ^a	2023 Forecast	2024 Budget ^b
All mature services	102.5	99.3	98.2	104.4	103.0
Check	108.4	99.8	96.7	101.2	95.4
FedACH	98.1	101.7	99.0	105.9	105.8
Fedwire Funds and NSS	101.5	95.3	96.2	101.3	103.2
Fedwire Securities	103.1	107.6	106.5	118.9	110.9

^a The 2023 budget figures reflect the final budgets as approved by the Board of Governors in December 2022. See Board of Governors of the Federal Reserve System, "2023 Federal Reserve Banks Budgets" available at <https://www.federalreserve.gov/foia/files/2023ReserveBankBudgets.pdf>.

^b The 2024 budget figures reflect preliminary budget information from the Reserve Banks. The Reserve Banks will submit final budget data to the Board for consideration by December 2023.

1. *2023 Forecasted Performance*—The Reserve Banks forecast that they will recover 104.4 percent of the costs of providing mature priced services in 2023, including total expense and targeted ROE, compared with a 2023 budgeted recovery rate of 98.2 percent, as shown in Table 2. Overall, the Reserve Banks forecast that they will fully recover actual and imputed costs and earn net income of \$29.4 million, compared with the targeted ROE of \$8.3 million. The Reserve Banks forecast that all services will achieve full cost recovery in 2023.

2. *2024 Private-Sector Adjustment Factor*—The 2024 PSAF for Reserve Bank mature priced services is \$29.2 million.⁴ This amount represents an increase of \$5.5 million from the 2023 PSAF of \$23.7 million. This increase is attributable to a \$6.1 million increase in the cost of capital primarily driven by rising interest rates, and a \$0.8 million increase in Board of Governors expenses, offset by a \$1.4 million decrease in sales tax.

3. *2024 Projected Performance*—The Reserve Banks project a mature priced services cost recovery rate of 103.0 percent in 2024, with a net gain of \$24.4

million and targeted ROE of \$9.7 million. The Reserve Banks project that each of the individual service lines will achieve full cost recovery in 2024 except for Check Services. Check Services are expected to under recover primarily because of anticipated volume declines. The Reserve Banks' primary risks to current projections are unanticipated volume and revenue reductions and the potential for cost overruns from new and ongoing improvement initiatives.

4. *2024 Pricing*—The following summarizes the Reserve Banks' changes

providing the service. See "Federal Reserve Actions to Support Interbank Settlement of Instant Payments," 84 FR 39297, (August 9, 2019). Available at <https://www.govinfo.gov/content/pkg/FR-2019-08-09/pdf/2019-17027.pdf>.

⁴ The FedNow Service launched in July 2023. Inclusive of the FedNow Service, the PSAF

increases to \$46.3 million for 2024. Per its 2019 Notice "Federal Reserve Actions to Support Interbank Settlement of Faster Payments" ("2019 Notice"), the Board has determined that it is most appropriate to report FedNow Service cost recovery independently of mature priced services until the service has relatively stable revenues and costs.

Thus, FedNow Service revenue is excluded from overall performance projections for 2023. See "Federal Reserve Actions to Support Interbank Settlement of Faster Payments," 4 FR 39297, (August 9, 2019). Available here: **Federal Register**: Federal Reserve Actions To Support Interbank Settlement of Faster Payments.

to fee schedules for priced services in 2024:

Check Services

The Reserve Banks will increase participation fees and Reject Repair fees and reduce fixed fees across image cash letter options. The Reserve Banks will additionally replace their existing 5:00 a.m. eastern time (ET) and 9:30 a.m. ET forward check deposit deadlines with a single consolidated deadline at 7:30 a.m. ET. The Reserve Banks will reassign their customers across new volume tiers based on recent actual levels, a process they perform every year. These changes will help address declining check volumes and continue a value-based pricing strategy for financial institutions.

FedACH Service

The Reserve Banks will increase the FedACH settlement fee for some customers and introduce a new FedACH receipt 5-year discount program for customers with Premium Receiver status. These changes will help address ongoing operational costs while also providing incentives for customers who handle high volumes of FedACH receipts.

Fedwire Funds Service

The Reserve Banks will increase the Fedwire Funds transfer price for all three tiers, the participation fee, and the FedPayments® Manager Import/Export fee. These changes will help address costs stemming from ongoing customer enhancement projects and will increase overall fixed fee revenue.

National Settlement Service

The Reserve Banks will increase the National Settlement Service pre-file and pre-entry fees. These changes will help address rising operational costs.

Fedwire Securities Service

The Reserve Banks will maintain prices at existing levels for all priced Fedwire Securities Service products.

FedNow Service

The Reserve Banks will maintain the previous year's fee schedule, inclusive of discounts to the monthly participation fee as well as for customer credit transfers under a threshold of 2,500 per month.⁵ These discounts will support financial institution testing and validation of 24x7 instant payments processing capabilities. Additionally, to support initial onboarding, the Reserve Banks will continue to discount certain

FedLine® Solutions fees. New FedLine Advantage® channel connections or upgrades from existing FedLine Solutions to FedLine Advantage will be discounted to \$0.00 for a rolling 12-month period following initiation.

FedLine Solutions

The Reserve Banks will increase the monthly fees for FedMail®, the FedMail Email à la carte option, and all electronic access service offered by Accounting Information Services. The Reserve Banks will also introduce a new FedLine Web® pricing tier called FedLine Web Premier to reflect the value-add service of check payment automation. These changes will help address the rising operating costs for attended access and extended support for the FedNow Service.

For the mature services, these changes collectively are an average price increase of 1.8 percent. The price changes are in line with the Reserve Banks' strategy to offset rising costs, diversify revenue sources, and continue to reduce pricing volatility associated with volume-based pricing. For the FedNow Service, the Reserve Banks continue to focus on adoption and achieving network effects as a new service.

B. Private-Sector Adjustment Factor—The imputed debt financing costs, targeted ROE, and effective tax rate are based on a U.S. publicly traded market model.⁶ The method for calculating the financing costs in the PSAF requires determining the appropriate imputed levels of debt and equity and then applying the applicable financing rates. In this process, a pro forma balance sheet using estimated assets and liabilities associated with the Reserve Banks' priced services is developed, and the remaining elements that would exist are imputed as if these priced services were provided by a private business firm. The same generally accepted accounting principles that apply to commercial-entity financial statements apply to the relevant elements in the priced services pro forma financial statements.

The portion of Federal Reserve assets that will be used to provide priced services during the coming year is determined using information about actual assets and projected disposals and acquisitions. The priced portion of these assets is determined based on the allocation of depreciation and amortization expenses of each asset

class. The priced portion of actual Federal Reserve liabilities consists of post-employment and post-retirement benefits, accounts payable, and other liabilities. The priced portion of the actual net pension asset or liability is also included on the balance sheet.⁷

The equity financing rate is the targeted ROE produced by the capital asset pricing model (CAPM). In the CAPM, the required rate of return on a firm's equity is equal to the return on a risk-free asset plus a market risk premium. The risk-free rate is based on the three-month Treasury bill; the beta is assumed to be equal to 1.0, which approximates the risk of the market as a whole; and the market risk premium is based on the monthly returns in excess of the risk-free rate over the most recent 40 years. The resulting ROE reflects the return a shareholder would expect when investing in a private business firm.

For simplicity, given that federal corporate income tax rates are graduated, state income tax rates vary, and various credits and deductions can apply, an actual income tax expense is not explicitly calculated for Reserve Bank priced services. Instead, the Board targets a pretax ROE that would provide sufficient income to fulfill the priced services' imputed income tax obligations. To the extent that performance results are greater or less than the targeted ROE, income taxes are adjusted using the effective tax rate.

Capital structure. The capital structure is imputed based on the imputed funding need (assets less liabilities), subject to minimum equity constraints. Short-term debt is imputed to fund the imputed short-term funding need. Long-term debt and equity are imputed to meet the priced services long-term funding need at a ratio based on the capital structure of the U.S. publicly traded market.⁸ Any equity imputed that exceeds the amount needed to fund the priced services' assets and meet the minimum equity constraints is offset by a reduction in imputed long-term debt. When imputed

⁷ The pension assets are netted with the pension liabilities and reported as a net asset or net liability as required by ASC 715 *Compensation—Retirement Benefits*.

⁸ The FDIC rule, which was adopted as final on April 14, 2014, requires that well-capitalized institutions meet or exceed the following standards: (1) total capital to risk-weighted assets ratio of at least 10 percent, (2) tier 1 capital to risk-weighted assets ratio of at least 8 percent, (3) common equity tier 1 capital to risk-weighted assets ratio of at least 6.5 percent, and (4) a leverage ratio (tier 1 capital to total assets) of at least 5 percent. Because all of the Federal Reserve priced services' equity on the pro forma balance sheet qualifies as tier 1 capital, only requirements 1 and 4 are binding. The FDIC rule can be located at 12 CFR 324.403(b).

⁵ See **Federal Register** Notice for Federal Reserve Bank Services (December 12, 2022). Available here: **Federal Register**: Federal Reserve Bank Services

⁶ Data for U.S. publicly traded firms is from the Standard and Poor's Compustat® database. This database contains information on more than 6,000 U.S. publicly traded firms, which approximates information for the entirety of the U.S. market.

equity is larger than what can be offset by imputed debt, the excess is imputed as investments in Treasury securities; income imputed on these investments reduces the PSAF.

Application of the Federal Reserve Policy on Payment System Risk (PSR policy) to the Fedwire Funds Service. The Board's PSR policy incorporates the international standards for financial market infrastructures (FMIs) developed by the Committee on Payments and Market Infrastructures and the Technical Committee of the International Organization of Securities Commissions in the *Principles for Financial Market Infrastructures*.⁹ The Board recognizes the critical role the Fedwire Services, including the Fedwire Funds Service, play in the financial system and requires them to meet or exceed the risk-management standards in the policy, consistent with relevant guidance and the requirements in the MCA.¹⁰ Principle 15 states that an FMI should identify, monitor, and manage general business risk and hold sufficient liquid net assets funded by equity to cover potential general business losses so that it can continue operations and services as a going concern if those losses materialize. Further, liquid net assets should at all times be sufficient to ensure a recovery or orderly wind-down of critical operations and services. The Fedwire Funds Service does not face the risk that a business shock would cause the service to wind down in a disorderly manner and disrupt the stability of the financial system. To foster competition with private-sector FMIs, however, the Reserve Banks' priced services will hold an amount equivalent to six months of the Fedwire Funds Service's current operating expenses as liquid financial assets and

equity on the pro forma balance sheet.¹¹ Current operating expenses are defined as normal business operating expenses on the income statement, less depreciation, amortization, taxes, and interest on debt. Using the Fedwire Funds Service's preliminary 2024 budget, six months of current operating expenses would be \$68.5 million. In 2024, \$68.5 million of equity was imputed to meet the FDIC capital requirements and was sufficient to meet the PSR policy requirement.

Effective tax rate. Like the imputed capital structure, the effective tax rate is calculated based on data from U.S. publicly traded firms. The tax rate is the mean of the weighted average rates of the U.S. publicly traded market over the past five years.

Debt and equity financing. The imputed short- and long-term debt financing rates are derived from the nonfinancial commercial paper rates from the Federal Reserve Board's H.15 Selected Interest Rates release (AA and A2/P2) and the annual Merrill Lynch Corporate & High Yield Index rate, respectively. The equity financing rate is described above. The rates for debt and equity financing are applied to the priced services estimated imputed short-term debt, long-term debt, and equity needed to finance short- and long-term assets and meet equity requirements.

The 2024 PSAF is \$29.2 million, compared with \$23.7 million in 2023. The increase of \$5.5 million is attributable to a net \$6.1 million increase in the cost of capital, and a \$0.8 million increase in Board of Governors expenses, offset by a \$1.4 million decrease in sales tax. The net \$6.1 million increase in cost of capital is primarily driven by a \$1.6 million increase in ROE imputed to satisfy FDIC requirements for a well-capitalized institution and rising interest rates resulting in a \$4.5 million increase in cost of debt.

The PSAF expense of \$29.2 million, detailed in Table 5, includes \$17.7 million for capital funding, \$7.6 million

for Board of Governors' expense, and \$3.9 million in sales tax expense.

As shown in Table 3, 2024 total assets of \$816.1 million increased by \$10.5 million from 2023. The net increase in total assets includes an additional \$62.6 million long-term assets partially offset by a net \$52.1 million decrease in short-term assets and imputed investments.

The net long-term asset increase of \$62.6 million primarily consists of a \$94.4 million increase in the net pension asset, reflecting higher surplus and higher discount rate. The increase is partially offset by a decrease in the deferred tax asset of \$28.1 million due to the higher discount rate.

The decrease in the short-term assets is primarily driven by a \$67.2 million decrease in the imputed investments in Treasury securities from imputed equity required to meet FDIC capital requirements for a well-capitalized institution and to comply with the PSR policy, partially offset by a \$37.0 million increase in imputed investments in Fed Funds.

The capital structure of the 2024 pro forma balance sheet, provided in Table 4, is composed of equity of \$68.5 million, or 12.3 percent of the 2024 risk-weighted assets detailed in Table 6, and long-term debt of \$100.3 million. The 2024 capital structure differs from that of 2023, which was composed of \$69.5 million of equity and no long-term debt. Provided in Table 5, the 2024 initially imputed equity required to fund assets and meet the publicly traded firm model capital requirements is \$68.5 million. As long-term assets are marginally greater than long-term liabilities, long-term debt of \$100.36 million was imputed at the observed market ratio of 59.4 percent. The equity of \$68.5 million was adequate to meet the FDIC capital requirements for a well-capitalized institution and sufficient to satisfy the PSR policy requirements.

The net Accumulated Other Comprehensive loss is \$551.0 million, compared with \$640.8 million in 2023. The \$89.8 million increase is primarily attributable to a higher discount rate. The net Accumulated Other Comprehensive loss position does not reduce the total imputed equity required to fund priced services assets or fulfill the FDIC equity requirements for a well-capitalized institution.

⁹ Principles for Financial Market Infrastructures, <https://www.bis.org/cpmi/publ/d101a.pdf>.

¹⁰ Certain standards may require flexibility in the way they are applied to central bank-operated systems because of central banks' unique role in the financial markets and their public responsibilities. These principles include principle 2 on governance, principle 3 on the framework for the comprehensive management of risks, principle 4 on credit risk, principle 5 on collateral, principle 7 on liquidity risk, principle 13 on participant-default rules and procedures, principle 15 on general business risk, and principle 18 on access and participation requirements. See PSR Policy Part I.B.1.a.

¹¹ This requirement does not apply to the Fedwire Securities Service. There are no private-sector competitors to the Fedwire Securities Service that would be expected to meet such a requirement. Imposing such a requirement when pricing the securities services could artificially increase the cost of these services.

TABLE 3—COMPARISON OF PRO FORMA BALANCE SHEETS FOR BUDGETED FEDERAL RESERVE MATURE PRICED SERVICES ^a

[Millions of dollars—projected average for year]

	2024	2023	Change
Short-term assets:			
Receivables	\$41.8	\$41.9	\$(0.1)
Inventory	0.2	0.2	0.1
Prepaid expenses	24.0	30.9	(6.8)
Items in process of collection ¹²	61.0	76.0	(15.0)
Total short-term assets	127.0	148.9	(21.9)
Imputed investments: ¹³			
Imputed investment in Treasury securities		67.2	(67.2)
Imputed investment in Fed Funds	219.0	182.0	37.0
Total imputed investments	219.0	249.2	(30.2)
Long-term assets:			
Premises ¹⁴	95.9	97.3	(1.4)
Furniture and equipment	53.9	54.2	(0.2)
Software and leasehold improvements	67.0	69.9	(2.9)
Net pension asset	120.4	25.9	94.4
Deferred tax asset	129.4	157.4	(28.1)
Total long-term assets	470.1	407.5	62.6
Total assets	816.1	805.6	10.5
Short-term liabilities:			
Deferred credit items	280.0	258.0	22.0
Short-term debt	32.7	47.0	(14.3)
Short-term payables	33.4	25.9	7.4
Total short-term liabilities	346.0	330.9	15.1
Long-term liabilities:			
Postemployment/postretirement benefits and net pension liabilities ¹⁵	300.0	403.9	(103.9)
Long term debt	100.3		100.3
Total liabilities	747.6	736.1	11.5
Equity ¹⁶	(551.0)	(640.8)	89.8
Total liabilities and equity	816.1	805.6	10.5

^a Calculations in this table and subsequent PSAF tables may be affected by rounding. Excludes amounts related to the FedNow Service.TABLE 4—IMPUTED FUNDING FOR MATURE PRICED-SERVICES ASSETS ^a

[Millions of dollars]

	2024	2023
A. Short-term asset financing:		
Short-term assets to be financed:.		
Receivables	\$41.8	\$41.9
Inventory	0.2	0.2
Prepaid expenses	24.0	30.9
Total short-term assets to be financed	66.0	140.1
Short-term payables	33.4	25.9
Net short-term assets to be financed	32.7	47.0
Imputed short-term debt financing ¹⁷	32.7	47.0
B. Long-term asset financing:		
Long-term assets to be financed:.		
Premises	95.9	97.3
Furniture and equipment	53.9	54.2
Software and leasehold improvements	67.0	69.9
Net pension asset	120.4	25.9
Deferred tax asset	129.4	157.4
Total long-term assets to be financed	470.1	407.5
Postemployment/postretirement benefits and net pension liabilities	300.0	403.9
Net long-term assets to be financed	68.5	69.5
Imputed long-term debt ²¹	100.3	0.0
Imputed equity ²¹	68.5	69.5

TABLE 4—IMPUTED FUNDING FOR MATURE PRICED-SERVICES ASSETS ^a—Continued
[Millions of dollars]

	2024	2023
Total long-term financing	68.5	69.5

^a Excludes amounts related to the FedNow Service.

TABLE 5—DERIVATION OF THE 2024 AND 2023 PSAF FOR MATURE PRICED SERVICES ^a
[Dollars in millions]

	2024		2023	
	Debt	Equity	Debt	Equity
A. Imputed long-term debt and equity:				
Net long-term assets to finance	\$168.9	\$168.9	\$2.3	\$2.3
Capital structure observed in market	59.4%	40.6%	59.1%	40.9%
Pre-adjusted long-term debt and equity	100.3	68.5	1.4	1.0
Equity adjustments: ¹⁸				
Equity to meet capital requirements		68.5		49.9
Adjustment to debt and equity funding given capital requirements ¹⁹			(1.4)	1.4
Adjusted equity balance		68.5		2.3
Equity to meet capital requirements ²⁰				47.5
Total imputed long-term debt and equity		68.5		49.9
B. Cost of capital:				
Elements of capital costs:				
Short-term debt ²¹	32.7 × 5.4%	= 1.8	47.0 × 2.6%	= 1.2
Long-term debt ²⁵	100.3 × 4.0%	= 4.0	× 3.6%	=
Equity ²²	68.5 × 17.4%	= 11.9	49.9 × 14.9%	= 7.4
C. Incremental cost of PSR policy:				
Equity to meet policy	× 17.4%	=	19.7 × 14.9%	= 2.9
D. Other required PSAF costs:				
Sales taxes		3.9		5.3
Board of Governors expenses		7.6		6.8
		11.5		12.1
E. Total PSAF:		29.2		23.7
As a percent of assets		3.6%		2.9%
As a percent of expenses		3.6%		3.9%
F. Tax rates		18.84%		19.26%

^a Excludes amounts related to the FedNow Service.

TABLE 6—COMPUTATION OF 2024 CAPITAL ADEQUACY FOR FEDERAL RESERVE MATURE PRICED SERVICES ^a
[Dollars in millions]

	Assets	Risk weight	Weighted assets
Imputed investments:			
1-Year Treasury securities ²³	\$	0.0	\$
Federal funds ²⁴	219.0	0.2	43.8
Total imputed investments	219.0		43.8
Receivables	41.8	0.2	8.4
Inventory	0.2	1.0	0.2
Prepaid expenses	24.0	1.0	24.0
Items in process of collection	61.0	0.2	12.2
Premises	99.4	1.0	99.4
Furniture and equipment	53.9	1.0	53.9
Software and leasehold improvements	67.0	1.0	67.0
Pension asset	120.4	1.0	120.4
Deferred tax asset	129.4	1.0	129.4
Total	816.1		558.7
Imputed equity:			
Capital to risk-weighted assets	12.3%		

TABLE 6—COMPUTATION OF 2024 CAPITAL ADEQUACY FOR FEDERAL RESERVE MATURE PRICED SERVICES ^a—Continued
[Dollars in millions]

	Assets	Risk weight	Weighted assets
Capital to total assets	8.4%		

^aExcludes amounts related to the FedNow Service.

C. *Check Services*—Table 7 shows the 2022 actual, 2023 forecasted, and 2024 budgeted cost-recovery performance for commercial check services.

TABLE 7—CHECK SERVICES PRO FORMA COST AND REVENUE PERFORMANCE
[Dollars in millions]

Year	Revenue	Total expense	Net income (roe)	Targeted roe	Recovery rate after targeted roe
	1	2	3[1–2]	4	5[1/(2+4)]
2022 (actual)	110.5	109.7	0.8	1.0	99.8
2023 (forecast)	110.7	108.1	2.6	1.3	101.2
2024 (budget)	106.1	109.1	(3.0)	2.2	95.4

1. *2023 Forecast*—The Reserve Banks forecast that Check Services will recover 101.2 percent of total expenses and targeted ROE, compared with a 2023 budgeted recovery rate of 96.7 percent.

¹²Credit float, which represents the difference between items in process of collection and deferred credit items, occurs when the Reserve Banks debit the paying bank for transactions before providing credit to the depositing bank. Float is directly estimated at the service level.

¹³Consistent with the Board's PSR policy, the Reserve Banks' priced services will hold an amount equivalent to six months of the Fedwire Funds Service's current operating expenses as liquid net financial assets and equity on the pro forma balance sheet. Six months of the Fedwire Funds Service's projected current operating expenses is \$68.5 million. In 2024, the amount of equity was sufficient to meet the regulatory capital requirements and no additional equity was imputed.

¹⁴Includes the allocation of Board of Governors assets to priced services of \$3.5 million for 2024 and \$2.7 million for 2023.

¹⁵Includes the allocation of Board of Governors liabilities to priced services of \$1.2 million for 2024 and \$1.3 million for 2023.

¹⁶Includes an accumulated other comprehensive loss of \$551.0 million for 2024 and \$640.8 million for 2023, which reflects the ongoing amortization of the accumulated loss in accordance with ASC 715. Future gains or losses, and their effects on the pro forma balance sheet, cannot be projected. See Table 5 for calculation of required imputed equity amount.

¹⁷Imputed short-term debt financing is computed as the difference between short-term assets and short-term liabilities. As presented in table 5, the financing costs of imputed short-term debt, imputed long-term debt and imputed equity are the elements of cost of capital, which contribute to the calculation of the PSAF.

¹⁸If minimum equity constraints are not met after imputing equity based on the capital structure observed in the market, additional equity is imputed to meet these constraints. The long-term

Through August 2023, total commercial forward and total commercial return check volumes were 6.7 percent lower and 3.9 percent greater, respectively, than they were during the same period last year. For full-year 2023, the Reserve Banks estimate that their total forward check volume will decline 7.2 percent

funding need was met by imputing long-term debt and equity based on the capital structure observed in the market (see Tables 4 and 6). In 2023, the amount of imputed equity met the minimum equity requirements for risk-weighted assets.

¹⁹Equity adjustment offsets are due to a shift of long-term debt funding to equity in order to meet FDIC capital requirements for well-capitalized institutions.

²⁰Additional equity in excess of that needed to fund priced services assets is offset by an asset balance of imputed investments in Treasury securities.

²¹Imputed short-term debt and long-term debt are computed in Table 4.

²²The 2024 ROE is equal to a risk-free rate plus a risk premium (beta * market risk premium). The 2023 after-tax CAPM ROE is calculated as 5.50% + (1.0 * 8.60%) = 14.11%. Using a tax rate of 18.8%, the after-tax ROE is converted into a pretax ROE, which results in a pretax ROE of (14.11%/(1–18.8%)) = 17.38%. Calculations may be affected by rounding.

²³If minimum equity constraints are not met after imputing equity based on all other financial statement components, additional equity is imputed to meet these constraints. Additional equity imputed to meet minimum equity requirements is invested solely in Treasury securities. The imputed investments are similar to those for which rates are available on the Federal Reserve's H.15 statistical release, which can be located at <http://www.federalreserve.gov/releases/h15/data.htm>.

²⁴The investments are imputed based on the amounts arising from the collection of items before providing credit according to established availability schedules.

(compared with a budgeted decline of 8.0 percent) and their total return check volume will increase 1.4 percent (compared with a budgeted decline of 6.0 percent) from 2022 levels. The Reserve Banks expect that check volumes will continue to decline because of ongoing substitution away from checks to other payment instruments.

2. *2024 Pricing*—The Reserve Banks expect Check Services to recover 95.4 percent of total expenses and targeted ROE in 2024. The Reserve Banks project revenue to be \$106.1 million, a decline of \$4.6 million, or 4.1 percent from the 2023 forecast. Total expenses for Check Services are projected to be \$109.1 million, an increase of \$1.0 million, or 1.0 percent, from 2023 forecasted expenses.

As check volumes continue to decline, the proposed pricing increases are intended to help stabilize check revenues, to shift the revenue mix toward fixed fees, and to continue a value-based pricing strategy for financial institutions that use the service. To that end, the Reserve Banks will increase the pricing tiers for the fixed monthly participation and Reject Repair fees. These fee changes support the cost of maintaining FRFS Check Services infrastructure as fewer checks are written each year and follow the Check Services business line's pricing strategy to increase the share of revenue collected from fixed fees. Table 8 displayed below shows the 2024-tiered participation fees.

TABLE 8—CHECK 21 PARTICIPATION FEE STRUCTURE

Tier ²⁵	Monthly fee
1	\$425
2	260
3	165
4	80

The Reserve Banks will also increase Reject Repair fees for both basic and premium users by \$0.05. The Reserve Banks will also eliminate forward check deposit deadlines—5:00 a.m. ET and 9:30 a.m. ET—and implement a new deadline at 7:30 a.m. ET to further simplify the FRFS Check Deposit structure. Removing the 9:30 a.m. ET deposit deadline and instituting a 7:30 a.m. ET deadline will eliminate debit

float and provide customers two-and-a-half additional hours to deposit.²⁶

The Standard Daily Fee B Image Cash Letter (ICL) Option will consequently be eliminated as the deposit option only provides deposit deadlines at the 5:30 a.m. ET and 7:30 a.m. ET deadlines the Reserve Banks intend to terminate. The tables below outline the eliminated and new deposit deadlines:

Deadline	Eliminated pricing structure		New pricing structure
	5:00 AM ET	9:30 AM ET	7:30 AM ET

Standard ICL Deposit Price Changes

Cash Letter Fee	\$8.50	\$10.50	\$10.50
Tier 1	0.057	0.072	0.057
Tier 2	0.067	0.082	0.067
Tier 3	0.077	0.092	0.077
Tier 4	0.087	0.102	0.087
Substitute Checks	0.200	0.200	0.200

Deadline	Eliminated pricing structure		New pricing structure	
	1:00 AM ET	9:30 AM ET	1:00 AM ET	7:30 AM ET

Standard Daily Fee A Deposit Option

Daily Fixed Fee	225.00		225.00	
Tier 1	\$0.003	\$0.018	\$0.003	\$0.010
Tier 2	0.014	0.029	0.014	0.021
Tier 3	0.024	0.039	0.024	0.031
Tier 4	0.035	0.050	0.035	0.042
Substitute Checks	0.200	0.200	0.200	0.200

Eliminate Standard Daily Fee B Deposit Option

In order to maintain volume stability, fixed fees across image cash letter options and volume thresholds for some customers will decrease in 2024. To that end, Daily Fixed Fees for FedForward® Services Premium Daily B image cash letters will be reduced by \$100, from \$1,700 to \$1,600, and for FedForward Premium Daily C image cash letters by \$250, from \$3,400 to \$3,150. Volume thresholds for Retail Payments Premium Receivers will be reduced from 2 million to 1 million items for Level 2 receivers and from 2 million to 1.5 million items for Level 3 receivers.

Finally, the Reserve Banks evaluate and set tier assignments every other year based on changes in the volume of items received by endpoints. These tier changes are designed to keep customers

assigned to the appropriate tier based on their volume, daily fixed fee reductions, and volume threshold reductions that will allow customers to qualify for discounts more often as the circulation of checks decline. In 2024, the Reserve Banks will reassign the tier placement of 672 customers in FedForward Standard's tiers, 389 customers in FedForward Premium Daily's tiers, 36 customers in the FedReturn® Standard's tiers, and 36 customers in FedReturn Premium Daily's tiers. Following these reassignments, the Reserve Banks will charge these customer segments in accordance to their tier's participation fee.

From the above price changes, the Reserve Banks estimate all customer segments will experience an average

increase of 0.8 percent of their total FRFS projected charges.

The Reserve Banks' primary risk to current projections for Check Services is a greater than expected decline in check volume due to the general reduction in check writing, substitution away from checks to other payment instruments, and competition from correspondent banks, aggregators, and direct exchanges, which would result in lower than anticipated revenue.

D. *FedACH Services*—Table 9 shows the 2022 actual, 2023 forecasted, and 2024 budgeted cost-recovery performance for commercial FedACH Services.

²⁵ This fee is charged to financial institutions that have received any Check 21 electronic or substitute check volume (forward or return) from the Reserve Banks during the month. The fee is applied at the parent financial institution level, as defined in the Reserve Banks' Global Customer Directory. Each

financial institution's tier assignment is determined by the criteria described in the FedForward Standard Endpoint Tier Listing.

²⁶ Because of FRFS' existing 8:00 a.m. ET Premium Delivery service, there are items deposited

between 7:30 a.m. and 9:30 a.m. today that cannot be presented on a same-day basis and therefore are held over until the following business day, thus the Federal Reserve incurs debit float in the process.

TABLE 9—FEDACH SERVICES PRO FORMA COST AND REVENUE PERFORMANCE
[Dollars in millions]

Year	Revenue	Total expense	Net income (roe)	Targeted roe	Recovery rate after targeted roe
	1	2	3[1–2]	4	5[1/(2 + 4)]
2022 (actual)	174.0	169.5	4.5	1.6	101.7
2023 (forecast)	183.0	170.6	12.4	2.2	105.9
2024 (budget)	184.8	171.0	13.8	3.6	105.8

1. *2023 Forecast*—The Reserve Banks forecast that FedACH Services will recover 105.9 percent of total expenses and targeted ROE, compared with a 2023 budgeted recovery rate of 99.0 percent.

Through August 2023, FedACH commercial origination and receipt volume was 0.4 percent higher and 2.0 percent higher, respectively, than they were during the same period last year. For full year 2023, the Reserve Banks estimate that FedACH commercial origination and receipt volume will increase 0.2 percent and 1.1 percent, respectively, from 2022 levels, compared with a budgeted increase of 0.6 percent and decline of 1.3 percent.

2. *2024 Pricing*—The Reserve Banks expect FedACH Services to recover 105.8 percent of total expenses and targeted ROE in 2024. The Reserve Banks project revenue to be \$184.8 million, an increase of \$1.8 million, or 1.0 percent, from the 2023 forecast. Total expenses are projected to be \$171.0 million, an increase of \$0.4 million, or 0.2 percent, from the 2023 forecast.

The Reserve Banks will increase the monthly ACH Settlement Fee from \$100 to \$110 per RTN per month for receivers in Tier 2 and from \$200 to \$250 per RTN per month for receivers in Tier 3.²⁷ The price changes are driven by ongoing operational costs and increased costs associated with the continued introduction of additional intraday settlement windows to the FedACH Service.

The Reserve Banks will introduce a new FedACH receipt 5-year discount program for FedACH customers with Premium Receiver status.²⁸ Eligible customers (Premium Receivers) that

choose to participate in the program will receive the following discounts for a five-year period as long as during that time they also maintain their existing Premium Receiver status:

- Customers with more than 30 million FedACH receipt items per month:
 - \$0.0002 per-item discount on all forward receipt items received through FedACH for the full 5-year length of the agreement
 - 50 percent discount on the FedACH FedPayments Reporter service (FPR) for two years at any point during participation in the program
 - 100 percent discount on the FedACH Exception Resolution Service (ERS) for two years at any point during their participation in the program
 - 100 percent discount on the FedACH FedPayments Insights service (FPI) for two years at any point during their participation in the program
- Customers with between 5 and 30 million FedACH receipt items per month:
 - \$0.0001 per-item discount on all forward receipt items received through FedACH for the full 5-year length of the agreement
 - 25 percent discount on the FedACH FedPayments Reporter service (FPR) for two years at any point during their participation in the program
 - 50 percent discount on the FedACH Exception Resolution Service (ERS) for two years at any point during their participation in the program
 - 50 percent discount on the FedACH FedPayments Insights service (FPI) for two years at any point during their participation in the program

All of these discounts will be off of the price on the FedACH fee schedule for which a customer would otherwise

qualify if they didn't participate in the program. Eligible customers that choose not to participate in the program will continue to pay the existing fees for which they qualify, as delineated on the FedACH fee schedule. If any customer participating in the program violates the tenets of the program at any time, *i.e.*, drops below the 5 million FedACH receipt items per month threshold and/or does not maintain the Premium Receiver status (Level One or Two) they had as of the signing of the agreement, they will be removed from the program and will be charged by FRFS for all of the discounts they had accumulated since joining the program.

The Reserve Banks estimate the above price changes will result in a 0.3 percent average price decrease for FedACH customers.

In addition, the Reserve Banks expect to offer an ex-post Payment Anomaly Service at some point in 2024 to identify unusual activity on payments that have been cleared and settled through the FedACH Service. Additional details will be forthcoming through normal Reserve Bank channels.

The Reserve Banks' primary risks to current projections for the FedACH Service are unanticipated cost overruns associated with continued technology and resiliency investments, and lower-than-projected volumes and growth due to the market and economic environment.

E. *Fedwire Funds Service and National Settlement Service*—Table 10 shows the 2022 actual, 2023 forecasted, and 2024 budgeted cost-recovery performance for the Fedwire Funds Service and the National Settlement Service.

²⁷ Premium Receivers, Tier 1, will be subject to a settlement fee of \$60 per RTN per month. Non-Premium Receivers with a volume threshold of less than 1,500,000 items per month, Tier 2, will be subject to a settlement fee of \$110 per RTN per month. Non-Premium Receivers with a volume

threshold of more than 1,500,000 items per month, Tier 3, will be subject to a settlement fee of \$250 per RTN per month.

²⁸ Premium Receivers are Receiving Depository Financial Institutions (RDFIs) receiving through FedACH at least 90 percent of their FedACH-

originated items, but less than 90 percent of all of their ACH items originated through any operator (Level One); or RDFIs receiving through FedACH at least 90 percent of all of their ACH items originated through any operator (Level Two).

TABLE 10—FEDWIRE FUNDS SERVICE AND NATIONAL SETTLEMENT SERVICE PRO FORMA COST AND REVENUE PERFORMANCE
[Dollars in millions]

Year	Revenue	Total expense	Net income (roe)	Targeted roe	Recovery rate after targeted roe
	1	2	3[1–2]	4	5[1/(2 + 4)]
2022 (actual)	157.3	160.8	(3.4)	4.3	95.3
2023 (forecast)	163.6	157.2	6.4	4.3	101.3
2024 (budget)	163.8	155.6	8.2	3.1	103.2

1. *2023 Forecast*—The Reserve Banks forecast that the Fedwire Funds Service and the National Settlement Service will recover 101.3 percent of total expenses and targeted ROE, compared with a 2023 budgeted recovery rate of 96.2 percent.

Through August 2023, Fedwire Funds Service online volume was 2.5 percent lower than it was during the same period last year. For full-year 2023, the Reserve Banks estimate that Fedwire Funds Service online volume will increase 0.1 percent from 2022 levels, compared with a budgeted increase of 2.9 percent. Through August 2023, the National Settlement Service settlement file volume was 3.0 percent lower than it was during the same period last year, and settlement entry volume was 1.0 percent lower. For full-year 2023, the Reserve Banks estimate that settlement file volume will decrease 3.5 percent (compared with a budgeted decrease of 0.1 percent) and settlement entry volume will decrease 0.8 percent (compared with a budgeted 0.4 percent increase) from 2022 levels.

2. *2024 Pricing*—The Reserve Banks expect the Fedwire Funds Service and the National Settlement Service to recover 103.2 percent of total expenses in 2024. Revenue is projected to be \$163.8 million, an increase of \$0.2 million, or 0.2 percent from the 2023 forecast. The Reserve Banks project total

expenses to be \$155.6 million, a decrease of \$1.6 million, or 1 percent, from the 2023 forecast. Although overall expenses are decreasing, the largest technology initiative for the Fedwire Funds Service is the transition to the ISO 20022 messaging format.²⁹ In addition, the National Settlement Service continues to incur higher costs because of the expansion of its operating hours in 2022.³⁰

The Reserve Banks will increase all three of the gross origination and receipt tiered fees. The tier 1 fee will increase from \$0.92 to \$0.94, the tier 2 fee will increase from \$0.285 to \$0.29, and the tier 3 fee will increase from \$0.18 to \$0.19. In addition, the Fedwire Funds Service participation fee will increase from \$100 to \$115, alongside a FedPayments Manger Import/Export fee increase of \$50 to \$60. The Reserve Banks will change National Settlement Service fees for 2024. The per file fee will increase from \$30 to \$35, and the per entry fee will increase from \$1.50 to \$1.70. The Reserve Banks estimate the above price changes will result in a 5 percent average price increase for customers. In addition to addressing the rising expenses noted above, these fee increases serve to balance additional costs incurred by the National Settlement Service since their last fee increase in 2014. In particular, ongoing maintenance and personnel costs largely

related to the expansion of operating hours, which are subject to inflationary pressures, have increased considerably in the interim.

In addition, these fee increases will help address diminishing fixed fee revenue from the Fedwire Funds Service as fee revenue has become increasingly dependent on variable resources. To note, the percentage of fixed fee revenue has decreased from 12 percent in 2014 to 7 percent in 2023. This has resulted in larger variances in fee revenue as volume moves higher or lower. The proposed fee increases will bolster the percentage of fixed fee revenue to approximately 8 percent in 2024.

The Reserve Banks' primary risk to current projections for these services is uncertainty about the economic outlook for 2024, which complicates the accuracy of 2024 volume projections. Historically, Fedwire Funds Service volume has reflected market conditions, and a broader downturn in 2024 would likely result in a decrease in Fedwire Funds Service volume.³¹ Separately, unexpected increases in 2024 technology costs would likely result in reduced cost recovery for the year.

F. *Fedwire Securities Service*—Table 11 shows the 2022 actual, 2023 forecast, and 2024 budgeted cost-recovery performance for the Fedwire Securities Service.³²

²⁹ In October 2021, the Board announced that the Federal Reserve Banks will adopt the ISO 20022 message format for the Fedwire® Funds Service. See New Message Format for the Fedwire Funds Services, 86 FR 55600 (June 27, 2022). Available at <https://www.frb.org/news/2022/10/22/iso20022>.

³⁰ The National Settlement Service expanded its hours to 21.5 hours per day in 2022, with a new 9:00 p.m. ET open for the next business day.

³¹ Fedwire Funds Service volume growth reflects economic growth. For example, its volume has grown every year except for 2008 and 2009, when it contracted 2.5 percent and 5.0 percent, respectively, during the Great Recession. For historical Fedwire Funds Service volume data, see [frb.org](https://www.frb.org/news/2022/10/22/iso20022), "Fedwire Funds Service—Annual Statistics. Available at: <https://www.frb.org/news/2022/10/22/iso20022>." <https://www.frb.org/news/2022/10/22/iso20022>

³² The Reserve Banks provide transfer services for securities issued by the U.S. Treasury, federal government agencies, government-sponsored enterprises, and certain international institutions. Prior to 2023, the priced component of this service consisted of revenues, expenses, and volumes associated with the transfer of all non-Treasury securities. Starting in 2023, the revenues, expenses, and volumes associated with the transfer of Treasury securities are also included in the priced component of this service.

TABLE 11—FEDWIRE SECURITIES SERVICE PRO FORMA COST AND REVENUE PERFORMANCE

[Dollars in millions]

Year	Revenue	Total expense	Net income (roe)	Targeted roe	Recovery rate after targeted roe
	1	2	3[1–2]	4	5[1/(2 + 4)]
2022 (actual)	24.9	22.9	2.0	0.2	107.6
2023 (forecast)	47.7	39.7	8.1	0.5	118.9
2024 (budget)	46.8	41.4	5.4	0.8	110.9

1. *2023 Forecast*—The Reserve Banks forecast that the Fedwire Securities Service will recover 118.9 percent of total expenses and targeted ROE, compared with a 2023 budgeted recovery rate of 106.5 percent.

Through August 2023, Treasury security transfer volume was 24.3 percent higher than it was during the same period last year. For full-year 2023, the Reserve Banks estimate that Treasury security transfer volume will increase 17.7 percent from 2022 levels, compared with a budgeted increase of 1.0 percent. Through August 2023, Agency security transfer volume was 11.1 percent lower than it was during the same period last year. For full-year 2023, the Reserve Banks estimate that Agency security transfer volume will decrease 9.4 percent from 2022 levels, compared with a budgeted decrease of 9.2 percent.

Through August 2023, account maintenance volume was 1.9 percent lower than it was during the same period last year. For full-year 2023, the Reserve Banks estimate that account maintenance volume will decline 1.4 percent from 2022 levels, compared with a budgeted decline of 3.3 percent. Through August 2023, the number of agency issues maintained was 2.0 percent higher than it was during the same period last year. For full-year 2023, the Reserve Banks estimate that the number of agency issues maintained will increase 1.3 percent from 2022 levels, compared with a budgeted decline of 0.1 percent.

2. *2024 Pricing*—The Reserve Banks expect the Fedwire Securities Service to recover 110.9 percent of total expenses and targeted ROE in 2024. Revenue is projected to be \$46.8 million, a decrease of \$0.9 million, or 2.0 percent, from the 2023 revenue forecast. The Reserve Banks also project that 2024 expenses will be \$41.4 million, an increase of \$1.7 million, or 4.3 percent from the 2023 forecast.

The Reserve Banks will leave fee schedules for the Fedwire Securities Service unchanged in 2024. The Reserve Banks project that agency transfer

volume will remain relatively stable compared with previous years, with no notable changes that could potentially have a significant impact on agency transfers. The volume of Treasury security transfers is projected to decrease due to the moderation of higher than expected Treasury security transfer volume in 2023. The volume of accounts maintained are expected to decrease 2.5 percent, consistent with recent trends and primarily driven by a reduction in joint custody accounts. The volume of agency issues maintained is expected to remain relatively flat, driven by the expecting slowing of net issuance of Agency MBS. Claim adjustment volume is expected to remain relatively stable consistent with recent trends.

The Reserve Banks' primary risks to current projections for the Fedwire Securities Service include variations in technology costs and product volume forecasts stemming from an uncertain economic outlook.

G. FedNow Service

1. *Cost to Introduce the FedNow Service*—Following the FedNow Service launch in July 2023 and in alignment with its 2019 **Federal Register** Notice announcing its decision to introduce the service, the Board is publishing total cost to bring the FedNow Service to market.³³ From August 2019 through July 2023, costs to introduce the FedNow Service totaled \$545 million. These costs include efforts to develop key FedNow Service features and functionality, as well as activities to support financial institutions as they leverage the service to provide innovative instant payments solutions to individuals and businesses. This figure includes costs related to delivery of a secure and resilient payments infrastructure that leverages cloud-first design, and implementation of 24x7 operations to support processing around

the clock. Additionally, costs include efforts to integrate the FedNow Service into existing Reserve Bank technology (for example, FedLine Solutions), implementation of a new seven-day accounting regime by the Federal Reserve, and education and readiness activities to prepare stakeholders across the payments ecosystem for adoption of the FedNow Service.

2. *2024 Pricing*—The Reserve Banks will maintain the previous year's fee schedule, inclusive of discounts.³⁴ With these discounts, the FedNow Service participation fee will be \$0.00 in recognition of the limited network reach, and customer credit transfers (CCTs) under a threshold of 2,500 per month will be \$0.00.³⁵ The discount for a limited number of CCTs is intended to support institutions of all sizes as they validate processing capabilities in production through regular test transactions with partners as well as acclimate to 24x7 operations. In addition, to encourage the onboarding of customers, new FedLine Advantage channel connections or upgrades from existing FedLine Solutions to FedLine Advantage will be discounted to \$0.00 for a rolling 12-month period following initiation.

H. *FedLine Solutions*—The Reserve Banks charge fees for the electronic

³⁴ This pricing is set to recover costs associated with mature volume estimates, when the service has relatively stable costs and revenues. This approach, which is in alignment with how the Reserve Banks have set fees for new services in the past, should limit prohibitively high or unnecessarily volatile pricing as the service matures. For instance, in establishing fees for the Federal Reserve's ACH service, the Board allowed fees to be set to recover costs associated with mature volume estimates instead of current costs. See Board of Governors of the Federal Reserve System, "Adoption of Fee Schedules and Pricing Principles for Federal Reserve Bank Services," 46 FR 1338, 1343 (Jan. 6, 1981). Available at: <https://cdn.loc.gov/service/ll/fedreg/fr046/fr046003/fr046003.pdf>.

³⁵ The participation fee will only be charged to RTNs that are able to receive CCTs (Send & Receive or Receive-only participation types). The participation fee will not be charged to Liquidity Management Transfer (LMT) only and Settlement-only participation types in 2024. The discount for CCT results from offsetting the fees for the first 2,500 CCTs (per month) and will be applied per RTN enrolled in the FedNow Service.

³³ See "Federal Reserve Actions to Support Interbank Settlement of Instant Payments," (August 9, 2019). Available at 2019–17027.pdf (govinfo.gov). Per its 2019 Notice, the Board committed to disclosing costs related to development of the service beginning the year the service is available to participating banks.

connections that financial institutions use to access priced services and allocate the costs and revenues associated with this electronic access to the priced services.³⁶ There are six FedLine Solutions channels through which customers can access the Reserve Banks' priced services: FedMail, FedLine Exchange®, FedLine Web, FedLine Advantage, FedLine Command® and FedLine Direct®.³⁷ The Reserve Banks bundle these channels into 12 FedLine Solutions packages, described below, that are supplemented by a number of premium (or à la carte) access and accounting information options. In addition, the Reserve Banks offer FedComplete® packages, which are bundled offerings of FedLine connections and a fixed number of FedACH Services, Fedwire Funds Service, and Check 21-enabled transactions.³⁸ FedLine Solutions packages offer attended or unattended access to critical payment and information services. FedMail, FedLine Exchange, FedLine Web, and FedLine Advantage packages offer attended or manual access via a web-based interface.³⁹ In addition, FedLine Advantage offers attended access to the FedNow Service since its launch in July 2023. FedLine Command and FedLine

Direct packages are computer-to-computer, internet protocol-based interfaces that support unattended access. The FedLine Command package offers an unattended connection to FedACH, most accounting information services, and the FedNow Service. FedLine Direct packages allow for unattended connections at multiple connection speeds to Check, FedACH, Fedwire Funds, and Fedwire Securities transactional and information services and to most accounting information services. In addition, FedLine Direct packages also allow for unattended connection to the FedNow Service.

In order to continue to support FedMail Services, the Reserve Banks will increase the monthly fees for the FedMail Email Service from \$85 to \$100 and increase the monthly fee for the FedMail Service from \$85 to \$100. The FedMail Email Service is available à la carte only for FedLine Web or higher packages. FedMail is a legacy service, and the fee increases are to incentivize customers to migrate to more contemporary, online solutions such as FedLine Web. This is part of the Reserve Banks' multiyear effort to provide highly secure, modern access solutions, and value-added services not available on legacy technology.

The FedLine Web solution offers access to core information services as well as check payment services. The Reserve Banks will create a new pricing tier for FedLine Web called FedLine Web Premier for a monthly fee of \$200. Automation of payments and informational services is available through FedLine Command and FedLine Direct packages, so credentialing a customer who desires check payment automation via FedLine Web requires a manual exception process by the FRFS Support Center. The Reserve Banks proposed the new pricing tier to reflect the cost of credentialing users and the value check files automation technology provides to payment services not offered by attended services such as FedLine Web and FedLine Web Plus.

The introduction of the FedNow Service requires multiple enhancements, such as 7-Day Accounting, that have been made to the Accounting Information Services (AIS). The Reserve Banks will increase prices for the AIS to reflect the enhancement value as well as to incentivize customers toward automated channels that better address their needs. Specifically, the Reserve Banks will increase the following fees:

TABLE 12—ACCOUNTING INFORMATION SERVICES FEE SCHEDULE

Electronic Access Service	Fee (per month)
End-of-Day Financial Institution Reconciliation Data (FIRD) File	from \$150 to \$200.
Statement of Account Spreadsheet File (SASF)	from \$150 to \$200.
Intra-day Download Search Results in Spreadsheet Format (with Accounting Management Information (AMI))	from \$150 to \$200.
CMS Plus Own Report—Up to 12 files with no OSRTN, Respondent or Subaccount activity	from \$60 to \$75.
CMS Plus Own Report plus OSRTN, Respondents and Subaccounts—Up to 12 files with up to nine OSRTNs, Respondents and Subaccounts.	from \$125 to \$150.
CMS Plus Own Report plus OSRTN, Respondents and Subaccounts—Up to 12 files with 10–50 OSRTNs, Respondents and Subaccounts.	from \$250 to \$300.
CMS Plus Own Report plus OSRTN, Respondents and Subaccounts—Up to 12 files with 51–100 OSRTNs, Respondents and Subaccounts.	from \$500 to \$600.
CMS Plus Own Report plus OSRTN, Respondents and Subaccounts—Up to 12 files with 101–500 OSRTNs, Respondents and Subaccounts.	from \$750 to \$900.
CMS Plus Own Report plus OSRTN, Respondents and Subaccounts—Up to 12 files with over 500 OSRTNs, Respondents and Subaccounts.	from \$1,000 to \$1,200.

The Reserve Banks estimate that the above price changes will result in an average 2.7 percent price increase for customers.

II. Analysis of Competitive Effect

All operational and legal changes considered by the Board that have a substantial effect on payment system participants are subject to the competitive impact analysis described

in the March 1990 policy “The Federal Reserve in the Payments System.”⁴⁰ Under this policy, the Board assesses whether changes would have a direct and material adverse effect on the ability of other service providers to

³⁶ FedLine Solutions provide customers with access to Reserve Bank priced services. As a result, FedLine costs and revenue are allocated to the Reserve Banks' priced services on an expense ratio basis.

³⁷ FedMail, FedLine Exchange, FedLine Web, FedLine Advantage, FedLine Command, and FedLine Direct are registered trademarks of the Federal Reserve Banks.

³⁸ The Reserve Banks are preparing to deliver services to the industry via Application Programming Interfaces (API). APIs are a set of protocols for connecting software systems programmatically, enabling system-to-system interoperability. Communication will be forthcoming on timing, availability, and pricing of initial APIs.

³⁹ Attended packages require manual processes compared to automation of payment and information services offered by unattended packages. The Reserve Banks will continue to update pricing to differentiate the value proposition offered by attended and unattended packages.

⁴⁰ Federal Reserve Regulatory Service (FRRS) 9–1558.

compete effectively with the Federal Reserve in providing similar services because of differing legal powers or constraints or because of a dominant market position deriving from such legal differences. If any proposed changes create such an effect, the Board must further evaluate the changes to assess whether the benefits associated with the changes—such as contributions to payment system efficiency, payment system integrity, or other Board objectives—can be achieved while minimizing the adverse effect on competition.

The 2024 fees, fee structures, and changes in service will not have a direct

and material adverse effect on the ability of other service providers to compete effectively with the Reserve Banks in providing similar services. When conducting the competitive effect analysis for the FedNow Service, the Federal Reserve assessed whether its pricing strategy as a new service, including discounts, would have a material, adverse effect on the ability of other service providers to compete effectively with the Reserve Banks due to differing legal powers or a dominate market position as a result of such differing legal powers. The Board concluded that the pricing strategy,

including discounts, followed general market practice for new services and could similarly be implemented by private sector providers unrelated to any differing legal powers. Therefore, the Reserve Banks' pricing does not have a material adverse effect on the ability of other service providers to compete effectively with the Reserve Banks in providing similar services.

The Reserve Banks expect to continue to achieve aggregate long-run cost recovery across all mature priced services.

III. 2024 Fee Schedules

FEDACH® SERVICES 2024 FEE SCHEDULE

[Effective January 2, 2024. **Bold indicates changes from 2023 prices.**]

	Fee
FedACH minimum monthly fee:	
Originating depository financial institution (ODFI) ⁴¹	\$50.00.
Receiving depository financial institution (RDFI) ⁴²	40.00.
Origination (per item or record):	
Forward or return items	0.0035.
SameDay Service—forward item ⁴³	0.0010 surcharge.
Addenda record	0.0015.
FedLine Web-originated returns and notification of change (NOC) ⁴⁴	0.50.
Facsimile Exception Return/NOC ⁴⁵	45.00.
SameDay Exception Return	45.00.
Automated NOC	0.20.
Volume discounts (based on monthly billed origination volume) ⁴⁶ per item when origination volume is	
750,001 to 1,500,000 items per month discount	0.0008.
more than 1,500,000 items per month discount	0.0010.
Volume discounts (based on monthly billed receipt volume) ⁴⁷ per item when receipt volume is	
10,000,001 to 15,000,000 items per month discount	0.0002.
more than 15,000,000 items per month discount	0.0003.
Receipt (per item or record):	
Forward Item	0.0035.
Return Item	0.0075.
Addenda record	0.0015.
Volume discounts:	
Non-Premium Receivers ⁴⁸ per item when volume is	
750,001 to 12,500,000 items per month ⁴⁹	0.0017 discount.
more than 12,500,000 items per month ⁵⁰	0.0019 discount.
Premium Receivers, Level One ⁵¹ per item when volume is	
750,001 to 1,500,000 items per month ⁵²	0.0017 discount.
1,500,001 to 2,500,000 items per month ⁵³	0.0017 discount.
2,500,001 to 12,500,000 items per month ⁵³	0.0018 discount.
12,500,001 to 30,000,000 items per month ⁵³	0.0020 discount.
more than 30,000,000 items per month ⁵³	0.0023 discount.
Premium Receivers, Level Two ⁵⁴ per item when volume is	
750,001 to 1,500,000 items per month ⁵⁵	0.0017 discount.
1,500,001 to 2,500,000 items per month ⁵⁶	0.0017 discount.
2,500,001 to 12,500,000 items per month ⁵⁶	0.0019 discount.
12,500,001 to 30,000,000 items per month ⁵⁶	0.0021 discount.
more than 30,000,000 items per month ⁵⁶	0.0024 discount.
FedACH Risk Management Services: ⁵⁷	
Monthly Package Fee (a single fee based on total number of criteria sets):	
For up to 5 criteria sets	45.00.
For 6 through 11 criteria sets	85.00.
For 12 through 23 criteria sets	150.00.
For 24 through 47 criteria sets	180.00.
For 48 through 95 criteria sets	300.00.
For 96 through 191 criteria sets	510.00.
For 192 through 383 criteria sets	810.00.
For 384 through 584 criteria sets	1,025.00.
For more than 584 criteria sets	1,325.00.
Batch/Item Monitoring (based on total monthly volume):	
For 1 through 100,000 batches (per batch)	0.007.
For more than 100,000 batches (per batch)	0.0035.

FEDACH® SERVICES 2024 FEE SCHEDULE—Continued
 [Effective January 2, 2024. **Bold indicates changes from 2023 prices.**]

	Fee
FedPayments Insights Service: ⁵⁸	
Monthly Fee (a single fee based on commercial receipt volume):	
0–50,000 items per month	75.00.
50,001–100,000 items per month	120.00.
100,001–500,000 items per month	180.00.
500,001–1,000,000 items per month	260.00.
1,000,001–5,000,000 items per month	340.00.
5,000,001–10,000,000 items per month	450.00.
10,000,001–25,000,000 items per month	550.00.
25,000,001–60,000,000 items per month	625.00.
Over 60,000,000 items per month	700.00.
Monthly FedPayments Reporter Service:	
FedPayments Reporter Service monthly package includes the following reports:	
ACH Received Entries Detail—Customer and Depository Financial Institution	
ACH Return Reason Report—Customer and Depository Financial Institution	
ACH Originated Entries Detail—Customer and Depository Financial Institution	
ACH Volume Summary by SEC Code—Customer	
ACH Customer Transaction Activity	
ACH Death Notification	
ACH International (IAT)	
ACH Notification of Change	
ACH Payment Data Information File	
ACH Remittance Advice Detail	
ACH Remittance Advice Summary	
ACH Return Item Report and File	
ACH Return Ratio	
ACH Social Security Beneficiary	
ACH Originator Setup	
ACH Report Delivery via FedLine Solution	
On Demand Report Surcharge ⁵⁹	1.00.
Monthly Package Fee (counts reflect reports generated as well as delivered via a FedLine Solution):	
For up to 50 reports	45.00.
For 51 through 150 reports	65.00.
For 151 through 500 reports	120.00.
For 501 through 1,000 reports	220.00.
For 1,001 through 1,500 reports	320.00.
For 1,501 through 2,500 reports	505.00.
For 2,501 through 3,500 reports	705.00.
For 3,501 through 4,500 reports	900.00.
For 4,501 through 5,500 reports	1,095.00.
For 5,501 through 7,000 reports	1,350.00.
For 7,001 through 8,500 reports	1,585.00.
For 8,501 through 10,000 reports	1,815.00.
For more than 10,000 reports	1,980.00.
Premier reports (per report generated): ⁶⁰	
ACH Volume Summary by SEC Code Report—Depository Financial Institution:	
For 1 through 5 reports	10.00.
For 6 through 10 reports	6.00.
For 11 or more reports	1.00.
On Demand Surcharge	1.00.
ACH Routing Number Activity Report:	
For 1 through 5 reports	10.00.
For 6 through 10 reports	6.00.
For 11 or more reports	1.00.
On Demand Surcharge	1.00.
ACH Originated Batch Report (monthly):	
For 1 through 5 reports	10.00.
For 6 through 10 reports	6.00.
For 11 or more reports	1.00.
On Demand Surcharge	1.00.
ACH Originated Batch Report (daily):	
Scheduled Report	0.65.
On Demand Surcharge	1.00.
On-us inclusion:	
Participation (monthly fee per RTN)	10.00.
Per-item	0.0030.
Per-addenda	0.0015.
Report delivery via encrypted email (per email)	0.20.
Other Fees and Discounts:	
Monthly fee (per RTN):	
FedACH Participation Fee ⁶¹	75.00.

FEDACH® SERVICES 2024 FEE SCHEDULE—Continued
 [Effective January 2, 2024. **Bold indicates changes from 2023 prices.**]

	Fee
Same Day Service Origination Participation Fee ⁶²	10.00.
FedACH Settlement Fee ⁶³	
Premium Receivers, Level One and Level Two	60.00.
Non-Premium Receivers when volume is less than 1,500,000 items per month, Tier 2	110.
Non-Premium Receivers when volume is more than 1,500,000 items per month, Tier 3	250.00.
FedACH Information File Extract Fee	180.00.
IAT Output File Sort Fee	150.00.
Fixed Participation Fee—Automated NOCs ⁶⁴	5.00.
Non-Electronic Input/Output fee: ⁶⁵	
CD/DVD (CD or DVD)	50.00.
Paper (file or report)	50.00.
Fees and Credits Established by Nacha: ⁶⁶	
Nacha Same-Day Entry fee (per item)	0.052.
Nacha Same-Day Entry credit (per item)	0.052 (credit).
Nacha Unauthorized Entry fee (per item)	4.50.
Nacha Unauthorized Entry credit (per item)	4.50 (credit).
Nacha Admin Network fee (monthly fee per RTN) ⁶⁷	28.67.
Nacha Admin Network fee (per entry)	0.000185.
FedGlobal® ACH Payments: ⁶⁸	
Fixed Monthly Fee (per RTN): ⁶⁹	
Monthly origination volume more than 500 items	185.00.
Monthly origination volume between 161 and 500 items	60.00.
Monthly origination volume less than 161 items	20.00.
Per-item Origination Fee for Monthly Volume more than 500 Items (surcharge): ⁷⁰	
Mexico service	0.55.
Panama service	0.60.
Per-item Origination Fee for Monthly Volume between 161 and 500 items (surcharge): ⁷⁰	
Mexico service	0.80.
Panama service	0.85.
Per-item Origination Fee for Monthly Volume less than 161 items (surcharge): ⁷⁰	
Mexico service	1.05.
Panama service	1.10.
Other FedGlobal ACH Payments Fees:	
Mexico service:	
Return received from Mexico ⁷¹	0.91 (surcharge).
Item trace ⁷²	13.50.
Foreign currency to foreign currency (F3X) item originated to Mexico ⁷⁰	0.67 (surcharge).
Panama service:	
Return received from Panama ⁷¹	1.00 (surcharge).
Item trace ⁷²	7.00.
NOC	0.72.
Exception Resolution Service:	
Monthly Fees (applies to cases only at the parent RTN): ⁷³	
Up to 5 cases	20.00.
6–25 cases	40.00.
26–50 cases	60.00.
51–100 cases	100.00.
101–1,000 cases	250.00.
1,001–5,000 cases	400.00.
5,001 cases and above	500.00.
Offline Service Participant—Case Fees: ⁷⁴	
Case Open Fee	5.00.
Case Response Fee	5.00.
FedACH Receipt Discount Program Introduced in 2024⁷⁵	
Customers with more than 30 million FedACH receipt items per month:	
Per-item discount on all forward receipt items received through FedACH for the full five-year length of the agreement.	0.0002
Percentage discount on the FedACH FedPayments® Reporter service (FPR) for two years at any point during participation in the program.	50 percent.
Percentage discount on the FedACH Exception Resolution Service (ERS) for two years at any point during their participation in the program.	100 percent.
Percentage discount on the FedACH FedPayments® Insights service (FPI) for two years at any point during their participation in the program.	100 percent.
Customers with between 5 and 30 million FedACH receipt items per month:	
Per-item discount on all forward receipt items received through FedACH for the full 5-year length of the agreement.	0.0001.
Percentage discount on the FedACH FedPayments Reporter service (FPR) for two years at any point during their participation in the program.	25 percent.
Percentage discount on the FedACH Exception Resolution Service (ERS) for two years at any point during their participation in the program.	50 percent.

FEDACH® SERVICES 2024 FEE SCHEDULE—Continued

[Effective January 2, 2024. **Bold indicates changes from 2023 prices.**]

	Fee
Percentage discount on the FedACH FedPayments Insights service (FPI) for two years at any point during their participation in the program.	50 percent.

FEDWIRE® FUNDS SERVICE AND NATIONAL SETTLEMENT SERVICE 2024 FEE SCHEDULES

[Effective January 2, 2024. **Bold indicates changes from 2023 prices.**]

	Fee
Fedwire® Funds Service	
Monthly Participation Fee	\$115.00
Basic volume-based pre-incentive transfer fee (originations and receipts)—per transfer for	
Tier 1: The first 14,000 transfers per month	0.940
Tier 2: Additional transfers up to 90,000 per month	0.290
Tier 3: Every transfer over 90,000 per month	0.190
Volume-based transfer fee with the incentive discount (originations and receipts)—per eligible transfer for ⁷⁶	
Tier 1: The first 14,000 transfers per month	0.188
Tier 2: Additional transfers 14,001 to 90,000 per month	0.058
Tier 3: Every transfer over 90,000 per month	0.038
Surcharge for Offline Transfers (Originations and Receipt)	75.00
Surcharge for End-of-Day Transfer Originations ⁷⁷	0.26
Monthly FedPayments Manager Import/Export fee ⁷⁸	60.00
Surcharge on transfers >\$10 million Origination and Receipt	0.14
Surcharge on transfers >\$100 million Origination and Receipt	0.36
Surcharge for Payment Notification:	
Origination Surcharge ⁷⁹	0.01
Receipt Volume ^{79 80}	N/A
Delivery of Reports—Hard Copy Reports to On-Line Customers	50.00
Special Settlement Arrangements (charge per settlement day) ⁸¹	150.00
National Settlement Service	
Basic:	
Settlement Entry Fee	1.70
Settlement File Fee	35.00
Surcharge for Offline File Origination ⁸²	45.00
Minimum Monthly Fee ⁸³	60.00

FEDWIRE® SECURITIES SERVICE 2024 FEE SCHEDULE

[Effective January 2, 2024. **Bold indicates changes from 2023 prices.**]

	Fee
Basic Transfer Fee: ^{84 85}	
Agency Securities: Transfer or reversal originated or received	\$0.61
Treasury Securities: Transfer or reversal originated or received	0.61
Surcharge: ⁸⁶	
Agency Securities: Offline origination & receipt surcharge	80.00
Treasury Securities: Offline origination & receipt surcharge	80.00
Monthly Maintenance Fees: ⁸⁷	
Agency Securities: Account maintenance (per account) ⁸⁸	57.50
Agency Securities: Issue maintenance (per issue/per account) ⁸⁹	0.61
Treasury Securities: Account maintenance (per account) ⁹⁰	None
Treasury Securities: Issue maintenance (per issue/per account) ⁹¹	None
ACAP Fees: ^{92 93}	
Claims Adjustment Fee	1.00
Tracking Indicators Fee	0.10
Position Maintenance Fee (per position maintained/per business day) ^{94 95}	0.03
GNMA Serial Note Stripping or Reconstitution Fee ⁹⁶	9.00
Joint Custody Origination Surcharge ^{97 98}	46.00
Delivery of Reports—Hard Copy Reports to On-Line Customers ⁹⁹	50.00

FEDNOW® SERVICE 2024 FEE SCHEDULE

[Effective January 2, 2024. **Bold indicates changes from 2023 prices.**]

	Fee
Customer Credit Transfer (per item) PACS.008 Origination	\$0.045.
Customer Credit Transfer Returns (per item) PACS.004 Origination	0.045.
Liquidity Management Transfer (LMT) (per-item) PACS.009 Origination	1.00.
Request for Payment (RFP) (per-item) PAIN.013	0.01.
PACS.008 Origination Discount	— \$0.045 per item for up to 2,500 customer credit transfers per month (in 2024).
Participation Fee—General (per month)	\$25.00, discounted to \$0.00 in 2024.

FEDLINE® 2024 FEE SCHEDULE

[Effective January 2, 2024. **Bold indicates changes from 2023 prices.**]

	Fee
FedComplete Packages (monthly) ^{100 101}	
FedComplete 100A Plus ¹⁰²	\$900.00.
FedComplete 100A Premier	975.00.
includes:	
FedLine Advantage Premier package.	
Volumes included in the FedComplete 100A Plus package.	
FedComplete 200A Plus	1,425.00.
FedComplete 200A Premier	1,500.00.
includes:	
FedLine Advantage Premier package.	
Volumes included in the FedComplete 200A Plus package.	
FedComplete Excess Volume and Receipt Surcharge: ¹⁰³	
FedForward ¹⁰⁴	0.03700/item.
FedReturn	0.82000/item.
FedReceipt	0.00005/item.
Fedwire Funds Origination	0.94000/item.
Fedwire Funds Receipt	0.09400/item.
FedACH Origination	0.00350/item.
FedACH Receipt	0.00035/item.
FedComplete credit adjustment	various.
FedComplete debit adjustment	various.
FedLine Solutions (monthly)	
FedMail ¹⁰⁵	\$100.00.
FedLine Exchange ¹⁰⁵	40.00.
includes:	
E-Payments Directory (via manual download).	
FedLine Exchange Premier ¹⁰⁵	125.00.
includes:	
FedLine Exchange package.	
E-Payments Directory (via automated download).	
FedLine Web ¹⁰⁶	110.00.
FedLine Web Plus ¹⁰⁶	160.00.
FedLine Web Premier ¹⁰⁶	200.00
includes:	
Services included in the FedLine Web Plus package.	
Check File Automation.	
FedLine Advantage ^{106 107}	415.00.
FedLine Advantage Plus ^{106 107}	460.00.
FedLine Advantage Premier ^{106 107}	570.00.
Includes:	
FedLine Advantage Plus package.	
Two VPN devices.	
Fedwire Funds FedPayments Manager Import/Export (more than 250 Fedwire transactions or more than one routing number in a given month).	
FedTransaction Analyzer (more than 250 Fedwire transactions or more than one routing number per month).	
FedLine Command Plus	1,035.00.
FedLine Direct Plus ¹⁰⁸	5,500.00.
FedLine Direct Premier ¹⁰⁸	10,500.00.
includes:	
Services included in the FedLine Direct Plus package.	

FEDLINE® 2024 FEE SCHEDULE—Continued

[Effective January 2, 2024. **Bold indicates changes from 2023 prices.**]

	Fee
Two 2 Mbps dedicated WAN Connections. One Network Diversity. Two VPN devices.	
A la carte options (monthly) ¹⁰⁹	
Electronic Access:	
FedMail—FedLine Exchange Subscribers—Pack of 5	25.00.
FedLine Subscribers—Pack of 5	100.00.
Additional VPNs ¹¹⁰	100.00.
Additional 2 Mbps WAN connection ¹⁰⁸	3,000.00.
WAN Connection Upgrade	
10 Mbps ¹¹¹	1,700.00.
30 Mbps ¹¹¹	3,000.00.
50 Mbps ¹¹¹	4,000.00.
100 Mbps ¹¹¹	7,000.00.
200 Mbps ¹¹¹	11,000.00.
FedLine International Setup (one-time fee)	5,000.00.
FedLine Custom Implementation Fee (one-time fee) ¹¹²	2,500–5,000.
Network Diversity	2,500.00.
FedMail Email (for customers with FedLine Web and above) ¹¹³	100.00
VPN Device Modification (one-time fee)	200.00.
VPN Device Missed Activation Appointment (one-time fee)	175.00.
VPN Device Expedited Hardware Surcharge (one-time fee)	100.00.
VPN Device Replacement or Move (one-time fee)	300.00.
E-Payments Automated Download Codes (Add'l Codes—Pack of 5) ¹¹⁴	75.00/month.
E-Payments Automated Download Codes (Add'l Codes—Pack of 20) ¹¹⁴	150.00/month.
E-Payments Automated Download Codes (Add'l Codes—Pack of 50) ¹¹⁴	300.00/month.
E-Payments Automated Download Codes (Add'l Codes—Pack of 100) ¹¹⁴	500.00/month.
E-Payments Automated Download Codes (Add'l Codes—Pack of 250) ¹¹⁴	1,000.00/month.
E-Payments Automated Download Codes (Add'l Codes—>250) ¹¹⁴	2,000.00/month.
Daily Statement of Account Activity and Monthly Statement of Service Charges (monthly): ^{115 116}	
End-of-Day Financial Institution Reconciliation Data (FIRD) File	200.00.
Statement of Account Spreadsheet File (SASF)	200.00.
Cash Management Service (CMS) Plus and Intra-day Service (monthly):	
Cash Management System (CMS) Plus—Own report—up to 12 files with ¹¹⁷ .	
no OSRTN, respondent/sub-account activity	75.00.
Up to nine OSRTNs, respondents and/or sub-accounts	150.00.
10–50 OSRTNs, respondents and/or sub-accounts	300.00.
51–100 OSRTNs, respondents and/or sub-accounts	600.00.
101–500 OSRTNs, respondents and/or sub-accounts	900.00.
>500 OSRTNs, respondents and/or sub-accounts	1,200.00.
Intra-day Download Search Results in Spreadsheet Format (with AMI) ¹¹⁸	200.00.
Other:	
Replacement Copies ¹¹⁹ .	
Daily Statement of Account	10.00/copy.
Monthly Statement of Service Charges	10.00/copy.
Vendor Pass-Through Fee	various.
Electronic Access Credit Adjustment	various.
Electronic Access Debit Adjustment	various.

⁴¹ Any ODFI incurring less than \$50 for the following fees will be charged a variable amount to reach the minimum: Forward value and non-value item origination fees, and FedGlobal ACH origination surcharges.

⁴² Any RDFI not originating forward value and non-value items and incurring less than \$40 in receipt fees will be charged a variable amount to reach the minimum. Any RDFI that originates forward value and non-value items incurring less than \$50 in forward value and nonvalue item origination fees will only be charged a variable amount to reach the minimum monthly origination fee.

⁴³ This surcharge is assessed on all forward items that qualify for same-day processing and settlement and is incremental to the standard origination item fee.

⁴⁴ The fee includes the item and addenda fees in addition to the conversion fee.

⁴⁵ The fee includes the item and addenda fees in addition to the conversion fee. Reserve Banks also assess a \$45 fee for every government paper return/ NOC they process.

⁴⁶ Origination volumes at these levels qualify for a waterfall discount that includes all FedACH origination items.

⁴⁷ Origination discounts based on monthly billed receipt volume apply only to those items received by FedACH receiving points and are available only to Premium Receivers.

⁴⁸ RDFIs receiving through FedACH less than 90 percent of their FedACH-originated items.

⁴⁹ This per-item discount is a reduction to the standard receipt fees listed in this fee schedule.

⁵⁰ Receipt volumes at these levels qualify for a waterfall discount that includes all FedACH receipt items.

⁵¹ RDFIs receiving through FedACH at least 90 percent of their FedACH-originated items, but less than 90 percent of all of their ACH items originated through any operator.

⁵² This per-item discount is a reduction to the standard receipt fees listed in this fee schedule.

⁵³ Receipt volumes at these levels qualify for a waterfall discount which includes all FedACH receipt items.

⁵⁴ RDFIs receiving through FedACH at least 90 percent of all of their ACH items originated through any operator.

⁵⁵ This per-item discount is a reduction to the standard receipt fees listed in this fee schedule.

⁵⁶ Receipt volumes at these levels qualify for a waterfall discount which includes all FedACH receipt items.

⁵⁷ Criteria may be set for both the Origination Monitoring Service and the RDFI Alert Service. Subscribers with no criteria set up will be assessed the \$45 monthly package fee.

⁵⁸ Monthly commercial receipt volume is calculated based on combined volume of subscribed RTNs in an account family.

⁵⁹ Premier reports generated on demand are subject to the package/tiered fees plus a surcharge.

⁶⁰ Premier reports generated on demand are subject to the package/tiered fees plus a surcharge.

⁶¹ The fee applies to RTNs that have received or originated FedACH transactions during a month. Institutions that receive only U.S. government transactions or that elect to use a private-sector operator exclusively are not assessed the fee.

⁶² This surcharge is assessed to any RTN that originates at least one item meeting the criteria for same-day processing and settlement in a given month.

⁶³ The fee is applied to any RTN with activity during a month, including RTNs of institutions that elect to use a private-sector operator exclusively but also have items routed to or from customers that access the ACH network through FedACH. This fee

does not apply to RTNs that use the Reserve Banks for only U.S. government transactions.

⁶⁴ Fee will be assessed only when automated NOCs are generated.

⁶⁵ Limited services are offered in contingency situations.

⁶⁶ The fees and credits listed are collected from the ODFI and credited to Nacha (admin network) or to the RDFI (same-day entry and unauthorized entry) in accordance with the ACH Rules.

⁶⁷ Nacha's monthly network administration fee for 2023 was misstated in the **FEDERAL REGISTER** Notice published on November 3, 2022. As announced by Nacha on September 22, 2022, effective January 1, 2023, Nacha is increasing the monthly network administration fee that the Federal Reserve collects on its behalf to \$28.67/RTN/month (\$344/RTN/year), as correctly stated on this fee schedule.

⁶⁸ The international fees and surcharges vary from country to country as these are negotiated with each international gateway operator.

⁶⁹ A single monthly fee based on total FedGlobal ACH Payments origination volume.

⁷⁰ This per-item surcharge is in addition to the standard domestic origination fees listed in this fee schedule.

⁷¹ This per-item surcharge is in addition to the standard domestic receipt fees listed in this fee schedule.

⁷² U.S. ODFIs are responsible for any investigation fees should they be assessed by foreign RDFIs or downstream payment participants.

⁷³ The monthly fee is rolled up to the parent DI level, such that a DI that opts into the FedACH Exception Resolution Service under two separate RTNs would pay a single monthly fee based on the total number of cases opened for their two RTNs combined.

⁷⁴ A financial institution may enroll in the Service as an Offline Service Participant by designating the Reserve Bank to access and use the functionality of the application on behalf of the Offline Participant.

⁷⁵ Federal Reserve Financial Services offers a five-year discount program to financial institutions that receive at least 5 million items per month through FedACH and meet the qualifications for Premium Receiver Level One or Level Two status.

⁷⁶ The incentive discounts apply to the volume that exceeds 60 percent of a customer's historic benchmark volume. Historic benchmark volume is based on a customer's average daily activity over the previous five calendar years. If a customer has fewer than five full calendar years of previous activity, its historic benchmark volume is based on its daily activity for as many full calendar years of data as are available. If a customer has less than one year of past activity, then the customer qualifies automatically for incentive discounts for the year. The applicable incentive discounts are as follows: \$0.752 for transfers up to 14,000; \$0.232 for transfers 14,001 to 90,000; and \$0.152 for transfers over 90,000.

⁷⁷ This surcharge applies to originators of transfers that are processed by the Reserve Banks after 5:00 p.m. ET.

⁷⁸ This fee is charged to any Fedwire Funds participant that originates a transfer message via the FedPayments Manager Funds tool and has the import/export processing option setting active at any point during the month.

⁷⁹ Payment Notification and End-of-Day Origination surcharges apply to each Fedwire funds transfer message.

⁸⁰ Provided on billing statement for informational purposes only.

⁸¹ This charge is assessed to settlement arrangements that use the Fedwire® Funds Service to affect the settlement of interbank obligations (as opposed to those that use the National Settlement

Service). With respect to such special settlement arrangements, other charges may be assessed for each funds transfer into or out of the accounts used in connection with such arrangements.

⁸² An organization that is a settlement agent may be able to use the National Settlement Service offline service if it is experiencing an operational event that prevents the transmission of settlement files via its electronic connection to the Federal Reserve Banks. The Federal Reserve Banks have limited capacity to process offline settlement files. As a result, while the Federal Reserve Banks use best efforts to process offline settlement file submissions, there is no guarantee that an offline settlement file, in particular one that is submitted late in the operating day or that contains a large number of entries, will be accepted for processing. Only those persons identified as authorized individuals on the National Settlement Service 04 Agent Contact Form may submit offline settlement files. For questions related to the National Settlement Service offline service, please contact National Settlement Service Central Support Service Staff (CSSS) at 800-758-9403, or via email at csss.staff@ny.frb.org.

⁸³ Any settlement arrangement that accrues less than \$60 during a calendar month will be assessed a variable amount to reach the minimum monthly fee.

⁸⁴ Restricted Securities Accounts maintained by the Reserve Banks under the Loans and Discounts program and the 31 CFR part 202 program are not assessed for monthly account maintenance fees or fees for Transfers of Book-Entry Securities to or from such Restricted Securities Accounts. Restricted Securities Accounts maintained by the Reserve Banks under the 31 CFR part 225 program are subject to monthly account maintenance fees but not fees for Transfers of Book-Entry Securities to or from such Restricted Securities Accounts.

⁸⁵ These fees are set by the Federal Reserve Banks.

⁸⁶ This surcharge is set by the Federal Reserve Banks. It is in addition to any basic transfer or reversal fee.

⁸⁷ Restricted Securities Accounts maintained by the Reserve Banks under the Loans and Discounts program and the 31 CFR part 202 program are not assessed for monthly account maintenance fees or fees for Transfers of Book-Entry Securities to or from such Restricted Securities Accounts. Restricted Securities Accounts maintained by the Reserve Banks under the 31 CFR part 225 program are subject to monthly account maintenance fees but not fees for Transfers of Book-Entry Securities to or from such Restricted Securities Accounts.

⁸⁸ These fees are set by the Federal Reserve Banks.

⁸⁹ These fees are set by the Federal Reserve Banks.

⁹⁰ The U.S. Department of the Treasury absorbs the cost of monthly account maintenance for securities accounts that contain only Treasury securities and reimburses the Federal Reserve Banks.

⁹¹ The U.S. Department of the Treasury absorbs the cost of monthly issue maintenance for custody holdings of Treasury securities and reimburses the Federal Reserve Banks.

⁹² These fees are set by the Federal Reserve Banks.

⁹³ Automated Claim Adjustment Process (ACAP) fees apply to all ACAP-eligible security types. Phase 2 of the ACAP enhancement project will include expanding ACAP tracking to all coupon-paying securities issued over the Fedwire Securities Service and adding securities lending as a transaction type. For information about the ACAP enhancement project, please visit: <https://www.frb-services.org/resources/financial-services/securities/acap>.

⁹⁴ Participants are charged the Repo Position Maintenance Fee for both a Repo-Out balance and a Repo-In balance. These fees will be assessed every business day.

By order of the Board of Governors of the Federal Reserve System.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2023-25925 Filed 11-22-23; 8:45 am]

BILLING CODE 6210-01-P

⁹⁵ Participants are charged the Securities Lending Position Maintenance Fee for both a Securities Borrowed balance and a Securities Lent balance. These fees will be assessed every business day. Securities lending positions will be available when Phase 2 of the ACAP enhancement project is implemented. For information about the ACAP enhancement project, please visit: <https://www.frbsservices.org/resources/financial-services/securities/acap/>.

⁹⁶ This fee is set by and remitted to the Government National Mortgage Association (GNMA).

⁹⁷ The Federal Reserve Banks charge participants a Joint Custody Origination Surcharge for both Agency and Treasury securities.

⁹⁸ These fees are set by the Federal Reserve Banks.

⁹⁹ These fees are set by the Federal Reserve Banks.

¹⁰⁰ FedComplete packages are all-electronic service options that bundle payment services with an access solution for one monthly fee.

¹⁰¹ FedComplete customers that use the email service would be charged the FedMail Email a la carte fee and for all FedMail-FedLine Exchange Subscriber 5-packs.

¹⁰² Packages with an "A" include the FedLine Advantage channel.

¹⁰³ Per-item surcharges are in addition to the standard fees listed in the applicable priced services fee schedules.

¹⁰⁴ FedComplete customers will be charged \$4 for each FedForward cash letter over the monthly package threshold. This activity will appear under billing code 51998 in Service Area 1521 on a month-lagged basis.

¹⁰⁵ FedMail and FedLine Exchange packages do not include user credentials, which are required to access priced services and certain informational services. Credentials are sold separately in packs of five via the FedMail-FedLine Exchange Subscriber 5-pack.

¹⁰⁶ FedLine Web and Advantage packages do not include user credentials, which are required to access priced services and certain informational services. Credentials are sold separately in packs of five via the FedLine Subscriber 5-pack.

¹⁰⁷ FedLine Solutions package fees associated with establishing a new connection or upgrading a current connection to FedLine Advantage® for the FedNow® Service will be credited up to twelve months.

¹⁰⁸ Early termination fees and/or expedited order fees may apply to all FedLine Direct packages and FedLine Direct à la carte options.

¹⁰⁹ These add-on services can be purchased only with a FedLine Solution.

¹¹⁰ Additional VPNs are available for FedLine Advantage, FedLine Command, and FedLine Direct packages only. All customers will need to replace their existing VPN device with the new VPN device. Effective October 1, 2023, customers who have not started migration will be assessed a \$400 monthly fee under billing code 22411 until migration is complete.

¹¹¹ Fee is in addition to the FedLine Direct package fees or Additional 2Mbps WAN Connection fee.

¹¹² The FedLine Custom Implementation Fee is \$2,500 or \$5,000 based on the complexity of the setup.

¹¹³ Available only to customers with a priced FedLine package.

¹¹⁴ Five download codes are included at no cost in all Plus and Premier packages.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS-1817-NC]

Medicare and Medicaid Programs; Announcement of Application From a Hospital Requesting Waiver for Organ Procurement Service Area

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice with request for comment.

SUMMARY: This notice acknowledges the receipt of an application from a hospital that has requested a waiver of statutory requirements that would otherwise require the hospital to enter into an agreement with its designated organ procurement organization (OPO). This notice requests comments from OPOs and the general public for our consideration in determining whether we should grant the requested waiver.

DATES: *Comment date:* To be assured consideration, comments must be received at one of the addresses provided below, by January 23, 2024.

ADDRESSES: In commenting, refer to file code CMS-1817-NC.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to <https://www.regulations.gov>. Follow the "Submit a comment" instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-1817-NC, P.O. Box 8010, Baltimore, MD 21244-8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the

¹¹⁵ Available for FedLine Web Plus, FedLine Web Premier, FedLine Advantage Plus, and FedLine Advantage Premier packages. It is also available for no extra fee in FedLine Command Plus and Direct packages.

¹¹⁶ The End of Day Financial Institution Reconciliation Data (FIRD) and Statement of Account Spreadsheet File (SASF) are available for Master accounts only.

¹¹⁷ Available with FedLine® Plus and Premier packages.

¹¹⁸ Available for FedLine Web Plus and Premier packages. Available for no extra fee in FedLine Advantage and higher packages.

¹¹⁹ Charging the \$10 Replacement Copy Fee is at the discretion of Reserve Banks.

following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-1817-NC, Mail Stop C4-26-05, 7500 Security Boulevard, Baltimore, MD 21244-1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Randy Thronset, (410) 786-0131.

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following website as soon as possible after they have been received: <https://www.regulations.gov>. Follow the search instructions on that website to view public comments. CMS will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the individual will take actions to harm the individual. CMS continues to encourage 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.

I. Background

Organ Procurement Organizations (OPOs) are not-for-profit organizations that are responsible for the procurement, preservation, and transport of organs to transplant centers throughout the country. Qualified OPOs are designated by the Centers for Medicare & Medicaid Services (CMS) to recover or procure organs in CMS-defined exclusive geographic service areas, pursuant to section 371(b)(1) of the Public Health Service Act (42 U.S.C. 273(b)(1)) and our regulations at 42 CFR 486.306. Once an OPO has been designated for an area, hospitals in that area that participate in Medicare and Medicaid are required to work with that OPO in providing organs for transplant, pursuant to section 1138(a)(1)(C) of the Social Security Act (the Act) and our regulations at 42 CFR 482.45.

Section 1138(a)(1)(A)(iii) of the Act provides that a hospital must establish protocols, which require the hospital to notify the designated OPO (for the service area in which it is located) of potential organ donors. Under section 1138(a)(1)(C) of the Act, every hospital must have an agreement only with its

designated OPO to identify potential donors.

However, section 1138(a)(2)(A) of the Act provides that a hospital may obtain a waiver of the above requirements from the Secretary of the Department of Health and Human Services (the Secretary) under certain specified conditions. A waiver allows the hospital to have an agreement with an OPO other than the one designated by CMS, if the hospital meets certain conditions specified in section 1138(a)(2)(A) of the Act. In addition, the Secretary may review additional criteria described in section 1138(a)(2)(B) of the Act to evaluate the hospital's request for a waiver.

Section 1138(a)(2)(A) of the Act states that in granting a waiver, the Secretary must determine that the waiver—(1) is expected to increase organ donations; and (2) will ensure equitable treatment of patients referred for transplants within the service area served by the designated OPO and within the service area served by the OPO with which the hospital seeks to enter into an agreement under the waiver. In making a waiver determination, section 1138(a)(2)(B) of the Act provides that the Secretary may consider, among other factors: (1) cost-effectiveness; (2) improvements in quality; (3) whether there has been any change in a hospital's designated OPO due to the changes made in definitions for metropolitan statistical areas; and (4) the length and continuity of a hospital's relationship with an OPO other than the hospital's designated OPO. Under section 1138(a)(2)(D) of the Act, the Secretary is required to publish a notice of any waiver application received from a hospital within 30 days of receiving the application, and to offer interested parties an opportunity to submit comments during the 60-day comment period beginning on the publication date in the **Federal Register**.

The criteria that the Secretary uses to evaluate the waiver in these cases are the same as those described above under section 1138(a)(2)(A) and (B) of the Act and have been incorporated into the regulations at § 486.308(e) and (f).

II. Waiver Request Procedures

In October 1995, we issued a Program Memorandum (Transmittal No. A-95-11) detailing the waiver process and discussing the information hospitals must provide in requesting a waiver. We indicated that upon receipt of a waiver request, we would publish a **Federal Register** notice to solicit public comments, as required by section 1138(a)(2)(D) of the Act.

According to these requirements, we will review the comments received. During the review process, we may consult on an as-needed basis with the Health Resources and Services Administration's Division of Transplantation, the United Network for Organ Sharing, and our regional offices. If necessary, we may request additional clarifying information from the applying hospital or others. We will then make a final determination on the waiver request and notify the hospital and the designated and requested OPOs.

III. Hospital Waiver Request

As permitted by § 486.308(e), the following hospital has requested a waiver to enter into an agreement with a designated OPO other than the OPO designated for the service area in which the hospital is located:

Renown Regional Medical Center,
Reno, Nevada, is requesting a waiver to work with:

Nevada Donor Network, Inc, 2055 E
Sahara Ave., Las Vegas, NV 89104

The Hospital's Designated OPO is:

Donor Network West, 12667 Alcosta
Blvd. #500, San Ramon, CA 94583

IV. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

V. Response to Comments

We will consider all comments we receive by the date specified in the **DATES** section of this document.

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Chyana Woodyard, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Dated: November 17, 2023.

Chyana Woodyard,

Federal Register Liaison, Centers for Medicare & Medicaid Services.

[FR Doc. 2023-25902 Filed 11-22-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS-1818-NC]

Medicare and Medicaid Programs; Announcement of Application From a Hospital Requesting Waiver for Organ Procurement Service Area

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice with request for comment.

SUMMARY: This notice acknowledges the receipt of an application from a hospital that has requested a waiver of statutory requirements that would otherwise require the hospital to enter into an agreement with its designated organ procurement organization (OPO). This notice requests comments from OPOs and the general public for our consideration in determining whether we should grant the requested waiver.

DATES: *Comment date:* To be assured consideration, comments must be received at one of the addresses provided below, by January 23, 2024.

ADDRESSES: In commenting, refer to file code CMS-1818-NC.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to <https://www.regulations.gov>. Follow the "Submit a comment" instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-1818-NC, P.O. Box 8010, Baltimore, MD 21244-8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-1818-NC, Mail Stop C4-26-05, 7500 Security Boulevard, Baltimore, MD 21244-1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Randy Thronset, (410) 786-0131.

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* All comments received before the close of the

comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following website as soon as possible after they have been received: <https://www.regulations.gov>. Follow the search instructions on that website to view public comments. CMS will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the individual will take actions to harm the individual. CMS continues to encourage 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.

I. Background

Organ Procurement Organizations (OPOs) are not-for-profit organizations that are responsible for the procurement, preservation, and transport of organs to transplant centers throughout the country. Qualified OPOs are designated by the Centers for Medicare & Medicaid Services (CMS) to recover or procure organs in CMS-defined exclusive geographic service areas, pursuant to section 371(b)(1) of the Public Health Service Act (42 U.S.C. 273(b)(1)) and our regulations at 42 CFR 486.306. Once an OPO has been designated for an area, hospitals in that area that participate in Medicare and Medicaid are required to work with that OPO in providing organs for transplant, pursuant to section 1138(a)(1)(C) of the Social Security Act (the Act) and our regulations at 42 CFR 482.45.

Section 1138(a)(1)(A)(iii) of the Act provides that a hospital must establish protocols, which require the hospital to notify the designated OPO (for the service area in which it is located) of potential organ donors. Under section 1138(a)(1)(C) of the Act, every hospital must have an agreement only with its designated OPO to identify potential donors.

However, section 1138(a)(2)(A) of the Act provides that a hospital may obtain a waiver of the above requirements from the Secretary of the Department of Health and Human Services (the Secretary) under certain specified conditions. A waiver allows the hospital to have an agreement with an OPO other than the one designated by CMS, if the hospital meets certain conditions specified in section 1138(a)(2)(A) of the Act. In addition, the Secretary may review additional criteria described in

section 1138(a)(2)(B) of the Act to evaluate the hospital's request for a waiver.

Section 1138(a)(2)(A) of the Act states that in granting a waiver, the Secretary must determine that the waiver—(1) is expected to increase organ donations; and (2) will ensure equitable treatment of patients referred for transplants within the service area served by the designated OPO and within the service area served by the OPO with which the hospital seeks to enter into an agreement under the waiver. In making a waiver determination, section 1138(a)(2)(B) of the Act provides that the Secretary may consider, among other factors: (1) cost-effectiveness; (2) improvements in quality; (3) whether there has been any change in a hospital's designated OPO due to the changes made in definitions for metropolitan statistical areas; and (4) the length and continuity of a hospital's relationship with an OPO other than the hospital's designated OPO. Under section 1138(a)(2)(D) of the Act, the Secretary is required to publish a notice of any waiver application received from a hospital within 30 days of receiving the application, and to offer interested parties an opportunity to submit comments during the 60-day comment period beginning on the publication date in the **Federal Register**.

The criteria that the Secretary uses to evaluate the waiver in these cases are the same as those described above under section 1138(a)(2)(A) and (B) of the Act and have been incorporated into the regulations at § 486.308(e) and (f).

II. Waiver Request Procedures

In October 1995, we issued a Program Memorandum (Transmittal No. A-95-11) detailing the waiver process and discussing the information hospitals must provide in requesting a waiver. We indicated that upon receipt of a waiver request, we would publish a **Federal Register** notice to solicit public comments, as required by section 1138(a)(2)(D) of the Act.

According to these requirements, we will review the comments received. During the review process, we may consult on an as-needed basis with the Health Resources and Services Administration's Division of Transplantation, the United Network for Organ Sharing, and our regional offices. If necessary, we may request additional clarifying information from the applying hospital or others. We will then make a final determination on the waiver request and notify the hospital and the designated and requested OPOs.

III. Hospital Waiver Request

As permitted by § 486.308(e), the following hospital has requested a waiver to enter into an agreement with a designated OPO other than the OPO designated for the service area in which the hospital is located:

Renown South Meadows Medical Center, Reno, Nevada, is requesting a waiver to work with:

Nevada Donor Network, Inc, 2055 E Sahara Ave., Las Vegas, NV 89104

The Hospital's Designated OPO is: Donor Network West, 12667 Alcosta Blvd. #500, San Ramon, CA 94583

IV. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

V. Response to Comments

We will consider all comments we receive by the date specified in the **DATES** section of this document.

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Chyana Woodyard who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Dated: November 17, 2023.

Chyana Woodyard,

Federal Register Liaison, Centers for Medicare & Medicaid Services.

[FR Doc. 2023-25903 Filed 11-22-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS 3453-PN]

Medicare Program; Application by the Accreditation Commission for Health Care (ACHC) for Continued CMS Approval of its Home Infusion Therapy (HIT) Accreditation Program

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

ACTION: Notice with request for comment.

SUMMARY: This notice acknowledges the receipt of an application from the Accreditation Commission for Health Care (ACHC) for continued approval by the Centers for Medicare & Medicaid Services (CMS) of ACHC's national accrediting organization program for suppliers providing home infusion therapy (HIT) services and that wish to participate in the Medicare or Medicaid programs. The statute requires that within 60 days of receipt of an organization's complete application, CMS will publish a notice that identifies the national accrediting body making the request, describes the nature of the request, and provides at least a 30-day public comment period.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, by December 26, 2023.

ADDRESSES: In commenting, refer to file code CMS-3453-PN.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to <http://www.regulations.gov>. Follow the "Submit a comment" instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-3453-PN, P.O. Box 8016, Baltimore, MD 21244-8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-3453-PN, Mail Stop C4-26-05, 7500 Security Boulevard, Baltimore, MD 21244-1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Shannon Freeland, (410) 786-4348.

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all 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>. Follow the search

instructions on that website to view public comments. We will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the individual will take actions to harm the individual. We continue to encourage 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.

I. Background

Home infusion therapy (HIT) is a treatment option for Medicare beneficiaries with a wide range of acute and chronic conditions. Section 5012 of the 21st Century Cures Act (Pub. L. 114-255, enacted December 13, 2016) added section 1861(iii) to the Social Security Act (the Act), establishing a new Medicare benefit for HIT services. Section 1861(iii)(1) of the Act defines "home infusion therapy" as professional services, including nursing services; training and education not otherwise covered under the Durable Medical Equipment (DME) benefit; remote monitoring; and other monitoring services. HIT must be furnished by a qualified HIT supplier and furnished in the individual's home. The individual must:

- Be under the care of an applicable provider (that is, physician, nurse practitioner, or physician assistant); and
- Have a plan of care established and periodically reviewed by a physician in coordination with the furnishing of home infusion drugs under Part B, that prescribes the type, amount, and duration of infusion therapy services that are to be furnished.

Section 1861(iii)(3)(D)(i)(III) of the Act requires that a qualified HIT supplier be accredited by an accrediting organization (AO) designated by the Secretary in accordance with section 1834(u)(5) of the Act. Section 1834(u)(5)(A) of the Act identifies factors for designating AOs and in reviewing and modifying the list of designated AOs. These statutory factors are as follows:

- The ability of the organization to conduct timely reviews of accreditation applications.
- The ability of the organization to take into account the capacities of suppliers located in a rural area (as defined in section 1886(d)(2)(D) of the Act).
- Whether the organization has established reasonable fees to be charged to suppliers applying for accreditation.

- Such other factors as the Secretary determines appropriate.

Section 1834(u)(5)(B) of the Act requires the Secretary to designate AOs to accredit HIT suppliers furnishing HIT not later than January 1, 2021. Section 1861(iii)(3)(D)(i)(III) of the Act requires a "qualified home infusion therapy supplier" to be accredited by a CMS-approved AO, pursuant to section 1834(u)(5) of the Act.

On March 1, 2019, we published a solicitation notice entitled, "Medicare Program; Solicitation of Independent Accrediting Organizations to Participate in the Home Infusion Therapy Supplier Accreditation Program" (84 FR 7057). This notice informed national AOs that accredit HIT suppliers of an opportunity to submit applications to participate in the HIT supplier accreditation program. We stated that complete applications would be considered for the January 1, 2021 designation deadline if received by February 1, 2020. Regulations for the approval and oversight of AOs for HIT organizations are located at 42 CFR part 488, subpart L. The requirements for HIT suppliers are located at 42 CFR part 486, subpart I.

II. Approval of Deeming Organization

Section 1834(u)(5) of the Act and regulations at 42 CFR 488.1010 require that our findings concerning review and approval of a national accrediting organization's requirements consider, among other factors, the applying accrediting organization's requirements for accreditation; survey procedures; resources for conducting required surveys; capacity to furnish information for use in enforcement activities; monitoring procedures for provider entities found not in compliance with the conditions or requirements; and ability to provide CMS with the necessary data.

Our rules at 42 CFR 488.1020(a) require that we publish, after receipt of an organization's complete application, a notice that identifies the national accrediting body making the request, describes the nature of the request, and provides at least a 30-day public comment period. Pursuant to our rules at 42 CFR 488.1010(d), we have 210 days from the receipt of a complete application to publish notice of approval or denial of the application.

The purpose of this proposed notice is to inform the public of the CMS-3453-PN request for CMS' continued recognition of its HIT accreditation program. This notice also solicits public comment on whether ACHC's requirements meet or exceed the Medicare requirements of participation for HIT services.

III. Evaluation of Deeming Authority Request

In the November 25, 2019 **Federal Register**, we published ACHC's initial application for recognition as an accreditation organization for HIT (84 FR 64904). On April 24, 2020, we published notification of their approval as such an organization, effective April 23, 2020 through April 23, 2024 (84 FR 23046). ACHC has since submitted all the necessary materials to enable us to make a determination concerning its request for continued recognition of its HIT accreditation program. This application was determined to be complete on September 26, 2023. Under section 1834(u)(5) of the Act and 42 CFR 488.1010 (Application and re-application procedures for national home infusion therapy accrediting organizations), our review and evaluation of ACHC will be conducted in accordance with, but not necessarily limited to, the following factors:

- The equivalency of ACHC's standards for HIT as compared with CMS' HIT requirements for participation in the Medicare program.

- ACHC's survey process to determine the following:

- ++ The composition of the survey team, surveyor qualifications, and the ability of the organization to provide continuing surveyor training.

- ++ The comparability of ACHC's to CMS standards and processes, including survey frequency, and the ability to investigate and respond appropriately to complaints against accredited facilities.

- ++ ACHC's processes and procedures for monitoring a HIT supplier found out of compliance with ACHC's program requirements.

- ++ ACHC's capacity to report deficiencies to the surveyed supplier and respond to the supplier's plan of correction in a timely manner.

- ++ ACHC's capacity to provide CMS with electronic data and reports necessary for effective assessment and interpretation of the organization's survey process.

- ++ The adequacy of ACHC's staff and other resources, and its financial viability.

- ++ ACHC's capacity to adequately fund required surveys.

- ++ ACHC's policies with respect to whether surveys are announced or unannounced, to assure that surveys are unannounced.

- ++ ACHC's agreement to provide CMS with a copy of the most current accreditation survey together with any other information related to the survey as CMS may require (including corrective action plans).

- ++ ACHC's agreement or policies for voluntary and involuntary termination of suppliers.

- ++ ACHC agreement or policies for voluntary and involuntary termination of the HIT AO program.

- ++ ACHC's policies and procedures to avoid conflicts of interest, including the appearance of conflicts of interest, involving individuals who conduct surveys or participate in accreditation decisions.

IV. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping, or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

V. Response to Comments

Because of the large number of public comments, we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Chyana Woodyard, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Dated: November 17, 2023.

Chyana Woodyard,

Federal Register Liaison, Centers for Medicare & Medicaid Services.

[FR Doc. 2023-25906 Filed 11-22-23; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: Document Identifiers: CMS-40B, CMS-10102, CMS-10866, and CMS-R-21]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

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

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by December 26, 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.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: <https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing>.

FOR FURTHER INFORMATION CONTACT:

William Parham at (410) 786-4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term “collection of information” is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Application for Enrollment in Medicare Part B (Medical Insurance); *Use:* Medicare Part B is a voluntary program, financed from premium payments by enrollees, together with contributions from funds appropriated by the Federal government. The Social Security Act (the Act) at section 226(a) provides that individuals who are age 65 or older and eligible for, or entitled to, Social Security or Railroad Retirement Board (RRB) benefits shall be entitled to premium-free Part A upon filing an application for such benefits. Section 1836 of the Act permits individuals with Medicare premium-free Part A to enroll in Part B.

The CMS-40B provides the necessary information to determine eligibility and to process the beneficiary's request for enrollment for Medicare Part B coverage. This form is only used for enrollment by beneficiaries who already have Part A, but not Part B. Form CMS-40B is completed by the person with Medicare or occasionally by an SSA representative using information provided by the Medicare enrollee during an in-person interview. The form is owned by CMS, but not completed by CMS staff. SSA processes Medicare enrollments on behalf of CMS. *Form Number:* CMS-40B (OMB control number: 0938-1230); *Frequency:* Once; *Affected Public:* Individuals or households; *Number of Respondents:*

1,132,000; *Number of Responses:* 1,132,000; *Total Annual Hours:* 192,440. (For policy questions regarding this collection, contact Candace Carter at 410-786-8466.)

2. *Type of Information Collection Request:* Extension without change of currently approved collection; *Title of Information Collection:* National Implementation of the Hospital Consumer Assessment of Healthcare Providers and Systems (HCAHPS) Survey; *Use:* The HCAHPS (Hospital Consumer Assessment of Healthcare Providers and Systems) Survey is the first national, standardized, publicly reported survey of patients' perspectives of their hospital care. HCAHPS is a 29-item survey instrument and data collection methodology for measuring patients' perceptions of their hospital experience. Since 2008, HCAHPS has allowed valid comparisons to be made across hospitals locally, regionally and nationally.

Three broad goals have shaped HCAHPS. First, the standardized survey and implementation protocol produce data that allow objective and meaningful comparisons of hospitals on topics that are important to consumers. Second, public reporting of HCAHPS results creates new incentives for hospitals to improve quality of care. Third, public reporting enhances accountability in health care by increasing transparency of the quality of hospital care provided in return for the public investment. *Form Number:* CMS-10102 (OMB control number: 0938-0981); *Frequency:* Occasionally; *Affected Public:* Private Sector, Business or other for-profits, Not-for-profits institutions; *Number of Respondents:* 2,304,450; *Number of Responses:* 2,304,450; *Total Annual Hours:* 282,366. (For policy questions regarding this collection, contact William G. Lehrman at 410-786-1037.)

3. *Type of Information Collection Request:* New collection (Request for a new OMB control number); *Title of Information Collection:* CMS Health Equity Award—Call for Nominations; *Use:* CMS Office of Minority Health (OMH) is going to announce a call for nominations for the 2024 CMS Health Equity Award. This award will recognize organizations who demonstrate they have advanced health equity by designing, implementing, and operationalizing policies and programs that support health for all the people served by our programs, reducing avoidable differences in health outcomes experienced by people who are underserved, and provided the care and support that CMS enrollees need to thrive.

The goals of the award are to encourage organizations to identify and address their health disparities, to disseminate best practices, and to show that progress is possible by having a results-oriented focus. By identifying organizations who are successfully closing gaps and reducing disparities, CMS can show our stakeholders how health equity work can be initiated, targeted, measured, and successfully reduce disparities among communities nationwide.

CMS Representatives collect Company Name, Point of Contact Information (email, phone# & name) along with information from the organizations regarding their programs to improve the health quality, outcomes, and access to care for the communities that they serve. The CMS selection committee uses a scoring rubric to score the applicants on demonstrated measurable results in reducing a disparity in one or more of the CMS priority populations. *Form Number:* CMS-10866 (OMB control number: 0938-NEW); *Frequency:* Annually; *Affected Public:* Federal Government, Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 50; *Number of Responses:* 50; *Total Annual Hours:* 100. (For policy questions regarding this collection, contact Ashley Peddicord-Austin at 410-786-0757.)

4. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Withholding Medicare Payments to Recover Medicaid Overpayments and Supporting Regulations in 42 CFR 447.31; *Use:* Certain Medicaid providers that are subject to offsets for the collection of Medicaid overpayments may terminate or substantially reduce their participation in Medicaid, leaving the state Medicaid agency unable to recover the amounts due. Recovery procedures allow for determining the amount of overpayments and offsetting the overpayments by withholding the provider's Medicare payments. To effectuate the withholding, the state agency must provide their respective CMS regional office with certain documentation that identifies the provider and the Medicaid overpayment amount. The agency must also demonstrate that the provider was notified of the overpayment and that demand for the overpayment was made. An opportunity to appeal the overpayment determination must be afforded to the provider by the Medicaid state agency. Lastly, Medicaid state agencies must notify CMS when to terminate the withholding; *Form*

Number: CMS–R–21 (OMB control number: 0938–0287); Frequency: Occasionally; Affected Public: State, Local, or Tribal Governments; Number of Respondents: 54; Total Annual Responses: 27; Total Annual Hours: 81. (For policy questions regarding this collection contact Stuart Goldstein at 410–786–0694.)

Dated: November 20, 2023.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023–25976 Filed 11–22–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–1816–NC]

Medicare and Medicaid Programs; Announcement of Application From a Hospital Requesting Waiver for Organ Procurement Service Area

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice with request for comment.

SUMMARY: This notice acknowledges the receipt of an application from a hospital that has requested a waiver of statutory requirements that would otherwise require the hospital to enter into an agreement with its designated organ procurement organization (OPO). This notice requests comments from OPOs and the general public for our consideration in determining whether we should grant the requested waiver.

DATES: *Comment date:* To be assured consideration, comments must be received at one of the addresses provided below, by January 23, 2024.

ADDRESSES: In commenting, refer to file code CMS–1816–NC.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to <https://www.regulations.gov>. Follow the “Submit a comment” instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1816–NC, P.O. Box 8010, Baltimore, MD 21244–8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1816–NC, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Randy Thronset, (410) 786–0131.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following website as soon as possible after they have been received: <https://www.regulations.gov>. Follow the search instructions on that website to view public comments. CMS will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the individual will take actions to harm the individual. CMS continues to encourage 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.

I. Background

Organ Procurement Organizations (OPOs) are not-for-profit organizations that are responsible for the procurement, preservation, and transport of organs to transplant centers throughout the country. Qualified OPOs are designated by the Centers for Medicare & Medicaid Services (CMS) to recover or procure organs in CMS-defined exclusive geographic service areas, pursuant to section 371(b)(1) of the Public Health Service Act (42 U.S.C. 273(b)(1)) and our regulations at 42 CFR 486.306. Once an OPO has been designated for an area, hospitals in that area that participate in Medicare and Medicaid are required to work with that OPO in providing organs for transplant, pursuant to section 1138(a)(1)(C) of the Social Security Act (the Act) and our regulations at 42 CFR 482.45.

Section 1138(a)(1)(A)(iii) of the Act provides that a hospital must establish protocols, which require the hospital to

notify the designated OPO (for the service area in which it is located) of potential organ donors. Under section 1138(a)(1)(C) of the Act, every hospital must have an agreement only with its designated OPO to identify potential donors.

However, section 1138(a)(2)(A) of the Act provides that a hospital may obtain a waiver of the above requirements from the Secretary of the Department of Health and Human Services (the Secretary) under certain specified conditions. A waiver allows the hospital to have an agreement with an OPO other than the one designated by CMS, if the hospital meets certain conditions specified in section 1138(a)(2)(A) of the Act. In addition, the Secretary may review additional criteria described in section 1138(a)(2)(B) of the Act to evaluate the hospital’s request for a waiver.

Section 1138(a)(2)(A) of the Act states that in granting a waiver, the Secretary must determine that the waiver—(1) is expected to increase organ donations; and (2) will ensure equitable treatment of patients referred for transplants within the service area served by the designated OPO and within the service area served by the OPO with which the hospital seeks to enter into an agreement under the waiver. In making a waiver determination, section 1138(a)(2)(B) of the Act provides that the Secretary may consider, among other factors: (1) cost-effectiveness; (2) improvements in quality; (3) whether there has been any change in a hospital’s designated OPO due to the changes made in definitions for metropolitan statistical areas; and (4) the length and continuity of a hospital’s relationship with an OPO other than the hospital’s designated OPO. Under section 1138(a)(2)(D) of the Act, the Secretary is required to publish a notice of any waiver application received from a hospital within 30 days of receiving the application, and to offer interested parties an opportunity to submit comments during the 60-day comment period beginning on the publication date in the **Federal Register**.

The criteria that the Secretary uses to evaluate the waiver in these cases are the same as those described above under section 1138(a)(2)(A) and (B) of the Act and have been incorporated into the regulations at § 486.308(e) and (f).

II. Waiver Request Procedures

In October 1995, we issued a Program Memorandum (Transmittal No. A–95–11) detailing the waiver process and discussing the information hospitals must provide in requesting a waiver. We indicated that upon receipt of a waiver

request, we would publish a **Federal Register** notice to solicit public comments, as required by section 1138(a)(2)(D) of the Act.

According to these requirements, we will review the comments received. During the review process, we may consult on an as-needed basis with the Health Resources and Services Administration's Division of Transplantation, the United Network for Organ Sharing, and our regional offices. If necessary, we may request additional clarifying information from the applying hospital or others. We will then make a final determination on the waiver request and notify the hospital and the designated and requested OPOs.

III. Hospital Waiver Request

As permitted by § 486.308(e), the following hospital has requested a waiver to enter into an agreement with a designated OPO other than the OPO designated for the service area in which the hospital is located:

Renown South Meadows Medical Center d/b/a Renown Rehabilitation Hospital, Reno, Nevada, is requesting a waiver to work with:

Nevada Donor Network, Inc., 2055 E Sahara Ave., Las Vegas, NV 89104

The Hospital's Designated OPO is: Donor Network West, 12667 Alcosta Blvd. #500, San Ramon, CA 94583

IV. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

V. Response to Comments

We will consider all comments we receive by the date specified in the **DATES** section of this document.

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Chyana Woodyard, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Dated: November 17, 2023.

Chyana Woodyard,

Federal Register Liaison, Centers for Medicare & Medicaid Services.

[FR Doc. 2023-25904 Filed 11-22-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2020-D-1370]

COVID-19: Developing Drugs and Biological Products for Treatment or Prevention; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance for industry entitled "COVID-19: Developing Drugs and Biological Products for Treatment or Prevention." The purpose of this guidance is to assist sponsors in the clinical development of drugs and biological products for the treatment or prevention of COVID-19. This guidance describes FDA's current recommendations for phase 2 and phase 3 trials with a focus on trial population, trial design, efficacy endpoints, safety considerations, and statistical considerations. This guidance supersedes the guidance of the same name initially issued on May 19, 2020, and reissued on February 22, 2021.

DATES: The announcement of the guidance is published in the **Federal Register** on November 24, 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-2020-D-1370 for "COVID-19: Developing Drugs and Biological Products for Treatment or Prevention." 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 this 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; or the 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 requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Maria Clary, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 4638, Silver Spring, MD 20993–0002, 240–402–8615; or Anne Taylor, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a final guidance for industry entitled “COVID–19: Developing Drugs and Biological Products for Treatment or Prevention.” This guidance provides FDA’s current recommendations for phase 2 and phase 3 trials with a focus on trial population, trial design, efficacy endpoints, safety considerations, and statistical considerations. The development of drugs for the treatment of Long COVID–19, preventative vaccines, and convalescent plasma are not within the scope of this guidance as these development programs raise different and additional considerations.

This guidance supersedes the guidance “COVID–19: Developing Drugs and Biological Products for Treatment or Prevention,” which was initially issued on May 19, 2020 (85 FR 29949),

and subsequently revised and reissued on February 22, 2021. This guidance was published to support public health efforts following a declaration, under section 319 of the Public Health Service Act (PHS Act) (42 U.S.C. 247d), by the Secretary of Health and Human Services of a public health emergency related to COVID–19. In the **Federal Register** of March 13, 2023 (88 FR 15417) FDA listed certain guidance documents that FDA was revising to continue in effect for 180 days after the expiration of the COVID–19 PHE declaration, during which time FDA planned to further revise the guidances. The February 2021 guidance on development of drugs and biological products for treatment or prevention of COVID–19 is included in this list.

FDA is issuing this guidance for immediate implementation in accordance with our good guidance practices regulation (§ 10.115(g)(3) (21 CFR 10.115(g)(3))) without initially seeking prior comment because the Agency has determined that prior public participation is not feasible or appropriate (see § 10.115(g)(2) and section 701(h)(1)(C)(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 371(h)(1)(C)(i))). Specifically, we are not seeking prior comment because although the COVID–19-related public health emergency declared under section 319 of the PHS Act has expired, SARS–CoV–2 continues to circulate, COVID–19 remains a serious health risk for some individuals, and there is a need to ensure that sponsors are aware of FDA’s recommendations on the development of drugs and biological products for treatment and prevention of COVID–19. This guidance document is being implemented immediately, but it remains subject to comment in accordance with the Agency’s good guidance practices.

FDA considered comments received on the guidance and the Agency’s experience with COVID–19 drug development when making revisions. Changes in this final guidance include the following: revisions to remove reference to the COVID–19 public health emergency and updates to the recommendations on trial population, trial design, efficacy endpoints, safety considerations, and statistical considerations to reflect the current scientific knowledge and state of the COVID–19 pandemic. In addition, editorial changes were made to improve clarity.

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 “COVID–19:

Developing Drugs and Biological Products for Treatment or Prevention.” It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. 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 21 CFR parts 312 and 320 have been approved under OMB control number 0910–0014. The collections of information in 21 CFR part 314 have been approved under OMB control number 0910–0001. The collections of information in 21 CFR parts 50 and 56 have been approved under OMB control number 0910–0130. The collections of information in 21 CFR part 601 have been approved under OMB control number 0910–0338. The collections of information in FDA’s final guidance for clinical trial sponsors entitled “Establishment and Operation of Clinical Trial Data Monitoring Committees” have been approved under OMB control number 0910–0581. The collections of information in 42 CFR part 11 have been approved under OMB control number 0925–0586.

III. Electronic Access

Persons with access to the internet may obtain the guidance at <https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs>, <https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances>, <https://www.fda.gov/regulatory-information/search-fda-guidance-documents>, or <https://www.regulations.gov>.

Dated: November 20, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–25952 Filed 11–22–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–D–2925]

Defining Durations of Use for Approved Medically Important Antimicrobial Drugs Fed to Food-Producing Animals; Draft Guidance for Industry; Extension of the Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability; extension of the comment period.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is extending the comment period for the notice of availability that published in the **Federal Register** of September 26, 2023. In that notice, FDA requested comments on the draft guidance for industry (GFI) #273 entitled “Defining Durations of Use for Approved Medically Important Antimicrobial Drugs Fed to Food-Producing Animals.” The Agency is taking this action in response to requests for an extension to allow interested persons additional time to develop and submit comments.

DATES: FDA is extending the comment period on the notice of availability published September 26, 2023 (88 FR 66009). Submit either electronic or written comments on the draft guidance by January 5, 2024, to ensure that the Agency considers your comments on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket No. FDA–2023–D–2925 for “Defining Durations of Use for Approved Medically Important Antimicrobial Drugs Fed to Food-Producing Animals.” 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.

FOR FURTHER INFORMATION CONTACT: John Mussman, Center for Veterinary Medicine (HFV–130), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–402–0589, john.mussman@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of September 26, 2023, FDA published a notice announcing the availability of a draft guidance for industry (GFI) #273 entitled “Defining Durations of Use for Approved Medically Important Antimicrobial Drugs Fed to Food-Producing Animals.” Interested persons were originally given until December 26, 2023, to comment on the draft guidance.

The Agency received requests for extension of the comment period for the draft guidance. After considering the requests, and the fact that the original comment period is scheduled to close on December 26, 2023, FDA has decided to extend the comment period for the draft guidance until January 5, 2024. The Agency believes that this extension allows adequate time for interested persons to submit comments to ensure that FDA can consider the comments before it begins work on the final version of the guidance.

Dated: November 20, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–25962 Filed 11–22–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2008-D-0053]

Communications From Firms to Health Care Providers Regarding Scientific Information on Unapproved Uses of Approved/Cleared Medical Products: Questions and Answers; Revised Draft Guidance for Industry; Availability; Agency Information Collection Activities; Proposed Collection; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is extending the comment period for the notice of availability that published in the **Federal Register** of October 24, 2023. In that notice, FDA requested comments on the revised draft guidance for industry entitled, “Communications From Firms to Health Care Providers Regarding Scientific Information on Unapproved Uses of Approved/Cleared Medical Products: Questions and Answers.” The Agency is taking this action in response to requests for an extension to allow interested persons additional time to submit comments.

DATES: FDA is extending the comment period on the notice published on October 24, 2023 (88 FR 73031). Submit either electronic or written comments by January 5, 2024, to ensure that the Agency considers your comments on this revised 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-2008-D-0053 for “Communications From Firms to Health Care Providers Regarding Scientific Information on Unapproved Uses of Approved/Cleared Medical Products: Questions and Answers.” 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.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked

as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

FOR FURTHER INFORMATION CONTACT:

With regard to the draft guidance: Kathleen David, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 3203, Silver Spring, MD 20993-0002, 301-796-1200; Anne Taylor, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993-0002, 240-402-7911; Ana Loloei, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5504, Silver Spring, MD 20993-0002, 301-796-8774; Office of Surveillance and Compliance, Center for Veterinary Medicine, Food and Drug Administration, 7500 Standish Pl. (HFV-6), Rockville, MD 20855, 240-402-7082; Julie Finegan, Office of Policy, Office of the Commissioner, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 4252, Silver Spring, MD 20993-0002, 301-827-4830.

With regard to the proposed collection of information: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 11601 Landsdown St., North Bethesda, MD 20852, 301-796-5733, PRStaff@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of October 24, 2023, FDA published a notice announcing the availability of a revised draft guidance for industry entitled, “Communications From Firms to Health Care Providers Regarding Scientific Information on Unapproved Uses of Approved/Cleared Medical Products: Questions and Answers.” Interested persons were originally given until December 26, 2023, to comment on the revised draft guidance.

The Agency received requests for extension of the comment period for the revised draft guidance. After considering the requests, and in light of the fact that the original comment period is scheduled to close on December 26, 2023, FDA has decided to extend the comment period for the revised draft guidance until January 5, 2024. The Agency believes that this extension allows adequate time for interested persons to submit comments to ensure that FDA can consider the comments before it begins work on the final version of the guidance.

Dated: November 20, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023-25969 Filed 11-22-23; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the Presidential Advisory Council on HIV/AIDS

AGENCY: Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice of a virtual meeting.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Service is hereby giving notice that the Presidential Advisory Council on HIV/AIDS (PACHA or the Council) will convene the 79th full council meeting utilizing virtual technologies on Wednesday, December 6, 2023. The meeting will be open to the public and there will be a public comment session during the meeting; pre-registration is required to provide public comment. To pre-register to provide public comment, please send an email to PACHA@hhs.gov and include your name, organization, and title by close of business Monday, November 27, 2023. If you decide you would like to provide public comment but do not pre-register, you may submit your written statement by emailing PACHA@hhs.gov by close of business Wednesday, December 13, 2023. The meeting agenda will be posted on the PACHA page on [HIV.gov](https://www.hiv.gov/federal-response/pacha/about-pacha) at <https://www.hiv.gov/federal-response/pacha/about-pacha> prior to the meeting.

DATES: The meeting will be held on Wednesday, December 6 from approximately 11:00 a.m.–06:00 p.m. (ET).

ADDRESSES: To attend the meeting virtually, please visit www.hhs.gov/live.

FOR FURTHER INFORMATION CONTACT: Ms. Caroline Talev, MPA, Senior Management Analyst, at PACHA@hhs.gov or Caroline.Talev@hhs.gov or (202) 795-7622. Additional information can be obtained by accessing the Council's page on the [HIV.gov](https://www.hiv.gov) site at www.hiv.gov/pacha.

SUPPLEMENTARY INFORMATION: PACHA was established by Executive Order 12963, dated June 14, 1995, as amended by Executive Order 13009, dated June 14, 1996 and is currently operating under the authority given in Executive Order 14048, dated September 30, 2021. The Council was established to provide advice, information, and recommendations to the Secretary regarding programs and policies intended to promote effective HIV diagnosis, treatment, prevention, and quality care services. The functions of the Council are solely advisory in nature. The Council consists of not more than 35 members. Council members are selected from prominent community leaders with particular expertise in, or knowledge of, matters concerning HIV and AIDS, public health, global health, population health, philanthropy, marketing or business, as well as other national leaders held in high esteem from other sectors of society. PACHA selections also include persons with lived HIV experience and racial/ethnic and sexual and gender minority persons disproportionately affected by HIV. Council members are appointed by the Secretary.

Dated: October 31, 2023.

B. Kaye Hayes,

Deputy Assistant Secretary for Infectious Disease, Director, Office of Infectious Disease and HIV/AIDS Policy, Executive Director, Presidential Advisory Council on HIV/AIDS, Office of the Assistant Secretary for Health, Department of Health and Human Services.

[FR Doc. 2023-25877 Filed 11-22-23; 8:45 am]

BILLING CODE 4150-43-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Center for Advancing Translational Sciences Special Emphasis Panel, Preclinical Proof of Concept Studies for Rare Diseases (R21) January 24, 2024, 9:00 a.m. to January 25, 2024, 5:00 p.m., National Institutes of Health, National Center for Advancing Translational

Sciences, 6701 Democracy Boulevard, Bethesda, MD, 20892 which was published in the **Federal Register** on November 14, 2023, FR DOC 2023-25070, 88 FR 78052.

The meeting is being rescheduled due to panel member availability. The meeting will be held on February 1, 2024, 9:00 a.m. to February 2, 2024, 5:00 p.m. This meeting will be held virtually. The meeting is closed to the public.

Dated: November 17, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-25885 Filed 11-22-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Program Project Applications (P01 Clinical Trial Not Allowed).

Date: December 20, 2023.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 903 South 4th Street, RML 31/3118, Hamilton, MT 59840 (Virtual Meeting).

Contact Person: Kristin L. McNally, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 903 South 4th Street, RML 31/3118, Hamilton, MT 59840 mcnallyk@niaid.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: November 17, 2023.

David W. Freeman,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–25940 Filed 11–22–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Avenir Award Program for Genetics or Epigenetics of Substance Use Disorders.

Date: February 13–14, 2024.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ipolia R. Ramadan, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, Bethesda, MD 20892, (301) 827–4471, ramadanir@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: November 17, 2023.

David W. Freeman,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–25938 Filed 11–22–23; 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; Topics in Drug Development and Molecular Pharmacology—A.

Date: December 5, 2023.

Time: 3:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Bidyottam Mittra, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, Bethesda, MD 20894, (301) 435–4057, bidyottam.mittra@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 17, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–25884 Filed 11–22–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Microbiology, Infectious Diseases and AIDS Initial Review Group; Acquired Immunodeficiency Syndrome Research Study Section Acquired Immunodeficiency Syndrome Research Study Section (AIDS).

Date: December 13, 2023.

Time: 10:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G21B, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Robert C. Unfer, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G21B, Bethesda, MD 20852, (240) 669–5035, robert.unfer@nih.gov. (Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: November 17, 2023.

David W. Freeman,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–25939 Filed 11–22–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which

would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; NHLBI Contract Review.

Date: December 13, 2023.

Time: 11:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Michael P. Reilly, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 208–Z, Bethesda, MD 20892, (301) 827–7975, reillymp@nhlbi.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. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: November 20, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–25937 Filed 11–22–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–0361.

Proposed Project: National Substance Use and Mental Health Services Survey (N–SUMHSS) (OMB No. 0930–0386)—Revision

Under section 505 of the Public Health Service Act (42 U.S.C. 290aa–4), SAMHSA is required to conduct annual collection of data on substance use and mental health. Selected information collected from the N–SUMHSS is also published on SAMHSA's *FindTreatment.gov* for persons seeking treatment for mental and substance use disorders in the United States.

FindTreatment.gov is authorized by the 21st Century Cures Act (Pub. L. 114–255, section 9006; 42 U.S.C. 290bb–36d).

In 2021, SAMHSA combined the National Survey of Substance Abuse Treatment Services (N–SSATS) and the National Mental Health Services Survey (N–MHSS) into the N–SUMHSS to reduce the burden on facilities offering both substance use and mental health services, optimize government resources to collect data, and enhance the quality of data collected on the treatment facilities.

The N–SUMHSS is the most comprehensive national source of data on substance use and mental health treatment facilities. On an annual basis, the N–SUMHSS collects information on the facility location, characteristics, and utilization of substance use and mental health treatment services. The survey also collects client counts on individuals receiving services at these facilities. There is an increasing need to collect and maintain data on current and accurate numbers of clients in treatment at the local level for communities to assess capacity and estimate resource requirements. This information on substance use and mental health services has assisted with communities to better respond to life changing events, (*i.e.* hurricane) and plan for service demands in the event of a natural disaster (*i.e.* earthquakes).

SAMHSA also maintains the Inventory of Substance Use and Mental Health Treatment Facilities (I–TF) (previously known as the Inventory of Behavioral Health Services [I–BHS]). The I–TF is a master list of all known substance use and mental health treatment facilities in the United States. It also serves as the universe population for the N–SUMHSS.

SAMHSA is requesting OMB approval of revisions to the N–SUMHSS and I–TF related data collections, to include changes to the following instruments:

N–SUMHSS Questionnaire

- *Q1a:* added to clarify if facilities reported providing mental health treatment services in Q1 also provide substance use treatment services, to help respondents understand how to respond accurately and ensure appropriate survey module(s) are completed.

- *A1a:* add the word “health” to clarify and improve survey item accuracy.

- *A8a. and QA9:* add “for opioid use disorder” and “for alcohol use disorder” in the existing question to clarify clients using MAT for specific substance use

disorder and to improve survey item accuracy.

- *B7a:* add the following new survey response options to the existing question to improve survey response option comprehensiveness:

- Add “Prochlorperazine” to the existing list of first-generation antipsychotics.

- Add “Inhalation” and “Don’t Know” to the existing route of administration options for first-generation antipsychotics.

- Add new response options of “Sublingual,” “Transdermal,” and “Don’t Know” to the existing route of administration options for second-generation antipsychotics.

- Add “Other first-generation antipsychotic #1 Specify, #2 Specify, and #3 Specify” and “Other second-generation antipsychotic #1 Specify, #2 Specify, and #3 Specify” to the existing list of first-generation and second-generation antipsychotics.

- *B11:* add the word “currently” to the question to improve survey item accuracy. Change the word “persons” to “clients” to increase survey item consistency between survey modules.

- *B19:* update the full title and add the acronyms “CSBG” and “MHBG” of the two existing Federal grants to improve survey item accuracy. Add “other” to clarify and help respondents better comprehend what is being asked.

- *C6a., C7a., C8., C8a:* Update the locator reference from the “Behavioral Health Treatment Services Locator” to *FindTreatment.gov* and the reference years associated with reporting client count data.

N–SUMHSS Between Cycle Questionnaire

Since the Mini N–SUMHSS is a subset of the N–SUMHSS, all proposed changes to the N–SUMHSS (listed above) apply to the Mini N–SUMHSS.

N–SUMHSS VA Supplement

SAMHSA proposes a new N–SUMHSS VA Supplement to collect information annually on suicide-related services, standardized suicide screening and evaluation tools, clients at high risk of suicide, referrals and follow-ups from VA substance use and mental health facilities. VA facilities providing only substance use treatment service will answer 7 questions (Attachment C). VA facilities providing only mental health treatment service will answer 12 questions (Attachment D). VA facilities providing both substance use and mental health treatment services will answer 19 questions.

N-SUMHSS EHR Supplement

SAMHSA proposes a new N-SUMHSS EHR Supplement to collect information once from facilities providing substance use and/or mental health treatment services on health IT adoption, use, and interoperability. There are 15 questions in the proposed new N-SUMHSS EHR Supplement.

I-TF Facility Registration Application Form

- Update the locator reference to “*FindTreatment.gov*,” and the reference years associated with reporting client count data.
- Replace existing “substance abuse” term with a clinically accurate, non-stigmatizing language for “substance use,” throughout the form, to help reduce stigma and support treatment for substance use disorders. This revision aligns with the current edition of *The Diagnostic and Statistical Manual of Mental Disorders* (5th ed., American Psychiatric Association, 2013), where

“abuse” has been replaced by “use.” This revision also aligns with the White House Office of National Drug Control Policy 2017 Memo on “Changing Federal Terminology regarding Substance Use and Substance Use Disorders.”

Augmentation Screener Questionnaire

- Replace existing “substance abuse” term with “substance use.”
- Update the locator reference to “*FindTreatment.gov*.”
- Update the reference of “Mental Health Survey” and “Substance Abuse Survey” to “N-SUMHSS” to improve accuracy.
- Revise the statute citation to be more specific on the level of protection of the information collected from the Augmentation Screener Questionnaire.
- Update the OMB number.

I-TF Online State Add/Update Form

- Update the reference of I-BHS to I-TF throughout the form.

- Update the new SAMHSA logo design throughout the form.
- Replace existing “substance abuse” term with “substance use.”
- Add “Intake 1a and Intake 2a” fields to the “Facility Information” section and add “Director’s Email” field to the “Director Information” section, to capture more comprehensive information about the new facilities and facility directors.
- Move existing data fields “State Approved,” “State Reviewed,” “National Directory Eligible,” and “Facility Surveys” to create a new section “Directory/Locator Eligibility” and add a new “Date Reviewed” field to improve response efficiency and accuracy.
- Move existing “Old-ITF ID” and add “Parent I-TF ID” to the “Other Facilities Details” section to improve response efficiency.

The estimated annual burden for the N-SUMHSS and I-TF activities is as follows:

Information collection title	Number of respondents	Responses per respondent	Total responses	Hours per response (in hours)	Total burden hours	Average hourly wage	Total annual cost
N-SUMHSS Questionnaire (either SU or MH)	32,000	1	32,000	0.83	26,560	\$48.72	\$1,294,003
N-SUMHSS Questionnaire (both SU and MH)	5,000	1	5,000	1.28	6,400	48.72	311,808
N-SUMHSS Between Cycle Questionnaire	1,500	1	1,500	0.75	1,125	48.72	54,810
N-SUMHSS VA Supplement	800	1	800	0.05	40	48.72	1,949
N-SUMHSS EHR Supplement *	37,000	1	37,000	0.12	4,440	48.72	216,317
I-TF Facility Registration Application Form	1,500	1	1,500	0.08	120	26.71	3,205
Augmentation Screener Questionnaire	1,300	1	1,300	0.08	104	26.71	2,778
I-TF Online State Add Update Form	61	50	3,050	0.08	244	26.71	6,517
Totals			82,150		39,033		1,891,387

* The N-SUMHSS EHR Supplement will be administered one time during the three-year period.

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.

Alicia Broadus,

Public Health Advisor.

[FR Doc. 2023-25918 Filed 11-22-23; 8:45 am]

BILLING CODE 4162-20-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Substance Abuse and Mental Health Services Administration****Agency Information Collection Activities: Submission for OMB Review; Comment Request**

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U. S. C. chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276-0361.

Project: GLS State/Tribal Evaluation of the Garrett Lee Smith (GLS) State/Tribal Youth Suicide Prevention and Early Intervention Program Reinstatement

The Substance Abuse and Mental Health Services Administration (SAMHSA) Center for Mental Health Services (CMHS) is requesting clearance for the reinstatement of data collection associated with the previously approved evaluation of the Garrett Lee Smith (GLS) Youth Suicide Prevention and Early Intervention Program (GLS Suicide Prevention Program). The GLS State/Tribal Evaluation is a proposed redesign of the previous evaluation (OMB No. 0930-0286; Expiration, March 31, 2019) that builds on prior published GLS evaluation proximal and

distal outcomes and aggregate findings from program activities (*e.g.*, Condrón, Godoy-Garraza, Walrath, McKeon, & Heilbron, 2014; Walrath, Godoy-Garraza, Reid, Goldston, & McKeon, 2015; Godoy-Garraza, Walrath, Kuiper, Goldston, & McKeon, 2018; Condrón, Godoy-Garraza, Kuiper, Sukumar, Walrath, & McKeon, 2018; Godoy-Garraza, Kuiper, Goldston, McKeon, & Walrath, 2019; Godoy-Garraza, Kuiper, Cross, Hicks, & Walrath, 2020; Goldston & Walrath, 2023). As a result of the vast body of information collected and analyzed through the previous cross-site evaluation, SAMHSA has identified areas for additional investigation and the types of inquiry needed to move the evaluation into its next phase.

The purpose of the GLS State/Tribal Suicide Prevention Program is to facilitate a comprehensive public health approach to prevent suicide. Passed by Congress in 2004, the Garrett Lee Smith Memorial Act (GLSMA) was the first legislation to provide funding for states, tribes, and institutions of higher education to develop, improve, and evaluate early intervention and suicide prevention programs. GLSMA mandates that the effectiveness of the GLS Suicide Prevention Program be evaluated through both cross-site and local evaluation and reported to Congress.

The GLS State/Tribal Evaluation is designed to gather detailed outcome and impact data to provide SAMHSA with the data and information needed to understand what works, why it works, and under what conditions, relative to program activities.

The purpose of the GLS Evaluation is to build the program's knowledge base by expanding on information gathered through the prior evaluation related to the process, products, context, and impacts of the GLS State/Tribal Program.

The GLS Evaluation incorporates three areas of evaluation to provide a robust understanding of the implementation, outcomes, and impacts of the GLS State/Tribal Program. A behavioral health equity and cultural equity lens will be applied to each area of evaluation to ensure a culturally specific understanding of intervention implementation, outcomes, and impacts.

The Implementation Evaluation inventories the array of strategies and services implemented by grantees and answers questions about the extent to which grantees are implementing required and allowed prevention strategies and services, including related settings, populations, and degree of fidelity to their work plan.

The Outcome Evaluation includes three studies related to trainings, youths' experience of services, and the continuity of care for at-risk youths—*i.e.*, the Training Outcomes Study; Youth Experience, Outcomes, and Resiliency Study (Youth Study); and Continuity of Care Study. These studies will provide a deeper examination of the effectiveness of these strategies as they relate to the long-term gains in trainee skills to identify and manage youths at risk for suicide; youths' perspectives, including an assessment of how youths experience services, supports and facets that encourage building resilience, stress tolerance, and self-management skills; and the effectiveness of a continuum of care that connects youths to treatment services and supports, and post-discharge follow-up.

Finally, the Impact Evaluation will combine data from the Implementation and Outcome Evaluations to assess the effectiveness of the GLS State/Tribal Program on decreasing suicide morbidity and mortality. Through implementation of this evaluation design, it will be possible to isolate prevention strategy impacts and explain cross-program impacts on short-term (*e.g.*, change in self-efficacy to identify change in the number of youths identified as at risk) and long-term program outcomes such as suicide attempts and deaths by suicide.

Nine data collection activities compose the GLS Evaluation—4 revised data collection instruments and 5 new data collection instruments.

Instrument Removals

The current GLS Evaluation does not include data collection with campus grantees, so all campus-specific instruments are being removed. Additionally, due to SAMHSA's current research priorities and the fulfillment of previous data collection requirements, 7 previously approved instruments are being revised or removed from the evaluation. These include: Behavioral Health Provider Survey (BHPS), Prevention Strategies Inventory (PSI) Campus, Student Behavioral Health Form (SBHF), Treatment as Prevention (TASP) Campus, Early Identification, Referral, Follow-up, and Treatment Individual Form, Early Identification, Referral, Follow-up, and Treatment Screening Form, Sustainability One-Year Follow-up (SFUP), SFUP Consent-to-Contact, and Training Utilization and Preservation—Survey (TUP-S) Campus.

Instrument Revisions

- PSI: the PSI is a web-based survey that captures all state/tribal program

prevention strategies and products. Data include strategy types and products distributed, intended audiences or populations of focus, and expenditures across major categories (*e.g.*, outreach and awareness, gatekeeper training, screening programs). Each major strategy includes sub-strategies, enabling grantees to specify and provide details about the sub-strategy, including implementation setting/location, timeframe, and intended audiences or populations of focus. The PSI is completed by grantee staff each quarter. PSI data will inform the Training Outcomes Study and Continuity of Care Study. Compared to the prior version of the PSI, the revised PSI includes all previous strategies and integrates new or revised questions related to the following areas of interest: (1) grantees use of emerging technologies (2) implementation of evidence based practices (EBPs), (3) cultural adaptations and health equity practices, and (4) program sustainability. In addition, we have revised the PSI to optimize the assessment of implementation timeframe and location and the alignment of audiences more precisely with grantee strategies implemented.

- TASP: the TASP is a web-based survey collecting aggregate-level training data from all state/tribal grantees. Data include information about the type of training delivered, the number and roles of training participants, and the setting of the training, including ZIP code where the training is held (for use in analysis of GLS program impact). The TASP also assesses intended outcomes, as well as the number of online trainings completed, train-the-trainer events held, and booster trainings that follow the initial training. The TASP also gathers information about the inclusion of behavioral rehearsal or role-play and resources provided at the training as these elements have been found to improve retention of knowledge and skills post-training. Additionally, the TASP collects information about resources or materials provided to trainees (*e.g.*, mobile or online tools or applications for suicide prevention, fact or resource sheets, and wallet card information) to improve understanding of how skills can be maintained over time with materials provided at trainings (Cross et al., 2011). A TASP is completed by grantee program staff within 2 weeks of each in-person training activity and quarterly for virtual training activities. The revised TASP includes more refined assessment of training format including (1) in person; (2) virtual (facilitated on a specific date)

and (3) virtual (self-directed; trainee completes training at own pace) and revisions to align with updated Government Performance and Results Act (GPRA) indicators.

- **EIRFT-I:** the web-based EIRFT-I gathers existing data for each at-risk youth identified as a result of the GLS Suicide Prevention Program (via a GLS-trained gatekeeper, a GLS-sponsored screening identification, or via a discharge from an emergency room or inpatient psychiatric treatment). Initial follow-up information (whether a service was received after referral or not) is obtained along with details on all services received in the 6 months following identification. Ensuring adequate resources and services for referral to care is a best practice for both screenings and gatekeeper trainings. In addition, a response system that ensures timely referrals is part of GLS grant requirements. Data can be extracted from case records or other existing data sources, including any organizational staff, community members, or family members who make a mental health identification and referral. Respondents include grant program staff and service providers representing all grantees in all funding years. Data collection is ongoing for each youth identified at risk, screened positive, or discharged from an emergency room or hospital for a suicide attempt and/or suicidal ideation. No personal identifiers are requested on the EIRFT-I. Grantee program staff enter EIRFT-I data on an ongoing basis. EIRFT-I data will inform the Training Outcomes and Continuity of Care Studies. This instrument builds upon the previous EIRFT-I, with the addition of data collection on follow-up post-discharge from emergency departments or psychiatric hospitalization and additional information on treatment.

- **EIRFT-S:** the web-based EIRFT-S gathers aggregate information about all screening activities conducted as part of the GLS program. Data include aggregate information on the number of youths screened for suicide risk through the GLS program, and the number screening positive. On an ongoing basis, the grantee will submit EIRFT-S forms. EIRFT-S forms are completed once per implementation of a screening tool in a group setting, once per month for clinical screenings, and once per month for one-on-one screenings. For each screening event in which multiple youths are screened at a given time, one EIRFT-S should be completed for the event. For one-on-one screenings in a clinical or other setting, one aggregated EIRFT-S is completed per month to reflect screening outcomes of all youths

screened during the month. Grantees develop systems locally to gather identification and referral data, including extracting data from existing electronic health records or forms. No personal identifiers are requested on the EIRFT-S. EIRFT-S data will inform the Continuity of Care Study. This instrument continues the previous EIRFT-S.

Instrument Additions

Five instruments will augment the evaluation.

- **TSA-P:** the Training Skills Assessment-Post Training (TSA-P) is a web-based survey to assess trainee confidence in identifying and managing youth at risk for suicide after participation in a training event. At the conclusion of all training events, trainees will be asked to complete the TSA-P. The instrument is designed to assess baseline confidence following the training, knowledge of suicide prevention, confidence in identifying and managing suicidal youth, and pretraining behaviors related to identifying and managing youths at risk of suicide. As part of the TSA-P, trainees will be asked to complete a consent-to-contact web form indicating their willingness to be contacted by the GLS Evaluation team to participate in the TSA-F and TSA-PS. If a trainer is unable to administer the survey or consent-to-contact form electronically, or a trainee does not have access to a mobile device or computer, they may also complete the survey and consent-to-contact form on paper. The grantee will submit this information to ICF, through direct data entry into the Suicide Prevention Data Center (SPDC), within 2 weeks of the training event. Once consent to contact has been received, ICF will create a random sample of participants for the phone simulation and the 6- and 12-month follow-up surveys. TSA-P data will inform the Training Outcomes Study.

- **TSA-F:** The Training Skills Assessment-Follow up (TSA-F) is a follow-up web-based survey to assess trainees' sustained confidence and skills in identifying and managing youth at risk for suicide, as well as experience with managing at-risk youth since training (interventions with youths, additional training, etc.). The survey will be administered to a sample of training participants at 6- and 12-months after the initial TSA-P is completed. TSA-F data will inform the Training Outcomes Study.

- **TSA-PS:** The Training Skills Assessment-Phone Simulation (TSA-PS) is a follow-up phone simulation using standardized interaction to assess

trainee skills in identification and management of a youth in suicidal crisis. A random subsample of training participants will be contacted by the evaluation team to participate in a simulated conversation with a youth in suicidal crisis portrayed by a trained actor. These simulations will occur between 3 and 6 months following their initial training. The simulated conversation between the training participant and actor will last approximately 10 to 30 minutes (community gatekeeper sessions will likely be shorter than the clinician interactions). In total, the session will be scheduled for 45 minutes to allow for consent, instructions, and a debrief. These phone sessions will be administered via tele video and recorded for additional post-simulation scoring and analysis. All sessions will be attended by the training participant, an actor, and an evaluation team member (observer), who will be responsible for facilitating the interaction, administering the consent, scoring the interaction (both in real time and based on the recording), and providing a short debrief to the training participant. TSA-PS data will inform the Training Outcomes Study.

- **YORS:** the Youth Outcomes and Resiliency Survey (YORS) is a web-based survey assessing the experience and outcomes of those youth who are served by the GLS Program. The instrument is designed to assess suicidality, positive youth development, satisfaction with services received, youth engagement experience, and family and school dynamics. Youth between the ages of 14–24 years who receive a positive screening result (as part of the GLS program activities) and receive a referral to a mental health service, or youths who attend skills-based training will be considered eligible for the study. A sample of eligible youth will be enrolled in the Youth Study. The age of the youth respondent will dictate how consent is obtained for the YORS. All youths under the age of 18 at selected grantee sites will be asked to have their parent complete consent-to-contact forms and participate in the YORS and Youth Experience Reflective (YER) Journal when they consent to receiving screening from the grantee. Youths over the age of 18 will be asked to complete consent-to-contact forms at the time of initial referral and screening (after gatekeeper identification). The YORS will be administered at 3-, 6-, and 12-months post enrollment, with enrollment occurring no later than 1

month following referral to a behavioral health service.

■ **YER Journal:** the YER Journal is a web-based survey consisting of a weekly journal prompt that youth can respond to with a photo and corresponding narrative interpretation of the photo. For example, youths may be asked to reflect on a recent experience receiving services. The youth would be asked to submit a photo that represents that experience, followed by a prompt that asks: “What words come to mind? How did it make you feel?” The narrative

description of what the photo represents will be analyzed using qualitative methodologies. Up to 25 youths will be recruited to participate in the YER Journal each year. Youths participating in the YORS will be invited to join the YER Journal via contact through the YORS data collection activities. For example, a youth may complete their third quarterly YORS follow-up, and be invited to join the YER Journal study simultaneously. Our team will leverage innovative data collection technology to engage youth. Weekly prompts will be

sent to youths for 6 weeks post enrollment to discover, for example, which components of what youths are receiving are meaningful and helpful, and how youths may be utilizing skills or services following the initial screening, both in the short and long terms.

The estimated response burden to collect this information associated with the redesigned GLS Evaluation is as follows annualized over the requested 3-year clearance period is presented below:¹

TOTAL AND ANNUALIZED AVERAGES: RESPONDENTS, RESPONSES AND HOURS

Type of respondent	Instrument	Number of respondents	Responses per respondent	Total number of responses	Burden per response (hours)	Annual burden (hours)	Hourly wage rate (\$)	Total cost (\$)
Project Evaluator	PSI	31	4	124	1.25	155	37.11	\$5,752
Project Evaluator	TASP	31	10	310	0.25	78	37.11	2,876
Project Evaluator	EIRFT-Individual Form.	31	4	124	2	248	37.11	9,203
Project Evaluator	EIRFT-Screening Form.	31	4	124	0.75	93	37.11	3,451
Provider Trainee	TSA Consent to Contact.	10,000	1	10,000	0.08	800	\$27.46	21,968
Provider Trainee	TSA-P	10,000	1	10,000	0.3	3000	27.46	82,380
Provider Trainee	TSA 6-month	187	1	187	0.3	56	27.46	1,541
Provider Trainee	TSA 12-month	140	1	140	0.3	42	27.46	1,153
Provider Trainee	TSA-PS	101	1	101	0.75	76	27.46	2,080
Youth	YORS baseline	300	1	300	0.5	150	7.25	1,088
Youth	YORS 3-month	240	1	240	0.5	120	7.25	870
Youth	YORS 6-month	192	1	192	0.5	96	7.25	696
Youth	YORS 12-month	115	1	115	0.5	58	7.25	417
Youth	YER Journal	25	6	150	0.25	38	7.25	272
Total		21,424		22,107		5,008		133,747

* Rounded to the nearest whole number.

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.

Alicia Broadus,
Public Health Advisor.

[FR Doc. 2023–25922 Filed 11–22–23; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2023–0872]

National Merchant Marine Personnel Advisory Committee; December 2023 Virtual Meeting

AGENCY: United States Coast Guard, Department of Homeland Security.

ACTION: Notice of open Federal advisory committee virtual meeting.

SUMMARY: The National Merchant Marine Personnel Advisory Committee (Committee) will conduct a virtual meeting to discuss issues relating to personnel in the United States Merchant Marine including the training, qualifications, certification, documentation, and fitness of mariners. The virtual meeting will be open to the public.

DATES:

Meeting: The Committee will meet virtually on Tuesday, December 12, 2023, from 10:00 a.m. until 2:30 p.m. Eastern Standard Time, (EST). The virtual meeting may adjourn early if the Committee has completed its business.

Comments and supporting documentation: To ensure your comments are received by Committee members before the virtual meeting, submit your written comments no later than December 5, 2023.

ADDRESSES: To join the virtual meeting or to request special accommodations, contact the individual listed in the **FOR**

FURTHER INFORMATION CONTACT section no later than 1 p.m. EST on December 5, 2023, to obtain the needed information.

The Committee is committed to ensuring all participants have equal access regardless of disability status. If you require reasonable accommodation due to a disability to fully participate, please email Ms. Pamela Moore pamela.j.moore@uscg.mil or call 202–372–1361 as soon as possible.

Instructions: You are free to submit comments at any time, including orally at the meeting as time permits, but if you want Committee members to review your comment before the virtual meeting, please submit your comments no later than December 5, 2023. We are particularly interested in comments regarding the topics in the “Agenda” section below. We encourage you to submit comments through the Federal Decision Making Portal at <https://www.regulations.gov>. To do so, go to <https://www.regulations.gov>, type USCG–2023–0872 in the search box and click “Search.” Next, look for this

¹ BLS OES May 2022 National Industry-Specific Occupation Employment and Wage Estimates

average annual salary for Survey Researchers (code

19–3022); https://www.bls.gov/oes/current/naics5_541720.htm.

document in the Search Results column, and click on it. If your material cannot be submitted using <https://www.regulations.gov>, email the individual in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. You must include the docket number USCG–2023–0872. Comments received will be posted without alteration at <http://www.regulations.gov>, including any personal information provided. You may wish to review the Privacy and Security Notice, found via link on the homepage <https://www.regulations.gov>. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020). If you encounter technical difficulties with comment submission, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Docket Search: Documents mentioned in this notice as being available in the docket, and all public comments, will be in our online docket at <https://www.regulations.gov> and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign-up for email alerts, you will be notified when comments are posted.

FOR FURTHER INFORMATION CONTACT: Ms. Pamela Moore, Alternate Designated Federal Officer of the National Merchant Marine Personnel Advisory Committee, telephone 202–372–1361 or email pamela.j.moore@uscg.mil.

SUPPLEMENTARY INFORMATION: Notice of this meeting is in compliance with the *Federal Advisory Committee Act* (Pub. L. 117–286, 5 U.S.C., ch. 10). The Committee is authorized by section 601 of the *Frank LoBiondo Coast Guard Authorization Act of 2018* (Pub. L. 115–282, 132 Stat. 4192), and is codified in 46 U.S.C. 15103. The Committee operates under the provisions of the *Federal Advisory Committee Act* and 46 U.S.C. 15109. The Committee advises the Secretary of Homeland Security through the Commandant, U.S. Coast Guard on matters relating to personnel in the United States Merchant Marine including the training, qualifications, certification, documentation, and fitness of mariners.

Agenda

The National Merchant Marine Personnel Advisory Committee will meet on Tuesday, December 12, 2023.

The agenda for the December 12, 2023, meeting is as follows:

- (1) Introduction.
- (2) Designated Federal Officer Remarks.

- (3) Roll call of Committee members.
- (4) Adoption of the Agenda.
- (5) Acceptance of Minutes from Committee Meeting 5.
- (6) U.S. Coast Guard Presentations:
 - (a) 2023 Report on Recommendations to the U.S. Coast Guard from the National Merchant Marine Personnel Advisory Committee;
 - (b) Presentation of New Merchant Mariner Credential.
- (7) Public comment period.
- (8) Closing remarks.
- (9) Adjournment of meeting.

A copy of all meeting documentation will be available at [https://homeport.uscg.mil/missions/federal-advisory-committees/national-merchant-marine-personnel-advisory-committee-\(nmerpac\)](https://homeport.uscg.mil/missions/federal-advisory-committees/national-merchant-marine-personnel-advisory-committee-(nmerpac)) no later than December 5, 2023. Alternatively, you may contact the individual noted in the **FOR FURTHER INFORMATION** section above.

During the December 12, 2023 meeting, a public comment period will be held immediately after the U.S. Coast Guard Presentations, at approximately 12:30 p.m. EST. Public comments will be limited to 3 minutes per speaker and limited to one comment per person. Please note that the public comments period will end following the last call for comments.

Please contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to register as a speaker.

Dated: November 9, 2023.

Jeffrey G. Lantz,

Director of Commercial Regulations and Standards.

[FR Doc. 2023–25912 Filed 11–22–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R4–ES–2023–0208; FXES11140400000–245–FF04EF4000]

Receipt of Incidental Take Permit Application and Proposed Habitat Conservation Plan for the Sand Skink; Orange County, FL; Categorical Exclusion

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the Fish and Wildlife Service (Service), announce receipt of an application from the Orange County Public Library System (Horizon West Library; applicant) for an incidental take permit (ITP) under the Endangered Species Act. The applicant requests the

ITP to take the federally listed sand skink (*Neoseps reynoldsi*) incidental to the construction and operation of a public library and related activities in Orange County, Florida. We request public comment on the application, which includes the applicant's proposed habitat conservation plan (HCP), and on 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 26, 2023.

ADDRESSES:

Obtaining Documents: The documents this notice announces, as well as any comments and other materials that we receive, will be available for public inspection online in Docket No. FWS–R4–ES–2023–0208 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 one of the following methods:

- **Online:** <https://www.regulations.gov>. Follow the instructions for submitting comments on Docket No. FWS–R4–ES–2023–0208.

- **U.S. Mail:** Public Comments Processing, Attn: Docket No. FWS–R4–ES–2023–0208; U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

FOR FURTHER INFORMATION CONTACT: Erin Gawera, by U.S. mail (see **ADDRESSES**), by telephone at 904–731–3121, or via email at erin_gawera@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 the Orange County Public Library System (Horizon West Library; applicant) for an incidental take permit

(ITP) under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The applicant requests the ITP to take the federally listed sand skink (*Neoseps reynoldsi*) (skink) incidental to the construction and operation of a public library, including a shared use area consisting of parking infrastructure, a YMCA facility, and ancillary improvements, and the associated clearing, infrastructure, and landscaping, in Orange County, Florida. We request public comment on the application, which includes the applicant's habitat conservation plan (HCP), and on 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 applicant requests a 5-year ITP to take skinks via the conversion of approximately 8.69 acres (ac) of occupied nesting, foraging, and sheltering skink habitat incidental to the construction and operation of a public library, including a shared use area consisting of parking infrastructure, a YMCA facility, and ancillary improvements, and the associated clearing, infrastructure, and landscaping on 12.45 ac on Parcels 16–23–27–0000–00–021, 16–23–27–0000–00–009, and 16–23–27–0000–00–031 in Section 16, Township 23 South, Range 27 East, Orange County, Florida. The applicant proposes to mitigate for take of the skinks by purchasing credits equivalent to 17.40 ac of skink-occupied habitat within the Lake Wales Conservation Bank or another Service-approved conservation bank. The Service would require the applicant to purchase the credits prior to engaging in any construction phase of the project.

Our Preliminary Determination

The Service has made a preliminary determination that the applicant's proposed project, including the construction of the buildings and associated infrastructure (e.g., electric, water, and sewer lines), would individually and cumulatively have a minor or negligible effect on the sand skink 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 sand skink 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 ITP is one that would result in (1) minor or negligible 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 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. After considering the preceding and other matters, we will determine 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 PER3397936 to Orange County Public Library System (Horizon West Library).

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).

Robert L. Carey,

*Manager, Division of Environmental Review,
Florida Ecological Services Field Office.*

[FR Doc. 2023–25943 Filed 11–22–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R4–ES–2023–0221;
FXES1114040000–245–FF04EF4000]

Receipt of Incidental Take Permit Application and Proposed Habitat Conservation Plan for the Sand Skink and Blue-Tailed Mole Skink; Polk County, FL; Categorical Exclusion

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the Fish and Wildlife Service (Service), announce receipt of an application from Vistas at Davenport, LLC (applicant) for an incidental take permit (ITP) under the Endangered Species Act. The applicant requests the ITP to take the federally listed sand skink and blue-tailed mole skink incidental to the construction of a residential development in Polk County, Florida. We request public comment on the application, which includes the applicant's proposed habitat conservation plan (HCP), and on 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 26, 2023.

ADDRESSES: *Obtaining Documents:* The documents this notice announces, as well as any comments and other materials that we receive, will be available for public inspection online in Docket No. FWS–R4–ES–2023–0221 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 one of the following methods:

- *Online:* <https://www.regulations.gov>. Follow the instructions for submitting comments on Docket No. FWS–R4–ES–2023–0221.
- *U.S. mail:* Public Comments Processing, Attn: Docket No. FWS–R4–ES–2023–0221; U.S. Fish and Wildlife

Service, MS; PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

FOR FURTHER INFORMATION CONTACT:

Alfredo Begazo, by U.S. mail (see **ADDRESSES**), by telephone at 772–469–4234, or via email at afredo_begazo@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 Vistas at Davenport, LLC (applicant) for an incidental take permit (ITP) under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The applicant requests the ITP to take the federally listed sand skink (*Neoseps reynoldsi*) and blue-tailed mole-skink (*Eumeces egregius lividus*) (skinks) incidental to the construction and operation of a residential development in Polk County, Florida. We request public comment on the application, which includes the applicant's habitat conservation plan (HCP), and on 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 applicant requests a 15-year ITP to take skinks via the conversion of approximately 6.71 acres (ac) of occupied nesting, foraging, and sheltering skink habitat incidental to the construction and operation of a residential development on a 56.5-ac parcel in Sections 23 and 24, Township 26 South, Range 27 East in Polk County, Florida. The applicant proposes to mitigate for take of the skinks by purchasing credits equivalent to 13.42 ac of skink-occupied habitat from a Service-approved conservation bank. The Service would require the applicant to purchase the credits prior to engaging in any construction phase of the project.

Our Preliminary Determination

The Service has made a preliminary determination that the applicant's project, including the construction of multiple single-family residences, driveways, parking spaces, green areas, stormwater pond, and associated infrastructure (e.g., electric, water, and sewer lines), would individually and cumulatively have a minor or negligible effect on the skinks 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 skinks 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 ITP is one that would result in (1) minor or negligible 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 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. After considering the preceding and other matters, we will determine 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 PER5062905 to Vistas at Davenport, 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).

Robert L. Carey,

*Manager, Division of Environmental Review,
Florida Ecological Services Field Office.*

[FR Doc. 2023–25949 Filed 11–22–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX24EB00A181100; OMB Control Number 1028–0101]

Agency Information Collection Activities; The William T. Pecora Award Application and Nomination Process

AGENCY: U.S. Geological Survey, Department of the Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the U.S. Geological Survey (USGS) is seeking to extend an information collection.

DATES: Interested persons are invited to submit comments on or before January 23, 2024.

ADDRESSES: Send your comments on this information collection request (ICR) by mail to USGS, Information Collections Clearance Officer, 12201 Sunrise Valley Drive, MS 159, Reston, VA 20192; or by email to gs-info_collections@usgs.gov. Please reference OMB Control Number 1028–0101 The William T. Pecora Award Application and Nomination Process in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Sarah Cook by email at scook@usgs.gov or by telephone at 703–648–6136. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: In accordance with the PRA (44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), all information collections require approval under the PRA. We may not conduct or sponsor, nor are you required to respond to, a collection of information unless it displays a currently valid OMB control number.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How the agency might minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personally identifiable information (PII) in your comment, you should be aware that your entire comment—including your PII—may be made publicly available at any time. While you can ask us in your comment to withhold your PII from public review, we cannot guarantee that we will be able to do so.

Abstract: The William T. Pecora Awards are presented annually to individuals or teams using satellite or aerial remote sensing who make outstanding contributions toward understanding the Earth (land, oceans, and air), educating the next generation of scientists, informing decisionmakers, or supporting natural or human-induced disaster response. The award is sponsored jointly by the Department of the Interior (DOI) and the National Aeronautics and Space Administration (NASA). The award was established in 1974 to honor the memory of Dr. William T. Pecora, former Director of the U.S. Geological Survey and Under Secretary, Department of the Interior. Dr. Pecora was a motivating force behind the establishment of a program

for civil remote sensing of the Earth from space. His early vision and support helped establish what we know today as the Landsat satellite mission. The purpose of the award is to recognize individuals or groups working in the field of remote sensing of the Earth. National and international nominations are accepted from public and private sector individuals, teams, organizations, and professional societies.

The nomination packages include three sections: a cover sheet, a summary statement, and supplemental materials. The cover sheet includes professional contact information. The summary statement is limited to two pages and describes the nominee's achievements in the scientific and technical remote sensing community, contributions leading to successful practical applications of remote sensing, and/or major breakthroughs in remote sensing science or technology. The supplemental materials section is limited to 12 pages (resume, publications list, letters of endorsement, etc.) which highlights the specific individual or group's achievements which should be peer-reviewed and documented in industry-recognized and scientifically credible publications.

Title of Collection: The William T. Pecora Award Application and Nomination Process.

OMB Control Number: 1028–0101.

Form Number: None.

Type of Review: Extension of an existing collection.

Respondents/Affected Public: Individuals, businesses and other academic and non-profit institutions; State, local and Tribal governments.

Total Estimated Number of Annual Respondents: 10–15.

Total Estimated Number of Annual Responses: 10–15.

Estimated Completion Time per Response: 6 hours.

Total Estimated Number of Annual Burden Hours: 90 hours.

Respondent's Obligation: Voluntary.

Frequency of Collection: Annually.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the PRA (44 U.S.C. 3501 *et seq.*).

Timothy Newman,

Program Coordinator, National Land Imaging Program, USGS.

[FR Doc. 2023–25944 Filed 11–22–23; 8:45 am]

BILLING CODE 4338–11–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX23BA000AD0100; OMB Control Number 1028–0103]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; USA National Phenology Network—The Nature's Notebook Plant and Animal Observing Program

AGENCY: U.S. Geological Survey, Department of the Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the U.S. Geological Survey (USGS) is proposing to extend an information collection.

DATES: Interested persons are invited to submit comments on or before December 26, 2023.

ADDRESSES: Send written comments on this information collection request (ICR) to the Office of Management and Budget's Desk Officer for the Department of the Interior by email at OIRA_Submission@omb.eop.gov; or via facsimile to (202) 395–5806. Please provide a copy of your comments to the USGS, Information Collections Clearance Officer, 12201 Sunrise Valley Drive MS 159, Reston, VA 20192; or by email to gs-info_collections@usgs.gov. Please reference OMB Control Number 1028–0103 Nature's Notebook in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Melanie J. Steinkamp by email at msteinkamp@usgs.gov or by telephone at 703–261–3128. You may also view the ICR at <http://www.reginfo.gov/public/do/PRAMain>.

SUPPLEMENTARY INFORMATION: In accordance with the PRA, (44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), all information collections require approval. We may not conduct or sponsor, nor are you required to respond to, a collection of information unless it displays a currently valid OMB control number.

A Federal Register notice with a 60-day public comment period soliciting comments on this collection of information was published on August 4, 2023 (88 FR 51851). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other federal agencies to comment on new,

proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How the agency might minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personally identifiable information (PII) in your comment, you should be aware that your entire comment—including your PII—may be made publicly available at any time. While you can ask us in your comment to withhold your PII from public review, we cannot guarantee that we will be able to do so.

Abstract: The USA–National Phenology Network is a program sponsored by the USGS that uses standardized forms for tracking plant and animal activity as part of a project called Nature's Notebook. The Nature's Notebook forms are used to record phenology (*e.g.*, the timing of the leafing or flowering of plants and the reproduction or migration of animals) as part of a nationwide effort to understand and predict how plants and animals respond to environmental variation and changes in weather and climate. Contemporary data collected through Nature's Notebook are quality-checked, described, and made publicly available; data are used to inform decision-making in a variety of contexts, including agriculture, drought monitoring, and wildfire risk assessment. Phenological information is also critical for the

management of wildlife, invasive species, and agricultural pests, and for understanding and managing risks to human health and welfare, including allergies, asthma, and vector-borne diseases. Participants may contribute phenology information to Nature's Notebook through a browser-based web application or via mobile applications for iPhone and Android operating systems, meeting Government Paperwork Elimination Act (GPEA) and Privacy Act requirements. The web application interface consists of several components: User registration; a searchable list of 1,756 plant and animal species that can be observed; a “profile” for each species that contains information about the species including its description and the appropriate monitoring protocols; a series of interfaces for registering as an observer, registering an observation site, and registering plants and animals at an observation site; generating datasheets to take to the field, and a data entry page that mimics the datasheets.

Title of Collection: USA NATIONAL PHENOLOGY NETWORK—THE NATURE'S NOTEBOOK PLANT AND ANIMAL OBSERVING PROGRAM.

OMB Control Number: 1028–0103.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public:

Members of the public registered with *Nature's Notebook*, State Cooperative Extension employees, and Tribal members.

Total Estimated Number of Annual Respondents: 6,598.

Total Estimated Number of Annual Responses: 4,102,388.

Estimated Completion Time per Response: Upon joining the program, each of the 6,598 respondents is expected to spend 13 minutes to register and read guidelines for an annual burden of 1,430 hours. New and existing respondents are expected to spend about two minutes on each observation and submission of a phenophase status record. Given a projection of 4,102,388 phenophase status responses each year, annual burden of observation and submission of records is 136,746 hours. Thus, the Total Estimated Annual Burden is 138,176 hours.

Respondent's Obligation: Voluntary.

Frequency of Collection: On occasion; depends on the seasonal activity of plants and animals.

Non-hour burden costs may be incurred for optional items such as clipboards, pencils, flags, markers, stakes, tags and/or popsicle sticks. We estimate that only 20% of users (*i.e.*, 1,320) will incur these costs, at an

estimated cost of \$2.52 per user, for a Total Estimated Annual Non-hour Burden cost of \$3,327.

An agency may not conduct or sponsor, nor is a person required to respond to, a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the PRA of 1995.

Melanie J. Steinkamp,

Species Management Research Program Coordinator, Ecosystems Mission Area, U.S. Geological Survey.

[FR Doc. 2023–25915 Filed 11–22–23; 8:45 am]

BILLING CODE 4338–11–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1103 (Third Review)]

Certain Activated Carbon From China

Determination

On the basis of the record ¹ developed in the subject five-year review, the United States International Trade Commission (“Commission”) determines, pursuant to the Tariff Act of 1930 (“the Act”), that revocation of the antidumping duty order on certain activated carbon 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 June 1, 2023 (88 FR 35926) and determined on September 5, 2023 that it would conduct an expedited review (88 FR 68670, October 4, 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 20, 2023. The views of the Commission are contained in USITC Publication 5474 (November 2023), entitled *Certain Activated Carbon from China: Investigation No. 731–TA–1103 (Third Review)*.

By order of the Commission.

Issued: November 20, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–25993 Filed 11–22–23; 8:45 am]

BILLING CODE 7020–02–P

¹ The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

DEPARTMENT OF JUSTICE**Drug Enforcement Administration****[Docket No. DEA-1296]****Bulk Manufacturer of Controlled Substances Application: Navinta LLC****AGENCY:** Drug Enforcement Administration, Justice.**ACTION:** Notice of application.

SUMMARY: Navinta LLC has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before January 23, 2024. Such persons may also file a written request for a hearing on the application on or before January 23, 2024.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to <https://www.regulations.gov> and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on <https://www.regulations.gov>. If you have received a Comment Tracking Number, your comment has been

successfully submitted and there is no need to resubmit the same comment.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on September 27, 2023, Navinta LLC, 1499 Lower Ferry Road, Ewing, New Jersey 08618-1414, applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Pentobarbital	2270	II
Levomethorphan	9210	II
Levorphanol	9220	II
Remifentanyl	9739	II

The company plans to bulk manufacture the listed controlled substances for validation purposes as part of the Food Administration approval process before distributing to their customers. No other activities for these drug codes are authorized for this registration.

Claude Redd,*Acting Deputy Assistant Administrator.*

[FR Doc. 2023-25991 Filed 11-22-23; 8:45 am]

BILLING CODE P**DEPARTMENT OF JUSTICE****Drug Enforcement Administration****[Docket No. DEA-1288]****Bulk Manufacturer of Controlled Substances Application: Organix Chemistry Solutions, LLC****AGENCY:** Drug Enforcement Administration, Justice.**ACTION:** Notice of application.

SUMMARY: Organix Chemistry Solutions, LLC has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before January 23, 2024. Such persons may also file a written request for a hearing on the application on or before January 23, 2024.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to <https://www.regulations.gov> and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on <https://www.regulations.gov>. If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on September 29, 2023, Organix Chemistry Solutions LLC, 240 Salem Street, Woburn, Massachusetts 01801-2029, applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Gamma Hydroxybutyric Acid	2010	I
Lysergic acid diethylamide	7315	I
Marihuana	7360	I
Tetrahydrocannabinols	7370	I
Mescaline	7381	I
3,4,5-Trimethoxyamphetamine	7390	I
4-Bromo-2,5-dimethoxyphenethylamine	7392	I
3,4-Methylenedioxamphetamine	7400	I
3,4-Methylenedioxymethamphetamine	7405	I
5-Methoxy-N,N-dimethyltryptamine	7431	I
Alpha-Methyltryptamine	7432	I
Bufotenine	7433	I
Diethyltryptamine	7434	I
Dimethyltryptamine	7435	I
Psilocybin	7437	I
Psilocyn	7438	I
2-(2,5-Dimethoxy-4-methylphenyl) ethanamine (2C-D)	7508	I
2-(2,5-Dimethoxyphenyl) ethanamine (2C-H)	7517	I
2-(4-Iodo-2,5-dimethoxyphenyl) ethanamine (2C-I)	7518	I
Heroin	9200	II
Morphine	9300	II

The company plans to synthesize the listed controlled substances for distribution to its customers. In reference to drug codes 7360 (Marihuana), and 7370 (Tetrahydrocannabinols), the company plans to bulk manufacture these drugs as synthetic. No other activities for these drug codes are authorized for this registration.

Claude Redd,

Acting Deputy Assistant Administrator.

[FR Doc. 2023-25946 Filed 11-22-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA-1295]

Bulk Manufacturer of Controlled Substances Application: Groff NA Hemplex LLC

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Groff NA Hemplex LLC. has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before January 23, 2024. Such persons may also file a written request for a hearing on the application on or before January 23, 2024.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to <https://www.regulations.gov> and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on <https://www.regulations.gov>. If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on September 19, 2023, Groff NA Hemplex LLC., 2218 South

Queen Street, York, Pennsylvania 17402, applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Marihuana Extract	7350	I
Marihuana	7360	I
Tetrahydrocannabinols ..	7370	I

The company is federally authorized to conduct cultivation activities in order to bulk manufacture the listed controlled substances for internal use and for sale to federally registered research investigators. No other activities for these drug codes are authorized for this registration.

Claude Redd,

Acting Deputy Assistant Administrator.

[FR Doc. 2023-25990 Filed 11-22-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA-1293]

Importer of Controlled Substances Application: Organic Standards Solutions International, LLC

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Organic Standards Solutions International, LLC has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before December 26, 2023. Such persons may also file a written request for a hearing on the application on or before December 26, 2023.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to <https://www.regulations.gov> and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not

instantaneously available for public view on <https://www.regulations.gov>. If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrisette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA **Federal Register** Representative/DPW, 8701 Morrisette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrisette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on November 6, 2023, Organic Standards Solutions International, LLC, 7290 Investment Drive, Unit B, North Charleston, South Carolina 29418-8305, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Marihuana Extract	7350	I
Marihuana	7360	I
Tetrahydrocannabinols ..	7370	I
Psilocybin	7437	I
Psilocyn	7438	I

The company plans to import the listed controlled substances to produce analytical reference standards for sale and distribution to its customers. Drug codes 7350 (Marihuana Extract) and 7360 (Marihuana) will be used for the manufacture of cannabidiol only. In reference to drug codes 7370 (Tetrahydrocannabinols) the company plans to import a synthetic version of this controlled substance. No other activities for these drug codes are authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Claude Redd,

Acting Deputy Assistant Administrator.

[FR Doc. 2023-25948 Filed 11-22-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE**Drug Enforcement Administration**

[Docket No. DEA-1292]

Bulk Manufacturer of Controlled Substances Application: Isosciences, LLC**AGENCY:** Drug Enforcement Administration, Justice.**ACTION:** Notice of application.

SUMMARY: Isosciences, LLC has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before January 23, 2024. Such persons may also file a written request for a hearing on the application on or before January 23, 2024.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to <https://www.regulations.gov> and follow the online instructions at that site for

submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on <https://www.regulations.gov>. If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on October 25, 2023, Isosciences, LLC, 340 Mathers Road, Ambler, Pennsylvania 19002-3420, applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Cathinone	1235	I
Methcathinone	1237	I
Lysergic acid diethylamide	7315	I
Marihuana	7360	I
Tetrahydrocannabinols	7370	I
3,4-Methylenedioxymphetamine	7400	I
3,4-Methylenedioxy-N-ethylamphetamine	7404	I
3,4-Methylenedioxymethamphetamine	7405	I
5-Methoxy-N-N-dimethyltryptamine	7431	I
Alpha-methyltryptamine	7432	I
Bufotenine	7433	I
Diethyltryptamine	7434	I
Dimethyltryptamine	7435	I
Psilocybin	7437	I
Psilocyn	7438	I
5-Methoxy-N,N-diisopropyltryptamine	7439	I
Dihydromorphine	9145	I
Heroin	9200	I
Nicocodeine	9309	I
Nicomorphine	9312	I
Normorphine	9313	I
Thebacon	9315	I
Normethadone	9635	I
Acryl fentanyl (N-(1-phenethylpiperidin-4-yl)-N-phenylacrylamide)	9811	I
Para-Fluorofentanyl	9812	I
3-Methylfentanyl	9813	I
Alpha-methylfentanyl	9814	I
Acetyl-alpha-methylfentanyl	9815	I
N-(2-fluorophenyl)-N-(1-phenethylpiperidin-4-yl)propionamide	9816	I
Acetyl Fentanyl (N-(1-phenethylpiperidin-4-yl)-N-phenylacetamide)	9821	I
Butyryl Fentanyl	9822	I
4-Fluoroisobutyryl fentanyl (N-(4-fluorophenyl)-N-(1-phenethylpiperidin-4-yl)isobutyramide)	9824	I
2-methoxy-N-(1-phenethylpiperidin-4-yl)-N-phenylacetamide	9825	I
Beta-hydroxyfentanyl	9830	I
Beta-hydroxy-3-methylfentanyl	9831	I
Alpha-methylthiofentanyl	9832	I
3-Methylthiofentanyl	9833	I
Furanyl fentanyl (N-(1-phenethylpiperidin-4-yl)-N-phenylfuran-2-carboxamide)	9834	I
Thiofentanyl	9835	I
Beta-hydroxythiofentanyl	9836	I
N-(1-phenethylpiperidin-4-yl)-N-phenyltetrahydrofuran-2-carboxamide	9843	I
Amphetamine	1100	II
Methamphetamine	1105	II
Codeine	9050	II
Dihydrocodeine	9120	II
Oxycodone	9143	II
Hydromorphone	9150	II
Hydrocodone	9193	II
Isomethadone	9226	II
Methadone	9250	II
Methadone intermediate	9254	II

Controlled substance	Drug code	Schedule
Morphine	9300	II
Thebaine	9333	II
Levo-alphaacetylmetadol	9648	II
Oxymorphone	9652	II
Thiafentanil	9729	II
Alfentanil	9737	II
Sufentanil	9740	II
Carfentanil	9743	II
Fentanyl	9801	II

The company plans to manufacture bulk controlled substances for use in analytical testing. In reference to drug codes 7360 (Marihuana) and 7370 (Tetrahydrocannabinols), the company plans to bulk manufacture these drugs as synthetics. No other activities for these drug codes are authorized for this registration.

Claude Redd,

Acting Deputy Assistant Administrator.

[FR Doc. 2023–25947 Filed 11–22–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1294]

Importer of Controlled Substances Application: VH G Labs DBA LGC Standards

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: VH G Labs DBA LGC Standards has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before December 26, 2023. Such persons may also file a written request for a hearing on the application on or before December 26, 2023.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to <https://www.regulations.gov> and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not

instantaneously available for public view on <https://www.regulations.gov>. If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrisette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrisette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrisette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on November 6, 2023, VH G Labs DBA LGC Standards, 3 Perimeter Road, Manchester, New Hampshire 03103–3341, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Amineptine (7-[(10,11-dihydro-5Hdibenzo[a,d]cyclohepten-5-yl)amino]heptanoic acid)	1219	I
Mesocarb (N-phenyl-N'-(3-(1-phenylpropan-2-yl)-1,2,3-oxadiazol-3-ium-5-yl)carbamimidate)	1227	I
3-Fluoro-N-methylcathinone (3-FMC)	1233	I
4-Fluoro-N-methylcathinone (4-FMC) 1238 I N	1238	I
Pentadron (α-methylaminovalerophenone)	1246	I
4-Methyl-N-ethylcathinone (4-MEC)	1249	I
Methiopropamine (N-methyl-1-(thiophen-2-yl)propan-2-amine) 1478 I N	1478	I
N,N-Dimethylamphetamine	1480	I
Fenethylamine	1503	I
4-Methylaminorex (cis isomer)	1590	I
4,4'-Dimethylaminorex (4,4'-DMAR; 4,5-dihydro-4-1595 I N methyl-5-(4-methylphenyl)-2-oxazolamine; 4-methyl-5-(4-methylphenyl)-4,5-dihydro-1,3-oxazol-2-amine)	1595	I
Mecloqualone	2572	I
ADB-FUBINACA (N-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-(4-fluorobenzyl)-1H-indazole-3-carboxamide)	7010	I
5-Fluoro-UR-144 and XLR11 [1-(5-Fluoro-pentyl)1H-indol-3-yl](2,2,3,3-tetramethylcyclopropyl)methanone	7011	I
AB-FUBINACA (N-(1-amino-3-methyl-1-oxobutan-2-yl)-1-(4-fluorobenzyl)-1H-indazole-3-carboxamide)	7012	I
JWH-019 (1-Hexyl-3-(1-naphthoyl)indole)	7019	I
FUB-AMB, MMB-FUBINACA, AMB-FUBINACA (2-(1-(4-fluorobenzyl)-1H-indazole-3-carboxamido)-3-methylbutanoate)	7021	I
AB-PINACA (N-(1-amino-3-methyl-1-oxobutan-2-yl)-1-pentyl-1H-indazole-3-carboxamide)	7023	I
THJ-2201 ([1-(5-fluoropentyl)-1H-indazol-3-yl](naphthalen-1-yl)methanone)	7024	I
5F-AB-PINACA (N-(1-amino-3-methyl-1-oxobutan-2-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboximide)	7025	I
AB-CHMINACA (N-(1-amino-3-methyl-1-oxobutan-2-yl)-1-(cyclohexylmethyl)-1H-indazole-3-carboxamide)	7031	I
5F-ADB, 5F-MDMB-PINACA (Methyl 2-(1-(5-fluoropentyl)-1H-indazole-3-carboxamido)-3,3-dimethylbutanoate)	7034	I
5F-MDMB-PICA (methyl 2-(1-(5-fluoropentyl)-1H-indole-3-carboxamido)-3,3-dimethylbutanoate)	7041	I
MDMB-CHMICA, MMB-CHMINACA (Methyl 2-(1-(cyclohexylmethyl)-1H-indole-3-carboxamido)-3,3-dimethylbutanoate) ..	7042	I
5F-APINACA, 5F-AKB48 (N-(adamantan-1-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide)	7049	I

Controlled substance	Drug code	Schedule
4-CN-CUML-BUTINACA, 4-cyano-CUMYL-BUTINACA, 4-CN-CUMYL BINACA, CUMYL-4CN-BINACA, SGT-78 (1-(4-cyanobutyl)-N-(2-phenylpropan-2-yl)-1H-indazole-3-carboxamide).	7089	I
JWH-073 (1-Butyl-3-(1-naphthoyl)indole)	7173	I
JWH-200 (1-[2-(4-Morpholinyl)ethyl]-3-(1-naphthoyl)indole)	7200	I
AM2201 (1-(5-Fluoropentyl)-3-(1-naphthoyl) indole)	7201	I
PB-22 (Quinolin-8-yl 1-pentyl-1H-indole-3-carboxylate)	7222	I
5F-PB-22 (Quinolin-8-yl 1-(5-fluoropentyl)-1H-indole-3-carboxylate)	7225	I
N-ethylhexedrone 7246 I N	7246	I
Alpha-ethyltryptamine	7249	I
2-(ethylamino)-2-(3-methoxyphenyl)cyclohexan-1-one (methoxetamine)	7286	I
CP-47,497 (5-(1,1-Dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl-phenol]	7297	I
2C-T-7 (2,5-Dimethoxy-4-(n)-propylthiophenethylamine	7348	I
2C-T-2 (2-(4-Ethylthio-2,5-dimethoxyphenyl) ethanamine)	7385	I
3,4,5-Trimethoxyamphetamine	7390	I
4-Bromo-2,5-dimethoxyamphetamine	7391	I
4-Bromo-2,5-dimethoxyphenethylamine	7392	I
4-Methyl-2,5-dimethoxyamphetamine	7395	I
2,5-Dimethoxy-4-ethylamphetamine	7399	I
3,4-Methylenedioxyamphetamine	7400	I
3,4-Methylenedioxy-N-ethylamphetamine	7404	I
Alpha-methyltryptamine	7432	I
Diethyltryptamine	7434	I
Dimethyltryptamine	7435	I
5-Methoxy-N,N-diisopropyltryptamine	7439	I
N-Ethyl-1-phenylcyclohexylamine	7455	I
1-(1-Phenylcyclohexyl)pyrrolidine	7458	I
1-[1-(2-Thienyl)cyclohexyl]piperidine	7470	I
N-Benzylpiperazine	7493	I
2C-D (2-(2,5-Dimethoxy-4-methylphenyl) ethanamine)	7508	I
2C-E (2-(2,5-Dimethoxy-4-ethylphenyl) ethanamine)	7509	I
2C-I 2-(4-iodo-2,5-dimethoxyphenyl) ethanamine)	7518	I
2C-C 2-(4-Chloro-2,5-dimethoxyphenyl) ethanamine)	7519	I
2C-N (2-(2,5-Dimethoxy-4-nitro-phenyl) ethanamine)	7521	I
2C-P (2-(2,5-Dimethoxy-4-(n)-propylphenyl) ethanamine)	7524	I
2C-T-4 (2-(4-Isopropylthio)-2,5-dimethoxyphenyl) ethanamine)	7532	I
25B-NBOMe (2-(4-bromo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl) ethanamine)	7536	I
25C-NBOMe (2-(4-chloro-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl) ethanamine)	7537	I
25I-NBOMe (2-(4-iodo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl) ethanamine)	7538	I
N-Ethypentylone, ephylone (1-(1,3-benzodioxol-5-yl)-2-(ethylamino)-pentan-1-one)	7543	I
alpha-pyrrolidinopentiophenone (α-PVP)	7545	I
alpha-pyrrolidinobutiophenone (α-PBP)	7546	I
Ethylone	7547	I
AM-694 (1-(5-Fluoropentyl)-3-(2-iodobenzoyl) indole)	7694	I
Difenoxin	9168	I
Nicomorphine	9312	I
Drotebanol	9335	I
U-47700 (3,4-dichloro-N-[2-(dimethylamino)cyclohexyl]-N-methylbenzamide)	9547	I
AH-7921 (3,4-dichloro-N-[(1-dimethylamino)cyclohexylmethyl]benzamide))	9551	I
MT-45 (1-cyclohexyl-4-(1,2-diphenylethyl)piperazine))	9560	I
Acetylmethadol	9601	I
Alphameprodine	9604	I
Benzethidine	9606	I
Betameprodine	9608	I
Clonitazene	9612	I
Dextromoramide	9613	I
Isotonotazene (N,N-diethyl-2-(2-(4 isopropoxybenzyl)-5-nitro-1H-benzimidazol-1-yl)ethan-1-amine)	9614	I
Dimenoxadol	9617	I
Dimepheptanol	9618	I
Dimethylthiambutene	9619	I
Dioxaphetyl butyrate	9621	I
Dipipanone	9622	I
Etonitazene	9624	I
Ketobemidone	9628	I
Levomoramide	9629	I
Noracymethadol	9633	I
Normethadone	9635	I
Piritramide	9642	I
Racemoramide	9645	I
1-Methyl-4-phenyl-4-propionoxypiperidine	9661	I
Metonitazene (N,N-diethyl-2-(2-(4-methoxybenzyl)-5-nitro-1Hbenzimidazol-1-yl)ethan-1-amine	9757	I
Protonitazene (N,N-diethyl-2-(5-nitro-2-(4-propoxybenzyl)-1H-benzimidazol-1-yl)ethan-1-amine)	9759	I
Para-Fluorofentanyl	9812	I
3-Methylfentanyl	9813	I
4-Fluoroisobutyl fentanyl (N-(4-fluorophenyl)-N-(1-phenethylpiperidin-4-yl)isobutyramide)	9824	I

Controlled substance	Drug code	Schedule
Beta-hydroxyfentanyl	9830	I
Beta-hydroxy-3-methylfentanyl	9831	I
3-Methylthiofentanyl	9833	I
Furanyl fentanyl (N-(1-phenethylpiperidin-4-yl)-N-phenylfuran-2-carboxamide)	9834	I
Thiofentanyl	9835	I
Beta-hydroxythiofentanyl	9836	I
Ocfentanyl	9838	I
beta'-Phenyl fentanyl (N-(1-phenethylpiperidin-4-yl)-N,3-diphenylpropanamide; also known as β' -phenyl fentanyl; 3-phenylpropanoyl fentanyl)	9842	I
N-(1-phenethylpiperidin-4-yl)-N-phenyltetrahydrofuran-2-carboxamide	9843	I
Crotonyl fentanyl ((E-N-(1-phenethylpiperidin-4-yl)-N-phenylbut-2-enamide)	9844	I
Cyclopropyl Fentanyl	9845	I
ortho-Fluorobutyl fentanyl (N-(2-fluorophenyl)-N-(1-phenethylpiperidin-4-yl)butyramide; also known as 2-fluorobutyl fentanyl)	9846	I
Nabilone	7379	II
Alphaprodine	9010	II
Levomethorphan	9210	II
Racemethorphan	9732	II
Alfentanil	9737	II

The company plans to import the listed controlled substances for distribution for analytical testing purposes. No other activities for these drug codes are authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Claude Redd,

Acting Deputy Assistant Administrator.

[FR Doc. 2023-25989 Filed 11-22-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA-1297]

Bulk Manufacturer of Controlled Substances Application: Sigma Aldrich Research Biochemicals, Inc.

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Sigma Aldrich Research Biochemicals, Inc. has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before January 23, 2024. Such

persons may also file a written request for a hearing on the application on or before January 23, 2024.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to <https://www.regulations.gov> and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on <https://www.regulations.gov>. If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on October 27, 2023, Sigma Aldrich Research Biochemicals, Inc., 400-600 Summit Drive, Burlington, Massachusetts 01803, applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Lisdexamfetamine	1205	I

The company plans to manufacture the listed controlled substances as reference standards. No other activities

for these drug codes are authorized for this registration.

Claude Redd,

Acting Deputy Assistant Administrator.

[FR Doc. 2023-25992 Filed 11-22-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

[OMB Number 1121-0330]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Law Enforcement Congressional Badge of Bravery

AGENCY: Office of Justice Programs, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Office of Justice Programs, Bureau of Justice Assistance (BJA), Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register** on September 15, allowing a 60-day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until December 26, 2023.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Gregory Joy at 202-514-1369, Policy Advisor, Bureau of Justice Assistance, 810 7th Street NW,

Washington, DC 20531; email: gregory.joy@usdoj.gov and telephone: (202) 514-1369.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and/or
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function and entering either the title of the information collection or the OMB Control Number 1121-0330. This information collection request may be viewed at www.reginfo.gov. Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a previously approved collection.

2. *Title of the Form/Collection:* Law Enforcement Congressional Badge of Bravery (CBOB).

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* No form number. Sponsor: Office of Justice Programs, Bureau of Justice Assistance (BJA).

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Affected Public: Federal Government, and State. Local and Tribal Governments.

Abstract: BJA will use the CBOB nomination information to confirm the eligibility of nominees to be considered for the CBOB, and forward all eligible nominations as appropriate, to the Federal or the State and Local CBOB Board for their further consideration. In General—the agency heads of Federal/State and Local law enforcement agencies many nominate for a Federal/State and Local Law Enforcement CBOB, an individual—(1) who is a Federal/State and Local law enforcement officer working within the agency of the Federal/State and Local agency head making the nomination; and (2) who—(A)(i) sustained a physical injury while—(I) engaged in the lawful duties of the individual; and (II) performing an act characterized as bravery by the Federal/State and Local agency head making the nomination; and (ii) put the individual at personal risk when the injury described in clause (i) occurred; or (B) while not injured, performed and act characterized as bravery by the Federal/State and Local agency head making the nomination that placed the individual at risk of serious physical injury or death. BJA has been authorized to administer the CBOB Program.

5. *Obligation to Respond:* Voluntary.

6. *Total Estimated Number of Respondents:* 164.

7. *Estimated Time per Respondent:* 15 minutes.

8. *Frequency:* Annually.

9. *Total Estimated Annual Time Burden:* 41 hours.

10. *Total Estimated Annual Other Costs Burden:* \$0.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W-218 Washington, DC 20530.

Dated: November 17, 2023.

Darwin Arceo,
Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023-25917 Filed 11-22-23; 8:45 am]

BILLING CODE 4410-18-P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Air Act

On November 20, 2023, the Department of Justice lodged a proposed Consent Decree ("Decree") with the United States District Court for the District of Kansas in the lawsuit entitled *United States of America and State of Kansas v. Coffeyville Resources Refining & Marketing, LLC*, Civil Action No. 6:04-cv-01064.

The proposed Decree will resolve violations of the Clean Air Act arising from Coffeyville Resources Refining & Marketing, LLC's ("CRRM") operation of a petroleum refinery in Coffeyville, Kansas alleged in a supplemental complaint filed by Plaintiffs in 2020 and amended in 2023. The Decree also resolves Plaintiffs' demand for stipulated penalties under a 2012 consent decree. The Decree requires CRRM to undertake various measures to facilitate future compliance with the Clean Air Act, reduce nitrogen oxide emissions from the refinery's heaters, and build a flare gas recovery system to reduce the refinery's emissions from refinery flares. CRRM will pay \$7 million in stipulated penalties and \$6.25 million in civil penalties in total to the United States and the State of Kansas, as well as spend at least \$1 million on an environmentally beneficial project to be approved by the State of Kansas.

The publication of this notice opens a period for public comment on the Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States et al. v. Coffeyville Resources Refining & Marketing, LLC*, D.J. Ref. No. 90-5-2-1-07459/5. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	Send them to:
By email	pubcomment-ees.enrd@usdoj.gov .
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044-7611.

During the public comment period, the Decree may be examined and downloaded at this Justice Department website: <https://www.justice.gov/enrd/consent-decrees>. We will provide a paper copy of the Decree upon written

request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for \$36 (25 cents per page reproduction cost) payable to the United States Treasury.

Kathryn C. Macdonald,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2023–25960 Filed 11–22–23; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

[OMB Number 1100–0049]

Agency Information Collection Activities; Proposed eCollection Activities; Comments Requested; Revision of a Previously Approved Collection; InfraGard Membership Application and Profile Questionnaire

AGENCY: Federal Bureau of Investigation, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Federal Bureau of Investigation, Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until January 23, 2024

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Tiffany Locklear, Unit Chief Federal Bureau of Investigation, 935 Pennsylvania Ave., Washington, DC 20535, email: tlocklear@fbi.gov, telephone: 202–436–7627.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g.,

permitting electronic submission of responses.

This collection is used by the FBI's Office of Private Sector to vet applicant's for InfraGard membership. InfraGard is a Public/Private Alliance with a purpose of sharing intelligence and criminal information between the FBI and the private sector about threats and infrastructure vulnerabilities.

Overview of This Information Collection

1. *Type of Information Collection:* Revision of a previously approved collection.

2. *The Title of the Form/Collection:* InfraGard Membership Application and Profile Questionnaire.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* N/A.

4. *Affected public who will be asked or required to respond, as well as the obligation to respond:* The public affected is individuals or households. The obligation to respond is voluntary.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* Approximately 11,000 people complete the application annually, taking approximately 30 minutes to complete.

6. *An estimate of the total annual burden (in hours) associated with the collection:* Ex: The estimated total annual burden hours for this collection is 5,500 hours.

7. *An estimate of the total annual cost burden associated with the collection, if applicable:* N/A.

TOTAL BURDEN HOURS

Activity	Number of respondents	Frequency	Total annual responses	Time per response (mins.)	Total annual burden (hours)
Complete Application	11,000	1/annually	11,000	30	5,500

If additional information is required contact: Darwin Arceo, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC.

Dated: November 17, 2023.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023–25916 Filed 11–22–23; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Registration Requirements To Serve as a Pooled Plan Provider to Pooled Employer Plans; Correction

ACTION: Notice of availability; correction.

SUMMARY: The Department of Labor (DOL) is correcting a notice that appeared in the **Federal Register** on October 17, 2023. DOL is correcting an

error in the estimated burden hours, estimated number of respondents and the estimated number of responses. This is an Employee Benefits Security Administration (EBSA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before December 26, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency’s estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Michael Howell by telephone at 202–693–6782, or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: The Setting Every Community Up for Retirement Enhancement Act of 2019 (the SECURE Act) was designed to improve retirement coverage as well as the ability of individuals to manage important retirement-related risks. Specifically, the Secure Act requires Section 101 of the SECURE Act requires a “pooled plan provider” to register with the Labor Department and the Treasury Department before beginning operations as a pooled plan provider. Specifically, Section 101 of the SECURE Act amends section 3(2) of the Employee Retirement Income Security Act (ERISA) to eliminate the commonality of interest requirement for establishing certain individual account plans, or “pooled employer plans,” that meet specific requirements. Among these requirements, plans must designate a “pooled plan provider” to serve as a named fiduciary and as the plan administrator. Further, section 101 of the SECURE Act requires pooled plan providers to register with the Department of Labor (the Department) and the Department of the Treasury (Treasury) before beginning operations. The statute expressly provides a separate authorization for the Department to require additional information. For additional substantive information about this ICR, see the related notice published in the **Federal**

Register on February 8, 2023 (88 FR 8317).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

Agency: DOL–EBSA.

Title of Collection: Registration Requirements to Serve as a Pooled Plan Provider to Pooled Employer Plans.

OMB Control Number: 1210–0164.

Affected Public: Businesses or other for-profits.

Total Estimated Number of Respondents: 142.

Total Estimated Number of Responses: 142.

Total Estimated Annual Time Burden: 71 hours.

Total Estimated Annual Other Costs Burden: \$0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michael Howell,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2023–25910 Filed 11–22–23; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Veterans’ Employment and Training Service

Honoring Investments in Recruiting and Employing (HIRE) Vets Medallion Program—Announcement of HIRE Vets Medallion Award Recipients

AGENCY: Veterans’ Employment and Training Service (VETS), Department of Labor.

ACTION: Notice.

SUMMARY: In a ceremony announcing the recipients of the 2023 HIRE Vets Medallion Awards, the Department of Labor (Department) recognized a select group of veteran-ready employers for excellence in recruiting, employing, and retaining America’s veterans. The employers honored by the Department on November 8, 2023, include small businesses, nonprofit organizations, and national corporations. Recipients receive an award certificate along with a digital image of the medallion for their use, including as part of an advertisement, solicitation, business activity, or product. The awards are

conferred in six categories, based on the size of the employer (small, medium, or large) and what level of criteria their application met (platinum or gold). This action announces the recipients of the 2023 and 2022 HIRE Vets Medallion Awards.

FOR FURTHER INFORMATION CONTACT:

Randall Smith, Veterans’ Employment and Training Service, U.S. Department of Labor, Room S–1325, 200 Constitution Avenue NW, Washington, DC 20210, email: HIREVets@dol.gov, telephone: (202) 693–4745 or TTY (877) 889–5627 (these are not toll-free numbers). For press inquiries, contact Bennett Gamble, Office of Public Affairs, U.S. Department of Labor, 200 Constitution Avenue NW, Room S–1032, Washington, DC 20210, email: gamble.bennett@dol.gov, telephone: (202) 693–6587 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

The HIRE Vets Medallion Awards are authorized by the Honoring Investments in Recruiting and Employing American Military Veterans Act of 2017 (HIRE Vets Act), enacted on May 5, 2017, as Division O of the Consolidated Appropriations Act, 2017, Public Law 115–31, 131 Stat. 838. The Department codified the HIRE Vets Act’s requirements through regulations found at 20 CFR part 1011¹ and an information collection containing the application forms.² This notice is required by section 2(b)(4)(B) of the HIRE Vets Act and the regulation at 20 CFR 1011.200(d)(2).

VETS received 864 applications for the HIRE Vets Medallion Award in 2023. Among the 864 applications, the Secretary of Labor approved 859 applications for award, with 3 applications denied and 2 applications withdrawn by the applicant. Of the 859 applications approved for award, the breakdown by award type is as follows: 246 small gold (SG), 147 small platinum (SP), 223 medium gold (MG), 153 medium platinum (MP), 71 large gold (LG), and 19 large platinum (LP).

The following list shows the 859 recipients for 2023 in alphabetical order by employer name, along with their doing business as (DBA) name (as applicable), state or territory and city, and award type.³ For more information about the program, including award criteria, key dates, and applicant

¹ For the final rule adopting these regulations, see 82 FR 52186 (Nov. 13, 2017).

² For the information collection and related documents, see OMB Control No. 1293–0015.

³ Employer Name and DBA edited as appropriate; VETS is not responsible for any typographical errors.

resources, visit <https://www.hirevets.gov>.

Employer name	DBA	City	State/ terr.	Award type
34ED LLC	Centegix	Atlanta	GA	MG
7G Environmental Compliance Management		Tallahassee	FL	MG
8-koi	8-koi	Melbourne	FL	MP
A&M Transport, LLC	A&M Transport	Glendale	OR	MP
A2 Supply Chain Services LLC	Restoration 1 of Metro Detroit	Ann Arbor	MI	SP
Abile Group, Inc		Harwood	MD	MP
ABML, LLC	AshBritt	Deerfield Beach	FL	SP
Abundant Healing LLC		Greensboro	NC	SG
Acato Information Management, LLC		Oak Ridge	TN	SG
ACCIONA Energy USA Global LLC		Chicago	IL	MG
Acclaim Technical Services, LLC	ATS ESOP Holdings, Inc	Reston	VA	MG
AcqCentric, Inc		Huntsville	AL	SG
Actualized Business Solutions, Inc	ABSI Aerospace & Defense	California	MD	SP
Adapt Forward LLC	Adapt Forward LLC	North Charleston	SC	MG
Adaptive Construction Solutions		Houston	TX	MP
Advanced IT Concepts, Inc		Orlando	FL	MG
Advanced Management Strategies Group Inc	AMSG	Dumfries	VA	MG
Advanced Technology International	ATI	Summerville	SC	MG
Advanced Technology Leaders, Inc	Advanced Technology Leaders, Inc	Martinez	GA	MG
AES BUILDING SERVICES, LLC		Akron	OH	SG
Agility Federal LLC		Phoenix	AZ	SP
Agility mfg		Dover	NH	SG
AGS LLC		Las Vegas	NV	LG
Air Combat Effectiveness Consulting Group, LLC	ACE Consulting Group, LLC	Lexington Park	MD	MG
Air Liquide USA LLC		Houston	TX	LP
Air Quality Solutions Heating and Cooling		Grove City	OH	SP
Alaska Joint Electrical Apprenticeship and Training Trust		Anchorage	AK	MG
Aldevra LLC	Aldevra LLC	Kalamazoo	MI	SG
All In Solutions, LLC		Fredericksburg	VA	MG
Allegient Defense, Inc		Arlington	VA	MG
ALLO Communications	ALLO Communications	Lincoln	NE	LP
Alluvionic Inc		Melbourne	FL	SP
ALLY Construction Services	ALLY Construction Services LLC	Bensalem	PA	SP
AM General LLC	AM General LLC	South Bend	IN	LG
America Works of California, Inc	America Works of California, Inc	San Francisco	CA	SG
America Works of Illinois, Inc	America Works of Illinois, Inc	Chicago	IL	SG
America Works of Tennessee, Inc	America Works of Tennessee, Inc	Memphis	TN	SG
American States Utility Services, Inc	ASUS	San Dimas	CA	MP
AMERICAN SYSTEMS		Chantilly	VA	LG
American Veteran Solutions, Inc		Las Vegas	NV	MP
America's Warrior Partnership		Augusta	GA	SP
AmeriVet Securities, Inc		New York	NY	SP
Ametrine, Inc		Round Rock	TX	SP
Amphenol Borisch Technologies		Grand Rapids	MI	MG
ANALYGENCE, Inc		Fulton	MD	MG
Ankobia Group LLC		South Fulton	GA	SG
Antean Technology LLC		Alexandria	VA	SG
Antech Systems, Inc		Chesapeake	VA	MG
Apogee Solutions, Inc		Chesapeake	VA	MG
Applied Materials		Santa Clara	CA	LG
A-P-T Research, Inc		Huntsville	AL	MP
Aptive Resources		Alexandria	VA	MP
APVantage, LLC		Webster	TX	SP
Aquatic World of North Syracuse Inc		North Syracuse	NY	SG
Arbinger Institute, LLC		Farmington	UT	MG
ArcBest	ArcBest	Fort Smith	AR	LG
Area X Cyber Solutions LLC		Dumfries	VA	SG
ArgenTech Solutions		Newmarket	NH	MG
Armcorp Construction, Inc		Celina	OH	SP
ARServices, Limited		Falls Church	VA	MP
Arsiem Corporation	Arsiem Corporation	Baltimore	MD	MG
Artemis Electronics, LLC		Prospect	KY	SG
Asheville Buncombe Community Christian Ministries—Veterans Services of the Carolinas	ABBCM	Asheville	NC	MG
ASJ IT Services, LLC	ASJ Solutions	Chesapeake	VA	SG
Assertic LLC		Chicago	IL	SP
Assertive Professionals		Southern Pines	NC	SP
Assured Consulting Solutions, LLC		Reston	VA	MP
Assured Information Security		Rome	NY	MG

Employer name	DBA	City	State/ terr.	Award type
ATeam Solution Services		Miami Beach	FL	SP
Atec, Inc	Atec, Inc	Stafford	TX	MP
ATECH, INC		Nashville	TN	MG
Atlanta Compressor LLC	Atlanta Compressor LLC	Hoschton	GA	SG
Atlas Sand Company, LLC	Atlas Energy Solutions	Austin	TX	MP
Atlas Technologies, Inc	Atlas Tech	North Charleston	SC	MG
Atrix, PLLC	Atrix PLLC	Hickory	NC	SP
Attollo, LLC		New Bern	NC	SP
Aunty's Place Early Learning & Child Care Center, LLC.		Auburn	WA	SG
AutoBase Inc		Amityville	NY	MP
AVIAN		Lexington Park	MD	MG
Aviate Enterprises, Inc		McClellan	CA	SP
Axiom Resource Management, Inc		Falls Church	VA	MG
Azimuth Corporation		Beavercreek	OH	MP
Banner Defense, Inc		Madison	AL	SP
Barnett Engineering & Signaling Laboratories LLC	BESL	Colorado Springs	CO	SP
Battelle Energy Alliance	Idaho National Laboratory	Idaho Falls	ID	LG
Bayaud Enterprises, Inc	Bayaud Enterprises, Inc	Denver	CO	MG
Beast Code LLC		Fort Walton Beach	FL	MG
Beeline Tours Ltd		Seattle	WA	SG
Bell Textron Inc		Fort Worth	TX	LG
Bernie's Plumbing and Heating, Co	Bernie's Plumbing and Heating, Co	Boulder	CO	SG
Berry Law, P.C., L.L.O		Lincoln	NE	MG
Beshenich Muir & Associates	Beshenich Muir & Associates	Huntsville	AL	MG
BEST VERSION OF YOURSELF PSYCHOLOGY LLC.		Henderson	NV	SP
Betis Group, Inc		McLean	VA	SP
Between Two Trees Inc	JDog Junk removal & Hauling	Post Falls	ID	SG
BGIS		Seattle	WA	LG
Big Ideas Inc		New Ulm	MN	SP
Bison Health, LLC	Bison Health	Las Vegas	NV	SG
Black Bear Technology Solutions, LLC		Alexandria	VA	SP
Black Hills Service Company LLC	Black Hills Energy	Rapid City	SD	LP
Blake Willson Group, LLC		Arlington	VA	MG
BLOKWORX, LLC		Reno	NV	SG
Blue Star Families, Inc	Blue Star Families, Inc	Encinitas	CA	MP
BluePath Labs LLC		Washington	DC	SP
Bluestaq		Colorado Springs	CO	MG
Boingo Wireless, Inc		Los Angeles	CA	MG
Booz Allen Hamilton	Booz Allen Hamilton	McLean	VA	LP
Boston Fusion Corp		Lexington	MA	SG
Boston Government Services		Oak Ridge	TN	MG
Brightstar Innovations Group, LLC		Arlington	VA	SG
Bullen Ultrasonics		Eaton	OH	MG
BWJ Metalworks, LLC		Abilene	TX	MG
C & G Consulting, Inc		Manassas Park	VA	SG
C2C LLC		Chesterfield	MO	SP
C4 Planning Solutions, LLC		Blythe	GA	MG
Caddell Construction Co. (DE) LLC	Caddell Construction	Montgomery	AL	MG
CAE USA INC		Tampa	FL	LP
Caladwich Consulting, LLC		Annandale	VA	SP
Calvert Systems Engineering Inc	Calvert Systems Engineering Inc	Bellevue	NE	MG
Cambridge International Systems, Inc		Arlington	VA	MG
CANA LLC	CANA Advisors LLC	Gainesville	VA	SG
Canadian Valley Electric Cooperative, Inc		Seminole	OK	MG
Candace Howell Insurance Agency Incorporated		Fayetteville	NC	SG
Cantrell-Gainco Group		Gainesville	GA	MG
Career Learning & Employment Center for Veterans, Inc.	Operation: Job Ready Veterans (OJRV)	Indianapolis	IN	SP
Career Systems Development Corporation	Penobscot Job Corps Center	Bangor	ME	MG
CareerSource Pinellas		Clearwater	FL	MG
Carter Machinery Co Inc		Salem	VA	LG
Cascade Environmental	Cascade Drilling	Bothell	WA	LG
Casilo Consulting, LLC	Vector Services	Collinsville	IL	MP
Cassidy Consulting Group/C2G	CASSIDY CONSULTING GROUP (DBA C2G)	Naples	FL	SG
Castalia Systems LLC		Tampa	FL	MG
Castle Hill Associates, LLC		Waterville	OH	SG
Catalyst Technical Consulting Group, LLC		Crown Point	IN	SG
Caylor Equipment Services LLC		Jupiter	FL	SG
Cayuse Holdings, LLC		Pendleton	OR	LP
CB Design Group		Alexandria	VA	SP
Celerity Government Solutions, LLC	Xcelerate Solutions	McLean	VA	MG

Employer name	DBA	City	State/ terr.	Award type
Central Texas Workforce Development Board, Inc	Workforce Solutions of Central Texas	Belton	TX	MP
Check-6 Inc		Tulsa	OK	MP
Chenega Corporation		Anchorage	AK	LG
Cincinnati Incorporated	Cincinnati Incorporated	Harrison	OH	MP
Cintel Inc	Cintel Inc	Huntsville	AL	MG
Circle Computer Resources	Circle Computer Resources	Cedar Rapids	IA	MP
Circuit Media LLC		Denver	CO	MP
Citizens Development Center dba U&I	U&I	Dallas	TX	SG
City of Alpharetta	City of Alpharetta	Alpharetta	GA	MG
City of Cape Canaveral		Cape Canaveral	FL	MP
City of Cedar Hill		Cedar Hill	TX	MG
City of Harker Heights		Harker Heights	TX	MG
City of Quincy	City of Quincy	Quincy	IL	MG
City of St. Charles		St Charles	IL	MG
City of Treasure Island		Treasure Island	FL	MG
City of Westbrook		Westbrook	ME	MG
Clarklift of Des Moines, Inc	Forklifts of Des Moines	Des Moines	IA	SG
Clear Resolution Consulting, LLC		Baltimore	MD	MG
Client First Technologies, Inc		Fairfax	VA	MP
CloudWyze, Inc		Wilmington	NC	SP
CMS Corporation	CMS Corporation	Maumee	OH	MP
Coalfire Systems Inc		Greenwood Village	CO	LG
Cognitive Medical Systems, Inc		San Diego	CA	SG
Cognosante, LLC		Falls Church	VA	LG
Col. David L. Frederick (Ret)	Facilities Development Corporation (FDC)	Reston	VA	SG
Colorado Springs Sheet Metal JATC		Colorado Springs	CO	MP
Colossal Contracting, LLC		Annapolis	MD	MP
Command Holdings, a Pequot Company	Command Holdings, a Pequot Company	Ledyard	CT	MG
Community Security Services, LLC	CSSI	Mobile	AL	MG
Compendium Federal Technology LLC		Lexington Park	MD	SP
COMSETRA LLC		Jay	OK	SG
COMSO, Inc		Columbia	MD	MG
Conceras, LLC		Fairfax	VA	SP
Concord Crossroads, LLC		Dumfries	VA	SG
Concordant, LLC		Laramie	WY	SP
CONCORDE JET CENTER		Brunswick	ME	SG
Conditioned Air Company of Naples LLC		Naples	FL	MG
Conflict Kinetics	Conflict Kinetics	Sterling	VA	SG
Connectria, LLC		St. Louis	MO	MG
Consolidated Nuclear Security, LLC	Y-12 National Security Complex	Oak Ridge	TN	LG
Constellation Software Engineering LLC	CSEngineering, LLC	Annapolis	MD	MG
Constellation West	Constellation West	Bellevue	NE	MG
Construction Services Group, Inc		Charleston	SC	SP
Contracting Resources Group, Inc		Baltimore	MD	MP
Convergint Technologies LLC	Convergint	Schaumburg	IL	LG
Converse Construction, Inc		Redding	CA	SP
Converse Electric		Grove City	OH	MG
Core Government Services (CGS)		Purcellville	VA	SG
Core4ce, LLC		Reston	VA	MG
Corporate America Supports You (CASY)	VetJobs	Fort Myers	FL	MP
Corps Solutions, LLC		Stafford	VA	MG
Cortina Solutions, LLC		Huntsville	AL	SG
CoSolutions, Inc		Sterling	VA	MG
Covered 6 LLC		Moorpark	CA	MG
CP Marine, LLC dba CPMG, LLC		Juneau	VA	SP
CPMC, LLC	CPMC, LLC	Tysons Corner	VA	SG
CPS Professional Services, LLC	CATHEXIS	Falls Church	VA	MG
Crane Inspection & Certification Bureau		Houston	TX	SP
Criterion Systems, LLC, a Cherokee Federal Company.		VIENNA	VA	MP
CriticalCx Inc	Critical CxE Inc	Annapolis	MD	SP
Cromulence LLC		Melbourne	FL	SG
CROSSWORKS TECHNOLOGIES, INC		Orlando	FL	SG
Cruz Associates, Inc		Yorktown	VA	MP
CSA	CSA LLC	Virginia Beach	VA	LG
CTI Resource Management Services, Inc	CTI Resource Management Services, Inc	Jacksonville	FL	MG
CymSTAR Services, LLC	CymSTAR Services, LLC	Broken Arrow	OK	MG
CymSTAR, LLC	CymSTAR, LLC	Broken Arrow	OK	MG
DAGER Technology, LLC		Fairfax	VA	SG
Dassault Aircraft Services Reno		Reno	NV	SG
Data Center Solutions, Inc	DCS Data Centers	Annapolis	MD	SP
Dauntless Wine Company		Forest Grove	OR	SG
Davis Agency LLC		Federal Way	WA	SP

Employer name	DBA	City	State/ terr.	Award type
DCO Operations, LLC		Lawrenceville	NJ	MP
DD DANNAR, LLC	DANNAR	Muncie	IN	SG
Decision Technologies, Inc		Arlington	VA	MG
Decisive Point Consulting Group, LLC		Waco	TX	MG
Deer Brook Consulting		North Yarmouth	ME	SG
DefendEdge OC LLC	DefendEdge	Glen Ellyn	IL	SP
Defense Contracting, Inc	DCI Solutions	Aberdeen Proving Ground	MD	MP
Delmarva Veteran Builders, LLC		Salisbury	MD	SG
DELTA CON GLOBAL INC		Sugarland	TX	SP
DEMCO Enterprises, Inc	DEMCO AUTOMATION	Quakertown	PA	SG
Devotion Hospice	Devotion Hospice	Conroe	TX	MG
DIGITAL GLOBAL CONNECTORS, LLC		McLean	VA	SG
Dillon Transportation		Ashland City	TN	MG
Diplomat Construction & Demolition, Inc	Diplomat Demolition	West Chester	PA	MG
DirectViz Solutions, LLC		Vienna	VA	MG
Dixon Management Group LLC	SERVPRO of Belle Meade	Nashville	TN	SG
DK & R Corp		Henderson	NV	SP
DLB Associates	DLB Associates	Neptune City	NJ	MP
Dorreaan, LLC	Dorreaan, LLC	Reston	VA	MG
Dotts Group LLC		Downingtown	PA	SG
Draken International LLC		Lakeland	FL	MP
Drexel Hamilton, LLC	Drexel Hamilton, LLC	New York	NY	SG
DroneShield LLC		Warrenton	VA	SG
DSoft Technology Company	DSoft Technology, Engineering & Analysis, Inc	Colorado Springs	CO	SG
DVL Group, Inc		Bristol	PA	MG
DWBH, LLC	DWBHCORP	Arlington	VA	SG
Eagle Systems, Inc		California	MD	MG
EARLY SERVICES INC		Decatur	AL	SG
Earnest Construction Company		San Antonio	TX	SG
Eastern Carolina Vocational Center, Inc (ECVC)		Greenville	NC	MG
Easterseals Redwood Military & Veteran Services		Cincinnati	OH	SG
Echo Five Group		Arlington	VA	SP
EGS Inc	Empowered Global Solutions	Englewood	CO	MG
Electric Power Systems International, Inc		Maryland Heights	MO	LG
Electrical Test Instruments, LLC	ETI Precision	Frederick	MD	SP
Eljen Corporation		Windsor	CT	SP
ELYON International, Inc		Vancouver	WA	MG
EM Key Solutions, Inc		St. Petersburg	FL	SP
EMD Electronics	EMD Electronics	Austin	TX	MP
EMD LLC		Woodbridge	VA	SG
Employment Source, Inc	ServiceSource, Inc	Fayetteville	NC	MG
Energy Systems Group, LLC		Newburgh	IN	MG
Enhanced Veterans Solutions, Inc		Fairfax	VA	MG
ENSCO Rail, Inc		Springfield	VA	MG
ENSCO, Inc		Springfield	VA	LG
Entegrity Consulting Group		Dayton	OH	SP
Entergy Corporation		New Orleans	LA	LG
Environet Inc		Honolulu	HI	SG
Environmental Chemical Corporation		Burlingame	CA	MP
EolianVR Inc		Largo	FL	SG
Epigen Technology Corp		McLean	VA	SG
EPS Corporation		Tinton Falls	NJ	MP
EquipmentShare.com	EquipmentShare	Columbia	MO	LG
Erie Industrial Products		Oberlin	OH	SG
Eskridge Enterprises LLC	Eskridge & Associates	Round Rock	TX	SP
Ever-Green Energy, Inc		Saint Paul	MN	MG
Evergreen Fire Alarms, LLC	Evergreen Fire and Security	Tacoma	WA	MG
Eversource Energy		Hartford	CT	LG
Exact Staff, Inc		Calabasas	CA	MG
Excalibur Legal Staffing LLC	The Excalibur Group	Washington	DC	SG
Excentium, Inc		Reston	VA	SP
Exceptional Employees for Exceptional Results Inc.	E3R, Inc	El Cajon	CA	MP
Executive Airborne Solutions, Inc		Bellevue	NE	SP
EXPANSIA Group LLC	EXPANSIA	Nashua	NH	MP
Expeditionary Technology Services INC	Expeditionary Technology Services INC	Atlanta	GA	SP
Explosive Countermeasures International, Inc	ECI	Delaplane	VA	SG
F3EA, Inc		Savannah	GA	MG
FASTPORT, Inc	FASTPORT, Inc	Valparaiso	IN	SG
Federal Practice Group	Federal Practice Group	Washington	DC	SG
Federal Strategies LLC		Fredericksburg	VA	SP
Feith Systems and Software, Inc	Feith Systems	Fort Washington	PA	MP

Employer name	DBA	City	State/ terr.	Award type
Fireside Partners, Inc		Dover	DE	SG
First Nation Group, LLC		Niceville	FL	MP
Five Star Global Security LLC		Fayetteville	NC	SG
Flagship Management, LLC		Bristol	PA	MG
Florida Institute for Human & Machine Cognition		Pensacola	FL	MG
Florida is for Veterans, Inc	Veterans Florida	Tallahassee	FL	SG
Flux Resources, LLC		Tigard	OR	MG
Foley, Incorporated		Piscataway	NJ	LG
Fontaine Consulting, LLC		East Moline	IL	SP
Forge Institute		Little Rock	AR	SP
Forte Health and Wellness, Inc		Denver	CO	SP
FourFront Design, Inc		Rapid City	SD	SG
Frontier Market Solutions	Ravenox	Mount Vernon	WA	SG
Fusion Cell LLC		Windham	NH	SP
Gannon & Scott Phoenix, Inc	Gannon & Scott	Phoenix	AZ	SG
Gary R Banks Industrial Group		West Berlin	NJ	SG
Gauss Management Research and Engineering GMRE, Inc.		South Ogden	UT	MG
GC LOGISTICS		Ridgeland	MS	SP
GCubed Enterprises Inc	GCubed, Inc	Stafford	VA	SP
GDM of Oregon		Bingen	WA	SG
GeekFindrz LLC	MOMENTUM	Huntsville	AL	SG
General Dynamics Mission Systems	General Dynamics Mission Systems	Fairfax	VA	LG
General Dynamics NASSCO—Norfolk	General Dynamics NASSCO—Norfolk	Norfolk	VA	MP
General Electric Company	GE Aerospace	Evendale	OH	LG
General Infomatics, Inc	GI	McLean	VA	MG
GenTech Associates Inc		Indianapolis	IN	MG
Global Business Solutions, LLC	GBSI	Pensacola	FL	SG
Global Security Services IA		Davenport	IA	MP
Global Skills Exchange Corporation	GSX, Global Skills X-Change	Alexandria	VA	SG
Global Technology & Management Resources, Inc.	GTMR, Inc	Hollywood	MD	MG
GLOTECH, Inc		Rockville	MD	MP
Go Energistics		Dallas	RI	SG
Goldbelt Apex		Herndon	VA	MG
Goldbelt C6, LLC		Chesapeake	VA	MP
Goldbelt Falcon, LLC		Chesapeake	VA	MP
Goldbelt Frontier, LLC		Alexandria	VA	MG
Goldbelt Glacier Health Services, LLC		Herndon	VA	MG
Goldbelt Hawk, LLC		Newport News	VA	MP
Goldbelt Incorporated		Juneau	AK	MP
Goldbelt Integrated Logistics Services		Chesapeake	VA	SG
Goldbelt Nighthawk, LLC		Newport News	VA	SP
Goldbelt Operations Support Services		Herndon	VA	SP
Goldbelt Professional Services		Chesapeake	VA	MP
Goldbelt Security, LLC		Juneau	AK	SP
Golden Key Group		Reston	VA	MG
Gotham Government Services		Haymarket	VA	SG
Government Tactical Solutions		Vienna	VA	MP
Green Expert Technology Inc		Haddonfield	NJ	MG
GSI Service Group Inc		Honolulu	HI	MG
Guardian Angels Medical Service Dogs, Inc	Guardian Angels Medical Service Dogs	Williston	FL	SG
H2 Performance Consulting Corp		Gulf Breeze	FL	MP
H2L Solutions, Inc		Huntsville	AL	MP
Hancock Resource Center		Waveland	MS	SG
Harvard Integrations		Tea	SD	MG
Hawkeye Tracking Inc		Lexington Park	MD	SG
HazAir, Inc	HazAir, Inc	Henderson	NV	SG
Haze Gray Vineyards LLC		Dobson	NC	SP
HD Dog Training Llc		Bensalem	PA	SG
Heptagon Information Technology, LLC		Montgomery	AL	SP
Herc Rentals		Bonita Springs	FL	LG
Hernandez Consulting & Construction LLC	Hernandez Consulting & Construction	New Orleans	LA	MP
HHO Carbon Clean Systems, LL	HHO Carbon Clean Systems, LL	Paducah	KY	SG
High Order Solutions, LLC		Frisco	TX	SG
HigherEchelon, Inc		Huntsville	AL	MP
Highland Engineering, Inc		Howell	MI	SG
Hill		Newport News	VA	LG
Hilliard Division of Police	Hilliard Division of Police	Hilliard	OH	MG
HM Cragg		Edina	MN	MG
Hope For The Warriors		Springfield	VA	MG
Hudgins Contracting Corp		Hampton	VA	SG
HudsonAnalytix, Inc	HudsonAnalytix, Inc	Cherry Hill	NJ	SG

Employer name	DBA	City	State/ terr.	Award type
Huot Construction & Services	Huot Construction & Services	South St. Paul	MN	SG
HurtVet Subcontracting, LLC .....	.....	Park City	UT	SP
Hydro Vac Services	GroundBreakers LLC	Indianapolis	IN	SG
HZ Construction Inc	Not Applicable	Orlando	FL	SG
Iberia Advisory, LLC .....	.....	Washington	DC	SP
Iconicx Critical Solutions, LLC .....	.....	Amsterdam	NY	MP
IDEA HELIX INC .....	.....	Fremont	CA	SG
IMPERIAL AUTO AND TRUCK SERVICE	LYLOKI LLC	Henderson	NV	SG
INDEPENDENCE HYDROGEN .....	.....	Ashburn	VA	SP
Indigo IT, LLC	Indigo IT, LLC	Herndon	VA	MP
Industrial Packaging Supplies, Inc	IPS Packaging & Automation	Fountain Inn	SC	MP
Infinity Systems Engineering .....	.....	Colorado Springs	CO	MP
Infinity Technology Services, LLC	ITS, LLC	Colorado Springs	CO	MP
Information Management Group Inc	IMG	Fairfax	VA	MG
Insignia Technology Services	9th Way Insignia	Ashburn	VA	MP
Inspired Solutions, Inc .....	.....	Manassas	VA	SG
Integration Innovation, Inc	i3	Huntsville	AL	LG
Integrity Consulting Engineering and Security So- lutions (ICESS) .....	.....	Purcellville	VA	SG
IntelliDyne, LLC .....	.....	Falls Church	VA	MG
intelliSolutions, Inc .....	.....	San Diego	CA	SP
IntePros Federal .....	.....	Washington	DC	MG
Interactive Government Holdings, Inc .....	.....	Springfield	VA	MP
InterImage, Inc	InterImage, Inc	Arlington	VA	SG
International Controls Systems, Inc .....	.....	Littleton	CO	SG
International Training Fund .....	.....	Annapolis	MD	LP
Intrepid .....	.....	Huntsville	AL	MG
Intrepid Solutions and Services, LLC .....	.....	Herndon	VA	MG
Invenergy .....	.....	Chicago	IL	LG
Invetus LLC .....	.....	Greer	SC	SG
iostudio, LLC	iostudio, LLC	Nashville	TN	MP
Ipsolon Research, Inc .....	.....	Frederick	MD	SG
IPT Associates	IPTA	Burlington	MA	MP
IronMountain Solutions, Inc .....	.....	Huntsville	AL	MP
IRONWORKERS LOCAL UNION #399 JATC	IRONWORKERS LOCAL UNION #399 JATC	Hammonton	NJ	SG
IT Concepts, Inc .....	.....	Vienna	VA	MG
IT Veterans, LLC	IT Veterans, LLC	Herndon	VA	SP
Itero Group, LLC .....	.....	New Cumberland	PA	MG
Jackson Ryan Construction Services, Inc .....	.....	Suffield	CT	SG
Janissary, LLC .....	.....	Houston	TX	MP
JANUS Research Group, LLC .....	.....	Evans	GA	LG
Jay & Kay Mfg. LLC .....	.....	Croswell	MI	SP
JB Management Inc .....	.....	Alexandria	VA	MP
JBM Energy Solutions, LLC .....	.....	Lawrenceville	NJ	SG
JCTM LLC .....	.....	Charlotte	NC	MP
JGMS Government Services, LLC .....	.....	Grand Junction	CO	MP
Jingoli Nuclear Services, LLC .....	.....	Lawrenceville	NJ	SG
Jingoli Power, LLC .....	.....	Lawrenceville	NJ	MP
JIT Staffing LLC	Just In Time Staffing	Round Rock	TX	SP
John H. Northrop & Associates, Inc	JHNA	Clifton	VA	MG
Jovian Concepts, Inc .....	.....	Hanover	MD	MG
JR Kays Trucking Inc .....	.....	Clarendon	PA	SP
JTEC Consulting LLC .....	.....	Decatur	GA	SG
JVC Enterprises LLC .....	.....	Byron Center	MI	SG
JVS SoCal .....	.....	Los Angeles	CA	MG
KaDSci, LLC .....	.....	Fairfax	VA	SP
Kaiva Services, LLC .....	.....	Tulsa	OK	SG
Kalman & Company, Inc .....	.....	Virginia Beach	VA	MG
KASTELLUM Group, LLC .....	.....	Odessa	FL	MG
Kegman Inc	Kegman Inc.	Melbourne	FL	SG
Kent, Campa and Kate (KCK) Inc .....	.....	Arlington	VA	SP
Kentco Corporation	ProteQ	Hendon	VA	SG
Keystone Fire & Security .....	.....	North Wales	PA	MG
Kilda Group LLC .....	.....	Severna Park	MD	SG
Kingfisher Systems, Inc .....	.....	Falls Church	VA	MG
Kingsky Flight Academy	Kingsky Flight Academy	Lakeland	FL	SG
KIRSH Helmets, Inc	KIRSH Helmets, Inc	Schenectady	NY	SG
Kizano Corp .....	.....	Woodbridge	VA	SP
Knight Federal Solutions Inc .....	.....	Orlando	FL	MP
Knowesis Inc .....	.....	Fairfax	VA	MP
Kolme Group, LLC .....	.....	Phoenix	AZ	SP
Korn Ferry Professional Search (US) .....	.....	Los Angeles	CA	LG
KSA Integration LLC .....	.....	Stafford	VA	SP

Employer name	DBA	City	State/ terr.	Award type
Kwest Group LLC	Kwest Group	Perrysburg	OH	MP
LaunchTech, LLC		Huntsville	AL	SG
LAZARUS ALLIANCE, INC	LAZARUS ALLIANCE, INC	Scottsdale	AZ	SP
Legato, LLC		Columbia	MD	SP
Leidos		Reston	VA	LG
Leonardo DRS, Inc		Arlington	VA	LG
Liberty Business Associates, LLC		Ladson	SC	MG
Life Cycle Engineering		Charleston	SC	MP
LinQuest Corporation		Herndon	VA	LG
Lockheed Martin		Bethesda	MD	LP
LockLeed International		Blaine	MN	SP
Lodestar Consulting, Inc		Charlotte	NC	MP
Long Capture & Contract Management LLC		Colorado Springs	CO	SP
Los Alamos National Laboratory		Los Alamos	NM	LG
Louisiana Energy Services LLC, d/b/a. URENCO USA.	URENCO USA	Eunice	NM	MG
LRS Federal LLC		Severna Park	MD	SP
LTC Solutions		Stafford	VA	SG
LUKOS LLC	LUKOS LLC	Tampa	FL	MP
Lynch Consultants, LLC	Lynch Consultants	Arlington	VA	MP
M Dean Owen, CPA, PSC	M Dean Owen, CPA, PSC	Paducah	KY	SG
Maggie's Outreach Community Economic Development Center.	Non-Profit	Raeford	NC	SG
Mainsail Group LLC	Mainsail Group LLC	Bedford	MA	MG
ManTech International Corp	ManTech	Herndon	VA	LG
Marand US Holdings LLC		Fort Worth	TX	SG
Mark My words LLC	Walker Bookstore	Tempe	AZ	SP
Mark Ronning LLC	Northwest Veterans Law	Salem	OR	SP
Markon, LLC	Markon Solutions, An Anser Advisory Company	Falls Church	VA	MP
Martinfederal Consulting, LLC		Huntsville	AL	MP
Matrix Business Concepts, LLC		Concord	NH	MG
Maveris, LLC	Maveris	Martinsburg	WV	MP
Mb Solutions, Inc		Huntsville	AL	MP
Memphis-Shelby County Schools		Memphis	TN	LG
Mesa Natural Gas Solutions		Loveland	CO	MP
Messer North America, Inc	Messer North America, Inc	Bridgewater	NJ	LG
Metis Technology Solutions, Inc		Albuquerque	NM	MP
Mfinite Consulting LLC		Severn	MD	SG
Michaels Stores, Inc	Michaels Stores Inc	Irving	TX	LG
Micron Technology		Boise	ID	LP
MidAmerican Energy Company		Des Moines	IA	LG
MIKROPOR AMERICA INC		Michigan City	IN	SP
Miles Technology Solutions LLC	Miles Enterprise Solutions	Charlotte	NC	SG
Military Officers Association of America	MOAA	Alexandria	VA	MP
MILLENNIUM CORPORATION		Arlington	VA	MG
Mischler Financial Group		Corona del Mar	CA	MP
Mission1st Group Inc		Arlington	VA	MP
MIT Lincoln Laboratory	MIT Lincoln Laboratory	Lexington	MA	LG
Mitchell Technical College	Mitchell Technical College	Mitchell	SD	MG
Monte Sano Research Corporation		Huntsville	AL	MG
Monterey Consultants, Inc		Dayton	OH	MP
MorningStar MyCo LLC		Reno	NV	SG
Mountain View Electric Company LLC		Willis	VA	SG
Mountaineer Community Health Center, Inc		Paw Paw	WV	SG
M'Possible Mortgage Group LLC	The M'Possible Mortgage	Phoenix	AZ	SG
MRP Training Solutions, Inc		San Diego	CA	SG
MTIV LLC	MTIV INC	Carleton	MI	SG
MULE Engineering, Inc	MULE Engineering & Construction, Inc	Winter Garden	FL	SP
Murray Automotive Group, Inc	Murray Chrysler Dodge Jeep Ram	Starke	FL	MG
Murray Ford Mercury, Inc	Murray Ford Superstore	Starke	FL	MG
National Grid Solutions LLC	National Grid Solutions LLC	Cypress	CA	SG
National Native American Construction, Inc	NNAC, Inc	Coeur d' Alene	ID	SG
Nation's Finest		Santa Rosa	CA	MP
Nationwide IT Services, Inc		Fairfax	VA	MP
Nationwide Pharmaceutical, LLC		San Antonio	TX	SG
Native Instinct LLC		Boynton Beach	FL	SP
Naval Systems, Inc		Lexington Park	MD	MG
Navigator Development Group Inc	Navigator Development Group Inc	Enterprise	AL	MP
Navigator International LLC		Huntsville	AL	MG
nDepth Security, LLC	nDepth Security	Columbia	MD	SG
Nemean Solutions, LLC		Sierra Vista	AZ	MP
NetCentrics		Herndon	VA	MG
Netizen Corporation		Allentown	PA	SG

Employer name	DBA	City	State/ terr.	Award type
NeuroScience Associates, Inc		Knoxville	TN	SG
NewBridge Partners, Inc		Herndon	VA	SP
NewStyle Communities		Belmont	NC	SG
NexTech Solutions LLC	NexTech Solutions	Tampa	FL	MG
NextEra Energy		Juno Beach	FL	LP
NextGen Federal Systems LLC		Morgantown	WV	MG
NextOp, Inc	NextOp	Houston	TX	SP
NineLine Veteran Services	NineLine Veteran Services	Fife	WA	SG
Nisga'a CIOPS		Chantilly	VA	SP
Nisga'a MOSTT		Chantilly	VA	SP
Nisga'a Tek, LLC		Chantilly	VA	MP
NorCal Staffing Group, Inc	TangoAlpha3	Austin	TX	SG
North America Mattress Corp	North America Mattress Corp	Clackamas	OR	SG
North American Consulting Services, Inc	NACS, Inc	Point Pleasant	WV	SG
North American Rescue		Greer	SC	MP
North American Substation Services, LLC		Altamonte Springs	FL	MG
Northrop Grumman Corporation	Northrop Grumman Systems Corporation	Falls Church	VA	LG
Northstrat		Sterling	VA	MG
NStar Global Services		Garner	NC	MP
NTCS LLC		Alexandria	VA	SG
NTT Global Data Centers Americas, Inc		Sacramento	CA	LG
Nucor Steel Auburn, Inc		Auburn	NY	MG
Nuss Truck and Equipment	Nuss Truck Group Inc	Roseville	MN	MP
Oaklea Security Services, LLC	Oaklea Simpson Security	Alexandria	VA	MP
Oasis Systems LLC		Burlington	MA	LG
Obera LLC		Herndon	VA	SG
Offset Strategic Services, LLC		Huntsville	AL	SP
Okaloosa-Walton Jobs and Education Partnership, Inc.	CareerSource Okaloosa Walton	Shalimar	FL	SG
Oklahoma Chiller Corporation		Tulsa	OK	SG
Olympus Solutions Inc		Daytona Beach	FL	SG
On Time Prime LLC	On Time Prime LLC	Daytona Beach	FL	MG
Ondadottdline, LLC		Salem	OR	SG
Ondra-Huyett Associates, Inc		Allentown	PA	SP
One Corps, Inc		Carolina	PR	SG
Open Security Inc		San Antonio	TX	SP
Open Systems Technologies Corporation	Open Systems Technologies Corporation	Gainesville	VA	MP
Operation Healing Forces		Tampa	FL	SG
Optimum Low Voltage, LLC	Optimum Fire & Security	Wilmington	NC	SG
Opto-Knowledge Systems, Inc	OKSI	Torrance	CA	SG
Orion ICS, LLC	Orion Talent	Cary	NC	MP
OWT GLOBAL	OWT Global, LLC	Tampa	FL	MG
Oxley Enterprises, Inc		Fredericksburg	VA	MG
P-11 Security, Inc	P-11 Security	Torrance	CA	SP
PACCAR WINCH Inc	PACCAR WINCH Inc	Broken Arrow	OK	MP
Pacific Aerospace Consulting, Inc		San Diego	CA	SG
Pacific Gas & Electric Company (PG&E)		Oakland	CA	LG
Paragon Cyber Solutions, LLC		Tampa	FL	SP
Paris Union School District No. 95	Paris Union School District No. 95	Paris	IL	MP
PatchPlus Consulting Inc		Medford	NJ	MG
PathFinder Digital LLC	PathFinder Digital	Sanford	FL	SG
Patriotic Holdings, LLC		New Braunfels	TX	SG
Patronus Systems Inc		Melbourne	FL	MP
Pennsylvania Petroleum Association, Inc		Middletown	PA	SG
PeopleService, Inc		Omaha	NE	MG
PeopleTec, Inc		Huntsville	AL	MP
Peraton Inc		Reston	VA	LG
PERCIVAL, INC	Percival Engineering	Columbia	MD	SP
Peregrine Energy Solutions, LLC		Boulder	CO	SP
Peregrine Technical Solutions		Yorktown	VA	SP
Persistent Systems LLC		New York	NY	MP
Phase II Staffing and Contracting, LLC		Quantico	VA	SP
phia LLC		Fairfax	VA	SP
Philbrook Construction Services Group, INC		Yarmouth Port	MA	SG
Phillips 66		Houston	TX	LG
Phoenix Global Support, LLC		Fayetteville	NC	SP
PingWind INC		Annandale	VA	MG
Pinkham Cyr, Inc		Mooreville	NC	SG
PL Consulting, Inc		Great Falls	VA	SG
Planet Technologies, Inc	Planet Technologies, Inc	Germantown	MD	MG
Planned Systems International, Inc	Planned Systems International, Inc. (PSI)	Columbia	MD	LG
Platform Aerospace	Platform Aerospace	Hollywood	MD	MG
Platinum Business Services LLC		Clarksville	MD	MG

Employer name	DBA	City	State/ terr.	Award type
Portable Solar LLC	Sol-Ark	Plano	TX	MG
Portsmouth Community Health Center Inc	Hampton Roads Community Health Center	Portsmouth	VA	MG
Postal Solutions Inc	A-1 Notary Solutions; A1- Packaging Solutions	Torrance	CA	SG
Posterity Group LLC		Rockville	MD	SG
Powell Strategies, LLC		Annapolis	MD	SG
PPT Solutions, Inc		Huntsville	AL	SG
Practical Intelligence, LLC		Gambrills	MD	SG
Precise Systems, Inc	Precise Systems	Lexington Park	MD	LG
Precision Concrete Cutting	Precision Concrete Cutting	Escondido	CA	SG
Preferre Melamines LLC		Springfield	MA	SG
Prince George's County Police Department	Prince George's County Police Department	Upper Marlboro	MD	LG
Principle Services, LLC		Graham	TX	SG
Priority 1 Air Rescue Operations Arizona LP		Mesa	AZ	SG
Professional Contract Services, Inc. PCSI		Austin	TX	LP
Professional Solutions Delivered, LLC		King George	VA	MP
Programatics, LLC		Alexandria	VA	SP
Project Management Professional Services Corporation.	The PMO Squad	Gilbert	AZ	SP
Promising People LLC		Orlando	FL	SG
ProSync Technology Group		Ellicott City	MD	SG
PSI		Knoxville	TN	MG
Puget Sound Energy		Bellevue	WA	LG
Quadrint, Inc		Falls Church	VA	MG
Qualis Corporation		Huntsville	AL	MP
Quecon, Inc		Front Royal	VA	SG
Quick Services LLC	QSL	Fayetteville	NC	MP
Quiet Professionals LLC		Tampa	FL	MP
R2C, Inc		Huntsville	AL	MG
R3		Coronado	CA	MP
Rafael Systems Global Sustainment LLC	RSGS	Bethesda	MD	SG
RAM Aviation, Space & Defense		St. George	UT	MG
Rapid Cycle Solutions		Nokesville	VA	SG
Rapid Dry, Inc		Scottsville	NY	SG
Raytheon Technologies	Raytheon Technologies	Arlington	VA	LP
RB Consulting, Inc	RBCI	Frederick	MD	MP
RC4VETS LLC		San Antonio	TX	SG
Ready Support Services, LLC		Plano	TX	SP
REDI Transports		Green Bay	WI	SP
RedSky LLC		Aldie	VA	SP
ReefPoint Group, LLC		Annapolis	MD	MP
Reinaert LLC		Pinellas Park	FL	SG
Reliability & Performance Technologies, LLC	R&P Technologies	Dublin	PA	MG
RELYANT Global, LLC		Maryville	TN	MG
Rembert Area Community Coalition	Rembert Area Community Coalition (RACC)	Rembert	SC	SG
Renaissance Global Services LLC		Holmdel	NJ	SP
Renewable Energy Systems LLC		Avilla	IN	SP
Research and Development Solutions, Inc	RDSI	North Kingston	RI	MG
Responsible Medical Solutions Corp	Temecula 24 Hour Urgent Care; Carlsbad Urgent Care San Marcos; Temecula Family Medicine.	Temecula	CA	MP
RESULTS Technology, INC		Overland Park	KS	SG
ResumeYourWay	MBH National Inc	Springfield	VA	SP
Revolution National Pest Council		Carson	CA	SP
Rhino Health FW, LLC		Fort Worth	TX	SG
Ricardo Defense	Ricardo Defense	Troy	MI	MG
Richard Group LLC	Richard Group LLC	Chicago	IL	SG
Ridgeline International		Tysons	VA	MG
RightDirection Technology Solutions LLC	RDTS	Baltimore	MD	SP
Rigid Security Group	Rigid Tactical	Virginia Beach	VA	MP
risk3sixty LLC		Roswell	GA	SP
Rite-Solutions, Inc		Middletown	RI	MP
Roberts & Ryan Investments, Inc	Roberts & Ryan	New York	NY	SG
Rockford Systems LLC		Rockford	IL	MG
rockITdata LLC		Philadelphia	PA	MP
Rocky Mountain Hydrostatics, LLC		Brighton	CO	SP
RTI Consulting, LLC	RTI Consulting LLC	Marshall	VA	SG
Rubicon Technical Services LLC	Rubicon Technical Services LLC	Kennesaw	GA	MP
Ruchman and Associates, Inc		Nottingham	MD	MG
Rushford State Bank		Rushford	MN	SG
S.B., Inc	Sherman Bros. Heavy Trucking	Harrisburg	OR	MP
Sabre Systems, Inc		Warminster	PA	MG
Safespill		Houston	TX	SP
Saliense Consulting		Tysons	VA	MG

Employer name	DBA	City	State/ terr.	Award type
Samsung Austin Semiconductor	Samsung Austin Semiconductor	Austin	TX	LG
Samuel Lennon	L2 Defense Inc	Middle River	MD	MG
Sancorp Consulting, LLC	Sancorp Consulting, LLC	Falls Church	VA	MG
Sandia National Laboratories		Albuquerque	NM	LG
Scale Facilitation Partners	Sanitex Global	New York	NY	MG
Science Applications International Corporation		Reston	VA	LG
Sciencel Solutions LLC		Aurora	IL	MP
SDV Command Source INC		Winston-Salem	NC	SP
SDV Construction, Inc		Albuquerque	NM	MG
Sealing Technologies, Inc		Columbia	MD	MG
SecureStrux, LLC		Lancaster	PA	SG
Security 1 Solutions LLC		Gaithersburg	MD	MG
Segment HR LLC	Segment HR	The Woodlands	TX	SG
Semper Fi Doorman, Inc	Semper Fi Doorman, Inc	Chicago	IL	SG
Semper Valens Solutions		Canyon Lake	TX	MG
Senior Solutions for the Jersey Shore, LLC		Point Pleasant	NJ	SG
Senspex, Inc	Senspex, Inc	Rio Rancho	NM	MG
Sentinels of Freedom Scholarship Foundation		San Ramon	CA	SG
ServiceSource, Inc	ServiceSource, Inc	Oakton	VA	LG
Sevan Multi-Site Solutions, Inc		Downers Grove	IL	MP
Sharp Decisions, Inc	Sharp Decisions, Inc	New York	NY	MG
Shearer & Associates, Inc		Huntsville	AL	SP
Sheep Dog Impact Assistance		Rogers	AR	SG
Shen Te Enterprises Incorporated		Tulsa	OK	SG
Sherpa 6, Inc		Littleton	CO	MG
Shine Systems LLC	Shine Enterprises LLC	Charlottesville	VA	MG
Short Powerline Service, LLC		Glenrock	WY	SG
Shotstop Ballistics LLC		Stow	OH	SG
ShurMed Emergency Medical Service, LLC		San Antonio	TX	MP
Sierra Management and Technologies, Inc		California	MD	MG
Sierra Nevada Corporation	Sierra Nevada Corporation	Sparks	NV	LG
Sigma Defense Systems, Inc		Perry	GA	MG
Silotech Group, Inc		San Antonio	TX	MP
Silver Mountain Construction, LLC	North Wind Group	Palmer	AK	MG
SIMCO Electronics		Santa Clara	CA	MG
Simulation Technologies, Inc. (SimTech)	Simulation Technologies, Inc. (SimTech)	Huntsville	AL	MP
Six Maritime, Inc		San Diego	CA	MG
SixGen, Inc		Annapolis	MD	MP
SkillStorm Commercial Services, LLC		Jacksonville	FL	LG
Sky Climber Wind Solutions, LLC	Sky Climber Renewables	Delaware	OH	MP
Skybridge Tactical LLC		Tampa	FL	MG
SNVC, LC		Herndon	VA	SP
Sodexo Government East		Jacksonville	NC	MP
SOFact Solutions, LLC		Fayetteville	NC	MG
Solution One Industries Inc		Killeen	TX	MG
Solutions for Information Design, LLC	SOLID	Fairfax Station	VA	SP
Sonalysts Inc		Waterford	CT	MP
SOSi | SOS International		Reston	VA	LG
SourceAmerica	SourceAmerica	Vienna	VA	MG
South Central Workforce Development Board		Bowling Green	KY	SP
South River Federal Solutions LLC	South River Federal Solutions	Mayo	MD	SP
Southern Company		Atlanta	GA	LP
SowFit Buffalo	PBNJ Enterprise	Buffalo	NY	SG
Space Coast Intelligent Solutions, Inc		Melbourne	FL	SG
Spark Energy Services Inc	Hohm Energy USA	New Castle	DE	SG
Spathe Systems		Tampa	FL	MP
Spees LLC	Spees Design Build	Kent	WA	SP
Spin Systems, Inc	SpinSys	Falls Church	VA	MP
Spirit Avionics, LTD	Spirit Aeronautics	Gahanna	OH	SG
St Clair & Co		Ypsilanti	MI	SP
St. James A.M.E. Zion Church—Zion House		Salisbury	MD	SG
Steel Point Solutions, LLC		Calverton	MD	SG
SteerBridge Strategies, LLC		Vienna	VA	SP
Stellar Solutions, Inc		Palo Alto	CA	MG
Still Serving Veterans		Huntsville	AL	SP
Stop the Addiction Fatality Epidemic (SAFE) Project US.	SAFE Project	Arlington	VA	SP
StraCon Services Group, LLC	StraCon Services Group, LLC	Benbrook	TX	MP
Strata-G, LLC		Knoxville	TN	MP
Strategic Alliance Business Group		Fairfax	VA	MP
Strategic Medical Equipment Solutions, LLC		Monument	CO	SG
Strategic Staffing Solutions	Strategic Staffing Solutions	Detroit	MI	MP
Sumaria Systems, LLC		Peabody	MA	MG

Employer name	DBA	City	State/ terr.	Award type
Summit 7 Systems, LLC	Summit 7 Systems	Huntsville	AL	MG
Summit Aviation		Middletown	DE	MP
Summit Exercises and Training		Saint Petersburg	FL	SG
Summit Technical Solutions, LLC		Colorado Springs	CO	MP
Support The Enlisted Project, Inc	STEP	San Diego	CA	SG
Supreme Insulated Panel Systems	Supreme Insulated Panel Systems	Mobile	AL	SG
Surveying and Mapping, LLC		Austin	TX	LG
Survival Systems USA, Inc		Groton	CT	SG
Synack, Inc	Synack	Redwood City	CA	MG
Syndetix		Las Cruces	NM	SG
Synergy ECP		Columbia	MD	MG
Syntelligent Analytic Solutions, LLC	Syntelligent Analytic Solutions, LLC	Falls Church	VA	MP
Sysmex America Inc		Lincolnshire	IL	LG
System Studies & Simulation	System Studies & Simulation or S3	Huntsville	AL	MP
Systematic Inc		Centreville	VA	SG
Systems Planning and Analysis, Inc		Alexandria	VA	LG
Systems Products and Solutions, Inc. (SPS)	Systems Products and Solutions, Inc (SPS)	Huntsville	AL	MG
T and T Consulting Services, Inc		Falls Church	VA	MP
Tactical Air Support, Inc		Reno	NV	MG
Tactical Construction, Inc		Victor	NY	SG
Tactical Engineering & Analysis, Inc		San Diego	CA	MG
Tactical Rehabilitation, Inc		Vero Beach	FL	SP
Talentscale, Inc		Las Vegas	NV	MG
Tangent Technologies, LLC		McLean	VA	SG
Target Media Mid Atlantic, Inc	Target Systems	Mechanicsburg	PA	MG
Tassy Trucks LLC	Tassy Transportation	Charlotte	NC	SG
Team Carney, Inc		Alexandria	VA	MP
Team Cymru, Inc		Lake Mary	FL	MG
Tech For Troops		Richmond	VA	SG
Tech62, Inc	Tech62	Fairfax	VA	SG
Technical Assent, LLC		Arlington	VA	MG
Technology Learning Group, Inc	TLG Learning	Bellevue	WA	SG
Technology Security Associates, Inc	TSA	California	MD	MG
TekSynap		Reston	VA	LG
Tele-Consultants, Inc		Alpharetta	GA	SG
Tetra Fields LLC	Tetra Fields	Rockville	MD	SG
Textron Systems Corporation		Hunt Valley	MD	LG
The Boeing Company	The Boeing Company	Arlington	VA	LP
The Coalition To Salute America's Heroes Foundation.	Coalition to Salute America's Heroes	Leesburg	VA	SG
The District Communications Group	DCG	Plantation	FL	MG
The Electronic On Ramp, Inc		Rockville	MD	SP
The Greentree Group		Beavercreek	OH	MG
THE INFORMATICS APPLICATIONS GROUP, INC.	TIAG	Reston	VA	MP
The Intellect Group	The Intellect Group, LLC	San Antonio	TX	MG
The Intelligence & Security Academy, LLC		Arlington	VA	MP
The McHenry Management Group (TMMG)	TMMG	Chesapeake	VA	MG
The Metamorphosis Group, Inc		Vienna	VA	SG
The MITRE Corporation		McLean	VA	LG
The Podmilsak Group, Inc	PGTEK	Ashburn	VA	MG
The Rockhill Group, Inc		Molino	FL	MP
The RockWood Group Inc	The RockWood Group Inc	Athens	AL	SG
The Ross Group Construction Corporation		Tulsa	OK	MG
The Wolverine Group		Washington	DC	SG
Thermo Systems LLC		East Windsor	NJ	MG
Thomas Solutions Incorporated		Alexandria	VA	SP
Thompson Metal Fab, Inc		Vancouver	WA	MG
Tidewater Emergency Medical Service Council	Tidewater EMS Council	Chesapeake	VA	SP
Titan Associates Group Inc	Titan Associates Group Inc	Athens	TN	SG
TM3 Solutions, Inc		Alexandria	VA	SP
Tokyo Electron U.S. Holdings, Inc		Austin	TX	LP
Topsarge Business Solutions LLC	Topsarge Business Solutions	Temple	TX	SP
Torden LLC	Torden	Tiverton	RI	MP
TorrNet Technology LLC		Lacey	WA	SG
Trade Training Company	Sonoran Desert Institute	Tempe	AZ	MG
Training, Rehabilitation and Development Institute, Inc.		San Antonio	TX	LG
Transmission Distribution Service	TDS Construction	Glenrock	WY	SG
TREALITY SVS LLC		Xenia	OH	SG
TRECIG LLC	The Veganish Cafe	Rockwall	TX	SP
Trewon Technologies, LLC		Stafford	VA	SP
TRIAEM, LLC		Sterling	VA	SG

Employer name	DBA	City	State/ terr.	Award type
TRIDENT 11 LLC .....	.....	Tulsa	OK	SG
Trident Technologies and Consulting—Global, LLC.	T2C-Global	Wesley Chapel	FL	SG
Trideum Corporation .....	.....	Huntsville	AL	MP
Trinity Information Technology LLC .....	.....	Yardley	PA	SG
TriWest Healthcare Alliance .....	.....	Phoenix	AZ	LG
Trotter Management Services, LLC .....	.....	Schwenksville	PA	SG
TruView BSI, LLC .....	.....	Melville	NY	MG
TruWeather Solutions, Inc .....	.....	Syracuse	NY	SP
U.S. Vet General Contracting, LLC .....	.....	McFarland	WI	SG
United Brotherhood of Carpenters—UBC MVP ...	United Brotherhood of Carpenters	Washington	DC	MP
United Brotherhood of Carpenters and Joiners of America Local 254. ....	.....	Edison	NJ	LG
United Rentals, Inc .....	.....	Stamford	CT	LG
United Veterans Construction and Landscape So- lutions, Inc. ....	.....	Fort Worth	TX	SP
Universal Strategy Group, Inc (USGI)	Universal Strategy Group, Inc (USGI)	Franklin	TN	MG
Universal Technical Resource Services, Inc .....	.....	Cherry Hill	NJ	MG
University of Health and Performance .....	.....	Bentonville	AR	SG
Unmanned Systems Incorporated	Albers Aerospace	McKinney	TX	MP
Upstate Warrior Solution, Inc .....	.....	Greenville	SC	SP
US Communications and Electric, Inc	US Communications and Electric, Inc	Garfield Heights	OH	MG
USA Environmental, Inc	USA Environmental, Inc	Oldsmar	FL	MG
USfalcon, Inc	USfalcon, Inc	Cary	NC	MG
UT Battelle, LLC (managing Oak Ridge National Laboratory, ORNL). ....	.....	Oak Ridge	TN	LG
Ute Water Conservancy District .....	.....	Grand Junction	CO	MG
Utility Mapping Services, P.C .....	.....	Clancy	MT	SG
VA Wholesale Mortgage .....	.....	Virginia Beach	VA	SP
Valor Network Inc .....	.....	Seaside Park	NJ	SG
Vantage Point Consulting, Inc .....	.....	Reston	VA	SG
Vaudra Ltd	Vaudra International	Huntersville	NC	SG
Vaultes, LLC	Vaultes	Reston	VA	SG
Vector Force Development .....	.....	Westminster	CO	LP
VectorCSP	VectorCSP	Elizabeth City	NC	MG
Veritech, LLC .....	.....	Aberdeen	MD	SG
Verium, LLC .....	.....	Owings	MD	SG
Verizon	Verizon	Basking ridge	NJ	LG
Veryable	Veryable INC	Dallas	TX	MG
VetCV Inc .....	.....	Pensacola	FL	SP
Veteran Benefits Guide .....	.....	Las Vegas	NV	MG
Veteran Engineering and Technology, LLC .....	.....	Colorado Springs	CO	SP
Veterans Alliance .....	.....	Stateline	NV	SG
Veterans Elite Services LLC .....	.....	Jacksonville	FL	SP
Veterans Guardian VA Claim Consulting	Veterans Guardian VA Claim Consulting	Pinehurst	NC	MP
Veterans Inc .....	.....	Worcester	MA	MP
Veterans Leadership Program of Western Penn- sylvania, Inc.	Veterans Leadership Program	Pittsburgh	PA	MG
Veterans Management Services, Inc	VMSI	Sterling	VA	MP
Veterans Medical Distributors Inc .....	.....	Jupiter	FL	SG
Veterans Outreach Center, Inc .....	.....	Rochester	NY	SG
Veterans Place of Washington Blvd .....	.....	Pittsburgh	PA	SP
ViaPath Technologies	Global Tel*Link	Falls Church	VA	LP
Viasat, Inc .....	.....	Carlsbad	CA	LG
Victory Solutions, Inc .....	.....	Huntsville	AL	MP
Village of Hanover Park .....	.....	Hanover Park	IL	MG
Virtual Service Operations	VSO	Manassas	VA	MP
VISTA Technology Services, Inc .....	.....	Arlington	VA	MP
VPD Government Solutions	Voigt-Peters Associates, LLC	Arlington	VA	MG
Vulcan, Inc	Vulcan, Inc.	Foley	AL	MG
W R Systems, Ltd .....	.....	Fairfax	VA	MG
Walsingham Group, Inc .....	.....	Fayetteville	NC	MP
Warfeather .....	.....	Coweta	OK	SP
Warrior Service Company LLC .....	.....	West Palm Beach	FL	SG
Watermark Risk Management International, LLC	Watermark Risk Management International, LLC	Triangle	VA	MG
Watershed Security, LLC .....	.....	Chesapeake	VA	SP
Watteredge, LLC .....	.....	Avon Lake	OH	MG
Web Business Solutions, Inc	WBSI	Fredericksburg	VA	SG
Western Electricity Coordinating Council	WECC	Salt Lake City	UT	MG
Westerwood Global USA Corporation .....	.....	Malta	NY	MP
Whalls Group LLC	Sanford Rose Associates	Aliso Viejo	CA	SG
WHITewater PROTECTION & TRAINING ACADEMY/HOMELAND SECURITY LLC.	PULLIAM HANDGUN SAFETY SCHOOL (DBA) WHITewater PROTECTION & INVESTIGA- TION.	Memphis	TN	SG

Employer name	DBA	City	State/ terr.	Award type
William & Mary	The Raymond A. Mason School of Business	Williamsburg	VA	MP
William C. Brown, Inc		Manassas	VA	SP
Willis Mechanical, Inc		Norcross	GA	SP
Windstream Holdings		Little Rock	AR	LP
Work for Warriors		Sacramento	CA	SP
Workforce Development Board of the Treasure Coast	CareerSource Research Coast	Port St Lucie	FL	SG
Worldwide Counter Threat Solutions, LLC		Fredericksburg	VA	SG
Wounded Warrior Project		Jacksonville	FL	LP
WPS Labor, LLC		Rogers	AR	SG
Xcel Energy		Minneapolis	MN	LG
XCEL Engineering		Oak Ridge	TN	SG
Zeido Technologies, LLC		Gainesville	VA	SG
Zero Point, Incorporated		Virginia Beach	VA	MP

VETS received 842 applications for the HIRE Vets Medallion Award in 2022. Among the 842 applications, 835 applications were approved for award, with 3 applications denied and 4 applications withdrawn by the applicant. Of the 835 applications

approved for award, the breakdown by award type is as follows: 288 small gold (SG), 147 small platinum (SP), 181 medium gold (MG), 129 medium platinum (MP), 68 large gold (LG), and 22 large platinum (LP).

The following list shows the 838 recipients for 2022 in alphabetical order by employer name, along with their doing business as (DBA) name (as applicable), city, state or territory, and award type.

Employer name	DBA	City	State/ terr.	Award type
3 Reasons Consulting LLC .....	.....	Mechanicsville	VT	SG
34ED LLC	Centegix	Atlanta	GA	SG
3C USA LLC	Sanitex Global	New York	NY	SG
7G Environmental Compliance Management .....	.....	Tallahassee	FL	MG
8-koi	8-koi	Melbourne	FL	MG
A&M Transport, LLC	A&M Transport	Glendale	OR	MP
A2 Supply Chain Services LLC	Restoration 1 of Western Wayne County	Ann Arbor	MI	SP
Abile Group, Inc .....	.....	Harwood	MD	MP
ABML, LLC .....	.....	Deerfield Beach	FL	MG
Academy Securities, Inc .....	.....	New York	NY	MG
ACROPOLIS CONTROLS ENGINEERS, PLLC	ACROPOLIS ENGINEERS	Raleigh	NC	SG
Actualized Business Solutions, Inc	ABSI Aerospace & Defense	California	MD	SG
Adaptive Construction Solutions	Adaptive Construction Solutions	Houston	TX	SP
ADT Commercial .....	.....	Boca Raton	FL	LG
Advanced Internet Marketing, Inc., DBA The GBS Group	The GBS Group	Virginia Beach	VT	MG
Advanced Technology International .....	.....	Summerville	SC	MP
Aggregate Resource Industries, Inc .....	.....	Springfield	OR	MG
Agile IT Synergy .....	.....	Tampa	FL	SP
Agility Federal LLC .....	.....	Phoenix	AZ	SG
AGS LLC .....	.....	Las Vegas	NV	LG
Air Quality Solutions Heating & Cooling .....	.....	Grove City	OH	SP
Air Traffic Engineering Co LLC	ATEC	Northfield	NJ	MG
Airstreams Renewables, Inc .....	.....	Tehachapi	CA	SG
Alaska Joint Electrical Apprenticeship and Training Trust .....	.....	Anchorage	AK	MG
All Embracing Home Care, LLC	All Embracing Home Care, LLC	Grand Forks	ND	SG
All In Solutions, LLC .....	.....	Fredericksburg	VT	MP
All Inclusive Security & Investigation	All Inclusive Security & Investigation	Detroit	MI	SG
Allegiant Defense, Inc .....	.....	Arlington	VT	MG
ALLO Communications	ALLO Communications	Imperial	NE	LG
Alluvionic, Inc .....	.....	Melbourne	FL	SG
ALLY Construction Services LLC	ALLY Construction Services	Bensalem	PA	SP
AM General .....	.....	South Bend	IN	SG
AMDEX Corporation	AMDEX Corporation	Rockville	MD	MG
American Corrosion Solutions, Inc .....	.....	Corpus Christi	TX	SG
American States Utility Services, Inc	ASUS	San Dimas	CA	MP
AMERICAN SYSTEMS .....	.....	Chantilly	VT	LG
American Veteran Solutions, Inc .....	.....	Las Vegas	NV	SP
America's Warrior Partnership, Inc .....	.....	Augusta	GA	SP
AmeriVet Securities, Inc .....	.....	New York	NY	SP
Ametrine Inc .....	.....	Round Rock	TX	SP
Amphenol Borisch Technologies .....	.....	Grand Rapids	MI	MG
ANALYGENCE, Inc .....	.....	Fulton	MD	MG
Analytic Services Inc	ANSER	Falls Church	VT	MP

Employer name	DBA	City	State/ terr.	Award type
Analytical Engineering, Inc		Columbus	IN	SP
Angelion Mobility		Bryn Mawr	PA	SG
ANVIL SYSTEMS GROUP INC		Lorton	VT	SP
Apogee Solutions, Inc		Chesapeake	VT	MG
A-P-T Research, Inc		Huntsville	AL	MG
Aptive Resources		Alexandria	VT	MP
Argent Technologies, LLC	Argent Technologies, LLC	Floresville	TX	SG
Armcorp Construction, Inc	Armcorp Construction, Inc	Celina	OH	SP
Arsiem Corporation, Inc		Baltimore	MD	SG
Artemis Electronics, LLC		Prospect	KY	SG
Asheville Buncombe Community Christian Ministries—Veterans Services of the Carolinas.	ABBCM	Asheville	NC	SG
ASJ IT Services, LLC	ASJ Solutions	Chesapeake	VT	SG
Assertic LLC		Chicago	IL	SG
Assertive Professionals		Southern Pines	NC	SG
Assessment Technologies Group	Assessment Technologies Group	Jacksonville	FL	SP
Assured Consulting Solutions, LLC		Reston	VT	MP
Assured Information Security, Inc	AIS	Rome	NY	MG
Astound LLC	Veteran Recruiting	Warrington	PA	SG
Atec, Inc	Atec, Inc	Stafford	TX	MG
ATECH, Inc		Nashville	TN	SG
Atkinson Aeronautics & Technology Inc		Fredericksburg	VT	SP
Atlas Sand Company, LLC	Atlas Sand	Austin	TX	MP
Atlas Technologies, Inc		North Charleston	SC	MG
Atriax, PLLC		Hickory	NC	SG
ATS ESOP Holdings, Inc	ATS/Acclaim Technical Services	Reston	VT	MG
Attain Technology Inc		Providence	RI	SG
Attollo, LLC	Attollo, LLC	New Bern	NC	SG
Aunty's Place Early Learning & Child Care Center, LLC.	Aunty's Place Early Learning & Child Care Center, LLC.	Auburn	WA	SG
AutoBase Inc		Amityville	NY	MP
AVANTUS FEDERAL	Avantus Federal	MCLEAN	VT	LG
Aviate Enterprises, Inc		McClellan	CA	SP
Aviation Safety Resources, INC		Nicholasville	KY	SG
AVIVV, LLC		San Diego	CA	SP
Azimuth Corporation		Beavercreek	OH	MP
Azule Management Group, Inc		Lakeville	MN	SG
B.A.F.E Group, LLC		Atlanta	GA	SG
Balance Point Construction		AVON	CO	SG
Bancroft Capital LLC	Bancroft Capital LLC	Ft. Washington	PA	SP
Banner Defense, Inc		Madison	AL	SP
Barnett Engineering & Signaling Laboratories LLC	BESL	Colorado Springs	CO	SG
Battelle Energy Alliance	Idaho National Laboratory	Idaho Falls	ID	LG
Battlespace, Inc		Las Vegas	NV	MP
BBP TRANSPORTATION INC		Douglasville	GA	SG
BC Medical	BC Medical	North Highlands	CA	SG
Beagle Hill Services LLC		Frazeyburg	OH	SG
Beast Code LLC		Fort Walton Beach	FL	MG
Bell Textron Inc		Fort Worth	TX	LG
Best Version Of Yourself Psychology LLC	Best Version Of Yourself Psychology LLC	Henderson	NV	SG
Betis Group, Inc		McLean	VT	SP
Bevilacqua Research Corporation		Huntsville	AL	MP
BGIS		Seattle	WA	LG
Big Ideas, Inc		New Ulm	MN	SP
Bilbro Construction Company		Escondido	CA	SG
Bison Health, LLC	Bison Health	Las Vegas	NV	SG
Black Bear Technology Solutions, LLC	Black Bear Technology Solutions, LLC	Alexandria	VT	SP
Black Fox LLC		Baltimore	MD	SG
Black Hills Service Company LLC	Black Hills Energy	Rapid City	SD	LP
Black Lion Realty		Newport News	VT	SG
Blake Willson Group, LLC	Blake Willson Group	Arlington	VT	SG
Blue Light LLC		Fayetteville	NC	SG
Blue Star Families		Encinitas	CA	MG
Bluecord International, Inc	Bluecord	Keizer	OR	SP
BlueHalo, LLC		Arlington	VT	MP
BluePath Labs LLC		Washington	DC	SP
Boingo Wireless		Los Angeles	CA	MG
Booz Allen Hamilton	Booz Allen Hamilton	McLean	VT	LP
Boston Fusion Corp		Lexington	MA	SG
Boston Government Services, LLC		Oak Ridge	TN	MG
Bradley-Morris Holdings, LLC	Bradley-Morris/RecruitMilitary	Chesapeake	VT	MG
Brighton Marine, Inc		Brighton	MA	SG
Brightstar Innovations Group, LLC		Arlington	VT	SG

Employer name	DBA	City	State/ terr.	Award type
Britescape		Seattle	WA	SG
Brusseau Construction	Brusseau Construction	Palos Verdes Estates ...	CA	SG
C & G Consulting, Inc		Manassas Park	VT	SG
Cabot Hosiery Mills	Darn Tough Vermont	Northfield	VT	MG
Caddell Construction	Caddell Construction Co. (DE) LLC	Montgomery	AL	MG
CAE USA INC		Tampa	FL	LP
Calvert Systems Engineering, Inc	Calvert Systems	Bellevue	NE	MG
Carvas, Inc		Huntsville	AL	MG
Capco, LLC		Grand Junction	CO	MG
Cape Henry Associates, Inc		Virginia Beach	VT	MP
Career Learning & Employment Center for Veterans, Inc.	Operation: Job Ready Veterans (OJRV)	Indianapolis	IN	SP
Career Systems Development Corp	Penobscot Job Corps Center	Bangor	ME	SG
Carolina Staffing	Shirley Swanson DBA Carolina Staffing	Aiken	SC	SG
Carter-Lambert Divisions, LLC		Waldorf	MD	SG
Carvana	Carvana	Tempe	AZ	LG
Casilo Consulting, LLC	Vector Services	Batavia	IL	MP
Cassidy Consulting Group, LLC/C2G	C2G	Hertford	NC	SG
Castle Hill Associates, LLC		Waterville	OH	SG
CAVU CONSULTING LLC	CAVU Construction	Virginia Beach	VT	SP
Cayuse Holdings, LLC		Pendleton	OR	LP
CB Design Group		Alexandria	VT	SP
Celerity Government Solutions, LLC	Xcelerate Solutions	McLean	VT	MG
Charter Trading Corporation		Clear Lake Shores	TX	SG
Chesapeake Bay Helicopters, Inc		Chesapeake	VT	SP
Choisys Technology, Inc		Ashburn	VT	SP
Chronic Golf, LLC	Chronic Golf	Hilton Head Island	SC	SG
CICB	CICB	Orlando	FL	SG
Cincinnati Incorporated		Harrison	OH	MG
Cintel Inc	Cintel	Huntsville	AL	SG
Circle Computer Resources		Cedar Rapids	IA	MP
Circuit Media LLC		Denver	CO	MP
City of Alpharetta, Georgia		Alpharetta	GA	MG
City of Cape Canaveral		Cape Canaveral	FL	MP
City of Harker Heights		Harker Heights	TX	MG
City of St. Charles	City of St. Charles	St Charles	IL	MG
City of Toledo		Toledo	OH	LP
City of Treasure Island		Treasure Island	FL	MG
Clarklift of Des Moines, Inc	Forklifts of Des Moines	Des Moines	IA	SG
Clear Creek Group, Inc		Reston	VT	MP
Client First Technologies, LLC		Fairfax	VT	SP
Client/Server Software Solutions Inc. Constellation West.	Constellation West	Vienna	VT	MG
Coalfire Systems Inc		Westminster	CO	LG
Cognosante		Falls Church	VT	LG
Cognovi Labs	Cognovi Government Services	Columbus	OH	SP
Colorado Sheet Metal JATC		Colorado Springs	CO	MP
Colorado Springs Utilities		Colorado Springs	CO	LG
Communities In Schools of Spokane County	Communities In Schools of Spokane County	Spokane	WA	SG
Community Security Services, LLC	CSSI	Mobile	AL	SP
Compendium Federal Technology LLC	CFT	Lexington Park	MD	SP
Computer Training Services, LLC	New Horizons Computer Learning Center	Knoxville	TN	SG
COMSETRA LLC	COMSETRA	Jay	OK	SG
COMSO, Inc		Columbia	MD	SP
Conceras, LLC		Fairfax	VT	SG
Concordant, LLC		Laramie	WY	SP
Conditioned Air Company of Naples LLC		Naples	FL	MG
Connectria, LLC		St. Louis	MO	MG
Consolidated Nuclear Security, LLC	Y-12 National Security Complex	Oak Ridge	TN	LG
Constellation Software Engineering Corp	CSEngineering	Annapolis	MD	MG
Construction Helicopters Inc	CHI AVIATION	Howell	MI	MG
Construction Services Group, Inc		Charleston	SC	SP
Contracting Resources Group, Inc		Baltimore	MD	MP
Convergint Technologies LLC	Convergint	Schaumburg	IL	LG
Converse Construction, Inc	Converse Construction, Inc	Redding	CA	SG
Converse Electric		Grove City	OH	MG
Core Government Services Corporation	CGS	Charles Town	WV	SG
Core4ce	Core4ce LLC	Reston	VT	MG
Coronet Technology Enterprises, Inc	CivilianCyber	Richmond	VT	SP
Corporate America Supports You (CASY)	VetJobs	Lake St Louis	MO	MP
Corps Solutions, LLC		Stafford	VT	MG
CoSolutions, Inc		Sterling	VT	MG
CP Marine, LLC dba CPMG, LLC		Juneau	AK	SP

Employer name	DBA	City	State/ terr.	Award type
CPS Professional Services, LLC (d/b/a CATHEXIS).	CATHEXIS	Falls Church	VT	MG
Crane 1 Services	Crane 1 Services	Miamisburg	OH	MG
Criterion Systems, Inc		Vienna	VT	MG
Critical CxE Inc	Critical CxE Inc	Annapolis	MD	SP
Cromulence LLC		Melbourne	FL	MG
CROSSWORKS TECHNOLOGIES, INC	Crossworks Technologies, Inc	Orlando	FL	SG
Cruz Associates, Inc		Yorktown	VT	MP
CTI Resource Management Services, Inc	CTI Resource Management Services, Inc	Jacksonville	FL	MG
Custom Mechanical Systems, Corp	CMS Corporation	Bargersville	IN	MP
Customer Value Partners, LLC	CVP	Fairfax	VT	MG
CymSTAR LLC	CymSTAR LLC	Broken Arrow	OK	MG
CymSTAR Services LLC		Broken Arrow	OK	MG
Darkblade Systems LLC		Winchester	VT	MG
DarkStar Intelligence, LLC		Alexandria	VT	MG
Datrose, Inc		Webster	NY	MG
Dauntless Wine Company		Forest Grove	OR	SG
DD DANNAR, LLC		Muncie	IN	SG
Dead River Company		South Portland	ME	LG
Decisive Point Consulting Group, LLC		Waco	TX	MG
Deem Structural Services		Longview	TX	SP
Defense Contracting, Inc	DCI Solutions	Aberdeen Proving Grounds.	MD	MP
DEFTEC Corporation		Huntsville	AL	SG
Deiter Bros. Fuel Co., Inc	Deiter Bros. Heating Cooling Energy	Bethlehem	PA	SG
Delmarva Veteran Builders		Salisbury	MD	SG
Delta Air Lines	Delta Air Lines	Atlanta	GA	LG
DELTA CON GLOBAL INC	Deltacon Security	Sugarland	TX	SP
DEMCO ENTERPRISES, INC	Demco Automation	Quakertown	PA	SG
Devine Timoney Law Group	Devine Timoney Law Group	Blue Bell	PA	SP
DIGITAL GLOBAL CONNECTORS, LLC		McLean	VT	SG
DiSorb Systems, Inc		Philadelphia	PA	SG
Dixon Management Group LLC	SERVPRO of Belle Meade	Nashville	TN	SG
DK & R Corp		Henderson	NV	SP
Dominion Energy, Inc		Richmond	VT	LG
Dorreaan, LLC		Reston	VT	SG
Dotts Group LLC		Downingtown	PA	SG
Draken International LLC		Fort Worth	TX	MP
Drexel Hamilton, LLC	Drexel Hamilton, LLC	New York	NY	SG
DroneShield		Warrenton	VT	SG
DSoft Technology, Engineering & Analysis		Colorado Springs	CO	SP
DuPont de Nemours, Inc		Wilmington	DE	LG
DWBH, LLC	DWBHCORP	Arlington	VT	SG
Dynamic Planning & Response LLC		Honolulu	HI	SG
Eagle Systems, Inc		California	MD	MG
EARLY SERVICES INC		Decatur	AL	SG
Eastern Carolina Vocational Center, Inc (ECVC)		Greenville	NC	MG
Electric Power Systems International, Inc		Maryland Heights	MO	LG
Electrical Test Instruments, LLC	ETI Precision	Frederick	MD	SP
Eljen Corporation		Windsor	CT	MG
EM Key Solutions, Inc		St. Petersburg	FL	SP
EMD LLC	EMD LLC	Woodbridge	VT	SG
Employment Source, Inc	ServiceSource	Fayetteville	NC	MP
Enhanced Veterans Solutions Inc		Fairfax	VT	MP
ENSCO Avionics, Inc		Endicott	NY	MG
ENSCO Rail, Inc		Springfield	VT	SP
ENSCO, Inc		Springfield	VT	LG
Integrity Consulting Group		Dayton	OH	SP
Entergy Corporation		New Orleans	LA	LG
Environet Inc		Honolulu	HI	SG
Environmental Chemical Corporation	n/a	Burlingame	CA	MP
Eolian		Clearwater	FL	SG
EPS Corporation		Tinton Falls	NJ	MP
Eskridge Enterprises LLC	Eskridge & Associates	Round Rock	TX	SP
EST Companies	EST Companies LLC	Tempe	AZ	SG
Etranservices		Fredericksburg	VT	SG
Ever-Green Energy, Inc		Saint Paul	MN	MG
Evergreen Fire and Security	Evergreen Fire and Security	Tacoma	WA	MP
Eversource Energy		Hartford	CT	LG
Exact Staff, Inc		Calabasas	CA	MG
Excalibur Legal Staffing, LLC	The Excalibur Group	Washington	DC	SG
Excel Medical Staffing, LLC		Grapevine	TX	SP
Excentium, Inc		Reston	VT	MP

Employer name	DBA	City	State/ terr.	Award type
Exceptional Employees for Exceptional Results Inc.	E3R Inc	San Diego	CA	SG
Expansia Group LLC	EXPANSIA	Nashua	NH	MP
Expeditionary Technology Services, Inc		Smyrna	GA	SP
Explosive Countermeasures International, Inc	ECI	Delaplane	VT	SP
F3EA, Inc		Savannah	GA	MG
FASTPORT, Inc		Valparaiso	IN	SG
Federal Acquisition Strategies, LLC		Arlington	VT	SP
Federal Practice Group	Eric S. Montalvo PLLC d/b/a Federal Practice Group.	Washington	DC	SG
Federal Strategies, LLC	Federal Strategies LLC	Fredericksburg	VT	SG
FedPoint	LTC Partners DBA FedPoint	Portsmouth	NH	MG
FireSAFE		Lakeville	MN	MP
First Choice Counseling Professional Corporation	First Choice Counseling Professional Corporation.	University City	MO	SG
First Nation Group, LLC		Niceville	FL	MP
Five Star Global Security LLC		Fayetteville	NC	SG
Flagship Management, LLC		Bristol	PA	SG
Flatter, Inc	Flatter	Fredericksburg	VT	MG
Florida is for Veterans, Inc	Veterans Florida	Tallahassee	FL	SG
Freedom Staffing LLC		Indianapolis	IN	MG
Fresh Start LLC	The Groutsmith	Bryn Mawr	PA	SP
Frontier Market Solutions, LLC	Ravenox	Mount Vernon	WA	SG
Fusion Cell LLC		Windham	NH	SP
Future Tech Career Institute		Chicago	IL	SP
G F G Contractor LLC	GFG Contractor	Montgomery	AL	SG
Gannon & Scott Phoenix, Inc		Phoenix	AZ	SG
Garry Gaston Global Career Coaches	G3 Global Career Coach	Arlington	VT	SG
Gary Merlino Construction		Seattle	WA	MG
Gary R Banks Industrial Group LLC	Banks Industrial Group	West Berlin	NJ	SG
Gatekeeper Intelligent Security	Gatekeeper Security, Inc	Sterling	VT	SG
Gauss Management Research and Engineering GMRE, Inc.		South Ogden	UT	MG
GCubed Enterprises, Inc	GCubed, Inc	Stafford	VT	SP
GDM		Bingen	WA	SG
General Dynamics Mission Systems	General Dynamics Mission Systems	Fairfax	VT	LP
General Dynamics NASSCO-Norfolk	General Dynamics NASSCO-Norfolk	Norfolk	VT	LP
General Dynamics-Bath Iron Works		Bath	ME	LG
GenTech Associates Inc		Indianapolis	IN	MG
Geo Owl LLC		Wilmington	NC	MG
Geostabilization International	Geostabilization International	Denver	CO	LP
Get Off the Drawing Board LLC	Divergence Academy	Addison	TX	SG
Global C2 Integration Technologies	Global C2 Integration Technologies	Las Vegas	NV	SP
Global Security Services		Davenport	IA	MP
Global Skills Exchange Corporation	GSX, Global Skills X-Change	Alexandria	VT	SG
Global Technology & Management Resources, Inc.	GTMR, Inc	Hollywood	MD	MG
GLOBALFOUNDRIES U.S. Inc		Malta	NY	LG
Glotech, Inc		Rockville	MD	MP
Go Energistics		Dallas	TX	SG
Goldbelt C6, LLC		Chesapeake	VT	MP
Goldbelt Falcon, LLC		Chesapeake	VT	MP
Goldbelt Frontier, LLC		Alexandria	VT	MP
Goldbelt Glacier Health Services, LLC		Alexandria	VT	MP
Goldbelt Hawk, LLC		Newport News	VT	MP
Goldbelt Nighthawk, LLC		Newport News	VT	SP
Goldbelt Security, LLC		Juneau	AK	MP
Goldbelt Transportation, LLC		Juneau	AK	SP
Golden Key Group		Reston	VT	MG
Good Samaritan Society—Simla		Simla	CO	SG
Gotham Government Services		McLean	VT	SG
Government Tactical Solutions		Vienna	VT	MP
Grace Federal Solutions, LLC		Raleigh	NC	SG
Green Cell Consulting LLC		Fredericksburg	VT	SG
Greencastle Associates Consulting, LLC		Malvern	PA	MP
GSI Service Group Inc		Honolulu	HI	MG
GSMB Services LLC	Gold Star Medical Business Services	Horseshoe Bay	TX	SP
GUARDIAN ANGELS MEDICAL SERVICE DOGS INC.		Williston	FL	SP
H2 Performance Consulting Corp		Gulf Breeze	FL	MP
Hancock Management LLC		Derry	NH	SG
Hard4Life NPO	Hard4Life NPO	Union	SC	SG
Harmonia Holdings Group, LLC		McLean	VT	MG

Employer name	DBA	City	State/ terr.	Award type
Hawkeye Tracking Inc		Lexington Park	MD	SG
HD Dog Training LLC		Bensalem	PA	SG
Health by Design		Jacksonville	FL	SG
Helimax Aviation, Inc	Helimax Aviation Inc	McClellan	CA	MG
Helios Defense Solutions, LLC		Eldersburg	MD	SP
Hernandez Consulting & Construction	Hernandez Consulting & Construction	New Orleans	LA	MP
High Order Solutions, LLC		Frisco	TX	SG
HigherEchelon, Inc		Huntsville	AL	MP
Highland Engineering, Inc		Howell	MI	SG
Historic Flight Foundation		Spokane	WA	SG
HTM Global, LLC	College of Biomedical Equipment Technology	San Antonio	TX	SG
HudsonAnalytix, Inc		Cherry Hill	NJ	SG
Huot Construction & Services	Huot Construction & Services	South St. Paul	MN	SG
HurtVet Subcontracting		Park City	UT	SP
Iconixx Critical Solutions, LLC		Amsterdam	NY	MP
IDEA HELIX INC		Fremont	CA	SG
Independence Hydrogen Inc		Ashburn	VT	SP
Indigo IT, LLC		Reston	VT	MG
Industrial Cooling Corporation		Metuchen	NJ	MG
Industrial Packaging Supplies Inc	IPS Packaging & Automation	Fountain Inn	SC	MP
Infinity Technology Services, LLC	ITS, LLC	Colorado Springs	CO	MG
Information Management Group Inc	IMG	Fairfax	VT	MG
Inspection Experts, Inc		Columbia	MD	MP
Inspired Solutions, Inc	Inspired Solutions of Virginia, Inc	Woodbridge	VT	SG
Integration Innovation, Inc	i3	Huntsville	AL	LG
INTELLIDYNE, LLC		Falls Church	VT	MG
Intelligent Waves LLC	Intelligent Waves	Reston	VT	MG
IntePros Federal		Washington	DC	MG
Interactive Government Holdings, Inc	Interactive Government Holdings, Inc	Springfield	VT	MP
Interlake Maritime Services		Middleburg Heights	OH	MG
International Controls Systems, Inc		Littleton	CO	SG
International Training Fund		Annapolis	MD	LP
Intrepid Solutions and Services, LLC		Herndon	VT	MG
Intuitive Research and Technology Corporation		Huntsville	AL	LP
Invenergy		Chicago	IL	LG
iostudio, LLC	iostudio, LLC	Nashville	TN	MG
IronMountain Solutions, Inc	IronMountain Solutions, Inc	Huntsville	AL	MG
IT Concepts, Inc		Vienna	VT	MG
IT Veterans LLC	IT Veterans LLC	Herndon	VT	SP
J Forrest Group	Forrest Performance Group (FPG)	Fort Worth	TX	SG
Jackson Ryan Construction Services, Inc		Suffield	CT	SG
Janissary, LLC		Houston	TX	SP
Java Productions Inc	JPI	Blacksburg	VT	MG
Jay & Kay Mfg. LLC	Jay & Kay Mfg. LLC	Croswell	MI	SP
JB Management Inc		Alexandria	VT	SG
JCTM LLC		Charlotte	NC	MP
Jersey Tractor Trailer Training, Inc		Lyndhurst	NJ	SG
Jesus M Salcedo	Yugen Brazilian Jiu-Jitsu	York	PA	SG
JGMS Government Services, LLC	JGMS Government Services, LLC	Grand Junction	CO	SG
Jingoli Nuclear Services, LLC		Lawrenceville	NJ	SP
Jingoli Power, LLC		Lawrenceville	NJ	MP
JIT Staffing LLC	Just In Time Staffing	Round Rock	TX	SP
JMA Resources, Inc		East Berlin	PA	SP
Joelle Rabow Maletis & Associates, Inc	Joelle Rabow Maletis	Mountain View	CA	SP
John H. Northrop & Associates, Inc	JHNA	Clifton	VT	MG
John Jensen	Isaiah 58—Ministries of Love	Rogersville	AL	SG
John Stevens Berry PC LLO	Berry Law Firm	Lincoln	NE	MG
Jovian Concepts, Inc		Hanover	MD	MG
JR Kays Trucking Inc		Clarendon	PA	SP
JVC Enterprises Inc		Byron Center	MI	SG
JVS SoCal		Los Angeles	CA	MG
K. S. Ware & Associates, LLC		Nashville	TN	SP
KA Logistics, Inc		Bolingbrook	IL	MG
KaDSci, LLC		Fairfax	VT	SP
Kaiva Services		Tulsa	OK	SG
Kaizen Approach, Inc		Hanover	MD	SP
KAW Enterprises LLC		The Villages	FL	SG
Kegman Inc	Kegman Inc	Melbourne	FL	SG
Kent, Campa and Kate (KCK) Inc		Arlington	VT	SP
Kentco Corporation	ProteQ	Herndon	VT	SG
Keystone Fire & Security		North Wales	PA	MG
Kingfisher Systems, Inc		Falls Church	VT	MG
Kingsky Flight Academy LLC		Lakeland	FL	SG

Employer name	DBA	City	State/ terr.	Award type
KIRSH Helmets, Inc	KIRSH Helmets	Schenectady	NY	SG
KITTENS Cleaning Service LLC	KITTENS Cleaning Service	Galax	VT	SG
Kitty Hawk Technologies .....	.....	Honesdale	PA	SG
Knight Federal Solutions Inc .....	.....	Orlando	FL	MG
Knowesis Inc .....	.....	Fairfax	VT	MP
KnowledgeBridge International Inc	KBI	Chantilly	VT	SP
Kolme Group, LLC .....	.....	Phoenix	AZ	SP
Korman LLC .....	.....	Waukegan	IL	SG
KSA Integration LLC .....	.....	Stafford	VT	SP
Kwest Group LLC	Kwest Group	Perrysburg	OH	MP
Laura Ebner .....	.....	Annapolis	MD	SG
LAZARUS ALLIANCE, INC	LAZARUS ALLIANCE, INC	Scottsdale	AZ	SP
Legacy Ironworks LLC .....	.....	Pearland	TX	SG
Legato, LLC .....	.....	Columbia	MD	SP
Leidos .....	.....	Reston	VT	LG
Leisureland RV Center	Leisureland RV Center	Boise	ID	SG
Leonardo Electronics US, Inc	Leonardo Electronics	Arlington	VT	MG
Leryn, Inc	Smash My Trash	Tampa	FL	SG
Linchpin Solutions, Inc .....	.....	Tampa	FL	MP
LinQuest Corporation .....	.....	Los Angeles	CA	LG
Lockheed Martin .....	.....	Bethesda	MD	LG
Los Alamos National Laboratory .....	.....	Los Alamos	NM	LG
Louisiana Energy Services LLC, d/b/a. URENCO USA	URENCO USA	Eunice	NM	MP
Lucas Group .....	.....	Atlanta	GA	MG
Lukos, LLC .....	.....	Tampa	FL	MP
Lynch Consultants, LLC	Lynch Consultants, LLC	Arlington	VT	MP
M Dean Owen, CPA, PSC .....	.....	Paducah	KY	SG
Magnolia River Services .....	.....	Decatur	AL	LG
Magnum Opus, LLC	MO Studio	Denver	CO	SG
Mainsail Group LLC .....	.....	Bedford	MA	MG
Maise Group LLC	Maise Technology	Brigham City	UT	SG
Malace HR	Malace HR	Troy	MI	SG
ManTech International Corporation .....	.....	Herndon	VT	LG
Mark Ronning, LLC	Northwest Veterans Law	Salem	OR	SP
Markon, LLC	Markon Solutions, An Anser Advisory Company	Falls Church	VT	MP
Marxmen Protection Agency .....	.....	Dundalk	MD	SG
Matrix Providers	Matrix Providers	Denver	CO	LG
Maveris, LLC	Maveris	Martinsburg	WV	MP
Mb Solutions, Inc .....	.....	Huntsville	AL	MP
MCPc Holdings, Inc .....	.....	Cleveland	OH	MG
MEDFORD KNIFE & TOOL LLC .....	.....	Phoenix	AZ	SG
Memphis-Shelby County Schools	Memphis-Shelby County Schools	Memphis	TN	LG
Mesa Natural Gas Solutions .....	.....	Loveland	CO	MP
Messer North America, Inc	Messer Americas	Bridgewater	NJ	LG
Metal Masters	Eagle Group	Clayton	DE	MG
Metis Technology Solutions, Inc .....	.....	Albuquerque	NM	MP
Metro Data, Inc .....	.....	Cockeysville	MD	SG
MI Technical Solutions, Inc .....	.....	Chesapeake	VT	MP
Miles Technology Solutions LLC	Miles Enterprise Solutions	Charlotte	NC	SG
Military Officers Association of America	MOAA	Alexandria	VT	MG
Miquin LLC .....	.....	Katy	TX	SG
Mischler Financial Group .....	.....	Corona Del Mar	CA	MP
Mission1st Group Inc	Mission1st Group Inc	Arlington	VT	MP
MIT Lincoln Laboratory	MIT Lincoln Laboratory	Lexington	MA	LG
Mitchell Technical College	Mitchell Technical College	Mitchell	SD	MG
MITRE Corporation .....	.....	Bedford	MA	LG
MKS2, LLC .....	.....	Austin	TX	MG
MLM Services Inc	Maintance and Logistics Managment INC	Camp Hill	PA	SG
Monte Sano Research Corporation .....	.....	Huntsville	AL	MP
Mortgage Research Center, LLC .....	.....	Columbia	MO	LG
Mosquito Joe SCPA .....	.....	Lancaster	PA	SG
Mountaineer Community Health Center .....	.....	Paw Paw	WV	SG
Moyer Brothers Company, Inc .....	.....	Luray	VT	SG
MRP Training Solutions, Inc .....	.....	San Diego	CA	SG
Murray Automotive Group, Inc	Murray Chrysler Dodge Jeep Ram	Starke	FL	SG
Murray Ford Mercury, Inc	Murray Ford Superstore	Starke	FL	MG
Murray Ford of Kingsland	Murray Ford of Kingsland	Kingsland	GA	SG
Nation's Finest .....	.....	Santa Rosa	CA	MP
Nationwide IT Services, Inc .....	.....	Fairfax	VT	MP
Nationwide Pharmaceutical LLC .....	.....	San Antonio	TX	SG
Naval Systems, Inc .....	.....	Lexington Park	MD	MG
Navigator Development Group Inc .....	.....	Enterprise	AL	MP

Employer name	DBA	City	State/ terr.	Award type
Navigator International LLC		Huntsville	AL	MG
nDepth Security, LLC	nDepth Security	Columbia	MD	SG
Nemean Solutions, LLC		Sierra Vista	AZ	MP
NetCentrics	NetCentrics	Herndon	VT	MP
Netizen Corporation		Allentown	PA	SP
NetLink Solutions, LLC		Broken Arrow	OK	SG
Network Cabling Services	NCS Network Cabling Services	Houston	TX	MG
NeuroScience Associates, LLC	NeuroScience Associates, LLC	Knoxville	TN	SG
NewBridge Partners, Inc		Herndon	VT	SP
NexTech Solutions LLC		Tampa	FL	MP
NextEra Energy		Juno Beach	FL	LP
NextGen Federal Systems		Morgantown	WV	MG
NineLine Veteran Services	NineLine Veteran Services	Fife	WA	SG
Nisga'a Data Systems, LLC		Chantilly	VT	MP
Nisga'a Tek, LLC		Chantilly	VT	MP
NorCal Staffing Group, Inc	TangoAlpha3	Austin	TX	SG
North America Mattress Corp		Clackamas	OR	SG
North American Consulting Services, Inc	NACS, Inc	Point Pleasant	WV	SG
North American Rescue, LLC	North American Rescue	Greer	SC	MP
North American Substation Services, LLC		Altamonte Springs	FL	MG
Northrop Grumman Corporation	Northrop Grumman Systems Corporation	Falls Church	VT	LG
Norton Consulting & Investigations		Lakewood	WA	SG
nou Systems, Inc	nou Systems, Inc	Huntsville	AL	MG
NTT Global Data Centers Americas, Inc		Sacramento	CA	MG
Nuss Truck and Equipment	Nuss Truck and Equipment	Roseville	MN	MP
Oaklea Security Services, LLC	Oaklea Simpson Security	Westminster	MD	MP
Oasis Systems LLC	Oasis Systems	Burlington	MA	LG
Opera LLC		Herndon	VT	SG
Odin Consulting International, LLC	Odin Consulting International, LLC	Tampa	FL	SG
Odyssey Systems Consulting Group		Wakefield	MA	LG
Offset Strategic Services, LLC		Huntsville	AL	SP
Okaloosa- Walton Jobs and Education Partnership, Inc.	CareerSource Okaloosa Walton	Shalimar	FL	SG
Olympus Solutions Inc		Daytona Beach	FL	SG
OMNICOMMANDER INC	OMNICOMMANDER	Miramar Beach	FL	MG
On Target Solutions Inc		Hendersonville	TN	SG
On Time Prime LLC		Daytona Beach	FL	MG
Ondra-Huyett Associates, Inc	Ondra-Huyett Associates, Inc	Allentown	PA	SP
Onset Technologies LLC		Houston	TX	SG
Open Security, Inc		San Antonio	TX	SP
Open Systems Technologies Corporation	Open Systems Technologies Corporation	Gainesville	VT	MP
Optimum Low Voltage, LLC	Optimum Fire & Security	Wilmington	NC	SG
Optimus Technologies, Inc		Pittsburgh	PA	SG
Opto-Knowledge Systems Inc	OptoKnowledge	Torrance	CA	SG
Orbit Advanced Technologies, Inc		Warminster	PA	SG
Orion ICS LLC	Orion Talent	Cary	NC	MG
Outdoor Services of the Coulee Region Inc	Outdoor Services, Inc	West Salem	WI	SG
Overwatch Mission Critical	Overwatch Mission Critical	Austin	TX	SG
OWT Global LLC		Tampa	FL	MG
Oxley Enterprises, Inc		Fredericksburg	VT	SP
P-11 Security, Inc	P-11 Security	Torrance	CA	SP
PACCAR WINCH INC	PACCAR WINCH INC	Broken Arrow	OK	MG
Pacific Gas & Electric Company (PG&E)		San Francisco	CA	LP
PacifiCorp		Portland	OR	LG
Paris Union School District No. 95	Paris Union School District No. 95	Paris	IL	SG
Parsons Corporation		Centreville	VT	LG
Pathfinder Consultants, LLC		Washington	DC	SP
Patronus Systems Inc		Melbourne	FL	MG
Peacemaker Defense Group	Peacemaker Defense Group	Pacific	MO	SG
Pearl Technology LLC		Peoria Heights	IL	SG
Penn Power Group, LLC	Penn Power Group	Philadelphia	PA	SG
PennFleet Corp		Boothwyn	PA	SG
Pennsylvania Petroleum Association		Middletown	PA	SG
PeopleTec, Inc		Huntsville	AL	MP
Peraton Inc		Herndon	VT	LG
PERCIVAL, INC		Columbia	MD	SG
Peregrine Technical Solutions		Yorktown	VT	MP
PERFECTA FEDERAL, LLC		Springfield	VT	SP
Phase II Staffing and Contracting, LLC	Phase II	Quantico	VT	SP
Philbrook Construction Services Group, INC		Yarmouth Port	MA	SG
Phillips 66		Houston	TX	LG
Phoenix Global Support, LLC		Fayetteville	NC	SP
Phoenix Management, Inc		Cedar Park	TX	MG

Employer name	DBA	City	State/ terr.	Award type
Pikes Peak Library District	Pikes Peak Library District	Colorado Springs	CO	MG
PingWind Inc		Annandale	VT	MG
Pinkham Cyr, Inc		Mooreville	NC	SG
Pittsburgh Hires Veterans		Pittsburgh	PA	SG
PL Consulting, Inc		Herndon	VT	SG
Planet Technologies, Inc	Planet Technologies, Inc	Germantown	MD	MG
Platform Systems, Inc	Platform Aerospace	Hollywood	MD	MG
PLEXSYS Interface Products, Inc		Camas	WA	MG
Ploutocracy, Inc		Santa Clara	CA	SG
Powell Strategies, LLC		Annapolis	MD	SG
Precise Systems, Inc	Precise Systems	Lexington Park	MD	LG
Princeton Plasma Physics Laboratory		Princeton	NJ	LG
Priority 1 Air Rescue Operations Arizona LP	Priority 1 Air Rescue or P1AR	Mesa	AZ	SG
Professional Contract Services, Inc. (PCSI)	N/A	Austin	TX	LP
Professional Solutions Delivered, LLC		King George	VT	MP
Programatics LLC		Alexandria	VT	SP
Project Management Professional Services Corporation.	The PMO Squad	Gilbert	AZ	SP
Promising People Enterprises, LLC		Maitland	FL	SG
Property & Environmental Management, Inc		Columbus	OH	SP
Proteum Energy, LLC		Phoenix	AZ	SG
Provalus	Optomi, LLC	Atlanta	GA	MP
Puget Sound Energy		Bellevue	WA	LG
QB Medical, Inc		Chula Vista	CA	SG
Quadrint, Inc		Falls Church	VT	MG
Qualis Corporation		Huntsville	AL	MP
Quality Cable Installers LLC		Houston	TX	SP
Quecon, Inc		Front Royal	VT	SG
Quick Services LLC	QSL	Fayetteville	NC	MP
Quiet Professionals LLC		Tampa	FL	MP
Quince Medical & Surgical LLC		Pine Brook	NJ	SG
R3 Strategic Support Group, Inc	R3 Strategic Support Group, Inc	Coronado	CA	MP
RADKIN	RADKIN	Houston	TX	MG
Rapid Cycle Solutions		Nokesville	VT	SG
Raytheon Technologies		Waltham	MA	LP
RBR-Technologies		Odenton	MD	MG
Readyop Communications Inc		Boca Raton	FL	SG
RealTime, LLC		Dothan	AL	SG
Redsky LLC		Aldie	VT	SP
RELI Group Inc		Catonsville	MD	LP
Reliability & Performance Technologies, LLC	R&P Technologies	Dublin	PA	MG
RELYANT Global LLC	RELYANT Global, LLC	Maryville	TN	MG
Renaissance Global Services LLC		Holmdel	NJ	SP
RENCON LLC	RENCON Door & Glass	Chesapeake	VT	SG
Research and Development Solutions, Inc. (RDSI).	RDSI	Pawcatuck	CT	MG
Resolute ISR, Inc	Resolute ISR, Inc	Carson City	NV	SG
RESULTS Technology, INC	RESULTS Technology, INC	Overland Park	KS	SG
Revolution National Pest Council		Carson	CA	SP
RF Logistics LLC		Carlsbad	CA	MP
Ricardo Defense, Inc	Ricardo Defense	Troy	MI	MG
RICHARD GROUP LLC	RICHARD GROUP LLC	Glenview	IL	SG
Ridgeline International		Tysons	VT	MG
RightDirection Technology Solutions LLC	RDTS	Baltimore	MD	MP
Risk3sixty LLC		Roswell	GA	SP
Rite Way Heating, Cooling & Plumbing	RiteWay Heating, Cooling & Plumbing	Tucson	AZ	SG
Rite-Solutions, Inc		Middletown	RI	MP
Road Warrior Logistics LLC		Modesto	CA	SG
Robert Prosser	National Grid Solutions llc	Cypress	CA	SG
Rock Project Management Services, L.L.C		Renton	WA	SP
rockITdata		Philadelphia	PA	SP
Rocky Mountain Hydrostatics LLC		Brighton	CO	SP
Rolston Information Systems Assurance	RISA	Lutz	FL	SG
Roseburg Urban Sanitary Authority		Roseburg	OR	SP
RTI Consulting, LLC	RTI Consulting, LLC	Marshall	VT	SG
Rubicon Technical Services LLC		Kennesaw	GA	MP
Ruchman and Associates, Inc		Nottingham	MD	MG
S.B, Inc	Sherman Bros. Heavy Trucking	Harrisburg	OR	MP
Sabre Systems, Inc		Warminster	PA	MG
SAF, Inc		Akron	OH	SG
Safe Foods Corporation		North Little Rock	AR	MG
SAFE Project	SAFE Project	Arlington	VT	SP
Safespill		Houston	TX	SP

Employer name	DBA	City	State/ terr.	Award type
Saliense Consulting		Tyson	VT	MG
Salute Mission Critical	Salute Mission Critical	Clinton TWP	MI	MP
Sancorp Consulting, LLC	Sancorp Consulting LLC	Falls Church	VT	SP
Sandia National Laboratories		Albuquerque	NM	LP
Satcom Direct, Inc		Melbourne	FL	MP
scDataCom LLC		Savannah	GA	SP
Science Applications International Corporation	SAIC	Reston	VT	LG
Science Systems and Applications, Inc		Lanham	MD	LG
SDV Command Source, Inc		Winston-Salem	NC	SP
SDV Construction, Inc		Albuquerque	NM	SG
SEACORP, LLC		Middletown	RI	MG
Sealing Technologies, Inc		Columbia	MD	MG
SecureStrux, LLC	SecureStrux	Lancaster	PA	SG
Security 1 Solutions, LLC		Gaithersburg	MD	MG
Semper Fi Doorman	Semper Fi Doorman	Chicago	IL	SG
Semper Valens Solutions, Inc		Canyon Lake	TX	MP
Senspex, Inc		Rio Rancho	NM	SG
Sentar, Inc	Sentar, Inc	Huntsville	AL	MG
Sentinels of Freedom Scholarship Foundation		San Ramon	CA	SP
ServiceSource	ServiceSource, Inc	Oakton	VT	LG
Sevan Multi-Site Solutions, Inc		Downers Grove	IL	MP
Sharp Decisions, Inc	Sharp Decisions, Inc	New York	NY	MG
Shearer & Associates, Inc		Huntsville	AL	SP
Shen Te Enterprises Incorporated		Tulsa	OK	SG
Shine Systems LLC	Shine Enterprises LLC	Charlottesville	VT	SG
Short Powerline Service, LLC		Glenrock	WY	SG
SHOTSTOP BALLISTICS LLC		Stow	OH	SG
Sierra Management and Technologies, Inc		California	MD	MG
Silotech Group, Inc		San Antonio	TX	MP
SIMCO Electronics	N/A	Santa Clara	CA	MG
Simulation Technologies, Inc. (SimTech)		Huntsville	AL	MG
SimVentions, Inc		Fredericksburg	VT	MP
SixGen, Inc		Annapolis	MD	MG
SkillStorm Commercial Services LLC		Jacksonville	FL	MP
Sky Climber Wind Solutions, LLC	Sky Climber Renewables	Delaware	OH	LG
SkyBridge Tactical, LLC		Tampa	FL	MG
SMART Local #46 JATC		Rochester	NY	MP
Smoothstack, Inc		McLean	VT	MG
SNVC, LC	N/A	Herndon	VT	SP
SoCal Airflow Pros	Tactical Air Inc	Rancho Santa Margarita	CA	SP
Sodexo Government East		Jacksonville	NC	MP
SOF Intelligence Solutions, LLC		Alexandria	VT	SG
Solutions for Information Design, LLC	SOLID	Fairfax Station	VT	SP
Sonalysts		Waterford	CT	MP
South Carolina Vocations & Individual Advancement, Inc.	South Carolina Vocations & Individual Advancement, Inc.	Greenville	SC	SG
South Central Workforce Development Board		Bowling Green	KY	SP
Southern California Precision Concrete, Inc	Precision Concrete Cutting	Escondido	CA	SG
Southern Company		Atlanta	GA	LG
Spartan Construction Services, Inc		Beaver Falls	PA	SG
Spathe Systems		Tampa	FL	MP
Spectral Labs Incorporated	Spectral Labs Incorporated	San Diego	CA	SG
Spees LLC	Spees Design Build	Burien	WA	SP
Spezio Property Services, Inc		Rochester	NY	SG
Spin Systems, Inc	Spin Systems, Inc	Falls Church	VT	MP
ST CLAIR & CO		Ypsilanti	MI	SG
Stateline Home Services LLC	Stateline Gutters	Kingsland	GA	SG
Stellar Solutions, Inc		Palo Alto	CA	SG
Still Serving Veterans	SSV	Huntsville	AL	SP
Storm Development Services LLC		Las Vegas	NV	SG
STR		Woburn	MA	LG
StraCon Services Group, LLC		Fort Worth	TX	MG
Strata-G, LLC	Strata-G	Knoxville	TN	MP
Strategic Alliance Business Group		Fairfax	VT	MP
Strategic Medical Equipment Solutions, LLC		Monument	CO	SG
Strategic Staffing Solutions	Strategic Staffing Solutions	Detroit	MI	MP
Sumaria Systems LLC		Danvers	MA	MG
Summit Aviation, Inc		Middletown	DE	MP
Summit Technical Solutions, LLC		Colorado Springs	CO	SP
Sunbelt Rentals		Fort Mill	SC	LG
Support The Enlisted Project, Inc	STEP	San Diego	CA	SG
Survival Systems USA, Inc		Groton	CT	SG

Employer name	DBA	City	State/ terr.	Award type
Synack, Inc		Redwood City	CA	MG
Syndetix		Las Cruces	NM	SG
Synergy ECP LLC	Synergy ECP	Columbia	MD	MP
Synergy PT & Athletic Performance		Prince George	VT	SG
Syntelligent Analytic Solutions, LLC	Syntelligent Analytic Solutions, LLC	Falls Church	VT	MP
Sysco Houston		Houston	TX	LG
Sysmex America Inc	Sysmex America Inc	Lincolnshire	IL	LG
System Studies & Simulation, Inc		Huntsville	AL	MP
Systems Planning and Analysis, Inc		Alexandria	VT	LG
Systems Products and Solutions, Inc		Huntsville	AL	MG
T and T Consulting Services, Inc		Falls Church	VT	MP
TAC Industries Inc		Springfield	OH	SG
Tactical Engineering & Analysis, Inc		San Diego	CA	MG
Tactical Rehabilitation		Vero Beach	FL	SG
Tactical Training Center, LLC	TTC, LLC	Flemington	NJ	SG
Talentscale, Inc		Las Vegas	NV	MG
Tangent Technologies, LLC		McLean	VT	SG
Target Media Mid Atlantic, Inc	Target Systems	Mechanicsburg	PA	MG
TBL TECH NERDS		Boulder	CO	SG
TCI	TCI	Commerce	CA	LG
Team Carney, Inc		Alexandria	VT	MP
Team Cymru, Inc		Lake Mary	FL	MG
Tech62 Inc	Tech62	Fairfax	VT	SG
Technology Learning Group, Inc	TLG Learning	Bellevue	WA	SG
Technology Security Associates, Inc	TSA	California	MD	MG
TechSmart		Seattle	WA	SG
TEL U.S. Holdings, Inc		Austin	TX	LP
Tele-Consultants, Inc		Alpharetta	GA	SG
Tenova LLC	HireMilitary	Fairfax	VT	SG
Tetrad Digital Integrity, LLC		Washington	DC	MP
Textron Systems Corporation	Air Systems, Land Systems, Sea Systems, Weapon Systems, Howe & Howe, Lycoming, ATAC.	Hunt Valley	MD	LG
The Arbinger Institute, LLC	The Arbinger Institute	Farmington	UT	MG
The Boeing Company	The Boeing Company	Chicago	IL	LP
The Electronic On-Ramp Inc	EOR	Rockville	MD	SP
The Emfield Team—Realtypath		Pleasant Grove	UT	SG
The Greentree Group		Beavercreek	OH	SP
The HABITS group LLC		Austin	TX	SG
THE INFORMATICS APPLICATIONS GROUP, INC.	TIAG	Reston	VT	MP
The Metamorphosis Group, Inc		Vienna	VT	SG
The Rockhill Group, Inc		Molino	FL	MG
The RockWood Group Inc	The RockWood Group INC	Athens	AL	SG
The Ross Group Construction Corporation	Ross Group	Tulsa	OK	MG
The W.W. Williams Company, LLC		Dublin	OH	LG
Thermo Systems LLC		East Windsor	NJ	MG
Third Generation Painting Co		Eugene	OR	SG
Thomas Solutions Incorporated		Alexandria	VT	SP
Thompson Metal Fab, Inc		Vancouver	WA	MG
Three Way Plumbing Services		Concord	NC	SG
Tidewater Emergency Medical Services Council, Inc.	Tidewater EMS Council	Chesapeake	VT	SP
TISTA Science and Technology		Rockville	MD	LG
Titan Associates Group, Inc	Titan Associated Group, Inc	Athens	TN	SG
Titan University, LLC	Titan University	Orlando	FL	SG
Titan, Consultants & Engineers, LLC	Titan	Orlando	FL	SP
TM3 Solutions, Inc	TM3 Solutions, Inc	Alexandria	VT	SG
TMC Design	TMC Design a LinQuest Company	Las Cruces	NM	MP
Topsarge Business Solutions		Tempe	TX	SP
Torden LLC	Torden LLC	Tiverton	RI	MP
Tosti Insurance Agency LLC		North Attleboro	MA	SG
Trade Training Company	Sonoran Desert Institute	Tempe	AZ	MG
Training, Rehabilitation & Development Institute, Inc.		San Antonio	TX	MG
Transmission Distribution Service	TDS Construction	Glenrock	WY	SG
TRECIG LLC	Veganish Cafe, Rylee Rucker Investments	Rockwall	TX	SP
Trewon Technologies, LLC		Stafford	VT	SP
TRI Industries NFP		Ottawa	IL	SG
TRIAEM, LLC		Sterling	VT	SP
TRIDENT 11 LLC		Tulsa	OK	SG
Trident Technologies and Consulting—Global, LLC.	T2C-Global	Wesley Chapel	FL	SG

Employer name	DBA	City	State/ terr.	Award type
Trimat Materials Testing, Inc		Durham	NC	SG
Trinity Information Technology LLC		Yardley	PA	SG
Tripple D Trucking LLC		Chicago	IL	SG
TriWest Healthcare Alliance		Phoenix	AZ	LP
Trotter Industries, LLC	Trotter Electrical Contractors	Schwenksville	PA	SG
Trotter Management Services		Schwenksville	PA	SG
Trusted Internet, LLC		New Boston	NH	SG
TruWeather Solutions, Inc		Syracuse	NY	SP
U.S. Vet General Contracting, LLC	U.S. Vet General Contracting, LLC	Mcfarland	WI	SG
UBC MVP—Military Veteran Program	UBC—Local 2232	Killeen	TX	SG
Unicoi County Emergency Medical Services		Erwin	TN	SG
Unified Fields, Inc		Pittsburgh	PA	SG
United One Communications, LLC		Tampa	FL	SG
United Rentals Inc		Stamford	CT	LG
United Veterans Construction and Landscape So- lutions, Inc.	United Veterans Construction and Landscape Solution.	Fort Worth	TX	SP
Universal Strategy Group, Inc. (USGI)	Universal Strategy Group, Inc (USGI)	Franklin	TN	MG
Universal Thin Film Lab Corporation		Newburgh	NY	SG
Unmanned Systems Incorporated	Albers Aerospace	McKinney	TX	MP
Upstate Warrior Solution		Greenville	SC	SP
US Communications & Electric, Inc		Garfield Heights	OH	MG
USA Environmental, Inc		Oldsmar	FL	MG
USAA		San Antonio	TX	LG
USfalcon, Inc	USfalcon, Inc	Cary	NC	MG
Utility Lines Construction Services		Bridgeville	DE	MG
Utility Mapping Services, P.C		Clancy	MT	SG
VA Wholesale Mortgage		Virginia Beach	VT	SP
Vantage Point Consulting, Inc		Reston	VT	SG
Vascular Center of Orlando, PA	Vascular Vein Centers	Orlando	FL	SG
VAUDRA LTD	Vaudra International	Huntersville	NC	SG
Vaultes, LLC	Vaultes	Reston	VT	SG
Vector Force Development	Vector Force Development	Collinsville	IL	MP
VectorCSP		Elizabeth City	NC	MP
Vengroff Williams, Inc		Sarasota	FL	MG
Ventas Consulting, LLC		Friso	TX	SP
Veracity Technology Solutions, LLC		Pensacola	FL	SG
Verizon		Basking Ridge	NJ	LG
Veteran Engineering and Technology, LLC	none	Colorado Springs	CO	SP
Veterans Alliance		Stateline	NV	SG
Veterans Assembled electronics	STRAC INSTITUTE	Providence	RI	SP
Veterans Elite Services LLC		Jacksonville	FL	SP
Veterans Enterprise Technology Solutions, Inc ...	VETS, Inc	Clarksville	VT	MG
Veterans Guardian VA Claim Consulting		Pinehurst	NC	MP
Veterans Inc	Veterans Inc	Worcester	MA	MP
Veterans Insurance Agency Inc		Florham Park Borough	NJ	SG
Veterans Leadership Program of Western Penn- sylvania, Inc.	Veterans Leadership Program	Pittsburgh	PA	MG
Veterans Management Services, Inc		Sterling	VT	MP
Veterans Outreach Center, Inc		Rochester	NY	SG
Veterans Place of Washington Boulevard		Pittsburgh	PA	SP
Vetlink Solutions		Surprise	AZ	SP
ViaPath Technologies	Global Tel-Link	Falls Church	VT	LP
Viasat, Inc		Carlsbad	CA	LG
Victory Solutions, Inc		Huntsville	AL	MP
Village of Hanover Park		Hanover Park	IL	MG
Virtual Service Operations	VSO	Nokesville	VT	MP
VISTA Technology Services, Inc		Arlington	VT	MG
Vulcan, Inc		Foley	AL	MG
W R Systems, Ltd		Fairfax	VT	MG
Ward Circle Strategies, Inc		Washington	DC	SG
Warfeather		Coweta	OK	SP
Warrior Service Company LLC		Hialeah	FL	MG
Warriors Heart Healing Center	Warriors Heart	Bandera	TX	MG
Waterdogs SCUBA and Safety LLC		Clarksville	TN	SG
Watermark Risk Management International, LLC		Triangle	VT	MG
Watershed Security, LLC	Watershed Security, LLC	Chesapeake	VT	SP
Web Business Solutions, Inc		Fredericksburg	VT	SG
Westerwood Global USA Corporation		Malta	NY	MG
Westinghouse Electric Company, LLC		Cranberry Township	PA	LG
Westwind Computer Products, Inc	Westwind Computer Products, Inc	Albuquerque	NM	MG
White Birch Ammo, LLC	White Birch Armory	Dover	NH	SP
William C Brown Inc		Manassas	VT	SP
Williams Creek Management Corporation		Plainfield	IN	SG

Employer name	DBA	City	State/ terr.	Award type
Willis Mechanical, Inc		Norcross	GA	SP
Windstream Holdings		Little Rock	AR	LP
Women In Military Service For America Memorial Foundation, Inc.	Military Women's Memorial	Arlington	VT	SP
Workforce Development Board of the Treasure Coast.	CareerSource Research Coast	Port St. Lucie	FL	SG
Worldwide Counter Threat Solutions	N/A	Fredericksburg	VT	SG
Wounded Warrior Project		Jacksonville	FL	LP
WPS Labor, LLC	WPS Labor, LLC	Rogers	AR	SG
WWC Global	WWC Global	Tampa	FL	MG
Xcel Energy		Minneapolis	MN	LG
Xenith Solutions		Reston	VT	SP
Your Recruiting Company Inc		Fairfax	VT	MG
Zeido Technologies, LLC		Gainesville	VT	SG
Zekiah Technologies, Inc		La Plata	MD	SP
ZENDEV & Co, LLC	ZENDEV	Mesa	AZ	SP
Zero Point, Incorporated		Virginia Beach	VT	MP

Dated: November 14, 2023.

James D. Rodriguez,

*Assistant Secretary, Veterans' Employment
and Training Service.*

[FR Doc. 2023-25563 Filed 11-22-23; 8:45 am]

BILLING CODE 4510-79-P

POSTAL REGULATORY COMMISSION

[Docket No. SS2022-1; Order No. 6803]

Special Study on Flats Operations

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is recognizing a recently filed Postal Service document with the Commission concerning its plan to remedy inefficiencies identified in the Commission's flats study. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* January 5, 2024.

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:

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I. Introduction

In accordance with the Postal Service Reform Act of 2022 (PSRA),¹ the Commission submitted a report on the findings of its flats operations study on April 6, 2023.² The PSRA also required the Postal Service to develop and implement a plan to remedy each inefficiency identified in the Commission's flats study or provide an explanation why remedying such inefficiency is not practicable. PSRA section 206(b)(1). On October 6, 2023, the Postal Service submitted its plan to the Commission for approval.³

II. Background

The Postal Service has faced significant challenges in processing and delivering flats⁴ in a cost-effective manner. For years, in response to statutory requirements and Commission directives, the Postal Service has been designing and implementing operational and pricing initiatives to address these issues, but the Postal Service has been unable to either quantify the expected

impact of those initiatives or isolate the impact to specific products.⁵

The PSRA required the Commission, in consultation with the Inspector General of the United States Postal Service (USPS OIG), to conduct a study evaluating the Postal Service's flats operations. PSRA section 206(b)(2)(A). The statute also required the Commission to submit a report on the findings of the study no later than 1 year after enactment of the PSRA. *Id.* To carry out the study, the Commission collected and reviewed flats data provided by the Postal Service. Flats Operations Study Report at 1. Commission staff also visited Postal Service facilities over a period of several months, visited mailers' facilities, contracted with an operations expert, and consulted with the USPS OIG. *Id.* On April 6, 2023, the Commission submitted its report on the findings of the study to Congress and the Postmaster General.

In its Flats Operations Study Report, the Commission identified multiple causes of inefficiencies in the collection, sorting, transportation, and delivery of flats. Flats Operations Study Report at 23-133. In addition, the Commission quantified the effects of the volume trends, certain investment decisions, excess capacity, and operational inefficiencies of the Postal Service on costs that are attributable to flats. *Id.* at 134-209. At the conclusion of the Flats Operations Study Report, the Commission provided eight suggestions to the Postal Service for consideration as the Postal Service develops its plan. *Id.* at 210.

In response to the report, the Postal Service was required to develop and implement a plan to remedy each

¹ Postal Service Reform Act of 2022, Public Law 117-108, 136 Stat. 1127, available at <https://www.congress.gov/117/plaws/publ108/PLAW-117publ108.pdf> (PSRA).

² Flats Operations Study Report, April 6, 2023 (Flats Operations Study Report).

³ See Submission of the United States Postal Service Flats Plan Pursuant to Section 206 of the Postal Service Reform Act of 2022, October 6, 2023 (Notice); see also Notice, Postal Service Flats Plan Pursuant to Section 206 of the Postal Service Reform Act of 2022, October 6, 2023 (Flats Plan).

⁴ Flats, or flat-shaped mail, refers to large envelopes, magazines, and other flexible, rectangular mail that meet certain criteria. See United States Postal Service, *Publication 32, Glossary of Postal Terms*, July 1, 2016, at 88, available at https://postalpro.usps.com/storages/2016-04/pub32_glossary.pdf.

⁵ Flats Operations Study Report at 23 (citing Docket No. ACR2021, *Annual Compliance Determination*, March 29, 2022, at 31, 60).

inefficiency identified in the Commission's flats study or provide an explanation why remedying such inefficiency is not practicable. PSRA section 206(b)(1). Prior to implementing the plan, the Postal Service must give the public an opportunity to comment on the plan and the Commission must approve the plan. *Id.* On August 16, 2023, the Postal Service published a draft plan and sought public comments on the plan.⁶ On October 6, 2023, the Postal Service submitted its Flats Plan to the Commission for approval.

III. Postal Service Flats Plan

The Postal Service asserts that its plan conforms to the relevant statutory requirements and should be approved by the Commission. Notice at 2. In addition to considering public comments, the Postal Service states that it considered the Commission's suggestions, and the findings that inform those suggestions. *Id.* It notes that the Flats Plan incorporates the majority of the Commission's recommendations. *Id.* The Postal Service asserts that where it was unable to accept a Commission recommendation fully, the Flats Plan details how such recommendations may in the future become practicable. *Id.*

At the beginning of its Flats Plan, the Postal Service describes how the implementation of the Delivering for America (DFA) plan will enable it to increase revenue from flats, while also reducing costs by addressing the inefficiencies that currently exist in the processing, transporting, and delivery of flats. Flats Plan at 2. The Postal Service claims that since enactment of the DFA Plan in March 2021, it has made significant progress.⁷ In addressing the Commission's suggestions from the Flats Operations Study Report, the Postal Service discusses specific initiatives relating to flats, and explains that these initiatives are part of the DFA plan. Flats Plan at 2–3. The initiatives include pricing to increase flats revenue, redesigning the network, improving the data quality, and pursuing initiatives to reduce bundle breakage. *Id.* at 4–17. The Postal Service also addresses the

relationship between mail volume and productivity, and provides analysis to support its view that productivity declines and therefore increased costs, are due in part to volume declines. *Id.* at 17–24. Finally, the Postal Service addresses comments from the public received on its Draft Flats Plan, and “clarif[ies] certain aspects of the flats plan in response to those comments.” *Id.* at 24–27.

IV. Motions

After the Postal Service filed its Flats Plan, the Commission received motions for leave to provide comments on the Flats Plan from the News Media Alliance (NMA) and the Association for Postal Commerce (PostCom).⁸

NMA and PostCom both state that acceptance of their comments on the Flats Plan would be in the public interest and assist in the Commission's decision whether to approve or reject the Flats Plan. NMA Motion at 1; PostCom Motion at 1. PostCom also provides examples of where the Commission has accepted pleadings in other dockets where such pleadings were not specifically authorized but would assist the Commission in its deliberations. PostCom Motion at 1. These motions are granted.

In its comments, NMA states the Flats Plan “lacks the comprehensiveness, metrics, and accountability” needed to remedy well-established flats inefficiencies.⁹ NMA recommends that the Commission reject the plan and direct the Postal Service to address the deficiencies identified by NMA. NMA Comments at 1.

PostCom also urges the Commission to reject the Flats Plan and direct the Postal Service to revise the plan to respond to PSRA directives.¹⁰ PostCom attaches its comments submitted to the Postal Service on the Draft Flats Plan, where PostCom asserts the draft plan lacked, among other things, targets toward cost coverage improvement, and did not consider the diseconomies of scale that result from declining flats volume. PostCom Comments at 1. PostCom states that despite its comments, the Postal Service submitted the final plan that is “essentially unchanged” from its draft plan. *Id.*

V. Commission Analysis

Upon consideration of the Flats Plan, the Commission finds that, as submitted, this plan presents a high-level proposal that lacks both important details and analytical support needed to evaluate the plan and determine whether it sufficiently and effectively addresses the inefficiencies identified by the Commission and described in the Flats Operations Study Report. The Commission suggested in the Flats Operations Study Report that the Postal Service quantify the impact of any initiatives on cost to ensure its efforts are effective. Flats Operations Study Report at 3. While the Postal Service explains that there are processes to validate potential net financial benefits of initiatives and methodologies for calculating and tracking the results, it does not provide any quantifiable metrics for potential benefits or cost impact results as it describes the initiatives throughout the Flats Plan. *See* Flats Plan at 17.

Furthermore, the Postal Service does not provide a clear timeline for implementing the initiatives, with some initiatives seemingly already implemented and others in various stages of implementation. *See* Flats Plan at 7, 9–14. Additionally, while some initiatives appear to have been implemented as early as FY 2021, there is no timeline for when quantifiable impacts of these initiatives will be available.

In its response to public comments, the Postal Service references technology updates to the Automated Flats Sorting Machine. *See id.* at 26. This effort is well-advised and further details of these plans, including timelines, would improve the Commission's ability to evaluate the plan. Similarly, it is important for the Commission to understand the plan and timeline for other technology improvements, including to the equipment used to process bundles as a means to reduce bundle breakage.

In addition, to thoroughly evaluate the Flats Plan, it is important for the Commission to learn more about the improved data-collection tools developed to enhance the reporting and tracking of bundle irregularities and bundle breakage. *See id.* at 7–9. The discussion of these tools highlights their capability to link images and other evidence of mail irregularities to the Mailer Scorecard but does not clearly specify whether the tools also resolve the other bundle breakage data quality issues the Commission set out in the Flats Operations Study Report. *Id.*; *see also* Flats Operations Study Report at

⁶ *See* Notice of Availability of Draft Plan for Flat-Shaped Mail, 88 FR 55740 (August 16, 2023); *see also* Postal Service Flats Plan Pursuant to Section 206 of the Postal Service Reform Act of 2022, August 15, 2023, available at <https://about.usps.com/psra-flats-study/usps-flats-plan.pdf> (Draft Flats Plan). Interested parties were invited to submit written comments during a 30-day period, terminating on September 15, 2023. Notice at 2.

⁷ *Id.* at 1–2 (referring to United States Postal Service, Delivering for America, Second-Year Progress Report (April 2023), available at <https://about.usps.com/what/strategic-plans/delivering-for-america/assets/usps-dfa-two-year-report.pdf>).

⁸ Motion for Acceptance of Comments, October 16, 2023 (NMA Motion); Motion for Leave to File Comments, October 18, 2023 (PostCom Motion).

⁹ Comments of the News/Media Alliance on the Postal Service's Flats Plan, October 16, 2023, at 1 (NMA Comments).

¹⁰ Comments of the Association for Postal Commerce, October 18, 2023, at 1 (PostCom Comments).

85–87. These data quality issues include missing data in the bundle breakage dataset for bundles without a full-service Intelligent Mail barcode (IMb) and the lack of ability to identify where in the mail processing flow a bundle breakage occurs. *See* Flats Operations Study Report at 85–87. Addressing these additional issues would allow the Postal Service to identify trends and causes of bundle breakage within the handling and processing of bundles, which were previously lacking in the data. Accordingly, the Commission will seek more information from the Postal Service to enable evaluation of the Flats Plan prior to issuing its approval. The Commission also will invite comments from other interested persons on whether the Flats Plan is consistent with applicable statutory requirements.

VI. Notice and Comment

Interested persons may submit comments on the Flats Plan no later than January 5, 2024. Pursuant to 39 U.S.C. 505, Manon A. Boudreault is designated as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

VII. Ordering Paragraphs

It is ordered:

1. The News Media Alliance's Motion for Acceptance of Comments, filed October 16, 2023, is granted.

2. The Association for Postal Commerce's Motion for Leave to File Comments, filed October 18, 2023, is granted.

3. Comments on the Flats Plan are due no later than January 5, 2024.

4. Pursuant to 39 U.S.C. 505, Manon A. Boudreault is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

5. The Secretary shall arrange for publication of this notice in the **Federal Register**.

By the Commission.

Erica A. Barker,
Secretary.

[FR Doc. 2023–25914 Filed 11–22–23; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2024–55 and CP2024–56; MC2024–56 and CP2024–57; MC2024–57 and CP2024–58; MC2024–58 and CP2024–59; MC2024–59 and CP2024–60; MC2024–60 and CP2024–61; MC2024–61 and CP2024–62; MC2024–62 and CP2024–63; MC2024–63 and CP2024–64; MC2024–64 and CP2024–65; MC2024–65 and CP2024–66]

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 29, 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):* MC2024–55 and CP2024–56; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 108 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 17, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* November 29, 2023.

2. *Docket No(s):* MC2024–56 and CP2024–57; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 14 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 17, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Gregory S. Stanton; *Comments Due:* November 29, 2023.

3. *Docket No(s):* MC2024–57 and CP2024–58; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 15 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 17, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Gregory S. Stanton; *Comments Due:* November 29, 2023.

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).

4. *Docket No(s)*.: MC2024–58 and CP2024–59; *Filing Title*: USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 16 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: November 17, 2023; *Filing Authority*: 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative*: Gregory S. Stanton; *Comments Due*: November 29, 2023.

5. *Docket No(s)*.: MC2024–59 and CP2024–60; *Filing Title*: USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 17 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: November 17, 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 29, 2023.

6. *Docket No(s)*.: MC2024–60 and CP2024–61; *Filing Title*: USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 18 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: November 17, 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 29, 2023.

7. *Docket No(s)*.: MC2024–61 and CP2024–62; *Filing Title*: USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 19 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: November 17, 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 29, 2023.

8. *Docket No(s)*.: MC2024–62 and CP2024–63; *Filing Title*: USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 20 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: November 17, 2023; *Filing Authority*: 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative*: Christopher C. Mohr; *Comments Due*: November 29, 2023.

9. *Docket No(s)*.: MC2024–63 and CP2024–64; *Filing Title*: USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 21 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: November 17, 2023; *Filing Authority*: 39 U.S.C. 3642, 39 CFR 3040.130 through

3040.135, and 39 CFR 3035.105; *Public Representative*: Christopher C. Mohr; *Comments Due*: November 29, 2023.

10. *Docket No(s)*.: MC2024–64 and CP2024–65; *Filing Title*: USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 22 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: November 17, 2023; *Filing Authority*: 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative*: Christopher C. Mohr; *Comments Due*: November 29, 2023.

11. *Docket No(s)*.: MC2024–65 and CP2024–66; *Filing Title*: USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 23 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: November 17, 2023; *Filing Authority*: 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative*: Christopher C. Mohr; *Comments Due*: November 29, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,
Secretary.

[FR Doc. 2023–25979 Filed 11–22–23; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2024–52; Order No. 6806]

Competitive Price Changes

AGENCY: Postal Regulatory Commission.
ACTION: Notice.

SUMMARY: The Commission is recognizing a recently filed Postal Service document with the Commission concerning changes in rates and classifications of general applicability for competitive products. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 1, 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 and Overview
- II. Summary of Changes
- III. Initial Administrative Actions
- IV. Ordering Paragraphs

I. Introduction and Overview

On November 15, 2023, the Postal Service filed notice with the Commission concerning changes in rates and classifications of general applicability for Competitive products.¹ The Postal Service represents that, as required by 39 CFR 3035.102(b) and 39 CFR 3035.104(b), the Notice includes an explanation and justification for the changes, the effective date, and a schedule of the changed rates. Notice at 1. The changes are scheduled to take effect on January 21, 2024. *Id.*

Attached to the Notice is Governors' Decision No. 23–5, which states the new prices are in accordance with 39 U.S.C. 3632 and 3633 and 39 CFR 3035.102–.104.² The Governors' Decision provides an analysis of the Competitive products' price and classification changes intended to demonstrate that the changes comply with 39 U.S.C. 3633 and 39 CFR part 3035. Governors' Decision No. 23–5 at 1. The Attachment to the Governors' Decision No. 23–5 sets forth the classification and price changes and includes draft Mail Classification Schedule (MCS) language for Competitive products of general applicability.

In addition, the Notice includes a non-public annex showing FY 2024 projected volumes, revenues, attributable costs, contribution, and cost coverage for each product. *See* Notice at 1. The Postal Service also filed supporting forecast data and price adjustment calculations for each affected product as required by Order No. 1062. *Id.*

The Notice also includes an application for non-public treatment of the unredacted version of the annex to the Governors' Decision, as well as the supporting materials for the data.³ *Id.* at 1–2.

¹ USPS Notice of Changes in Rates and Classifications of General Applicability for Competitive Products, November 15, 2023 (Notice). Pursuant to 39 U.S.C. 3632(b)(2), the Postal Service is obligated to publish the Governors' Decision and record of proceedings in the **Federal Register** at least 30 days before the effective date of the new rates.

² Notice, Decision of the Governors of the United States Postal Service on Changes in Rates and Classifications of General Applicability for Competitive Products (Governors' Decision No. 23–5), at 1 (Governors' Decision No. 23–5).

³ *See* United States Postal Service Notice of Errata to Application for Nonpublic Treatment Accompanying USPS Notice of Changes in Rates and Classifications of General Applicability for Competitive Products, November 17, 2023.

II. Summary of Changes

The Notice proposes price changes to Priority Mail Express, Priority Mail, Parcel Select, and USPS Ground Advantage, and most International Products. *Id.* at 2. Additionally, the proposed changes include price adjustments to Domestic Extra Services, including Premium Forwarding Service, Competitive Post Office Boxes, and Adult Signature Service among others, and a 20 percent price increase in certain Nonstandard Fees (NSFs). *Id.* There are two classification changes proposed, renaming the Electronic Verification System (eVS) Unmanifested Fee to simply “Unmanifested Fee” and the elimination of Parcel Select Lightweight Price Category. *Id.* at 2–5. No other price or classification changes are proposed in this docket. *See* Governors’ Decision No. 23–5 at 2–3. The changes are summarized below and condensed to Table I–1.

A. Price Changes

1. Domestic

Priority Mail Express changes. The proposed changes to the MCS in the Governors’ Decision No. 23–5 show the Postal Service’s planned price changes for Priority Mail Express. On average, Priority Mail Express prices are proposed to increase 5.9 percent. *See id.* at 2. For January 2024, the Postal Service will maintain the consolidation of Commercial Base and Commercial Plus price categories into one Commercial price category and the differentiated “Local, 1, 2” Zone prices and dimensional weighting for all zones. *Id.* The retail prices for Priority Mail Express will increase an average of 5.9 percent. *Id.* On average, commercial prices will increase by 5.9 percent and reflect an average of 13.7 percent discount off of retail prices. *Id.*

Priority Mail changes. The proposed changes to the MCS in the Governors’ Decision No. 23–5 show the Postal Service’s planned price changes for Priority Mail. On average, Priority Mail prices are proposed to increase 5.7 percent. *See id.* at 2. For January 2024, the Postal Service will maintain the consolidation of Commercial Base and Commercial Plus price categories into one Commercial price category and the differentiated “Local, 1, 2” Zone prices and dimensional weighting for all zones. *Id.* On average, the retail prices will increase by 5.6 percent. The commercial prices will increase by an average of 5.8 percent and reflect an average of 20.5 percent discount off retail prices. *Id.* at 3.

Parcel Select. The proposed changes to the MCS in the Governors’ Decision No. 23–5 show the Postal Service’s planned price changes for Parcel Select. On average, Parcel Select prices are proposed to increase 5.9 percent. *See id.* at 3. Proposed for January 2024, Parcel Select Lightweight will be eliminated as a separate price category and instead ounce-based prices will be added under the destination categories at 4-, 8- and 12-ounce increments. *Id.* Parcel Select will be expressed in a single price table to reflect the elimination of Parcel Select Lightweight along with previous structural changes in 2023. *Id.*

The average price increase for parcels entered in destination delivery units, destination hubs, destination network distribution centers, and destination sectional center facilities is 5.9 percent. *Id.* The prices for USPS Connect, introduced in 2022, will remain unchanged. *Id.* The Postal Service proposes to maintain dimensional weighting which was introduced for all zones in 2019.

USPS Ground Advantage. The proposed changes to the MCS in the Governors’ Decision No. 23–5 show the Postal Service’s planned price changes for USPS Ground Advantage overall will increase an average of 5.4 percent. *Id.* The retail prices will increase an average of 5.2 percent and commercial will increase an average of 5.4 percent. *Id.* The Alaska Limited Overland Routes price category will increase an average of 9.2 percent. *Id.* at 3–4.

Domestic Extra Services. The proposed changes to the MCS in the Governors’ Decision No. 23–5 show the Postal Service’s planned price changes for Premium Forwarding Service will increase an average of 3.0 percent. *Id.* at 4. On average, prices for Address Enhancement Service are proposed to increase 3.0 percent. *Id.* The Competitive Post Office Box prices will increase an average of 6.5 percent. *Id.*

2. International

Expedited Services. The proposed changes to the MCS in the Governors’ Decision No. 23–5 show the Postal Service’s planned price changes for Global Express Guaranteed and Priority Mail Express International will increase an average of 5.4 percent with Commercial Plus equivalent to Commercial Base. *Id.*

Priority Mail International. The proposed changes to the MCS in the Governors’ Decision No. 23–5 show the Postal Service’s planned price changes for Priority Mail International will increase an average of 5.4 percent with

Commercial Plus prices equivalent to Commercial Base. *Id.*

International Priority Airmail and International Surface Air Lift. The proposed changes to the MCS in the Governors’ Decision No. 23–5 show the Postal Service’s planned published price changes for International Priority Airmail and International Surface Air Lift will have an average increase of 5.5 percent and 3.5 percent, respectively. *Id.* at 5.

Airmail M-Bags. The published price changes for Airmail M-Bags will increase by 5.4 percent. *Id.*

First-Class Package International Service. The proposed changes to the MCS in the Governors’ Decision No. 23–5 show the Postal Service’s planned price changes for First-Class Package International Service will increase an average of 6.4 percent with Commercial Plus prices equivalent to Commercial Base. *Id.*

International Ancillary Service and Special Services. The proposed changes to the MCS in the Governors’ Decision No. 23–5 show the Postal Service’s planned price changes for several international ancillary services. *Id.* The prices for International Certificate of Mailing and International Registered Mail will increase by an average of 2.5 percent. *Id.* The prices for International Return Receipt will increase by an average of 2.7 percent. *Id.* Lastly, the prices for International Insurance and Customs and Clearance Delivery Fee will increase by an average of 3.0 percent. *Id.*

B. Classification Changes

Renaming eVS Unmanifested Fee. The “eVS Unmanifested Fee” will be renamed as “Unmanifested Fee” to accommodate the ongoing migration of customers from eVS to the USPS Ship platform. Notice at 2. The Postal Service plans to retire the eVS platform and therefore plans to rename the “eVS Unmanifested Fee” to simply “Unmanifested Fee.” *Id.*

Elimination of Parcel Select Lightweight. As discussed above, Parcel Select Lightweight will be eliminated as a separate price category and ounce-based prices will be added under the destination entered categories at 4-, 8-, and 12-ounce increments. *Id.* at 4.

NSFs. The Nonstandard Fees applicable to Priority Mail Express, Priority Mail, Parcel Select, and USPS Ground Advantage will see a 20 percent increase in 2024. *Id.* at 2–4.

TABLE I-1—PROPOSED PRICE CHANGES

Product name	Average price increase (percent)
Domestic Competitive Products	
Priority Mail Express	5.9
Retail	5.9
Commercial	5.9
Priority Mail	5.7
Retail	5.6
Commercial	5.8
Parcel Select	5.9
Destination Delivery Unit	5.9
Destination hub	5.9
Destination Sectional Center Facility	5.9
Destination Network Distribution Center	5.9
USPS Ground Advantage	5.4
Retail	5.2
Commercial	5.4
Domestic Extra Services	
Premium Forwarding Service	3.0
Adult Signature Service:	
Basic	3.3
Person-Specific	3.2
Competitive Post Office Box	6.5
Package Intercept Service	3.0
Address Enhancement Service	3.0
International Competitive Products	
Global Express Guaranteed	5.4
Priority Mail Express International	5.4
Priority Mail International	5.4
International Priority Airmail	5.5
International Surface Air Lift	3.5
Airmail M-Bags	5.4
First-Class Package International Service	6.4
International Ancillary Services and Special Services	
International Ancillary Services	2.7
International Certificate of Mailing	2.5
International Insurance	3.0
International Registered Mail	2.5
International Return Receipt	2.7
Customs and Clearance Delivery Fee	3.0

Source: See Governors' Decision No. 23-5 at 2-5.

III. Initial Administrative Actions

The Commission establishes Docket No. CP2024-52 to consider the Postal Service's Notice. Interested persons may express views and offer comments on whether the planned changes are consistent with 39 U.S.C. 3632, 3633, and 3642, 39 CFR part 3035, and 39 CFR 3040 subparts B and E. Comments are due no later than December 1, 2023. For specific details of the planned price changes, interested persons are encouraged to review the Notice, which is available on the Commission's website at www.prc.gov.

Pursuant to 39 U.S.C. 505, Christopher C. Mohr is appointed to serve as Public Representative to

represent the interests of the general public in this docket.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. CP2024-52 to provide interested persons an opportunity to express views and offer comments on whether the planned changes are consistent with 39 U.S.C. 3632, 3633, and 3642, 39 CFR part 3035, and 39 CFR 3040 subparts B and E.

2. Comments are due no later than December 1, 2023.

3. Pursuant to 39 U.S.C. 505, the Commission appoints Christopher C. Mohr to serve as an officer of the Commission (Public Representative) to

represent the interests of the general public in this docket.

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

By the Commission.

Erica A. Barker,
Secretary.

[FR Doc. 2023-25988 Filed 11-22-23; 8:45 am]

BILLING CODE 7710-FW-P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* November 24, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 17, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 19 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2024–61, CP2024–62.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2023–25897 Filed 11–22–23; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* November 24, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 17, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 108 to Competitive Product List*. Documents

are available at www.prc.gov, Docket Nos. MC2024–53, CP2024–54.

Sean Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2023–25890 Filed 11–22–23; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* November 24, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 17, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 17 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2024–59, CP2024–60.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2023–25895 Filed 11–22–23; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* November 24, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 17, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 22 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2024–64, CP2024–65.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2023–25900 Filed 11–22–23; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* November 24, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 17, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 20 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2024–62, CP2024–63.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2023–25898 Filed 11–22–23; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a

domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* November 24, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 17, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 16 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2024-58, CP2024-59.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2023-25894 Filed 11-22-23; 8:45 am]
BILLING CODE 7710-12-P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* November 24, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 17, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 18 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2024-60, CP2024-61.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2023-25896 Filed 11-22-23; 8:45 am]
BILLING CODE 7710-12-P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* November 24, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 17, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 14 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2024-56, CP2024-57.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2023-25892 Filed 11-22-23; 8:45 am]
BILLING CODE 7710-12-P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* November 24, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 17, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 15 to Competitive Product List*. Documents

are available at www.prc.gov, Docket Nos. MC2024-57, CP2024-58.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2023-25893 Filed 11-22-23; 8:45 am]
BILLING CODE 7710-12-P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* November 24, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 17, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 23 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2024-65, CP2024-66.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2023-25901 Filed 11-22-23; 8:45 am]
BILLING CODE 7710-12-P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* November 24, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 15, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 13 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2024–52, CP2024–53.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2023–25891 Filed 11–22–23; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* November 24, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 16, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 107 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2024–53, CP2024–54.

Sean Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2023–25889 Filed 11–22–23; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service

Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* November 24, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 16, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 106 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2024–53, CP2024–54.

Sean Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2023–25888 Filed 11–22–23; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* November 24, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 17, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 21 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2024–63, CP2024–64.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2023–25899 Filed 11–22–23; 8:45 am]
BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98981; File No. SR–CboeBZX–2023–058]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To List and Trade Shares of the Global X Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

November 17, 2023.

On August 4, 2023, Cboe BZX Exchange, Inc. (“BZX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b–4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the Global X Bitcoin Trust (“Trust”) under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. The proposed rule change was published for comment in the **Federal Register** on August 23, 2023.³

On September 26, 2023, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ This order institutes proceedings under Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.

I. Summary of the Proposal

As described in more detail in the Notice,⁷ the Exchange proposes to list and trade the Shares of the Trust under BZX Rule 14.11(e)(4), which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.

The investment objective of the Trust is to reflect the performance of the price of bitcoin less the expenses of the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 98156 (Aug. 17, 2023), 88 FR 57490 (“Notice”). Comments on the proposed rule change are available at: <https://www.sec.gov/comments/sr-cboebzx-2023-058/srcboebzx2023058.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 98531, 88 FR 67829 (Oct. 2, 2023). The Commission designated November 21, 2023, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Notice, *supra* note 3.

Trust's operations.⁸ The Trust's assets will consist of bitcoin held by the Trust's custodian on behalf of the Trust.⁹ The Trust will value its Shares daily based on the value of bitcoin as reflected by the CoinDesk Bitcoin Price Index (XBIX) ("Index").¹⁰ The administrator of the Trust will determine the net asset value ("NAV") of the Trust on each day that the Exchange is open for regular trading, as soon as practicable after 4:00 p.m. ET.¹¹ In determining the Trust's NAV, the administrator will calculate the price of the bitcoin held by the Trust as reflected by the Index as of 4:00 p.m. ET.¹² When the Trust sells or redeems its Shares, it will do so in "in-kind" transactions with authorized participants in large blocks of Shares.¹³

II. Proceedings To Determine Whether To Approve or Disapprove SR–ChoeBZX–2023–058 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹⁴ to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,¹⁵ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be "designed to prevent fraudulent and manipulative acts and practices" and

"to protect investors and the public interest."¹⁶

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following questions and asks commenters to submit data where appropriate to support their views:

1. What are commenters' views on whether the proposed Trust and Shares would be susceptible to manipulation? What are commenters' views generally on whether the Exchange's proposal is designed to prevent fraudulent and manipulative acts and practices? What are commenters' views generally with respect to the liquidity and transparency of the bitcoin markets and the bitcoin markets' susceptibility to manipulation?

2. Based on data and analysis provided and the academic research cited by the Exchange,¹⁷ do commenters agree with the Exchange that the Chicago Mercantile Exchange ("CME"), on which CME bitcoin futures trade, represents a regulated market of significant size related to spot bitcoin?¹⁸ What are commenters' views on whether there is a reasonable likelihood that a person attempting to manipulate the Shares would also have to trade on the CME to manipulate the Shares?¹⁹ Do commenters agree with the Exchange that trading in the Shares would not be the predominant influence on prices in the CME bitcoin futures market?²⁰

3. The Exchange states that bitcoin is resistant to price manipulation and that other means to prevent fraudulent and manipulative acts and practices "exist to justify dispensing with the requisite surveillance sharing agreement" with a regulated market of significant size related to spot bitcoin.²¹ In support, the Exchange states, among other things, that the geographically diverse and continuous nature of bitcoin trading make it difficult and prohibitively costly to manipulate the price of bitcoin, and that the fragmentation across bitcoin platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of bitcoin prices through continuous trading activity

challenging.²² The Exchange also states that offering only in-kind creations and redemptions provides "unique protections against potential attempts to manipulate the price of the Shares" and that the price the Sponsor uses to value the Trust's bitcoin "is not particularly important."²³ Do commenters agree with the Exchange's statements regarding the bitcoin market's resistance to price manipulation?

4. The Exchange also states that it will execute a surveillance-sharing agreement with Coinbase, Inc. ("Coinbase") that is intended to supplement the Exchange's market surveillance program.²⁴ According to the Exchange, the agreement is "expected to have the hallmarks of a surveillance-sharing agreement between two members of the [Intermarket Surveillance Group], which would give the Exchange supplemental access to data regarding spot [b]itcoin trades on Coinbase where the Exchange determines it is necessary as part of its surveillance program for the Commodity-Based Trust Shares."²⁵ Based on the description of the surveillance-sharing agreement as provided by the Exchange, what are commenters' views of such an agreement if finalized and executed? Do commenters agree with the Exchange that such an agreement with Coinbase would be "helpful in detecting, investigating, and deterring fraud and market manipulation in the Commodity-Based Trust Shares"?²⁶

5. Some sponsors of proposed spot bitcoin exchange-traded products have also provided data regarding the correlation between certain bitcoin spot markets and the CME bitcoin futures market.²⁷ What are commenters' views on the correlation between the bitcoin spot market and the CME bitcoin futures

²² See *id.*

²³ See *id.* at 57498.

²⁴ See *id.*

²⁵ See *id.* The Exchange states that "[t]his means that the Exchange expects to receive market data for orders and trades from Coinbase, which it will utilize in surveillance of the trading of Commodity-Based Trust Shares." *Id.*

²⁶ See *id.*

²⁷ See, e.g., Notice of Filing of Amendment No. 3 to, and Order Instituting Proceedings to Determine Whether to Approve or Disapprove, a Proposed Rule Change to List and Trade Shares of the ARK 21Shares Bitcoin ETF under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 98112 (Aug. 11, 2023), 88 FR 55743 (Aug. 16, 2023) (including data from sponsor 21Shares US LLC that purports to show correlations of returns across the two-year period from January 20, 2021, to February 1, 2023, of no less than 92% among certain spot bitcoin platforms and between the CME bitcoin futures market and such spot bitcoin platforms on an hourly basis, and no less than 78% on a minutely basis).

⁸ See *id.* at 57499. Global X Digital Assets ("Sponsor") is the sponsor of the Trust. See *id.* at 57490.

⁹ See *id.* at 57499. The Trust generally does not intend to hold cash or cash equivalents; however, there may be situations where the Trust would unexpectedly hold cash or cash equivalents on a temporary basis. See *id.*

¹⁰ See *id.*

¹¹ See *id.* at 57500.

¹² See *id.* at 57499–00.

¹³ See *id.* at 57499.

¹⁴ 15 U.S.C. 78s(b)(2)(B).

¹⁵ *Id.*

¹⁶ 15 U.S.C. 78f(b)(5).

¹⁷ See Notice, 88 FR at 57495–98.

¹⁸ See *id.* at 57491.

¹⁹ See *id.* at 57498.

²⁰ See *id.*

²¹ See *id.* at 57497 n.49.

market? What are commenters' views on the extent to which that correlation provides evidence that the CME bitcoin futures market is "significant" related to spot bitcoin?

III. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, and the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.²⁸

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by December 15, 2023. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by December 29, 2023.

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-2023-058 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to file number SR-CboeBZX-2023-058. 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-2023-058 and should be submitted on or before December 15, 2023. Rebuttal comments should be submitted by December 29, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁹

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-25882 Filed 11-22-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98979; File No. SR-OCC-2023-003]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Granting Approval of Proposed Rule Change, as Modified by Partial Amendment No. 1, Concerning Clearing Member Cybersecurity Obligations

November 17, 2023.

I. Introduction

On March 21, 2023, the Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the

proposed rule change SR-OCC-2023-003 pursuant to Section 19(b) of the Securities Exchange Act of 1934 ("Exchange Act")¹ and Rule 19b-4² thereunder. The proposed rule change would amend certain provisions in OCC's Rules relating to each Clearing Member's obligation to address a "Security Incident" (i.e., the occurrence of a cyber-related disruption or intrusion of a Clearing Member's systems that is reasonably likely to pose an imminent risk or threat to OCC's operations) of that Clearing Member. The proposed rule change was published for public comment in the **Federal Register** on April 5, 2023.³ The Commission has received comments regarding the proposed rule change.⁴

On May 18, 2023, pursuant to the Section 19(b)(2) of the Exchange Act,⁵ the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve the proposed rule change.⁶ On May 24, 2023, OCC filed Partial Amendment No. 1 to the Notice of Filing.⁷ For the reasons discussed below, the Commission is approving the proposed rule change, as modified by Partial Amendment No. 1 (hereinafter, "proposed rule change").

II. Background

Currently, the only OCC Rule governing a Clearing Member's cybersecurity obligations to OCC is Rule 219, titled "Cybersecurity Confirmation."⁸ It requires Clearing Members and applicants for clearing membership to submit to OCC a form called the "Cybersecurity Confirmation" at least every two years or as part of its application materials. Through the form,

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 97225 (Mar. 30, 2023), 88 FR 20195 (Apr. 5, 2023) (File No. SR-OCC-2023-003) ("Notice of Filing").

⁴ Comments on the proposed rule change are available at <https://www.sec.gov/comments/sr-occ-2023-003/srocc2023003.htm>.

⁵ 15 U.S.C. 78s(b)(2).

⁶ See Securities Exchange Act Release No. 97525 (May 18, 2023), 88 FR 33655 (May 24, 2023) (File No. SR-OCC-2023-003).

⁷ See Securities Exchange Act Release No. 97602 (May 26, 2023), 88 FR 36351 (June 2, 2023) (File No. SR-OCC-2023-003) ("Notice of Partial Amendment"). OCC submitted Partial Amendment No. 1 in response to comments regarding the proposed definition of "Security Incident" for purposes of proposed Rule 213(d), the notification requirements and procedure in the event of a Security Incident, factors considered when determining whether to disconnect or reduce a clearing member's access, and clarification related to reconnection.

⁸ Capitalized terms used but not defined herein have the meanings specified in OCC's Rules and By-Laws, available at <https://www.theocc.com/about/publications/bylaws.jsp>.

²⁸ Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Public Law 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

²⁹ 17 CFR 200.30-3(a)(57).

Clearing Members and applicants confirm that they maintain a comprehensive cybersecurity program that meets certain criteria (e.g., the cybersecurity program is approved by senior management, it is reviewed and updated periodically, the cybersecurity program is designed to protect the segment of the Clearing Member's or applicant's system that interacts with OCC, it includes a process for the Clearing Member to remediate cyber issues, etc.). However, current Rule 219 does not require Clearing Members to notify OCC if they experience a cybersecurity incident that could impact OCC or otherwise address OCC's processes, or the Clearing Member's obligations with respect to OCC.

The proposed rule change would renumber Rule 219 as Rule 213 and rename the rule "Cybersecurity Obligations" to reflect the expanded scope of the Rule.⁹ It also would add section headings to the Rule and replace references to "OCC" with references to "the Corporation," but otherwise would not change the provisions regarding the existing Cybersecurity Confirmation form that confirms the existence of a Clearing Member's cybersecurity program.¹⁰

The substantive changes to the Rule would be the addition of two new subsections—(d) and (e)—titled "Occurrence of a Security Incident" and "Procedures for Connecting Following a Security Incident," respectively. New subsection (d) would require a Clearing Member to immediately notify OCC if the member becomes aware or should be aware of a Security Incident (as defined in the Rule). It would also specify that OCC may take actions reasonably necessary to mitigate any effects on its operations following a Security Incident. New subsection (e) would require a Clearing Member wishing to reconnect its systems to OCC's systems to provide OCC with a new form, titled "Reconnection Attestation," that describes the Security Incident and attests to certain security requirements, as well as an associated checklist, titled "Reconnection Checklist," that describes the affected Clearing Member's remediation efforts and other key information. Each of these proposed

changes is described in greater detail below.

A. New Paragraph (d): Occurrence of a Security Incident

Proposed Rule 213(d) would define a Security Incident as an incident that has occurred or is occurring involving a cyber-related disruption or intrusion of the Clearing Member's system(s) that is reasonably likely to pose an imminent risk or threat to OCC's operations.¹¹ To provide guidance regarding the types of disruptions or intrusions that might be considered Security Incidents, the proposed rule includes a non-exhaustive list of examples. Specifically, a Security Incident may include any disruption or degradation of the normal operation of the Clearing Member's systems or any unauthorized entry into the Clearing Member's systems that would result in loss of OCC's data or system integrity, an unauthorized disclosure of sensitive information related to OCC, or the inability of OCC to conduct essential clearance and settlement functions.¹²

Under the proposed rule, a Clearing Member would be required to immediately notify OCC if the member becomes aware or should be aware that there has been a Security Incident or that a Security Incident is occurring.¹³ The Clearing Member would also need to promptly confirm such notice in writing.

The proposed rule would specify that, if OCC receives notice of a Security Incident from a Clearing Member or has a reasonable basis to believe a Security Incident has occurred or is occurring, OCC may take actions reasonably necessary to mitigate any effects to its operations, including disconnecting the Clearing Member's access to OCC's information and data systems or modifying the scope and specifications of such access. Finally, paragraph (d) of the proposed rule would provide a non-exhaustive list of factors OCC may consider in determining whether to modify a Clearing Member's access to OCC's information and data systems, up to and including disconnection, in

response to a Security Incident. Specifically, among other factors, OCC may consider the potential loss of control by a Clearing Member of its internal system(s), the potential loss of OCC's confidential data, the potential strain on or loss of OCC's resources due to OCC's inability to perform clearance and settlement functions, and the overall severity of the threat to the security and operations of OCC.¹⁴ Further, if the Corporation reasonably determines that disconnection of a Clearing Member is necessary, the Clearing Member must continue to meet its obligations to the Corporation, notwithstanding disconnection from the Corporation's systems.

B. New Paragraph (e): Procedures for Connecting Following a Security Incident That Results in Disconnection

Proposed Rule 213(e) would clarify the process for a Clearing Member to request reconnection to OCC's systems following disconnection as a result of a Security Incident. In particular, the Clearing Member would need to complete and submit, upon OCC's request, a new form referred to by OCC as the "Reconnection Attestation" and a related checklist referred to by OCC as the "Reconnection Checklist." The Reconnection Attestation would include a text box for the Clearing Member to provide a narrative description of the Security Incident and five representations to which, by signing the form, the Clearing Member would be attesting. Specifically, by signing the Reconnection Attestation, the Clearing Member would be attesting that it has:

- provided full, complete and accurate information in response to all requests made by OCC regarding the Security Incident, including all requests contained in the Reconnection Checklist, on a good faith, best efforts basis;
- provided full, complete and accurate information regarding any OCC data or systems that were potentially compromised during the Security Incident, including any potential exposure of credentials used to access OCC's systems, and will immediately notify OCC if it later becomes aware of a previously undetected or unreported compromise of OCC data or systems during the Security Incident;

¹⁴ In response to public comment, OCC amended its proposed rule to specify that these are the types of factors OCC would consider when determining whether to disconnect a Clearing Member. See Notice of Partial Amendment, 88 FR at 36353. OCC also clarified its anticipation that not all Security Incident notifications will result in a Clearing Member disconnection. See *id.* at 36352.

⁹ The renumbering follows proposed changes to OCC's clearing membership standards, which includes removal of current Rules 213 through 218. See Securities Exchange Act Release No. 97150 (Mar. 15, 2023), 88 FR 17046 (Mar. 21, 2023) (File No. SR-OCC-2023-002).

¹⁰ Specifically, OCC would add the following headings: "Cybersecurity Confirmation Submission" to paragraph (a); "Representations in the Cybersecurity Confirmation" to paragraph (b); and "Execution of the Cybersecurity Confirmation" to paragraph (c).

¹¹ In response to public comment, OCC amended the proposed rule change to specify that a disruption or intrusion of a Clearing Member's systems would only be deemed a Security Incident if it is "reasonably likely to pose an imminent risk or threat to OCC's operations." See Notice of Partial Amendment, 88 FR at 36352.

¹² In response to public comment, OCC added the non-exhaustive list of potential Security Incidents to clarify that the focus of the Rule would be on the potential impact on OCC of a disruption or intrusion. See Notice of Partial Amendment, 88 FR at 36352.

¹³ See Notice of Partial Amendment, 88 FR at 36352.

- determined whether the Security Incident resulted, directly or indirectly, from any controls that failed or were circumvented by its employees, contractors or agents (“Failed Controls”);¹⁵

- implemented, or will implement promptly, technical and operational changes, both preventative and detective, with the intent to prevent a recurrence of the Security Incident and has provided written summaries of such changes to OCC; and

- complied and will continue to comply with all applicable laws in connection with its response to the Security Incident, including any notifications required to be provided to government agencies, OCC, and third parties.¹⁶

The associated Reconnection Checklist would include questions designed to elicit additional details regarding the Security Incident, including the potential cause of the incident, steps taken to contain it, the exposure and impact to OCC’s systems or data, the Clearing Member’s remediation efforts, and any other details relevant to the Clearing Member’s request to reconnect to OCC’s systems. The Reconnection Checklist would require the Clearing Member to respond to the following questions:¹⁷

- was the disconnection the result of a cybersecurity-related incident;
- describe the nature of the incident;
- what steps were taken to contain the incident;
- what OCC data, if any, was compromised during the incident;
- what OCC systems, if any, were impacted during the incident;
- was there any risk of exposure of credentials used to access OCC systems and, if so, were the credentials reissued;
- which controls were circumvented or failed that led to the incident occurring;
- what changes, preventative and detective, were implemented to prevent a reoccurrence;
- how has data integrity been preserved and what data checks have been performed prior to reconnecting to and sending/receiving data to/from OCC;
- have third-parties, including government agencies, been notified; and

¹⁵ The proposed language would further specify that the Clearing Member has communicated the existence of Failed Controls to OCC and is remediating or has remediated all Failed Controls.

¹⁶ See proposed Rule 213(e)(1)(A) through (E). Further, each Reconnection Attestation must be provided in writing and signed by a designated senior executive of the Clearing Member.

¹⁷ The description of the checklist provided here is based on the Exhibit 3 to File No. SR–OCC–2023–003 provided by OCC at the time of filing.

- any additional details relevant to reconnection.¹⁸

According to OCC, the Reconnection Attestation and Reconnection Checklist are designed to accomplish several goals. First, they are designed to enable OCC to determine whether the risk or threat to OCC has been mitigated sufficiently for OCC to resume connectivity to the Clearing Member.¹⁹ Second, they are designed to provide OCC with evidence related to a Clearing Member’s response to a Security Incident, including whether the Clearing Member has appropriate security requirements and carried out suitable remediation measures, to enable OCC to better understand and manage Security Incidents more broadly.²⁰ Finally, they would better enable OCC to identify areas of interest, concern, or heightened risk by presenting information in a standardized format.²¹

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Exchange Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to such organization.²² Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization [‘SRO’] that proposed the rule change.”²³

The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,²⁴ and any failure of an SRO to provide this information may result in the Commission not having a sufficient

¹⁸ These are the specific questions included in the Reconnection Checklist that OCC submitted as Exhibit 3 to the proposed rule change. See Exhibit 3 to File No. SR OCC2023–003. However, proposed Rule 213(e)(2) specifies that the Reconnection Checklist may require “information including, but not limited to,” the 11 questions noted above. This is to account for the evolving nature of Security Incidents and provide OCC with flexibility to modify the specific information requirements if necessary. See Notice of Filing, 88 FR at 20196.

¹⁹ See Notice of Filing, 88 FR at 20196.

²⁰ *Id.* at 20197.

²¹ *Id.*

²² 15 U.S.C. 78s(b)(2)(C).

²³ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

²⁴ *Id.*

basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.²⁵ Moreover, “unquestioning reliance” on an SRO’s representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.²⁶

After carefully considering the proposed rule change, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to OCC. More specifically, the Commission finds that the proposal is consistent with Section 17A(b)(3)(F) of the Exchange Act²⁷ and Rule 17Ad–22(e)(17)(i)²⁸ thereunder as described in detail below.

A. Consistency With Section 17A(b)(3)(F) of the Exchange Act

Section 17A(b)(3)(F) of the Exchange Act requires, among other things, that a clearing agency’s rules are designed to promote the prompt and accurate clearance and settlement of securities transactions.²⁹ In addition to centralizing relevant information pertaining to Clearing Member Security Incidents in a single rule, the proposed rule change is designed to support OCC’s management of potential cybersecurity risks by enhancing OCC’s ability to identify and mitigate cybersecurity risks posed by a Security Incident experienced by one of OCC’s Clearing Members. It also is designed to standardize OCC’s cybersecurity risk management practices with respect to such Security Incidents. Among other things, the changes set forth Clearing Member obligations and the actions OCC may take if reasonably necessary to mitigate the effects of a Security Incident on its operations. As discussed further below, the changes also strengthen OCC’s ability to manage its cyber-related risks by requiring Clearing Members to immediately notify OCC if the Clearing Member becomes aware of or should be aware that there has been a Security Incident or one is occurring, and promptly confirm such a notice in writing. Taken together, the proposed changes should strengthen OCC’s cybersecurity risk management processes. By creating a consistent set of obligations on Clearing Members for identifying and reporting Security

²⁵ *Id.*

²⁶ *Susquehanna Int’l Group, LLP v. Securities and Exchange Commission*, 866 F.3d 442, 447 (D.C. Cir. 2017) (“*Susquehanna*”).

²⁷ 15 U.S.C. 78q–1(b)(3)(F).

²⁸ 17 CFR 240.17Ad–22(e)(17)(i).

²⁹ 15 U.S.C. 78q–1(b)(3)(F).

Incidents, OCC would enhance its ability to monitor, mitigate, and manage cybersecurity risks—such as unauthorized disclosure of sensitive information or a loss of data or system integrity—in the event a Clearing Member experiences a Security Incident. Because OCC's information, data, and systems support and enable OCC's ability to conduct essential clearance and settlement functions, enhancing OCC's ability to limit the impact of a Security Incident at a Clearing Member promotes OCC's ability to continue the prompt and accurate clearance and settlement of securities transactions.

Accordingly, and for the reasons discussed below, the proposal is consistent with the requirements of Section 17A(b)(3)(F) of the Exchange Act.

B. Consistency With Rule 17Ad–22(e)(17)(i) of the Exchange Act

Rule 17Ad–22(e)(17)(i) requires that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to manage the covered clearing agency's operational risks by identifying the plausible sources of operational risk, both internal and external, and mitigating their impact through the use of appropriate systems, policies, procedures, and controls.³⁰ In adopting Rule 17Ad–22(e)(17)(i), the Commission provided guidance, stating that a covered clearing agency generally should consider, among other things, whether it identifies, monitors, and manages the risks that key participants pose to its operations.³¹ To the extent they interact with OCC's systems, Clearing Member systems may present operational risk to OCC. As described above, OCC proposes requiring members to report any cyber-related disruption or intrusion that could pose a risk to OCC's operations, such as a degradation of normal operations that would result in the inability of OCC to conduct essential clearance and settlement functions. OCC also proposes numerous protective measures, such as the ability to take reasonably necessary actions to mitigate the effects of a Security Incident on its operations, including disconnecting the Clearing Member's access to OCC's systems; the ability to consider a non-exhaustive list of factors to determine whether to modify a Clearing Member's access to OCC's systems in response to

a Security Incident, up to and including disconnection; and the requirement for disconnected Clearing Members to complete a Reconnection Attestation and Reconnection Checklist that OCC would review and evaluate as part of a determination to reconnect the Clearing Member to OCC's systems. Taken together, these proposals support OCC's ability to effectively identify, monitor, and manage the risks that Clearing Members pose to OCC operations, and are therefore consistent with Rule 17Ad–22(e)(17)(i).

A commenter opposed the proposal on a number of grounds.³² Specifically, the commenter expressed concerns about the proposed definition of Security Incident, stating that because the proposed definition applies to all of a Clearing Member's systems and therefore could include an incident that would not affect OCC systems, the definition is inconsistent with the risks identified by OCC in the rule filing, other regulatory and SRO requirements, and is potentially beyond the scope of OCC's authority.³³ The commenter also stated that OCC's proposed definition of Security Incident is inconsistent with other regulatory and SRO requirements because it does not require that a loss or harm has occurred and it does not require that a clearing member be aware of the incident.³⁴ The commenter stated that the definition of Security Incident should be limited to an incident that could result in "loss of data or system integrity," "unauthorized disclosure of sensitive information," or "an inability [for the OCC] to conduct essential clearance and settlement functions."³⁵ The commenter further requested clarification that the reference to "disruption or degradation of a clearing member's systems" in the proposed definition of Security Incident is limited to cyber-related disruptions or intrusions resulting from malicious third-party activity as opposed to, for example, a power outage.³⁶

OCC responded by amending the proposed rule change in a number of ways.³⁷ First, OCC amended the

definition of Security Incident to limit it to a cyber-related disruption or intrusion of the Clearing Member's systems that is reasonably likely to pose an imminent risk or threat to OCC's operations.³⁸ OCC further amended the definition of Security Incident to state that such an incident may include, but is not limited to, any disruption or degradation of the normal operation of the Clearing Member's systems or any unauthorized entry into the Clearing Member's systems that would result in loss of OCC's data or system integrity, unauthorized disclosure of sensitive information related to OCC, or the inability of OCC to conduct essential clearance and settlement functions.³⁹ In amending the Security Incident definition this way, OCC reasonably addressed the commenter's concerns about the scope of the rule by clarifying that only occurrences that present certain risks or threats to OCC's operations are considered Security Incidents, and provided examples to help illustrate the types of risks and threats to OCC's operation that are covered by the rule. In response to the commenter's concern that the proposed definition of Security Incident does not require that a clearing member be aware of the incident, OCC also amended the proposed definition to require notice only if the Clearing Member becomes aware or should be aware that such an incident has occurred or is occurring.⁴⁰ The commenter further stated that OCC "should incorporate into the notice provision a [condition] that only requires reporting when a clearing member has a reasonable basis to conclude that a reportable cybersecurity incident has occurred or determines that a reportable cybersecurity incident has occurred."⁴¹ As noted, OCC amended the proposed definition to require reporting only where a Clearing Member becomes or should be aware of a Security Incident. The proposed rule change therefore would require Clearing Members to engage in reasonable diligence to obtain and report to OCC readily discoverable information about a Security Incident, consistent with the Clearing Member's current obligation to maintain a comprehensive cybersecurity program that, among other things, is designed to protect the segment of the Clearing Member's system that interacts with OCC, but it would not require reporting of a cybersecurity incident if the member could not reasonably be aware of such an incident. OCC's

³⁰ 17 CFR 240.17Ad–22(e)(17)(i).

³¹ See Standards for Covered Clearing Agencies, Securities Exchange Act Release No. 78961 (Sept. 28, 2016), 81 FR 70786, 70838 (Oct. 13, 2016).

³² See letter from Howard Meyerson, Managing Director, Financial Information Forum ("FIF"), dated April 26, 2023, to Vanessa Countryman, Secretary, Commission ("FIF Letter").

³³ *Id.* at 2–3. FIF stated that, as drafted, a Security Incident could include an incident that would not affect OCC systems and this approach appears to be overly broad with the risks identified in the proposed rule change, indicating that the reference to "disruption or degradation of a clearing member's systems" in the proposed definition of Security Incident is ambiguous. *Id.* at 2.

³⁴ *Id.* at 4–5.

³⁵ *Id.* at 3.

³⁶ *Id.* at 5–6.

³⁷ See Notice of Partial Amendment *supra* note 7.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ FIF Letter at 5.

response reasonably balances the commenter's concern about being required to report unknown information and OCC's need to ensure that its Clearing Members are diligently monitoring their own systems so that OCC can identify, monitor, and manage the impact of a Security Incident at a Clearing Member on OCC's systems and operations, as well as the listed options markets generally.

A commenter stated that the content of the notification should be limited in scope given the requirement for "immediate" notification, and recommended that OCC should provide more detail about the expected content in the notification.⁴² The commenter also expressed the view that the need for immediate written notice "does not provide a clearing member with the opportunity to evaluate the incident prior to reporting."⁴³ OCC addressed these comments in the amendment by clarifying the notification requirements and procedure in the event of a Security Incident. Specifically, because there are "innumerable circumstances that could lead to a Security Incident," rather than requiring the notice to include specific, pre-determined content, OCC clarified that a Clearing Member can share information it believes is relevant, and that OCC can follow up directly as needed.⁴⁴ OCC also noted that, given the urgency required to address a Security Incident quickly and remain functional as a systemically important financial market utility, OCC will provide a dedicated email address for Clearing Members to provide OCC with written notification (or confirmation) of a Security Incident.⁴⁵ By clarifying that the notice is limited to information the affected Clearing Member believes is relevant and that OCC can follow up directly with the Clearing Member as needed, OCC's response reasonably balances the commenter's concern about the rule not specifying what information needs to be included in the notice and OCC's need to identify, monitor, and manage the impact of a Security Incident at a Clearing Member on OCC's systems and operations, as well as the listed options markets generally. Allowing Clearing Members to provide the information they believe is relevant together with OCC's ability to gather additional information as necessary and appropriate helps ensure that OCC gets timely information on Security Incidents, which supports OCC's ability

to identify, monitor, and manage risks posed to its operations,⁴⁶ consistent with the Commission's guidance regarding Rule 17Ad-22(e)(17)(i).

A commenter stated that OCC should enumerate threshold conditions that must be satisfied before OCC could disconnect or modify a Clearing Member's access.⁴⁷ The commenter further requested clarification on the relationship between the proposed Security Incident notifications and the proposed disconnection and reconnection process.⁴⁸ In response, as noted above, OCC amended the definition of Security Incident to limit it to a cyber-related disruption or intrusion of the Clearing Member's systems that is reasonably likely to pose an imminent risk or threat to OCC's operations.⁴⁹ OCC also stated that because there are "innumerable circumstances that could lead to a Security Incident," such a determination would require an evaluation of the specific facts and circumstances related to the Security Incident, and amended the proposed rule to include a non-exhaustive list of factors OCC will consider when making a disconnection determination.⁵⁰ Specifically, as amended, the rule provides that OCC may consider any one or more of the following in determining whether or not to disconnect a member: the potential loss of control by a Clearing Member of its internal system(s), the potential loss of OCC's confidential data, the potential strain on or loss of OCC's resources due to OCC's inability to perform clearance and settlement functions, and the overall severity of the threat to OCC's security and operations. By amending the definition of a Security Incident in this way, OCC identified the threshold condition that must be satisfied before OCC could disconnect or modify a Clearing Member's access in response to a Security Incident. Specifically, unless the Clearing Member experiences a cyber-related disruption or intrusion of the Clearing Member's system that is reasonably likely to pose an imminent risk or threat to OCC's operations, OCC

would not have a basis under the proposed rule to disconnect or modify a Clearing Member's access to OCC systems. Further, disconnection or modification of a Clearing Member's access to OCC's systems is not an automatic consequence in the event a Clearing Member notifies OCC of a Security Incident. OCC stated that it believes that not all Security Incident notifications will result in a Clearing Member disconnection, and the proposed rule does not mandate disconnection in response to a Security Incident. Rather, disconnection or modification of access are among the various mitigation actions that OCC may take if it determines that it is reasonably necessary to do so to mitigate a Security Incident's effects on its operations. In addition, OCC's non-exhaustive list of factors provides examples of specific risks or threats to OCC's operations that OCC would consider as factors in making a disconnection determination, and that are consistent with the Commission's guidance related to Rule 17Ad-22(e)(17)(i). Given the extensive variety and rapidly evolving nature of cyber-related threats, it is reasonable for OCC to balance its need to evaluate the specific facts and circumstances of each cyber-related incident at a Clearing Member and the desire of Clearing Members to know in advance the specific conditions that could result in a disconnection or modification of its access to OCC's systems. OCC's proposed approach of defining a single, specific threshold condition—namely, a cyber-related disruption or intrusion of the Clearing Member's system reasonably likely to pose an imminent risk or threat to OCC's operations—while providing an illustrative list of factors OCC will consider as it makes a disconnection determination, strikes this balance.

By making these amendments, OCC also clarified the connection between a Security Incident notification and the proposed disconnection and reconnection process. If OCC determines that disconnection is reasonably necessary to mitigate any effects to its operations, the process for the affected Clearing Member to reconnect to OCC's systems following the disconnection are set forth in paragraph (e) of proposed rule 213, "Procedures for Connecting Following a Security Incident." Additionally, OCC amended the proposed rule to require a Clearing Member to complete the Reconnection Attestation and Reconnection Checklist only in the event that OCC disconnected the Clearing Member that has reported a

⁴² *Id.* at 5–6.

⁴³ *Id.* at 5.

⁴⁴ See Notice of Partial Amendment, 88 FR at 36352.

⁴⁵ See *id.*

⁴⁶ The clarification provided by OCC also addresses a commenter concern that the disclosure should "take into account the fact that target firms often have incomplete information about a cybersecurity incident and engage in an investigative process over a period of time." FIF Letter at 7. OCC's ability to follow up directly as needed ensures that Clearing Members will have an opportunity to provide additional information as facts develop.

⁴⁷ *Id.* at 6–7.

⁴⁸ *Id.* at 7.

⁴⁹ See Notice of Partial Amendment *supra* note 7.

⁵⁰ See Notice of Partial Amendment, 88 FR at 36353.

Security Incident.⁵¹ The information provided in the Reconnection Attestation and Reconnection Checklist would help OCC determine whether the risk to OCC has been mitigated sufficiently for OCC to resume connectivity to the Clearing Member. Taken together, these changes as well would allow OCC to identify and mitigate operational risks presented by its Clearing Members and secure its environment more effectively against potential vulnerabilities.

A commenter stated that the Reconnection Checklist appears to be a security incident notification form rather than a checklist for reconnection.⁵² As discussed above, the Reconnection Checklist is only required in the event that a Clearing Member is disconnected from OCC's systems as the result of a Security Incident. The checklist includes information such as the nature of the incident, the steps taken to contain the incident, and any OCC data that was compromised during the incident, all of which is used by OCC to determine whether the risk to OCC posed by the Security Incident has been mitigated sufficiently to resume the Clearing Member's connectivity. The commenter also stated that the proposed rule should establish a clear process for reconnection, including the process and timing for OCC to decide on a reconnection request and the process for OCC to communicate its determination.⁵³ As noted above, the process for reconnection is set forth in paragraph (e) of proposed Rule 213. In addition, although the proposed rule does not mandate the specific timing for OCC to make a reconnection determination, the information provided to OCC by the Reconnection Attestation and Reconnection Checklist is designed to facilitate OCC's reconnection determinations, which should help expedite the process. Given the innumerable circumstances that could lead to a Security Incident and a resulting disconnection, the proposed rule strikes a reasonable balance between OCC's need to ensure that the operational risks presented by a Security Incident at a Clearing Member have been sufficiently mitigated before reconnecting to OCC's systems and the Clearing Member's desire to reconnect as quickly as possible.

A commenter expressed concern that the information required to be disclosed in Reconnection Checklist and Attestation is too detailed and could either provide a roadmap to malicious

actors or subject the Clearing Member to third-party litigation risk.⁵⁴ The commenter also requested clarification on the protection of information reported by Clearing Members to OCC.⁵⁵ Any information disclosed to OCC in a Reconnection Checklist and Attestation would be kept confidential by OCC and would not be made publicly available, including to third parties and potential malicious actors, and therefore would not, by virtue of being provided to OCC, provide a roadmap to malicious actors or subject the reporting Clearing Member to third-party litigation risk. Further, OCC routinely receives, and is responsible for the protection of, confidential information related to its Clearing Members. For example, OCC routinely receives and protects confidential and sensitive information related Clearing Members' risk management practices,⁵⁶ as well as information related to any financial or operational difficulty reported by Clearing Members to any regulatory organization.⁵⁷

The commenter also stated that OCC should provide an exception to disclosure when law enforcement directs the member not to disclose.⁵⁸ However, the lack of the type of law enforcement exception suggested by the commenter is consistent with the Exchange Act. For example, OCC's current rules, as approved by the Commission, include various reporting and disclosure requirements, none of which provide the type of explicit law enforcement exception suggested by the commenter.⁵⁹

The commenter also questioned whether the Clearing Members should be required to provide evidence of regulatory compliance to other government agencies and third parties.⁶⁰ OCC's current rules, as

approved by the Commission, require Clearing Members to notify OCC if the Clearing Member is required to notify any regulatory organization of any operational difficulty affecting the Clearing Member, or of any failure by the Clearing Member to be in compliance with the operational responsibility rules of any regulatory organization.⁶¹ Thus, a Clearing Member that experiences a Security Incident that subjects the Clearing Member to a regulatory notification requirement is already required, under existing OCC Rules, to notify OCC that it complied with that requirement. The proposed rule change does not create a new obligation for Clearing Members to notify OCC of regulatory notices to regulatory organizations; it merely specifies when a notification to OCC in connection with a Security Incident must be provided.

Finally, a commenter referenced a number of cybersecurity-related rule proposals recently published by the Commission and stated that the proposed rule change should be delayed at least until the Commission finalizes all the currently proposed cybersecurity rulemaking to ensure that investors are protected from cyber threats and unnecessary additional burdens are not placed on OCC Clearing Members.⁶² The commenter states further that the proposed rule change interconnects and may overlap with four different rules proposed by the Commission,⁶³ and requests that the Commission extend the period for comment on the proposed rule change to allow time to analyze the proposed rule change alongside the rules proposed by the Commission.⁶⁴

explicitly that the representations in the Reconnection Attestation would be made "on a good faith, best efforts basis," which necessarily means the attestation would be to the knowledge of the attesting executive. See proposed Rule 213(e)(1)(A).

⁶¹ See OCC Rule 306A (Event-Based Reporting).

⁶² See letter from Melissa MacGregor, Managing Director, Deputy General Counsel & Corporate Secretary, SIFMA, dated April 25, 2023, to Vanessa Countryman, Secretary, Commission, ("SIFMA Letter") available at <https://www.sec.gov/comments/sr-occ-2023-003/srocc2023003-20164982-334488.pdf>. A similar perspective was provided by a second commenter. See FIF Letter at 8–9; see also Securities Exchange Act Release Nos. 97141 (Mar. 15, 2022), 88 FR 20616 (Apr. 6, 2023); 97142 (Mar. 15, 2022), 88 FR 20212 (Apr. 5, 2023); 97143 (Mar. 15, 2023), 88 FR 23146 (Apr. 14, 2023); 97144 (Mar. 15, 2023), 88 FR 16921 (Mar. 21, 2023); 94382 (Mar. 9, 2022), 87 FR 16590 (Mar. 23, 2022).

⁶³ SIFMA Letter at 2. SIFMA does not state how the proposed rule change interconnects or conflicts with the Commission's proposed rules.

⁶⁴ *Id.* This concern was echoed in a letter from the FIF. See FIF Letter (stating that OCC should withdraw the proposed rule change and resubmit after the comment periods for the Commission's proposals have expired).

⁵¹ *Id.*

⁵² FIF Letter at 8.

⁵³ *Id.*

⁵⁴ *Id.* at 7–8. For example, the commenter expressed concern that the level of detail required by the proposed rule change could provide a roadmap for malicious actors who wish to gain access to OCC's systems or could present third-party litigation risk to the Clearing Member.

⁵⁵ *Id.* at 6.

⁵⁶ See OCC Rule 305(b).

⁵⁷ See OCC Rule 306A(1).

⁵⁸ FIF Letter at 6.

⁵⁹ See, e.g., OCC Rules 207 (Submission to and Retrieval of Items to and from the Corporation) and 306A (Event-Based Reporting).

⁶⁰ FIF Letter at 7. The commenter stated that many clearing members would be subject to numerous governmental and third-party notification requirements in the event of a cybersecurity incident and expressed confusion regarding why OCC would require an attestation relating to a clearing member's notification to other regulators and third-parties if the clearing member has provided all required notifications to the OCC. *Id.* The commenter also stated that any required attestation should be to the knowledge of the attesting executive. The proposed rule change states

Under the Exchange Act and relevant rules thereunder, SROs, including OCC, determine for themselves when to file a proposed rule change. The Exchange Act defines the process and time within which the Commission may act,⁶⁵ and Section 19(b)(2)(C) of the Exchange Act requires the Commission to approve a proposed rule change of a SRO if it finds that such change is consistent with the Exchange Act and rules and regulations thereunder that are applicable to the SRO.⁶⁶ Concerns regarding rules proposed by the Commission may be presented as comments to such rules so that the Commission may consider them in determining what, if any, final rule it will adopt.

Based on the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of Rule 17Ad-22(e)(17)(i) under the Exchange Act.⁶⁷

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change, as modified by Partial Amendment No. 1, is consistent with the requirements of the Exchange Act, and in particular, the requirements of Section 17A of the Exchange Act⁶⁸ and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,⁶⁹ that the proposed rule change (SR-OCC-2023-003), as modified by Partial Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷⁰

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-25883 Filed 11-22-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98980; File No. SR-FINRA-2023-006]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, To Adopt Supplementary Material .19 (Residential Supervisory Location) Under FINRA Rule 3110 (Supervision)

November 17, 2023.

I. Introduction

On March 29, 2023, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change (SR-FINRA-2023-006) to adopt new Supplementary Material .19 (Residential Supervisory Location) under FINRA Rule 3110 (Supervision). The proposed rule change, as modified by Amendment Nos. 1 and 2 (hereinafter, the “proposed rule change” unless otherwise specified), would treat a private residence in which an associated person engages in specified supervisory activities, subject to certain safeguards and limitations, as a non-branch location.³ Treated as non-branch locations, these newly defined Residential Supervisory Locations (“RSLs”) would be subject to inspections on a regular periodic schedule (presumed to be at least every three years) instead of the annual inspection currently required for “offices of supervisory jurisdiction” (“OSJs”) and “supervisory branch offices.”⁴

The proposed rule change was published for public comment in the **Federal Register** on April 6, 2023.⁵ On May 16, 2023, FINRA consented to an extension of the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to

approve or disapprove the proposed rule change to July 5, 2023.⁶ The Commission received thirteen comment letters in response to the Notice.⁷

On July 3, 2023, FINRA filed an amendment to the proposed rule change (“Amendment No. 1”).⁸ On July 5, 2023, the Commission published a notice of filing of Amendment No. 1 and an order instituting proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.⁹ On July 25, 2023, FINRA responded to the comment letters received in response to the Notice.¹⁰ The Commission received twelve comment letters in response to the notice of Amendment No. 1 and order instituting proceedings.

On September 14, 2023, FINRA responded to the comment letters received in response to the notice of Amendment No. 1 and order instituting proceedings, and it filed an amendment to the proposed rule change (“Amendment No. 2”).¹¹ On September 22, 2023, FINRA consented to an extension of the time period in which the Commission must approve or disapprove the proposed rule change to December 2, 2023.¹² The Commission is publishing this order to provide notice of the filing of, and to solicit comments on, Amendment No. 2 from interested persons and is approving the proposed

⁶ See letter from Sarah Kwak, Associate General Counsel, Office of General Counsel, FINRA, to Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, dated May 16, 2023, <https://www.finra.org/sites/default/files/2023-05/sr-finra-2023-006-extension-no-1.pdf>.

⁷ The comment letters are available at <https://www.sec.gov/comments/sr-finra-2023-006/srfinra2023006.htm>.

⁸ See Amendment No. 1, <https://www.finra.org/sites/default/files/2023-07/sr-2023-006-amendment-No1.pdf>.

⁹ Exchange Act Release No. 97839 (July 5, 2023), 88 FR 44173 (July 11, 2023) (File No. SR-FINRA-2023-006), <https://www.govinfo.gov/content/pkg/FR-2023-07-11/pdf/2023-14523.pdf>.

¹⁰ See letter from Sarah Kwak, Associate General Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated July 25, 2023 (“FINRA Response I”), <https://www.sec.gov/comments/sr-finra-2023-006/srfinra2023006-235699-491502.pdf>.

¹¹ See Amendment No. 2, <https://www.finra.org/sites/default/files/2023-09/SR-FINRA-2023-006-Amendment-2.pdf>; letter from Kosha Dalal, Vice President and Associate General Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated Sept. 14, 2023 (“FINRA Response II”), <https://www.sec.gov/comments/sr-finra-2023-006/srfinra2023006-259039-608182.pdf>.

¹² See letter from Sarah Kwak, Associate General Counsel, Office of General Counsel, FINRA, to Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, dated Sept. 22, 2023, <https://www.finra.org/sites/default/files/2023-09/sr-finra-2023-006-ext2.pdf>.

⁶⁵ See, e.g., 15 U.S.C. 78s(b)(2)(A)(ii) (allowing the Commission to extend the period for review by not more than 45 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination).

⁶⁶ 15 U.S.C. 78s(b)(2)(C).

⁶⁷ 17 CFR 240.17Ad-22(e)(17)(i).

⁶⁸ In approving this proposed rule change, the Commission has considered the proposed rules’ impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁶⁹ 15 U.S.C. 78s(b)(2).

⁷⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Exchange Act Release No. 97237 (Mar. 31, 2023), 88 FR 20568, 20568 (Apr. 6, 2023) (File No. SR-FINRA-2023-006 (“Notice”)) (citing FINRA Rules 3110(c)(1)(C) and 3110.13), <https://www.govinfo.gov/content/pkg/FR-2023-04-06/pdf/2023-07145.pdf>.

⁴ See *id.*

⁵ *Id.*

rule change, as modified by Amendment Nos. 1 and 2, on an accelerated basis.

II. Description of the Proposed Rule Change

FINRA stated that technological advancements and an emerging remote workplace prompted it to reconsider the regulatory framework for the supervision and inspection of residential locations.¹³ As a result of this evaluation, FINRA determined to issue the proposed rule change “to create a regulatory framework in which member firms can capably continue to carry out their obligation to effectively inspect the supervisory activities taking place at an office or location . . . on a regular periodic schedule without diminishing investor protection.”¹⁴ After describing the current regulatory framework, the Commission describes the proposed rule change.

A. Background

1. FINRA Rule 3110 (Supervision)

FINRA Rule 3110 requires a member firm to establish and maintain a supervisory system for the activities of its associated persons “that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules” (hereinafter, a “reasonably designed supervisory system”).¹⁵ The rule identifies the minimum requirements of a member’s supervisory system, including: (1) the registration and designation as a branch office or an OSJ of each location,¹⁶ including the main office, that meets the definitions contained in FINRA Rule 3110(f);¹⁷ and (2) inspecting all offices and locations in accordance with Rule 3110(c).¹⁸ The rule also establishes the frequency with which a member firm must inspect its locations.¹⁹ The frequency is based, in part, on whether

the location is designated as a supervisory branch office, a non-supervisory branch office, an OSJ, or a non-branch location.²⁰ Each of these designations is described in turn.

a. Supervisory and Non-Supervisory Branch Offices

FINRA Rule 3110(f)(2) defines a “branch office” as: (1) any location where one or more associated persons of a member regularly conducts the business of effecting any transactions in, or inducing or attempting to induce the purchase or sale of, any security, or is held out as such;²¹ or (2) any location that is responsible for supervising the activities of persons associated with the member at one or more non-branch locations of the member.²² A branch office is either “supervisory” (*i.e.*, it “supervises one or more non-branch locations”) or “non-supervisory” (*i.e.*, it “does not supervise one or more non-branch locations”).²³ The branch office’s type dictates the frequency of its inspection cycle: a supervisory branch office must be inspected at least annually,²⁴ and a non-supervisory branch office must be inspected at least every three years.²⁵

b. Office of Supervisory Jurisdiction

A branch office may be further designated as an OSJ. An OSJ is any office of a member at which any one or more of the following functions take place: (1) order execution or market making; (2) structuring of public offerings or private placements; (3) maintaining custody of customers’ funds or securities; (4) final acceptance (approval) of new accounts on behalf of the member; (5) review and endorsement of customer orders pursuant to Rule 3110(b)(2);²⁶ (6) final approval of retail communications for

use by persons associated with the member pursuant to Rule 2210(b)(1), except for an office that solely conducts final approval of research reports;²⁷ or (7) having responsibility for supervising the activities of persons associated with the member at one or more other branch offices of the member.²⁸ If a location satisfies any one of those criteria, it is an OSJ that must be inspected at least annually.²⁹

c. Non-Branch Locations

FINRA explained that seven types of locations—often referred to as “unregistered offices” or “non-branch locations”—are excluded from the definition of “branch office.”³⁰ Member firms must inspect their non-branch locations on a regular periodic schedule, presumed to be at least every three years.³¹

Two of the seven exclusions address residential locations: the primary residence exclusion and the non-primary residence exclusion. The primary residence exclusion³² excludes from registration as a branch office any non-supervisory³³ location that is an associated person’s primary residence, provided that: (1) only one associated person, or multiple associated persons who reside at that location and are

²⁷ “In general, with some exceptions, paragraph (b)(1) of Rule 2210 (Communications with the Public) requires that an appropriately qualified registered principal approve each retail communication prior to use or filing with FINRA.” Notice at 20574 n.57.

²⁸ FINRA Rule 3110(f)(1).

²⁹ See FINRA Rule 3110(c)(1)(A). In 1988, the National Association of Securities Dealers (“NASD,” the predecessor to FINRA) stated that the amended OSJ definition, among other proposed amendments, focused on creating a “supervisory ‘chain of command,’ in which qualified supervisory personnel are appointed to carry out the firm’s supervisory obligations” See Notice at 20572 (quoting NASD Notice to Members 88–11 (Feb. 8, 1988), <https://www.finra.org/rules-guidance/notices/88-11>).

³⁰ See Notice at 20574; FINRA Rule 3110(f)(2)(A)(i)–(vii) (identifying seven exclusions from the definition of branch office).

³¹ See FINRA Rules 3110(c)(1)(C) (stating that “[i]n establishing such schedule, the member shall consider the nature and complexity of the securities activities for which the location is responsible and the nature and extent of contact with customers. The member’s written supervisory and inspection procedures shall set forth the schedule and an explanation regarding how the member determined the frequency of the examination.”) and 3110.13 (stating that “[i]n establishing a non-branch location inspection schedule, there is a general presumption that a non-branch location will be inspected at least every three years, even in the absence of any indicators of irregularities or misconduct (*i.e.*, “red flags”). If a member establishes a longer periodic inspection schedule, the member must document in its written supervisory and inspection procedures the factors used in determining that a longer periodic inspection cycle is appropriate.”).

³² FINRA Rule 3110(f)(2)(A)(ii).

³³ See *supra* note 23 and corresponding text.

¹³ Notice at 20569.

¹⁴ *Id.* at 20573.

¹⁵ FINRA Rule 3110(a).

¹⁶ Unless otherwise specified, the Commission uses the term “location” in this order to refer to any location where a firm does business, such as an OSJ, supervisory branch office, non-supervisory branch office, or non-branch location, as applicable.

¹⁷ See FINRA Rule 3110(a)(3).

¹⁸ See FINRA Rule 3110(c). On November 17, 2023, the Commission issued an approval order for File Number FINRA–2023–007, which adopted new Supplementary Material. 18 (Remote Inspections Pilot Program) under FINRA Rule 3110 (Supervision). FINRA Rule 3110.18 establishes a voluntary, three-year pilot program to allow eligible member firms to elect to fulfill their inspection obligations under FINRA Rule 3110(c) by conducting inspections of eligible OSJs, branch offices, and non-branch locations remotely without an on-site visit to such locations, subject to specified safeguards and limitations.

¹⁹ See FINRA Rule 3110(c)(1).

²⁰ See *id.*

²¹ FINRA Rule 3110(f)(2)(A).

²² FINRA Rule 3110(f)(2)(B).

²³ See Notice at 20573 (“[A]ny location that is responsible for supervising the activities of persons associated with the member at one or more non-branch locations of the member is a branch office (*i.e.*, a supervisory branch office).”; FINRA Rule 3110(c)(1)(B) (“Each member shall inspect at least every three years every branch office that does not supervise one or more non-branch locations.”).

²⁴ FINRA Rule 3110(c)(1)(A) (“Each member shall inspect at least annually . . . any branch office that supervises one or more non-branch locations.”).

²⁵ FINRA Rule 3110(c)(1)(B) (“Each member shall inspect at least every three years every branch office that does not supervise one or more non-branch locations.”).

²⁶ FINRA Rule 3110(b)(2) provides that “[t]he supervisory procedures required by [Rule 3110(b) (Written Procedures)] shall include procedures for the review by a registered principal, evidenced in writing, of all transactions relating to the investment banking or securities business of the member.”

members of the same immediate family, conduct business at the location; (2) the location is not held out to the public as an office, and the associated person does not meet with customers at the location; (3) neither customer funds nor securities are handled at that location; (4) the associated person is assigned to a designated branch office, and such designated branch office is reflected on all business cards, stationery, retail communications, and other communications to the public by such associated person; (5) the associated person's correspondence and communications with the public are subject to the member firm's supervision in accordance with Rule 3110; (6) electronic communications (e.g., email) are made through the member's electronic system; (7) all orders are entered through the designated branch office or an electronic system established by the member that is reviewable at the branch office; (8) written supervisory procedures pertaining to supervision of sales activities conducted at the residence are maintained by the member; and (9) a list of the residence locations is maintained by the member.³⁴

The non-primary residence exclusion³⁵ excludes from registration as a branch office any non-supervisory location, "other than a primary residence, that is used for securities business for less than 30 business days in any one calendar year, provided [that] the member complies with" the conditions described in (1) through (8) of the primary residence exclusion (detailed above).³⁶ FINRA explained that the non-primary residence exclusion typically applies to a vacation or second home.³⁷

Notwithstanding these residential exclusions, a private residence is considered a branch office if it "is responsible for supervising the activities of persons associated with the member at one or more non-branch locations of the member,"³⁸ and it is an OSJ if it performs any of the seven functions associated with OSJs.³⁹ Therefore, a primary or non-primary residence is subject to registration and annual inspection if the associated person's activities at the residence cause it to be an OSJ or supervisory branch office.⁴⁰

2. FINRA's Stated Reasons for the Proposed Rule Change

FINRA stated that during the COVID-19 pandemic, many member firms developed "hybrid workforce models" in which "some employees may work permanently in an alternative location[,] such as a private residence, other employees may spend some time in alternative locations and some time on-site in a conventional office setting, and some may work on-site full time."⁴¹ FINRA "believes this model will endure" notwithstanding the end of the COVID-19 Public Health Emergency in May 2023.⁴² Many of the supervisors who began working from home during the pandemic continue to do so, at least on a part-time basis.⁴³ Under the current regulatory framework, those supervisors likely conduct activities that would require the registration and designation of their private residences as supervisory branch offices or OSJs under Rule 3110(a)(3) and thus would require inspections at least annually under Rule 3110(c)(1)(A).⁴⁴

During the pandemic, FINRA temporarily suspended members' requirements to comply with the registration and inspection obligations applicable to new locations. Specifically, in March 2020, FINRA temporarily suspended the requirement for member firms to submit branch office registration applications on Form BR (Uniform Branch Office Registration Form) for any newly opened temporary office locations or space-sharing arrangements established because of the pandemic (the "Form BR Temporary Suspension").⁴⁵ The Form BR Temporary Suspension remains in effect. But when it ends, FINRA believes that current FINRA rules would require member firms to "either curtail

activities at residential locations or register large numbers of residential locations as OSJs or supervisory branch offices."⁴⁶

As set forth above, registering a private residence as an OSJ or supervisory branch office would trigger a corresponding annual inspection requirement.⁴⁷ FINRA explained that the proposed rule change would alter the regulatory framework to accommodate hybrid workforce models and mitigate the costs associated with registering and inspecting so many private residences.⁴⁸ FINRA stated that the proposed rule change "would allow firms to effectively and more efficiently carry out their supervisory responsibilities to review the activities of each office or location while preserving investor protections."⁴⁹

B. The Proposed Rule Change

The proposed rule change would adopt new Supplementary Material .19 (Residential Supervisory Location) under FINRA Rule 3110 (Supervision) and would treat a private residence at which an associated person engages in certain supervisory activities as a non-branch location, subjecting it to inspections on a regular periodic schedule (presumed to be at least every three years) instead of the annual schedule required for OSJs and supervisory branch offices.⁵⁰ To help mitigate the potential risks associated with a less frequent inspection cycle, the proposed rule change also would establish safeguards that limit RSL designation to certain firms and locations based on criteria designed to minimize risk.⁵¹ These safeguards would: (1) exclude certain member firms from designating any location as an RSL;⁵² (2) exclude certain locations from designation as an RSL;⁵³ (3) impose certain conditions that a member firm and/or its candidate locations must meet prior to RSL

⁴¹ Notice at 20579.

⁴² See Notice at 20569; Centers for Disease Control and Prevention, COVID-19: End of Public Health Emergency (PHE) Declaration (Sept. 12, 2023), <https://www.cdc.gov/coronavirus/2019-ncov/your-health/end-of-phe.html>.

⁴³ See Notice at 20575 ("Firms responded that they relied extensively on technology to support their effective transition to the remote work environment and enhance the supervision of geographically dispersed associated persons, many of whom have been working from home since early 2020 and may continue to do so in some manner in the current environment."); FINRA Regulatory Notice 21-44 (Dec. 2021), <https://www.finra.org/rules-guidance/notices/21-44> ("To mitigate the impacts of the pandemic, member firms have relied heavily on remote offices and alternative work arrangements (e.g., working from home or a backup or recovery location) for a broad range of personnel.");

⁴⁴ See FINRA Rules 3110(a)(3) and 3110(c)(1)(A).

⁴⁵ See FINRA Regulatory Notice 20-08 (Mar. 2020) ("Regulatory Notice 20-08"), <https://www.finra.org/rules-guidance/notices/20-08>; see also Notice at 20569 n.7.

⁴⁶ See Notice at 20579.

⁴⁷ FINRA Rule 3110(c)(1)(A).

⁴⁸ Notice at 20575, 20579 (explaining that the proposed rule change would reduce, but not eliminate, the need to register and inspect residential locations as supervisory branch offices or OSJs).

⁴⁹ *Id.* at 20569.

⁵⁰ See *id.* at 20568.

⁵¹ See *id.* at 20568-69 ("FINRA believes the proposal strikes an appropriate balance to preserve investor protection while developing a risk-based approach for designating residential supervisory locations that includes key safeguards with respect to, among other things, books and records of the member, while excluding locations where higher risk activities may take place or associated persons that may pose higher risk are assigned.");

⁵² See proposed Rule 3110.19(b).

⁵³ See proposed Rule 3110.19(c).

³⁴ See FINRA Rule 3110(f)(2)(ii)(a) through (i).

³⁵ FINRA Rule 3110(f)(2)(A)(iii).

³⁶ *Id.*

³⁷ See NASD Notice to Members 06-12 (Mar. 21, 2006), <https://www.finra.org/rules-guidance/notices/06-12>; see also Notice at 20574.

³⁸ FINRA Rule 3110(f)(2)(B).

³⁹ FINRA Rule 3110(f)(1).

⁴⁰ See FINRA Rules 3110(a)(3) and 3110(c)(1)(A).

designation;⁵⁴ (4) require any member firm that elects to designate an RSL to provide certain data to FINRA on a regular basis;⁵⁵ and (5) require any eligible member firm to develop a reasonable risk-based approach to designating a location as an RSL and conduct and document a risk assessment for the associated person assigned to that location prior to designating a location as an RSL.⁵⁶

1. Member Firm Ineligibility Criteria

Under proposed Rule 3110.19(b), a member firm would be ineligible to designate any of its locations as an RSL if the member: (1) is currently designated as a Restricted Firm under Rule 4111 (Restricted Firm Obligations) (hereinafter, a “Restricted Firm”);⁵⁷ (2) is currently designated as a Taping Firm under Rule 3170 (Tape Recording of Registered Persons by Certain Firms) (hereinafter, a “Taping Firm”);⁵⁸ (3) is currently undergoing, or is required to undergo, a review under Rule 1017(a)(7) as a result of one or more associated persons at such location (hereinafter, a “continuing membership review”);⁵⁹ (4) receives a notice from FINRA pursuant to Rule 9557 (Procedures for Regulating Activities under Rule 4110 (Capital Compliance), Rule 4120 (Regulatory Notification and Business Curtailment), or Rule 4130 (Regulation of Activities of Section 15C Members Experiencing Financial and/or Operational Difficulties)), unless FINRA has otherwise permitted activities in writing pursuant to such rule;⁶⁰ (5) is or becomes suspended by FINRA (hereinafter, a “suspended firm”);⁶¹ (6) based on the date in the Central Registration Depository (“CRD”), had its FINRA membership become effective within the prior twelve months;⁶² or (7)

is or has been found within the past three years by the SEC or FINRA to have violated Rule 3110(c).⁶³

FINRA stated that these exclusions address “attributes of a member firm that FINRA believes are more likely to raise investor protection concerns”⁶⁴ For example, FINRA explained that “a member firm that is experiencing issues complying with its capital requirements or that has been suspended by FINRA is more likely to face significant operational challenges that may negatively impact the firm’s overall supervision of its associated persons.”⁶⁵ Similarly, FINRA stated that “a firm that has been a FINRA member for less than 12 months is often still implementing its business plan and developing a supervisory system appropriate[ly] tailored to the firm’s specific attributes and structure.”⁶⁶ FINRA also stated that firms with recent Rule 3110(c) violations have “demonstrated challenges in developing or maintaining a robust inspection program.”⁶⁷

2. Location Ineligibility Criteria

A location of an otherwise eligible member firm⁶⁸ would be ineligible for RSL designation if one or more associated persons at the location: (1) is a designated supervisor who has less than one year of direct supervisory experience with the member, or an affiliate or subsidiary of the member that is registered as a broker-dealer or investment adviser;⁶⁹ (2) is functioning as a principal for a limited period in accordance with Rule 1210.04 (Registration Requirements);⁷⁰ (3) is subject to a mandatory heightened supervisory plan under the rules of the SEC, FINRA, or a state regulatory agency;⁷¹ (4) is statutorily disqualified, unless such disqualified person (A) has been approved (or is otherwise permitted pursuant to FINRA rules and the federal securities laws) to associate with a member and (B) is not subject to a mandatory heightened supervisory plan under proposed Rule 3110.19(c)(3) or otherwise as a condition to approval or permission for such association;⁷² (5)

has an event in the prior three years that required a “yes” response to any item in Questions 14A(1)(a) and 2(a), 14B(1)(a) and 2(a), 14C, 14D, and 14E on Form U4 (Uniform Application for Securities Industry Registration or Transfer Registration) (“Form U4”);⁷³ or (6) has been notified in writing that such associated person is now subject to any Investigation⁷⁴ or Proceeding,⁷⁵ as such terms are defined for Form U4, by the SEC, a self-regulatory organization, including FINRA, or state securities commission (or agency or office performing like functions) (each, a “Regulator”) expressly alleging they have failed reasonably to supervise another person subject to their supervision with a view to preventing the violation of any provision of the Securities Act of 1933 (“Securities Act”), the Exchange Act, the Investment Advisers Act of 1940 (“Investment Advisers Act”), the Investment Company Act of 1940 (“Investment Company Act”), the Commodity Exchange Act, any state law pertaining to the regulation of securities, or any rule or regulation under any of such acts or laws, or any of the rules of the Municipal Securities Rulemaking Board (“MSRB”) or other self-regulatory organization, including FINRA.⁷⁶

⁷³ See proposed Rule 3110.19(c)(5). Form U4’s Questions 14A(1)(a), 14A2(a), 14B(1)(a), and 14B2(a) elicit reporting of criminal convictions, and Questions 14C, 14D, and 14E pertain to regulatory action disclosures. See Notice 20577 n.97.

⁷⁴ As defined for purposes of Form U4, an Investigation “[i]ncludes: (a) grand jury investigations; (b) U.S. Securities and Exchange Commission investigations after the ‘Wells’ notice has been given; (c) FINRA investigations after the ‘Wells’ notice has been given or after a person associated with a member, as defined by The FINRA By-Laws, has been advised by the staff that it intends to recommend formal disciplinary action; (d) NYSE Regulation investigations after the ‘Wells’ notice has been given or after a person over whom NYSE Regulation has jurisdiction, as defined in the applicable rules, has been advised by NYSE Regulation that it intends to recommend formal disciplinary action; (e) formal investigations by other SROs; or (f) actions or procedures designated as investigations by jurisdictions. The term investigation does not include subpoenas, preliminary or routine regulatory inquiries or requests for information, deficiency letters, ‘blue sheet’ requests or other trading questionnaires, or examinations.” FINRA, Form U4 Explanation of Terms at 2 (Apr.—Version 2014.1), <https://www.finra.org/sites/default/files/AppSupportDoc/p468051.pdf>.

⁷⁵ As defined for purposes of Form U4, a Proceeding is “[a] formal administrative or civil action initiated by a governmental agency, self-regulatory organization or a foreign financial regulatory authority; a felony criminal indictment or information (or equivalent formal charge), or a misdemeanor criminal information (or equivalent formal charge), but does not include an arrest or similar charge effected in the absence of a formal criminal indictment or information (or equivalent formal charge).” *Id.* at 3.

⁷⁶ See proposed Rule 3110.19(c)(6); Amendment No. 1.

⁵⁴ See proposed Rule 3110.19(a).

⁵⁵ See proposed Rule 3110.19(d).

⁵⁶ See proposed Rule 3110.19(e).

⁵⁷ See proposed Rule 3110.19(b)(1).

⁵⁸ See proposed Rule 3110.19(b)(2).

⁵⁹ See proposed Rule 3110.19(b)(3). FINRA Rule 1017(a)(7) “requires a member firm to file an application for continuing membership when a natural person seeking to become an owner, control person, principal[,] or registered person of the member firm has, in the prior five years, one or more defined ‘final criminal matters’ or two or more ‘specified risk events’ unless the member firm has submitted a written request to FINRA seeking a materiality consultation for the contemplated activity. Rule 1017(a)(7) applies whether the person is seeking to become an owner, control person, principal[,] or registered person at the person’s current member firm or at a new member firm.” Notice at 20577 n.94 (citing FINRA Regulatory Notice 21–09 (Mar. 2021) (announcing FINRA’s adoption of rules to address brokers with a significant history of misconduct)).

⁶⁰ See proposed Rule 3110.19(b)(4).

⁶¹ See proposed Rule 3110.19(b)(5).

⁶² See proposed Rule 3110.19(b)(6).

⁶³ See proposed Rule 3110.19(b)(7).

⁶⁴ Notice at 20576.

⁶⁵ *Id.* at 20577.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 20578 (“Proposed Rule 3110.19 would not be available to a member firm or private residence that meets any of the ineligibility criteria in proposed paragraphs (b) or (c), respectively, under Rule 3110.19 even with the safeguards and limitations listed in proposed Rule 3110.19(a).”).

⁶⁹ See proposed Rule 3110.19(c)(1).

⁷⁰ See proposed Rule 3110.19(c)(2).

⁷¹ See proposed Rule 3110.19(c)(3).

⁷² See proposed Rule 3110.19(c)(4).

Nonetheless, this sixth exclusion would permit an affected location to be designated or redesignated as an RSL upon the earlier of: (1) the member's receipt of written notification from the applicable Regulator that such Investigation has concluded without further action; or (2) one year from the date of the last communication from such Regulator relating to such Investigation.⁷⁷ This relief would not apply to an associated person subject to a covered Proceeding.⁷⁸

FINRA stated that these exclusions "reflect the appropriate limitations on the private residences that can be designated" as an RSL.⁷⁹ For example, FINRA stated that "specified disclosures on Form U4 pertaining to criminal convictions[,] . . . final regulatory action[,] and the imposition of a mandatory heightened supervisory plan are indicia of increased risk to investors at some firms and locations" ⁸⁰ FINRA further explained that requiring one-year of direct supervisory experience recognizes that "a new supervisor at the current member firm may need time to become knowledgeable about that firm's systems, people, products, and overall compliance culture," even if that new supervisor comes to the member firm with prior supervisory experience from another firm.⁸¹ But FINRA also stated that affiliates and subsidiaries of FINRA members "may share systems and have similar compliance cultures to meet their obligations under federal securities laws."⁸² For that reason, FINRA stated that the proposed rule change would "permit the one-year supervisory experience minimum to be satisfied by also counting supervisory experience accrued at an affiliate or subsidiary of the member firm that is registered as a broker-dealer or investment adviser."⁸³

3. Conditions for Designation as a Residential Supervisory Location

The proposed rule change includes ten conditions that an eligible member firm and its eligible location must meet prior to designating the location as an RSL. Under proposed Rule 3110.19(a), a location that is the associated person's private residence where supervisory activities⁸⁴ are conducted would be

considered a non-branch location, provided that: (1) only one associated person, or multiple associated persons who reside at that location and are members of the same immediate family, conduct business at the location;⁸⁵ (2) the location is not held out to the public as an office;⁸⁶ (3) the associated person does not meet with customers or prospective customers at the location;⁸⁷ (4) any sales activity that takes place at the location complies with the conditions set forth under Rule 3110(f)(2)(A)(ii) or (iii);⁸⁸ (5) neither customer funds nor securities are handled at that location;⁸⁹ (6) the associated person is assigned to a designated branch office, and such designated branch office is reflected on all business cards, stationery, retail communications, and other communications to the public by such associated person;⁹⁰ (7) the associated person's correspondence and communications with the public are subject to the member firm's supervision in accordance with Rule 3110;⁹¹ (8) the associated person's electronic communications (e.g., email) are made through the member's electronic system;⁹² (9)(A) the member has a recordkeeping system to make, keep current, and preserve records required to be made, kept current, and preserved under applicable securities laws and regulations, FINRA rules, and the member's own written supervisory procedures under Rule 3110, (B) such records are not physically or electronically maintained and preserved at the office or location, and (C) the member has prompt access to such records;⁹³ and (10) the member has determined that its surveillance and

in FINRA Rule 3110(f)(1)(D) through (G) include: final acceptance (approval) of new accounts on behalf of the member; review and endorsement of customer orders, pursuant to FINRA Rule 3110(b)(2); final approval of retail communications for use by persons associated with the member, pursuant to Rule 2210(b)(1), except for an office that solely conducts final approval of research reports; and, responsibility for supervising the activities of persons associated with the member at one or more other branch offices of the member. FINRA Rule 3110(f)(2)(B) addresses "any location that is responsible for supervising the activities of persons associated with the member at one or more non-branch locations of the member"

⁸⁵ See proposed Rule 3110.19(a)(1).

⁸⁶ See proposed Rule 3110.19(a)(2).

⁸⁷ See proposed Rule 3110.19(a)(3).

⁸⁸ See proposed Rule 3110.19(a)(4). Rule 3110(f)(2)(A)(ii) and (iii) identify the conditions for the primary and non-primary residence exclusions. For a discussion of those exclusions, see Section II(A)(1)(c) above.

⁸⁹ See proposed Rule 3110.19(a)(5).

⁹⁰ See proposed Rule 3110.19(a)(6).

⁹¹ See proposed Rule 3110.19(a)(7).

⁹² See proposed Rule 3110.19(a)(8).

⁹³ See proposed Rule 3110.19(a)(9).

technology tools are appropriate to supervise the types of risks presented by each RSL, and that these tools may include but are not limited to: (A) firm-wide tools, such as an electronic recordkeeping system, electronic surveillance of email and correspondence, electronic trade blotters, regular activity-based sampling reviews, and tools for visual inspections, (B) tools specific to the RSL based on the activities of the associated person assigned to the location, products offered, and restrictions on the activity of the RSL, and (C) system tools, such as secure network connections and effective cybersecurity protocols.⁹⁴

FINRA stated that these conditions "would strengthen a firm's ability to monitor the supervisory activities occurring at [an RSL] and act to lower the overall risks associated with such location" ⁹⁵ FINRA explained that the first eight conditions are derived from those for the primary and non-primary residence exclusions, "which align with the SEC's Books and Records Rules [and] were developed in coordination with other [self-regulatory organizations] and state securities regulators."⁹⁶ For that reason, FINRA stated that member firms have "experience with monitoring and supervising these conditions."⁹⁷ FINRA coupled those eight conditions with a new books and records requirement and a condition addressing technology and surveillance tools.⁹⁸

4. Obligation To Provide List of RSLs to FINRA

Under proposed Rule 3110.19(d), any member that elects to designate any location of the member as an RSL would be required to "provide FINRA with a current list of all locations designated as RSLs by the 15th day of the month following each calendar quarter in the manner and format (e.g., through an electronic process or such other process) as FINRA may prescribe."⁹⁹ FINRA acknowledged that the CRD system¹⁰⁰

⁹⁴ See proposed Rule 3110.19(a)(10).

⁹⁵ Notice at 20576.

⁹⁶ *Id.*; see FINRA Rule 3110(f)(2)(A)(ii) and (iii).

⁹⁷ Notice at 20576.

⁹⁸ *Id.*

⁹⁹ Proposed Rule 3110.19(d). FINRA stated that it is "exploring ways to provide this information to state regulators in a practical format." Notice at 20578 n.108.

¹⁰⁰ The CRD system is the central licensing and registration system used by the U.S. securities industry and its regulators. In general, information in the CRD system is obtained through the uniform registration forms that firms and regulatory authorities complete as part of the securities industry registration and licensing process. The uniform registration forms are Form BD (Uniform Application for Broker-Dealer Registration), Form

Continued

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ Notice at 20578.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Amendment No. 1 at 5.

⁸³ *Id.* at 4.

⁸⁴ Proposed Rule 3110.19(a) indicates that the "supervisory activities" include "those described in Rule 3110(f)(1)(D) through (G) or in Rule 3110(f)(2)(B)." The supervisory activities identified

currently provides access to “information regarding the offices and locations (registered and unregistered) to which associated persons required to be registered are assigned,” but it explained that “requiring member firms to affirmatively provide this information to FINRA through a scheduled process would make this information more readily accessible to regulators.”¹⁰¹

5. Risk Assessment

Under proposed Rule 3110.19(e), a member would be required to “develop a reasonable risk-based approach to designating an office or location as an RSL[] and conduct and document a risk assessment for the associated person assigned to that office or location” prior to designating that location as an RSL (hereinafter, a “person-specific risk assessment”).¹⁰² The proposed rule change would require documentation of the factors considered, including, among others, whether the associated person at such office or location is now subject to: (1) customer complaints, taking into account the volume and nature of the complaints; (2) heightened supervision other than where such office or location is ineligible for RSL designation under proposed Rule 3110.19(c)(3); (3) any failure to comply with the member’s written supervisory procedures; (4) any recordkeeping violation; and (5) any regulatory communications from a Regulator indicating that the associated person at such office or location failed reasonably to supervise another person subject to their supervision, including but not limited to, subpoenas, preliminary or routine regulatory inquiries or requests for information, deficiency letters, “blue sheet” requests or other trading questionnaires, or examinations.¹⁰³ Furthermore, the proposed rule change would require the member to account for “any higher risk activities that take place [at] or a higher risk associated

person that is assigned to that office or location.”¹⁰⁴

“Consistent with [a firm’s] obligation under Rule 3110(a),” the proposed rule change also would provide that “the member’s supervisory system must take into consideration any indicators of irregularities or misconduct (i.e., ‘red flags’) when designating an office or location as an RSL.”¹⁰⁵ Further, the proposed rule change would provide that “[r]ed flags should . . . be reviewed in determining whether it is reasonable to maintain the RSL designation of such office or location in accordance with the requirements of [proposed Rule 3110.19] and [that] the member should consider evidencing steps taken to address those red flags where appropriate.”¹⁰⁶

III. Discussion and Commission Findings

After careful review of the proposed rule change, the comment letters, and FINRA’s responses to the comments, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1 and 2, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities association.¹⁰⁷ Specifically, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act, which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.¹⁰⁸

Pursuant to FINRA Rule 3110, member firms must “establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules.”¹⁰⁹ Rule 3110 provides that “[e]ach member shall establish and maintain supervisory procedures that must take into consideration, among other things, the firm’s size, organizational structure, scope of business activities, number and location of the firm’s offices, the nature and complexity of the products and services offered by the firm, the volume

of business done, the number of associated persons assigned to a location, the disciplinary history of registered representatives or associated persons, and any indicators of irregularities or misconduct (i.e., ‘red flags’), etc.”¹¹⁰ Rule 3110(c) further requires member firms to conduct internal inspections of each location, and it identifies the presumed frequency of inspection for various types of locations.¹¹¹ Importantly, Rule 3110 provides that “[f]inal responsibility for proper supervision . . . rest[s] with the member.”¹¹²

The proposed rule change is consistent with these obligations. It permits certain eligible firms to inspect certain eligible locations on a regular periodic schedule (presumed to be at least every three years) instead of an annual schedule. If an eligible member firm and its eligible location comply with various conditions and safeguards—including a person-specific risk assessment—designed to minimize risks, the proposed rule change would provide this additional flexibility for the member firm in structuring its reasonably designed supervisory system. But it does not automatically transform residences into RSLs subject to less frequent inspection. Nor does it require firms to treat all residences where certain supervisory activities are performed as RSLs. It only permits a member firm to consider whether an RSL designation for a specific location would be appropriate in light of the rule’s requirements and the member firm’s broader obligation to establish and maintain a reasonably designed supervisory system. Accordingly, and as explained in more detail below, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act.

A. Residential Supervisory Location Terms and Conditions

The proposed rule change has various terms and conditions that limit the RSL designation to certain firms and locations. The Commission addresses the terms and conditions, and any related comments, in turn.

1. Member Firm Ineligibility Criteria

As stated above, under proposed Rule 3110.19(b), a member firm would be ineligible to designate any of its locations as an RSL if the member is subject to any of seven firm-level

BDW (Uniform Request for Broker-Dealer Withdrawal), Form BR (Uniform Branch Office Registration Form), Form U4, Form U5 (Uniform Termination Notice for Securities Industry Registration), and Form U6 (Uniform Disciplinary Action Reporting Form). These forms, particularly Forms U4 and U5, collect administrative, regulatory, criminal history, customer complaint, and other information about brokers, while Form BD collects similar information about broker-dealer firms. FINRA, state, and other regulatory authorities use this information in connection with their licensing and regulatory activities, and member firms use this information to help them make informed employment decisions. See Exchange Act Release No. 88760 (Apr. 28, 2020), 85 FR 26502, 26503 (May 4, 2020) (File No. SR-FINRA-2020-012).

¹⁰¹ Notice at 20578.

¹⁰² Proposed Rule 3110.19(e).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ In approving this rule change, the Commission has considered the rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁰⁸ 15 U.S.C. 78o-3(b)(6).

¹⁰⁹ FINRA Rule 3110(a).

¹¹⁰ FINRA Rule 3110.12.

¹¹¹ FINRA Rule 3110(c)(1).

¹¹² See *id.* Rule 3110(a)(1) through (7) identify certain minimum requirements for the reasonably designed supervisory system. See generally FINRA Rule 3110.

eligibility exclusions. The seven exclusions address members that are designated as Restricted Firms under FINRA Rule 4111; members designated as Taping Firms under FINRA Rule 3170; members undergoing, or required to undergo, a continuing membership review under FINRA Rule 1017(a)(7) as a result of one or more associated persons at such location; firms that have received a notice from FINRA pursuant to FINRA Rule 9557, unless FINRA has otherwise permitted activities in writing pursuant to such rule; firms suspended by FINRA; firms that have been FINRA members for less than one year; and firms that have been found within the past three years by the SEC or FINRA to have violated Rule 3110(c).¹¹³

One commenter specifically supported the inclusion of the firm-level exclusions covering suspended firms and firms that have been FINRA members for less than one year.¹¹⁴ No commenter opposed any of the proposed seven firm-level eligibility exclusions.

FINRA reasonably determined to exclude a member firm from participation in the Pilot if the member firm is subject to any of the six proposed firm-level ineligibility criteria. Each of these criteria identifies—and excludes—member firms with characteristics that may indicate increased risk of non-compliance. Specifically, Restricted Firms have a history of misconduct or a high concentration of registered persons with a significant history of misconduct that gave rise to the designation,¹¹⁵ while Taping Firms are subject to heightened regulatory oversight because they employ a “significant number of registered persons [who] previously worked for firms that have been expelled from the industry or have had their registrations revoked for inappropriate sales practices.”¹¹⁶ Moreover, a member firm that is required to undergo a continuing membership review pursuant to FINRA Rule 1017(a)(7) has a person at the proposed RSL who is seeking to become an owner, control person, principal, or

registered person of the member firm who has, in the previous five years, one or more “final criminal matters” or two or more “specified risk events.”¹¹⁷ Finally, if the Commission or FINRA has found that a member firm has violated Rule 3110(c) within the past three years, the member firm has demonstrated a recent difficulty implementing a compliant inspection program.¹¹⁸ Member firms covered by these exclusions therefore have a history of non-compliance or have registered representatives who have a history of (or come from a member firm with a history of) non-compliance. It is therefore reasonable for FINRA to determine that member firms that fall into these categories are not eligible to designate RSLs and exercise the flexibility that the proposed rule change provides in designing a member firm’s supervisory system.

Furthermore, Rule 9557 notices are sent to member firms that are experiencing financial or operational difficulties.¹¹⁹ Additionally, suspension of a member firm by FINRA would be based on FINRA’s determination that the member firm has failed to comply with its regulatory requirements or suspension is needed for the safety of investors, creditors, or other members because of the member firm’s financial or operational difficulties.¹²⁰ Such member firms raise concerns about their ability to comply with their obligations and may present risk to others. As such,

it is reasonable to conclude that these member firms should not be eligible for the proposed rule change that is designed to afford member firms greater flexibility in designing their supervisory systems.

Moreover, member firms that have been FINRA members for less than 12 months may need additional time to develop their supervisory and compliance systems to effectively comply with applicable securities laws and rules.¹²¹ This time period also provides FINRA and other regulators with time to conduct inspections of new member firms to determine their compliance with their regulatory obligations before they may be eligible for the flexibility provided in the proposed rule.¹²² It is therefore reasonable for FINRA to determine that firms must be operating for a certain amount of time before they can be eligible to designate RSLs. One year provides a reasonable balance between providing member firms with the flexibility for supervision allowed in the proposed rule and concerns that member firms need to develop experience operating before they are given such flexibility. In sum, these proposed exclusions limit RSL designation to certain member firms without indicia that their business operations, supervisory system, or inspection programs may lack the maturity or safeguards to fully address the potential risks associated with RSLs.¹²³

2. Location Ineligibility Criteria

As stated above, proposed Rule 3110.19(c) would prohibit RSL designation for any location if one or more associated persons at the location is subject to any of six location-level eligibility exclusions.¹²⁴ These six exclusions address associated persons with less than one year of direct supervisory experience with the member or its affiliate or subsidiary, who are functioning as a principal for a

¹¹³ See *supra* notes 57 through 63 and accompanying text.

¹¹⁴ Theresa J. Manderski, SVP, Chief Compliance Officer—BD, Davenport & Company LLC, to the Commission, dated Apr. 27, 2023, at 2 (“Davenport”).

¹¹⁵ Proposed Rule 3110.19(b)(1); see FINRA, Rule 4111 Frequently Asked Questions, <https://www.finra.org/rules-guidance/key-topics/protecting-investors-from-misconduct/faq#:~:text=A%20Restricted%20Firm%20is%20a,such%20in%20a%20Department%20decision.>

¹¹⁶ Proposed Rule 3110.19(b)(2); FINRA, FINRA Taping Rule (FINRA Rule 3170), <https://www.finra.org/rules-guidance/guidance/taping-rule>.

¹¹⁷ Proposed Rule 3110.19(b)(3) (exclusion applicable where the person responsible for triggering a continuing membership review is located at the proposed RSL); FINRA Rule 1017(a)(7). “The term ‘final criminal matter’ means a criminal matter that resulted in a conviction of, or plea of guilty or nolo contendere (‘no contest’) by, a person that is disclosed, or is or was required to be disclosed, on the applicable Uniform Registration Forms.” FINRA Rule 1011(h). “Specified risk events” include certain investment-related, consumer-initiated (1) customer arbitration awards, (2) civil judgments, (3) customer arbitration settlements, or (4) civil litigation settlements. FINRA Rule 1011(p)(1), (2). “Specified risk events” also include certain investment-related civil actions or regulatory actions that result in (1) monetary sanctions for a dollar amount at or above \$15,000 or (2) a bar, expulsion, revocation, rescission, or suspension. See FINRA Rule 1011(p)(3), (4).

¹¹⁸ Proposed Rule 3110.19(b)(7).

¹¹⁹ Proposed Rule 3110.19(b)(4); see FINRA Rule 9557 (Procedures for Regulating Activities Under Rules 4110, 4120 and 4130 Regarding a Member Experiencing Financial or Operational Difficulties); see also FINRA Regulatory Notice 09–71 (Dec. 2009) (announcing SEC approval of consolidated FINRA rules governing financial responsibility), <https://www.finra.org/rules-guidance/notices/09-71>.

¹²⁰ Proposed Rule 3110.19(b)(5); A suspended firm may have been suspended because of a violation of “federal securities laws, rules or regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or FINRA rules.” FINRA Rule 8310(a)(3), (5); see FINRA Rule 9550 Series.

¹²¹ Proposed Rule 3110.19(b)(6).

¹²² See Exchange Act Rule 15b2–2, 17 CFR 240.15b2–2 (generally requiring inspection of a newly registered broker dealer within six months for compliance with applicable financial responsibility rules and within 12 months for all other applicable regulatory requirements).

¹²³ Cf. Exchange Act Release No. 90635 (Dec. 10, 2020), 85 FR 81540 (Dec. 16, 2020) (Order Approving File No. SR–FINRA–2020–011 to Address Brokers With a Significant History of Misconduct); Exchange Act Release No. 92525 (July 30, 2021), 86 FR 42925 (Aug. 5, 2021) and 86 FR 49589 (Sept. 3, 2021) (Corrected Order Approving File No. SR–FINRA–2020–041 to Adopt FINRA Rules 4111 (Restricted Firm Obligations) and 9561 (Procedures for Regulating Activities Under Rule 4111)).

¹²⁴ Proposed Rule 3110.19(c).

limited period in accordance with Rule 1210.04 (Registration Requirements), who are subject to a mandatory heightened supervisory plan, who are statutorily disqualified, who are required to make disclosures about certain criminal and regulatory actions, or who are subject to a covered regulatory investigation or proceeding.¹²⁵ These six exclusions are discussed in more detail below.

a. Less Than One Year of Supervisory Experience

As originally proposed in the Notice, proposed Rule 3110.19(c)(1) would have prohibited an RSL designation for any location with a designated supervisor with less than one year of direct supervisory experience with the member firm.¹²⁶ Several commenters urged FINRA to eliminate this exclusion.¹²⁷ One commenter stated that requiring one year of supervisory experience is “not supported by any objective evidence and can only be characterized as arbitrary.”¹²⁸ These commenters indicated that this proposed exclusion would negatively impact the employment opportunities for “experienced supervisory personnel who may switch firms or those associated persons who are stand-outs at a firm [and secure a] promotion to a supervisory role.”¹²⁹ Another commenter emphasized that “there is not a sufficient investor protection justification for this language to offset the substantial chilling effect on the transfer of experienced supervisory personnel from one broker-dealer to

another broker-dealer.”¹³⁰ Although one commenter acknowledged that a member firm could still permit a new supervisor to work from a residence registered as an OSJ or supervisory branch office in the first year, that commenter emphasized that this proposed exclusion would “create[] an additional burden that could have a disparate impact on people with years of experience who are reentering the workforce after time off to care for children or other family members.”¹³¹

In the event that FINRA declined to delete the proposed exclusion, some commenters requested modifications to the provision instead.¹³² For example, some commenters asked FINRA to modify the proposed exclusion to permit RSL designation for locations with supervisors who have as little as three months of direct supervisory experience with the member firm.¹³³ Alternatively, some commenters urged FINRA to permit RSL designation for supervisors with less than one year of supervisory experience with the member firm so long as the member firm conducts an inspection of the RSL within the first year of designation.¹³⁴

In response, FINRA amended proposed Rule 3110.19(c)(1) to address “the comments about the potential adverse impacts [this condition] could have on hiring efforts.”¹³⁵ As modified by Amendment No. 1, the proposed rule change would prohibit RSL designation for any location with a designated supervisor who has less than one year of direct supervisory experience with the member or an affiliate or subsidiary

of the member that is registered as a broker-dealer or investment adviser.¹³⁶ FINRA explained that this modification would permit RSL designation for a location with a designated supervisor who has, for example, six months of supervisory experience with the member firm and six months of supervisory experience at the member’s affiliate or subsidiary that is registered as a broker-dealer or investment adviser.¹³⁷ FINRA stated that this modification “recogniz[es] that such entities may share systems and have similar compliance cultures to meet their obligations under the federal securities laws.”¹³⁸ As such, FINRA indicated that such supervisors should have sufficient experience with the member firm’s compliance systems.¹³⁹

Five commenters supported the amended exclusion,¹⁴⁰ and one of them “agree[d] that this amendment strikes an appropriate balance between regulators’ interest in high supervisory standards and industry concerns about the impact on hiring efforts.”¹⁴¹

Three other commenters, on the other hand, opposed this proposed exclusion.¹⁴² One of these three

¹³⁶ See proposed Rule 3110.19(c)(1); Amendment No. 1 at 4.

¹³⁷ FINRA Response I at 5.

¹³⁸ *Id.*

¹³⁹ See *id.* at 4–5.

¹⁴⁰ Letters from Bernard V. Canepa, Managing Director & Associate General Counsel, Securities Industry and Financial Markets Association, to Vanessa Countryman, Secretary, Commission, dated Aug. 1, 2023, at 2 (“SIFMA II”) (indicating that the modified language addresses “concerns raised by the industry”); Gail Merken, Chief Compliance Officer, Janet Dyer, Chief Compliance Officer, John McGinty, Chief Compliance Officer, Fidelity Investments, to Vanessa Countryman, Secretary, Commission, dated Aug. 1, 2023, at 1 (“Fidelity II”); Jim McHale, Executive Vice President, Head of WIM Compliance and Peter Macchio, Executive Vice President, Head of CIB Compliance, Wells Fargo, to Vanessa Countryman, Secretary, Commission, dated Aug. 1, 2023, at 2 (“Wells Fargo”) (expressing appreciation for the amended proposal but encouraging a future reassessment “for experienced supervisors [who] are switching to a new supervisory role at an unaffiliated broker-dealer”); Jennifer Szaro, CRCP, Chief Compliance Officer, XML Securities, LLC, et al., to Vanessa Countryman, Secretary, Commission, dated July 29, 2023, at 1 (“XML”) (the amended proposal “applies a commonsense approach, in that if an associated person has been working in either capacity the member will have a basis to evaluate the associated person’s working relationship and conduct a reasonable risk assessment.”); Andrew Hartnett, NASAA President and Deputy Commissioner, Iowa Insurance Division, North American Securities Administrators Association, Inc., to Sherry Haywood, Assistant Secretary, Commission, dated July 26, 2023, at 4 (“NASAA II”).

¹⁴¹ NASAA II at 4.

¹⁴² Letters from Michael Friedman, Head of Broker Dealer, Albert Securities, LLC, to Vanessa Countryman, Secretary, Commission, dated July 24, 2023, at 1–2 (“Albert”); Mark Quinn, Director of Regulatory Affairs, Cetera Financial Group, to Vanessa Countryman, Secretary, Commission, dated

¹²⁵ See *supra* notes 69 through 78 and accompanying text.

¹²⁶ Notice at 20577.

¹²⁷ Letters from Eversheds Sutherland LLP on behalf of the Committee of Annuity Insurers, to Secretary, Commission, dated Apr. 27, 2023, at 2 (“CAI”); David T. Bellaire, Esq., Executive Vice President & General Counsel, Financial Services Institute, to Secretary, Commission, dated Apr. 27, 2023, at 4–5 (“FSI”); Mark Quinn, Director of Regulatory Affairs, Cetera Financial Group, to Sherry Haywood, Assistant Secretary, Commission, dated Apr. 27, 2023, at 2–3 (“Cetera I”); Bernard V. Canepa, Managing Director & Associate General Counsel, Securities Industry and Financial Markets Association, to Vanessa Countryman, Secretary, Commission, dated Apr. 27, 2023, at 2 n.6 (“SIFMA I”).

¹²⁸ Cetera I at 2.

¹²⁹ FSI at 4; see Cetera I at 2 (“Branches would be ineligible for classification as an RSL simply because individual supervisors who may have been employed by the member firm for many years but who have previously either performed functions not directly related to supervision were not formally designated as supervisors. In addition, branches that house supervisors who have a lot of experience in supervisory roles with other member firms but have been employed by the current member firm for less than one year would be ineligible for RSL status.”).

¹³⁰ CAI at 2; see FSI at 4 (“this proposed criterion would place an unnecessary impediment on firms to hire and retain talent in a competitive job market.”); Cetera I at 3 (“If a member firm wishes to hire a supervisor in a remote location, the arbitrary one-year requirement will prevent them from classifying their residence as an RSL for at least one year, which may prevent the firm from hiring the individual. [. . .] The benefits of this are minimal and do not outweigh the burdens.”).

¹³¹ FSI at 4.

¹³² See FSI at 5; letter from Mark Seffinger, Chief Compliance Officer, LPL Financial, to Vanessa Countryman, Secretary, Commission, dated May 25, 2023, at 2 (“LPL I”); ASA 3.

¹³³ FSI at 5 (suggesting a “three or six-month requirement” if such a requirement remains in the proposed rule change); cf. Cetera I at 2 (suggesting that the time period “could as easily be three months or three years.”).

¹³⁴ LPL I at 2 (“[W]e support a requirement for such [a] branch to be inspected within the first year of designation versus registering that location as an OSJ.”); letter from Christopher A. Iacovella, President & Chief Executive Officer, American Securities Association, to Vanessa Countryman, Secretary, Commission, dated May 25, 2023, at 3 (“ASA”) (“Rather than prohibiting new supervisors from taking advantage of the definition, we believe firms should be able to perform an onsite branch exam during the supervisor’s first year.”).

¹³⁵ FINRA Response I at 5.

commenters repeated its request to remove this proposed exclusion, stating that it “is arbitrary and not reasonably related to the objectives it seeks to accomplish.”¹⁴³ Another of these commenters preferred the exclusion as originally proposed in the Notice, explaining that FINRA erroneously assumes that the compliance and supervisory cultures are the same at all of a member’s affiliates and subsidiaries.¹⁴⁴ The third commenter asked for a modification that would permit RSL designation so long as the associated person at the location has at least one year of any experience—either supervisory or non-supervisory—with the member, its affiliates, or its subsidiaries.¹⁴⁵

In response, FINRA declined to further amend the proposed rule change.¹⁴⁶ FINRA stated that the amended language “appropriately addresses” the concern that this proposed exclusion is intended to address: that an associated person at an RSL might otherwise “not have the requisite tenure at the member firm to develop experience with the firm’s systems, people, products, and overall compliance culture.”¹⁴⁷

The proposed rule change, as modified by Amendment No. 1 (requiring a level of supervisory experience to permit a member firm to consider an RSL designation), is reasonable. For new supervisors or supervisors hired from outside of a member firm’s broader organization, the proposed rule change requires that they operate from a location that is an OSJ or supervisory branch office (where they would be inspected at least annually) for at least a year to gain supervisory

experience with the member firm’s systems and overall compliance culture.¹⁴⁸ Because of the unique nature of each member firm’s business, FINRA reasonably determined that supervisors wishing to exercise the flexibility of this proposed rule change must first have experience with the member firm’s systems and products, and fully integrate into a member firm’s compliance program and culture. Therefore, just as it is reasonable for FINRA to exclude supervisors without *any* direct supervisory experience, it is also reasonable for FINRA to exclude supervisors with substantial direct supervisory experience at different member firm(s). This proposed rule change does not, however, require these categories of excluded supervisors to work from a non-residential location. A member firm may permit such a supervisor to work from a residential location under the current regulatory framework by designating the new supervisor’s residence as an OSJ or supervisory branch office and subjecting it to an annual inspection. The one-year time period—whether in a non-residential location or residential location designated as an OSJ or supervisory branch office—allows supervisors to develop experience with the member firm’s systems, people, products, and overall compliance culture. This should help to ensure that new supervisors at a member firm develop the experience necessary to reasonably carry out their assigned supervisory responsibilities for a member firm’s supervisory system before their residences become eligible for RSL designation and less frequent inspection.

It is reasonable for FINRA to determine that supervisors must have a certain amount of direct supervisory experience with the member firm, or an affiliate or subsidiary of the member that is registered as a broker-dealer or investment adviser, before their residence can be eligible for RSL designation. The one-year requirement will help ensure that new supervisors have an opportunity to gain experience with a member firm’s systems and products, and fully integrate into a member firm’s compliance program and culture. This time period also provides the member firm with time to evaluate the performance of the new supervisor to determine their compliance with their regulatory obligations before they may be eligible for the flexibility provided in the proposed rule. Moreover, one year provides a

reasonable balance between providing member firms with the flexibility for supervision allowed in the proposed rule and concerns that supervisors need to spend time directly supervising before they are given such flexibility.

Regarding the commenter’s request to permit RSL designation so long as the associated person at the proposed RSL has at least one year of *any* experience with the member firm, its affiliates, or its subsidiaries,¹⁴⁹ it is reasonable for FINRA to conclude that supervisors without direct supervisory experience at the member firm, its affiliates, or its subsidiaries may lack the skills and experience to effectively supervise other people, locations, and business activities from a residence treated as a non-branch location. For that reason, it is reasonable that FINRA limited qualifying experience to direct supervisory experience with the member firm, its affiliates, or its subsidiaries.

Commenters expressed concern that this proposed exclusion would negatively impact hiring and retention without providing an investor-protection benefit.¹⁵⁰ However, member firms retain the flexibility to permit supervisors to work from a residential location registered as an OSJ or supervisory branch office. Firms may choose to exercise that flexibility to attract and retain talent, and the proposed rule change would provide member firms even more flexibility after the supervisor has gained at least one year of supervisory experience with the member firm. In light of these factors, it is reasonable to require new supervisors or supervisors new to the member firm to work from a location registered as an OSJ or supervisory branch office that would be subject to an annual inspection cycle for a set period of time.

A commenter opposed the provision providing that the one-year experience requirement may be satisfied by experience with a member firm’s affiliate or subsidiary that is registered as a broker-dealer or investment adviser.¹⁵¹ This commenter explained that member firms, affiliates, and subsidiaries do not necessarily share the same compliance systems and cultures.¹⁵² However, where a member firm relies on a supervisor’s experience from an affiliate or subsidiary to satisfy the experience requirement, the supervisor’s private residence would not be automatically designated as an RSL. Rather, as discussed further below,

July 31, 2023, at 2 (“Cetera II”); Hugh Berkson, President, Public Investors Advocate Bar Association, to Vanessa Countryman, Secretary, Commission, dated July 31, 2023, at 3 (“PIABA II”).

¹⁴³ Cetera II at 2 (stating that “[o]nce an individual passes the necessary qualifications examinations, they [should be able to] begin their duties immediately.”).

¹⁴⁴ PIABA II at 3 (“While some firms may share systems and have similar compliance cultures with affiliates and subsidiaries, many others [do not], especially given the size and complexity of numerous financial firms. Yet, FINRA’s adjustment permits disparate entities to combine supervisory experience for meeting the one year minimum and contains no minimum time requirement at all for the member itself.”).

¹⁴⁵ Albert at 1–2 (“[U]nlike FINRA, we believe a newly-hired registered principal should be allowed to start the clock on their one year at their new employer by working remotely in a non-supervisory capacity prior to becoming a designated supervisor and qualifying their home as a residential supervisory location.” . . . Doing so “would still require new employees to learn the details of their new firm before being eligible to supervise remotely . . .”).

¹⁴⁶ FINRA Response II at 4–5.

¹⁴⁷ *Id.*

¹⁴⁸ See proposed Rule 3110.19(c)(1); *supra* notes 81 through 83 and accompanying text.

¹⁴⁹ Albert at 1–2.

¹⁵⁰ See FSI at 4, CAI at 2, Cetera I at 2–3.

¹⁵¹ PIABA II at 3.

¹⁵² See *id.*

proposed Rule 3110.19(e) would require the member firm to conduct and document a person-specific risk assessment prior to designating the location as an RSL. If a supervisor lacks comparable supervisory experience with the member, its affiliates, or its subsidiaries, or if the member, its affiliates, or its subsidiaries do not have similar compliance systems and cultures, the member firm may choose to consider those circumstances to assess whether such an RSL designation is appropriate.

b. Heightened Supervisory Plans

As stated above, proposed Rule 3110.19(c)(3) would prohibit RSL designation for any location with a designated supervisor who “is subject to a mandatory heightened supervisory plan under the rules of the SEC, FINRA, or a state regulatory agency.”¹⁵³ One commenter urged FINRA to modify this proposed exclusion to also cover “heightened supervision under a plan established by the member in connection with or in response to any such regulator’s recommendation or finding,” stating that the rule should not distinguish between heightened supervisory plans imposed by regulators and those imposed by member firms.¹⁵⁴ The commenter explained that a member firm’s decision to impose its own heightened supervisory plan “in lieu of a formal regulatory action or order[] or in response to a regulatory examination” raises “the same concerns as regulator-mandated plans and should be addressed accordingly.”¹⁵⁵

In response, FINRA declined to extend the proposed exclusion to cover any heightened supervisory plans imposed by a member.¹⁵⁶ FINRA expects that a member may, from time to time, impose voluntary heightened supervisory plans as part of its supervision program.¹⁵⁷ FINRA stated that what constitutes a firm-imposed heightened supervisory plan is “subjective,” and it expressed concern that extending this proposed exclusion to them “could act to disincentivize

firms from imposing tailored or more specific supervisory controls if the result [would be] RSL ineligibility.”¹⁵⁸ However, FINRA “agree[d] that there is value in considering heightened supervision as a risk factor.”¹⁵⁹ To balance the commenter’s concern with FINRA’s concern about discouraging the use of heightened supervision, FINRA modified the proposed rule change to require consideration of non-mandatory heightened supervisory plans in the risk assessment described in proposed Rule 3110.19(e).¹⁶⁰

The same commenter characterized FINRA’s modification as “an acceptable balance between [its previous] concerns and FINRA’s desire not to disincentivize firms from taking such steps to proactively improve their supervisory systems.”¹⁶¹ No commenter opposed the amended language.

Prohibiting locations with an associated person subject to a regulator-imposed heightened supervisory plan from being designated as an RSL is reasonable as it is designed to limit compliance risks. If a regulator has imposed a heightened supervisory plan on a specific associated person, the regulator has determined that they require additional supervision to help ensure their compliance with securities laws, regulations, and rules. It is reasonable for FINRA to determine that under those circumstances a member firm should not be permitted to designate that person’s residence as an RSL and permit a reduced inspection cycle. Firm-imposed heightened supervisory plans may, in some circumstances, indicate similar risks. At the same time, expanding this exclusion to firm-imposed supervisory plans could disincentivize firms from using heightened supervision when circumstances would otherwise counsel such a plan. Under these circumstances, it is reasonable to require member firms to consider any firm-imposed heightened supervisory plans as part of the mandatory, person-specific risk assessment.

c. Investigations and Proceedings Alleging a Failure To Supervise

As originally proposed in the Notice, proposed Rule 3110.19(c)(6) would have prohibited RSL designation for any location with an associated person who is “currently subject to, or has been notified in writing that [they] will be subject to, any investigation, proceeding, complaint or other action

by the member, the SEC, a self-regulatory organization, including FINRA, or state securities commission (or agency or office performing like functions) alleging they have failed reasonably to supervise another person subject to their supervision, with a view to preventing the violation of any provision of the Securities Act, the Exchange Act, the Investment Advisers Act, the Investment Company Act, the Commodity Exchange Act, any state law pertaining to the regulation of securities or any rule or regulation under any of such Acts or laws, or any of the rules of the MSRB or FINRA.”¹⁶²

Three commenters supported this proposed exclusion.¹⁶³ One commenter emphasized the importance of equal treatment for all regulatory actions alleging a failure to supervise, regardless of whether federal or state securities laws are at issue.¹⁶⁴ Another commenter coupled its support with a recommendation that the proposed exclusion also extend to associated persons who have been subject to multiple customer complaints, arbitrations, and civil cases.¹⁶⁵

Four commenters opposed the proposed exclusion, citing practical challenges associated with the tracking, duration, and resolution of state-level securities investigations.¹⁶⁶ In particular, three of the opposing commenters stated that the inclusion of state-law violations in this proposed exclusion is fundamentally unfair, and one of these commenters stated that supervisors would “lose[] the privilege

¹⁶² Notice at 20577; proposed Rule 3110.19(c)(6).

¹⁶³ NASAA I at 2; letter from Hugh Berkson, President, Public Investors Advocate Bar Association, to Vanessa Countryman, Secretary, Commission, dated Apr. 26, 2023, at 3 (“PIABA I”); Davenport at 2 (supporting “[m]aking an office or location ineligible when an associate[d] person is [the] subject of an investigation or action relating to a failure to supervise.”).

¹⁶⁴ NASAA I at 2 (“State securities laws are an important part of the regulatory framework and should not be treated differently with respect to assessments of regulatory and supervisory risks that the proposed ineligibility criteria are designed to address.”).

¹⁶⁵ PIABA I at 3.

¹⁶⁶ ASA at 2; Cetera I at 3–4; letter from Scott C. Kursman, Managing Director & Chief Compliance Officer, Citigroup Global Markets, Inc., to Vanessa Countryman, Secretary, Commission, dated Apr. 28, 2023, at 1–2 (“Citigroup”); SIFMA I at 1–3. Taken together, the alleged practical challenges include: state investigations are difficult to track; state investigations may take years to commence or conclude; it is difficult to discern when state investigations commence or conclude; state regulators open investigations based on varying standards for the evidence required to open such an investigation; and the phrase “subject of” is too vague to equip firms to effectively comply with the proposed exclusion. See SIFMA I at 1–3; Citigroup at 1 (noting that it shares SIFMA’s concern); ASA at 2 (taking this position in comments related to the “Pilot Program”); Cetera at 3–4.

¹⁵³ See proposed Rule 3110.19(c)(3).

¹⁵⁴ See letter from Andrew Hartnett, NASAA President and Deputy Commissioner, Iowa Insurance Division, North American Securities Administrators Association, Inc., to Sherry Haywood, Assistant Secretary, Commission, dated April 27, 2023, at 4–5 (“NASAA I”).

¹⁵⁵ *Id.* at 5.

¹⁵⁶ FINRA Response I at 6.

¹⁵⁷ *Id.* (“[A] firm should routinely evaluate its supervisory system to ensure it is appropriately tailored to the firm’s business. Such an evaluation may prompt a firm, out of an abundance of caution and independent of specific regulatory requirements or mandates, to undertake additional supervisory measures, including voluntarily imposing a heightened supervisory plan.”).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*; see proposed Rule 3110.19(e).

¹⁶¹ NASAA II at 4.

of workplace flexibility for an uncertain and inordinate amount of time[, disrupting their lives] without any adjudication that they failed in their supervisory duties.”¹⁶⁷ For these reasons, three opposing commenters urged FINRA to remove state-level securities investigations from the proposed rule change.¹⁶⁸ The fourth opposing commenter similarly recommended that FINRA narrow the proposed exclusion such that it take effect upon receipt of something akin to a Wells notice.¹⁶⁹

In response, FINRA amended the proposed exclusion in two ways.¹⁷⁰ First, FINRA limited its scope to Investigations and Proceedings, as those terms are defined in Form U4, by a Regulator “expressly” alleging a failure to supervise.¹⁷¹ FINRA stated that

¹⁶⁷ SIFMA I at 3; *see* Citigroup at 1 (“[T]he fact that the mere initiation of an investigation, as opposed to some adjudicated finding, can be the basis for ineligibility seems problematic from an individual fairness and notice standpoint.”); Cetera at 4 (“It unfairly shifts the presumption from innocence to guilt without any form of substantive finding, much less adjudication.”).

¹⁶⁸ SIFMA at 3; Citigroup at 1 (“We support the suggestion made by SIFMA that, rather than lose RSL eligibility, a state investigation for failure to supervise should be considered by a firm’s preexisting obligations under Rule 3110 to maintain a reasonably designed supervisory system and to conduct an appropriate risk assessment.”); ASA at 2 (“We implore federal regulators not to allow unsubstantiated claims by state regulators trying to protect their regulatory turf to dictate how the regulation of the modern broker-dealer business should evolve.”).

¹⁶⁹ Cetera I at 4 (“RSL eligibility would only be precluded if the associated person has been notified by a regulatory agency, in writing, that the agency intends to take or recommend enforcement action against the individual for failure to perform supervisory responsibilities.”). A Wells notice is a communication from SEC Staff to a person involved in an investigation that: (1) informs the person the staff has made a preliminary determination to recommend that the Commission file an action or institute a proceeding against them; (2) identifies the securities law violations that the staff has preliminarily determined to include in the recommendation; and (3) provides notice that the person may make a submission to the Division and the Commission concerning the proposed recommendation. *See* Enforcement Manual, Securities and Exchange Commission, Division of Enforcement, at 19–20, <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

¹⁷⁰ *See* FINRA Response I at 6–9; proposed Rule 3110.19(c)(6); Amendment No. 1.

¹⁷¹ FINRA Response I at 7–8; *see* Amendment No. 1; proposed Rule 3110.19(c)(6). As modified by Amendment No. 1, the proposed rule change would prohibit RSL designation for any location with an associated person who “has been notified in writing that [he or she] is now subject to[] any Investigation or Proceeding, as such terms are defined [for Form U4], by [a Regulator] expressly alleging they have failed reasonably to supervise another person subject to their supervision with a view to preventing the violation of any provision of the Securities Act, the Exchange Act, the Investment Advisers Act, the Investment Company Act, the Commodity Exchange Act, any state law pertaining to the regulation of securities[,] or any rule or regulation under any of such [a]cts or laws, or any

“using the definitions from Form U4 provides consistency and clarity not only with respect to the scope of applicable events subject to the ineligibility criteria, but also regarding when some events “begin” (e.g., after the ‘Wells’ notice has been given).”¹⁷² Second, FINRA included a temporal element to provide that such locations may be designated or redesignated as an RSL subject to the requirements of the proposed rule change, as modified by Amendment No. 1, upon the earlier of: (1) the member’s receipt of written notification from the applicable Regulator that such Investigation has concluded without further action; or (2) one year from the date of the last communication from such Regulator relating to such Investigation.¹⁷³ FINRA explained that the proposed amendment addresses “commenters’ concerns that unadjudicated allegations would form the basis of a location’s permanent exclusion as an RSL.”¹⁷⁴

Three commenters supported the modified exclusion, stressing that the revisions provide regulatory clarity and address industry concerns about the uncertain length of some regulatory investigations.¹⁷⁵ A fourth commenter “generally support[ed]” the modified provision because it “reduces the likelihood that a location remains ineligible for longer than reasonably

of the rules of the MSRB or other self-regulatory organization, including FINRA.” Proposed Rule 3110.19(c)(6). The proposed amendment also broadens the scope of the applicable rules. As originally proposed in the Notice, the proposed rule change would have reached the rules of the MSRB and FINRA, but not—as now proposed—“any” self-regulatory organization. *See* Notice at 20577.

¹⁷² FINRA Response I at 8–9. FINRA emphasized that this proposed exclusion would apply “where a Regulator’s written notification to an associated person describes circumstances and other allegations that could be reasonably construed to relate to a failure to reasonably supervise another individual under the associated person’s supervision.” *Id.* at 8.

¹⁷³ *See* FINRA Response I at 6–9; Proposed Rule 3110.19(c)(6); Amendment No. 1. As stated above, this proposed modification would not apply to an associated person who is subject to an ongoing Proceeding.

¹⁷⁴ FINRA Response I at 9.

¹⁷⁵ SIFMA II at 2 (“[T]he Proposed Rule Change, as amended, addresses in part concerns raised by the industry. For example, proposed Rule . . . 3110(c)(6) now allows a firm to designate or redesignate an RSL location after a specified period of time following an investigation.”); XML at 1 (the use of the Form U4 definitions for Investigation and Proceeding “will maintain consistency within the industry,” and the revised exclusion “will enable members to determine an effective date for designation or redesignation of an RSL”); Fidelity II at 2 (“Fidelity also appreciates the clarification provided concerning an associated person who is the subject of an investigation or proceeding by a regulator, particularly the ability to resume designating a location as an RSL either at the closure of the proceeding or after the matter has been idle for a year.”).

necessary for a regulator to investigate potential misconduct[] while allowing regulators sufficient flexibility to conduct a thorough investigation.”¹⁷⁶ But this commenter asked for further modifications to broaden the scope of the proposed rule change, including to codify FINRA’s statement that the exclusion would apply where circumstances can be reasonably construed to evidence a covered Investigation, to clarify that a Wells notice or its equivalent “is not a prerequisite for ineligibility under this criterion,” and to clarify that some regulatory communications, including subpoenas, may provide notice of a covered investigation “depending on the information” they contain.¹⁷⁷

In response, FINRA declined to further amend the proposed rule change.¹⁷⁸ FINRA stated that “the well-established definitions from Form U4 provide a clear picture of the scope of applicable events subject to the proposed eligibility criterion.”¹⁷⁹ FINRA also emphasized that although subpoenas and other regulatory communications do not necessarily establish the existence of an “Investigation” as defined in Form U4, the proposed rule change separately requires firms to consider “any regulatory communications,” including subpoenas, in the mandatory risk assessment.¹⁸⁰

The proposed rule change, as modified by Amendment No. 1, reasonably addresses the potential risks indicated by written communications from a Regulator alleging a failure to supervise. It is reasonable for FINRA to conclude that, where an associated person’s conduct has resulted in a Regulator notifying the associated person that they are subject to an Investigation or a Proceeding expressly alleging that they have failed reasonably to supervise another person subject to their supervision, the potential risk warrants the associated person having their residence inspected on a more frequent basis, and therefore the residence should not be designated as an RSL.¹⁸¹

¹⁷⁶ NASAA II at 2–3.

¹⁷⁷ *Id.* at 3–4 and n.8.

¹⁷⁸ FINRA Response II at 6.

¹⁷⁹ *Id.*

¹⁸⁰ *See id.*

¹⁸¹ NASAA requested that FINRA clarify that a Wells notice or its equivalent “is not a prerequisite for ineligibility under this criterion.” NASAA II at 3. The proposed rule change, as modified by Amendment No. 1, makes clear that “Investigation” has the same meaning as it does for Form U4. *See supra* note 74 and accompanying text. For purposes of Form U4, some of the circumstances constituting

Continued

The proposed exclusion, as modified by Amendment No. 1, also reasonably addresses commenter concerns with its scope and equips member firms to comply with its terms. By limiting its scope to certain Investigations and Proceedings, as those terms are defined for purposes of Form U4, that “expressly” allege a failure to reasonably supervise, the proposed exclusion clarifies that FINRA does not expect firms to discern—based on vague or ambiguous information—whether the exclusion applies. Separately, the proposed rule change addresses commenter concerns that unadjudicated allegations might permanently prohibit a location from RSL designation by including a temporal element that permits the designation or redesignation of affected RSLs under limited circumstances. Specifically, this provision would permit RSL designation or redesignation upon (1) the member’s receipt of written notification from the applicable Regulator that such Investigation has concluded without formal action or (2) one year from the date of the last communication from such Regulator relating to such Investigation.¹⁸² Finally, while the proposed exclusion would not capture circumstances short of a formal Investigation or Proceeding that could counsel against an RSL designation, the proposed rule change separately requires firms to consider—as part of the mandatory, person-specific risk assessment—any regulatory communications from a Regulator indicating that the associated person at the proposed RSL failed reasonably to supervise another person subject to their supervision.¹⁸³

d. Customer Complaints, Arbitration Claims, and Civil Actions

As originally proposed in the Notice, proposed Rule 3110.19(c) did not include a location-level exclusion addressing any associated person who is or has been subject to multiple customer complaints or customer-initiated, investment-related arbitration claims or civil actions.¹⁸⁴ One commenter recommended that FINRA include a location-level exclusion covering such associated persons, as these customer-initiated actions are often the “canary in the coal mine” indicating threats to investor protection.¹⁸⁵ In response, FINRA modified the proposed rule

change (as described in more detail below) to require a member to consider the volume and nature of customer complaints as part of the mandatory, person-specific risk assessment prior to RSL designation.¹⁸⁶ Although the proposed risk assessment does not expressly require the consideration of customer-initiated, investment-related arbitration or civil litigation, FINRA emphasized that the risk assessment’s list of factors is “non-exhaustive” and it “agree[d] that the presence of such arbitration[s] or civil litigation[s] would be a factor for a firm to consider as part of the risk assessment.”¹⁸⁷

In response to the Amendment No. 1, the commenter repeated its request that the location-level exclusions also cover locations of associated persons who have been subject to multiple customer complaints or customer-initiated, investment-related arbitrations or civil actions.¹⁸⁸ This commenter emphasized that such an associated person should be disqualified from working from an RSL “[r]ather than trusting member firms to conduct and document a risk assessment[] that includes examining the ‘volume and nature of customer complaints.’”¹⁸⁹

In response, FINRA declined to modify the proposed rule change to include an automatic exclusion for locations with associated persons who have been the subject of multiple customer complaints.¹⁹⁰ FINRA emphasized that customer complaints “may lack merit,” and the proposed rule change’s mandatory risk assessment requires the consideration of the volume and nature of customer complaints prior to any RSL designation.¹⁹¹

The proposed rule change takes a reasonable approach to the issue of customer complaints and customer-initiated, investment-related arbitration claims and civil actions by requiring firms to consider the “volume and nature of customer complaints” in the mandatory risk assessment prior to RSL designation.¹⁹² Although the proposed risk assessment does not explicitly mandate the consideration of customer-initiated, investment-related arbitration claims and civil actions, the risk assessment’s factors are non-exhaustive. Moreover, FINRA has stated that such arbitration claims and civil actions would be relevant factors for

consideration during the mandatory risk assessment.¹⁹³

Such complaints, claims, and actions may, in certain circumstances, indicate heightened levels of risk. However, they are not formal investigations or proceedings initiated by a regulator charged with enforcing securities laws, regulations, and rules. For example, they may be overly broad in scope or lack the factual development of a comparable regulatory action. Because assessing the risk associated with complaints, claims, and actions may require investigation and a consideration of the totality of the circumstances, it is reasonable that—in lieu of creating a blanket exclusion for such associated persons—the volume and nature of customer complaints should be considered in the mandatory risk assessment.

e. Other Three Location-Level Exclusions

As stated above, the proposed rule change’s location-level eligibility exclusions also prohibit RSL designation for any location with an associated person who: (1) is functioning as a principal for a limited period in accordance with Rule 1210.04 (Registration Requirements); (2) is statutorily disqualified, unless such disqualified person (A) has been approved (or is otherwise permitted pursuant to FINRA rules and the federal securities laws) to associate with a member and (B) is not subject to a mandatory heightened supervisory plan under proposed Rule 3110.19(c)(3) or otherwise as a condition to approval or permission for such association; or (3) has an event in the prior three years that required a “yes” response to any item in Questions 14A(1)(a) and 2(a), 14B(1)(a) and 2(a), 14C, 14D, and 14E on Form U4.¹⁹⁴ No commenter offered specific support for, or opposition to, any of these three exclusions.

Each of these three location-level exclusions is reasonable in light of the increased risk each category of person might pose. First, a supervisor acting as a principal for a limited period prior to passing a qualification examination has not yet acquired the credentials allowing them to act as a principal on a permanent basis.¹⁹⁵ Second, an

¹⁹³ FINRA Response I at 7.

¹⁹⁴ See proposed Rule 3110.19(c)(2), (4), and (5).

¹⁹⁵ FINRA Rule 1210.04 permits a member to “designate any person currently registered, or who becomes registered, with the member as a representative to function as a principal for a period of 120 calendar days prior to passing an appropriate principal qualification examination as specified under Rule 1220(a), provided that such person has at least 18 months of experience functioning as a

an “Investigation” would not require a Wells notice. See *id.*

¹⁸² Proposed Rule 3110.19(c)(6).

¹⁸³ Proposed Rule 3110.19(e)(5).

¹⁸⁴ See Notice at 20577–78; proposed Rule 3110.19(c).

¹⁸⁵ PIABA I at 3.

¹⁸⁶ Proposed Rule 3110.19(e); Amendment No. 1 at 6.

¹⁸⁷ FINRA Response I at 7.

¹⁸⁸ PIABA II at 3–4.

¹⁸⁹ *Id.* at 4.

¹⁹⁰ See FINRA Response II at 6.

¹⁹¹ *Id.*

¹⁹² The Commission addresses the proposed risk assessment in Section III(A)(5).

individual subject to a statutory disqualification has engaged in violative conduct that may indicate an increased risk of non-compliance.¹⁹⁶ Third, an individual with certain regulatory or criminal-action disclosures on Form U4 has a history of criminal conviction(s) or regulatory finding(s) that may indicate an increased risk of non-compliance.¹⁹⁷ Because of the heightened risks associated with these three categories of supervisors, it is reasonable for the proposed rule change to require such supervisors to operate from an OSJ or supervisory branch office (where they will be inspected at least annually) rather than from a location designated as an RSL (where they would be inspected on a regular periodic schedule, presumed to be at least every three years).¹⁹⁸ Therefore, it is reasonable to exclude such supervisors' residences from RSL designation.

3. Conditions for Designation as a Residential Supervisory Location

As stated above, proposed Rule 3110.19(a) would provide that an associated person's private residence where supervisory activities are conducted may be eligible for RSL designation provided that the member firm and/or location complies with ten conditions.¹⁹⁹ FINRA stated that it adapted the first eight conditions from the primary and non-primary residence exclusions.²⁰⁰ It added a ninth condition on recordkeeping and a tenth condition addressing technology and

surveillance tools.²⁰¹ These ten conditions are discussed in more detail below.

a. Conditions Adapted From the Primary and Non-Primary Residence Exclusions

As stated above, FINRA adapted the first eight conditions of the proposed rule change from the primary and non-primary residence exclusions: (1) only one associated person, or multiple associated persons who reside at that location and are members of the same immediate family, conduct business at the location;²⁰² (2) the location is not held out to the public as an office;²⁰³ (3) the associated person does not meet with customers or prospective customers at the location;²⁰⁴ (4) any sales activity that takes place at the location complies with the conditions set forth under Rule 3110(f)(2)(A)(ii) or (iii);²⁰⁵ (5) neither customer funds nor securities are handled at that location;²⁰⁶ (6) the associated person is assigned to a designated branch office, and such designated branch office is reflected on all business cards, stationery, retail communications, and other communications to the public by such associated person;²⁰⁷ (7) the associated person's correspondence and communications with the public are subject to the member firm's supervision in accordance with Rule 3110;²⁰⁸ and (8) the associated person's electronic communications (e.g., email) are made through the member's electronic system.²⁰⁹

One commenter opposed the requirement, set forth in proposed Rule 3110.19(a)(1), that only one associated person, or multiple associated persons who reside at that location and are members of the same immediate family, conduct business at the location.²¹⁰ This commenter stated that this proposed condition would not provide any meaningful investor protection safeguards because associated persons who reside together "to afford the rising cost of housing" do not necessarily pose a higher risk to investor protection.²¹¹ This commenter further stated that this

proposed condition is "unnecessarily narrow and restrictive."²¹²

In response, FINRA declined to modify proposed Rule 3110.19(a)(1).²¹³ FINRA emphasized that the proposed rule change "is intended to align with one of several conditions to the current" primary and non-primary residence exclusions.²¹⁴ FINRA also noted that the proposed rule change aligns with SEC Books and Records rules, which provide (among other things) that "a broker dealer is not required to maintain records at an office that is a private residence 'where only one associated person (or multiple associated persons who reside at that location and are members of the same immediate family) regularly conducts business.'" ²¹⁵ Although FINRA declined to modify this proposed condition, it stated that it would consider relevant comments "in connection with future initiatives to consider the OSJ and branch office definitions more broadly." ²¹⁶

A second commenter requested that FINRA modify proposed Rule 3110.19(a)(7), which would require that the associated person's correspondence and communications with the public be subject to the member firm's supervision in accordance with Rule 3110.²¹⁷ The commenter stated that this language improperly focuses on the recipient (as opposed to the subject) of the communications, and its reference to "the public" is unclear.²¹⁸ The commenter recommended that the condition instead require that "all correspondence and communications by the associated person related in any way to existing or potential business activities [be] subject to the firm's supervision in accordance with [Rule 3110]." ²¹⁹

²¹² See CAI, Exhibit A at 2 ("The Committee believes that this language is unnecessarily narrow and restrictive and would limit the ability of a location, in several common scenarios, to claim [RSL] status, without providing any meaningful investor protection safeguards.").

²¹³ FINRA Response I at 3–4.

²¹⁴ *Id.* at 3.

²¹⁵ *Id.* at 3–4 (quoting 17 CFR 240.17a–4(l)).

²¹⁶ *Id.* at 4. FINRA acknowledged that Rule 3110(f)(2) does not define "immediate family," but it noted that this term is defined in Rule 3241. *Id.* at 4 n.12.

²¹⁷ See proposed Rule 3110.19(a)(7); NASAA I at 1 ("We reiterate and incorporate our previous comments on [File Number FINRA–SR–2022–019]"; see also NASAA (8/23/2022) at 12 (addressing the same provision), <https://www.sec.gov/comments/sr-firna-2022-019/srfinra2022019-20137298-307861.pdf>).

²¹⁸ See NASAA I at 1; see also NASAA (8/23/2022) at 12.

²¹⁹ *Id.*

registered representative within the five-year period immediately preceding the designation and has fulfilled all applicable prerequisite registration, fee and examination requirements prior to designation as a principal. However, in no event may such person function as a principal beyond the initial 120 calendar day period without having successfully passed an appropriate principal qualification examination as specified under Rule 1220(a)."

¹⁹⁶ Section 3(a)(39) of the Exchange Act identifies a list of events that disqualify someone from membership in, participation in, or association with a member of a self-regulatory organization. 15 U.S.C. 78c(a)(39).

¹⁹⁷ See *supra* note 73.

¹⁹⁸ See FINRA Rule 3110(c)(1); proposed Rule 3110.19(a).

¹⁹⁹ See proposed Rule 3110.19(a). SEB Securities stated that the proposed rule change "does not fully explain how often a home office would need to be used to be considered a non-branch location or RSL" and questioned whether the RSL designation is "only for associated persons whose primary place of business is their home." Letter from Anonymous, Compliance Officer, SEB Securities, Inc. ("SEB"), to the Commission, dated July 13, 2023. FINRA responded that SEB's comment relates to a "broader question about the branch office definition" and that the proposed rule change "is not intended to change" the longstanding definition of "branch office," which has been in effect since 2006. FINRA Response II at 8.

²⁰⁰ Notice at 20576.

²⁰¹ *Id.*

²⁰² See proposed Rule 3110.19(a)(1).

²⁰³ See proposed Rule 3110.19(a)(2).

²⁰⁴ See proposed Rule 3110.19(a)(3).

²⁰⁵ See proposed Rule 3110.19(a)(4). Rule

3110(f)(2)(A)(ii) and (iii) identify the conditions for the primary and non-primary residence exclusions. For a discussion of those exclusions, see Section II(A)(1)(c) above.

²⁰⁶ See proposed Rule 3110.19(a)(5).

²⁰⁷ See proposed Rule 3110.19(a)(6).

²⁰⁸ See proposed Rule 3110.19(a)(7).

²⁰⁹ See proposed Rule 3110.19(a)(8).

²¹⁰ CAI at 1–2.

²¹¹ See CAI at 1–2, Exhibit A at 2.

In response, FINRA declined to modify proposed Rule 3110.19(a)(7).²²⁰ FINRA explained that the proposed language “aligns with existing rule text used in the primary residence exclusion in Rule 3110(f)(2)(A)(ii)[(e)] and aligns with the terminology in FINRA Rule 2210 (Communications with the Public).”²²¹ Adopting the commenter’s proposed alternative would, FINRA stated, “create an incongruity within Rule 3110 and raise questions about the difference in meanings.”²²²

A commenter requested to expand proposed Rule 3110.19(a)(7) to require that “all correspondence and communications by the associated person related in any way to existing or potential business activities [be] subject to the firm’s supervision in accordance with [Rule 3110].”²²³ However, Rule 3110 already imposes broad supervision requirements to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules, and those obligations would apply to RSLs.²²⁴ Moreover, the proposed condition’s use of the term “communications with the public” aligns with language in FINRA Rule 2210, the SEC Books and Records Rule,²²⁵ and the preexisting residential exclusions,²²⁶ and so should be familiar to both firms and to regulators. For these reasons, it is reasonable for FINRA to retain the same condition as that for the primary and non-primary residence exclusions.

No other commenter offered specific support for or opposition to any of the remaining six conditions adapted from the primary and non-primary residence exclusions.²²⁷

Each of these eight conditions imposes a reasonable limitation on the designation of an RSL. Limiting an RSL designation to a location with only one associated person, or multiple associated persons who reside at that location and are members of the same immediate family, is a reasonable limitation in light of FINRA’s stated

intention to align the condition with the SEC Books and Records rules.²²⁸ Restrictions on activities that occur at the RSL, such as prohibitions involving interactions with customers (e.g., not holding the office out to the public, not meeting customers or prospective customers in-person, and limitations on sales activities) and the handling of customer funds and securities,²²⁹ will limit higher risk activities occurring at an RSL that may benefit from more frequent inspection of the location. Furthermore, requiring an associated person to be assigned to a designated branch office and to name that branch office on all of their communications with the public²³⁰ provides investors with information about the person with whom they are conducting business. In addition, the affirmative obligations in the conditions, such as explicitly subjecting the associated person’s correspondence and communication with the public to the member firm’s supervision and requiring the associated person’s electronic communications to be made through the member firm’s electronic system,²³¹ will help provide the member firm with enhanced supervisory oversight of certain activities directly involving investors, and thereby lower risk associated with an RSL. Moreover, incorporating the conditions from the preexisting residential exclusions, a rule that FINRA has experience in administering and that the industry is familiar with, will promote regulatory consistency and minimize regulatory confusion, thereby enhancing investor protection.

b. Books and Records

As its ninth condition for designation as an RSL, the proposed rule change would impose the following recordkeeping requirements: (1) the member must have a recordkeeping system that makes, keeps current, and preserves records required to be made, kept current, and preserved under applicable securities laws and regulations, FINRA rules, and the member’s own written supervisory procedures under Rule 3110; (2) such records must not be physically or electronically maintained and preserved at the office or location; and (3) the member must have prompt access to such records.²³² Because books and records required to be made and preserved would not be maintained on-site at the RSL, FINRA believes that this

condition “strengthen[s] a firm’s ability to monitor the supervisory activities occurring” at an RSL and lowers overall risk.²³³

Two commenters supported this recordkeeping condition.²³⁴ One stated that requiring members to have “prompt access” to their records “would better enable firms to supervise their associated persons centrally” and “protect against misappropriation and misuse of sensitive customer information.”²³⁵ The second commenter agreed with prohibiting the preservation and maintenance of books and records at the RSL.²³⁶ No commenter opposed this proposed condition.

The proposed rule change’s recordkeeping conditions are reasonable. Prompt access to an RSL’s records from an alternative location decreases the need for more frequent inspection of the RSL. Specifically, the proposed rule change couples the prompt-access requirement with a prohibition on the physical or electronic storage of records at the RSL location. Because records would not be located at the RSL, the member firm should have the ability to supervise the RSL remotely so long as it can promptly access such records, thus decreasing the need for a more frequent inspection cycle. Consequently, the recordkeeping condition would help facilitate the timely and effective supervision of an RSL’s business activities.

c. Surveillance and Technology Tools

The tenth condition for designation as an RSL would require a member firm to “determine that its surveillance and technology tools are appropriate to supervise the types of risk[] presented by each [RSL].”²³⁷ The proposed rule change explains that these tools may include but are not limited to: (1) firm-wide tools, such as an electronic recordkeeping system, electronic surveillance of email and correspondence, electronic trade blotters, regular activity-based sampling reviews, and tools for visual inspections; (2) tools specific to the RSL based on the activities of the associated person assigned to the location, products offered, and restrictions on the activity of the RSL; and (3) system tools, such as secure network connections and effective cybersecurity protocols.²³⁸ No commenter offered specific support for

²²⁰ Letter from Kosha Dalal, Vice President and Associate General Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated Oct. 31, 2022, at 8, available as Exhibit 2b to File Number FINRA-SR-2023-006 (addressing the same provision).

²²¹ *Id.*

²²² *Id.*

²²³ See NASAA I at 1; NASAA (8/23/2022) at 12.

²²⁴ FINRA Rules 3110(a); see FINRA Rules 3110(b)(4), 3110.06, and 3110.09.

²²⁵ 17 CFR 240.17a-4(b)(4) (requiring preservation of “[o]riginals of all communications . . . which are subject to the rules of a self-regulatory organization of which the member, broker[,] or dealer is a member regarding communications with the public.”).

²²⁶ FINRA Rule 3110(f)(2)(A)(ii)(e).

²²⁷ Proposed Rule 3110(a)(2) through (6), (8).

²²⁸ See *supra* note 215 and accompanying text.

²²⁹ Proposed Rule 3110.19(a)(2) through (5).

²³⁰ Proposed Rule 3110.19(a)(6).

²³¹ Proposed Rule 3110.19(a)(7) and (8).

²³² See proposed Rule 3110.19(a)(9).

²³³ See Notice at 20576.

²³⁴ See NASAA I at 2-3; Davenport at 2.

²³⁵ NASAA I at 2-3.

²³⁶ Davenport at 2.

²³⁷ Proposed Rule 3110.19(a)(10).

²³⁸ See proposed Rule 3110.19(a)(10).

or opposition to this proposed condition.

FINRA justified the proposed rule change, in part, on technological advancements that equip firms to supervise employees working from remote locations.²³⁹ Therefore, it is reasonable to require any member firm taking advantage of the proposed rule change—and its less-frequent inspection cycle—to first determine that its surveillance and technology tools are appropriate to supervise the types of risks presented by each RSL. To aid member firms in this assessment, the non-exhaustive list of tools outlined in the proposed rule change, including firm-wide tools and tools particular to the RSL based on the activities of the person assigned to that RSL, help illustrate FINRA's expectations and will assist firms in implementing robust surveillance systems.

4. Obligation To Provide List of RSLs to FINRA

As stated above, proposed Rule 3110.19(d) would require any member firm that has designated any RSL locations to provide a current list of all of its RSL locations to FINRA on a quarterly basis.²⁴⁰

Two commenters supported the proposed rule change, and one of them labeled this quarterly-reporting requirement as “critical” to the ability of regulators “to effectively oversee firms’ important supervisory functions.”²⁴¹ Two other commenters opposed the proposed rule change because of the inefficiency that would result.²⁴² Instead of a quarterly filing

that provides intermittent snapshots of RSL designations, the opposing commenters recommended that FINRA leverage CRD and the existing branch office registration process to continuously collect timely information on RSL designations.²⁴³ For example, one opposing commenter emphasized that using the existing branch-office registration process would provide FINRA “with more current information . . . because of existing requirements to amend and update information within 30 days.”²⁴⁴

In response, FINRA declined to modify the proposed rule change.²⁴⁵ FINRA indicated, however, that it appreciates the commenters’ recommendations and “is exploring ways for firms to provide this information to FINRA and other state regulators in a more efficient manner.”²⁴⁶ No commenter offered a specific response to FINRA’s decision not to modify the proposed rule change, although one commenter encouraged FINRA to seek input from its members to avoid creating an “overly burdensome reporting process.”²⁴⁷

Prompt access to information about a member firm’s RSL designations should improve the ability of FINRA to readily identify which of a member firm’s locations have been designated as an RSL and more efficiently assess the reasonableness of a member firm’s RSL designations and corresponding supervision. Therefore, the proposed rule change’s quarterly-reporting requirement is reasonable and would provide FINRA with the information it needs to carry out its regulatory obligations.²⁴⁸

5. Risk Assessment

As stated above, proposed Rule 3110.19(e) would require a member

Holly Butson, Chief Compliance Officer, Nationwide Fund Distributors, LLC, Nationwide Financial Services, Inc. to Sherry Haywood, Assistant Secretary, Commission, dated Apr. 24, 2023, at 2 (“Nationwide”); FSI at 3–4.

²⁴³ See Nationwide at 2; FSI at 3–4.

²⁴⁴ FSI at 3–4; see Nationwide at 2 (recommended “a separate filing for [an RSL] like a Form BR 2, similar to the U4 page 2 process, so that members have a way to track and link Registered Representatives who are supervised from the [RSL] not an OSJ”).

²⁴⁵ See FINRA Response I at 9.

²⁴⁶ *Id.*; FINRA Response II at 7 (FINRA “is exploring ways for firms to provide this information to FINRA and state regulators in a more efficient and timely manner, including through the use of existing uniform registration forms or FINRA Gateway.”).

²⁴⁷ XML at 2.

²⁴⁸ FINRA indicated that it is exploring ways to structure this data-collection requirement, and it expressed appreciation for the commenters’ suggestions. FINRA Response I at 9; FINRA Response II at 7.

firm—prior to designating any location as an RSL—to “develop a reasonable risk-based approach to designating such office or location as an RSL, and [to] conduct and document a risk assessment” that considers five mandatory factors.²⁴⁹ These factors would require consideration of, among other things, customer complaints, firm-imposed heightened supervisory plans, and regulatory communications indicating a failure to reasonably supervise.²⁵⁰ The proposed rule change also would require the member to account for any higher risk activities occurring at the location, any higher risk associated persons assigned to the location, and any indicators of irregularities or misconduct (*i.e.*, red flags) prior to designating a location as an RSL.²⁵¹ Further, the proposed rule change would provide that member firms should review red flags—and consider evidencing their review—in determining whether it is reasonable to maintain an RSL designation for a particular location.²⁵² FINRA explained that this risk assessment—and the non-exhaustive list of factors to consider—would strengthen supervisory controls and further investor protection “by requiring firms to consider higher risk criteria in determining whether to designate an office or location as an RSL.”²⁵³

One commenter offered unqualified support for the proposed rule change.²⁵⁴ Two other supportive commenters asked that FINRA clarify and modify one aspect of proposed Rule

²⁴⁹ Proposed Rule 3110.19(e); Amendment No. 1 at 8; Amendment No. 2 at 4–5. The five mandatory factors are: “(1) customer complaints, taking into account the volume and nature of the complaints; (2) heightened supervision other than where such office or location is ineligible for RSL designation under [proposed Rule 3110.19(c)(3)]; (3) any failure to comply with the member’s written supervisory procedures; (4) any recordkeeping violation; and (5) any regulatory communications from a Regulator, indicating that the associated person at such office or location failed reasonably to supervise another person subject to their supervision, including but not limited to, subpoenas, preliminary or routine regulatory inquiries or requests for information, deficiency letters, ‘blue sheet’ requests or other trading questionnaires, or examinations.” See proposed Rule 3110.19(e).

²⁵⁰ See *supra* note 103 and accompanying text.

²⁵¹ Proposed Rule 3110.19(e).

²⁵² *Id.*

²⁵³ FINRA Response I at 9–10; Amendment No. 1 at 8.

²⁵⁴ Cetera II at 1 (“We endorse the requirement for member firms to develop and document a risk-based assessment before designating a location[] as an RSL. This approach is both logical and proportional.”); see XML at 2 (“In addition to the time needed to address other requirements in Rule 3110.19, members will need adequate time to develop policies and procedures to comply with the location assessments and documentation requirements of Rule 3110.19(e) and time to implement and perform such activities.”).

²³⁹ Notice at 20575 (“FINRA believes that the structural and lifestyle changes for member firms and their workforce catalyzed by the pandemic—along with advances in technology—merit reevaluation of some aspects of the branch office registration and inspection requirements.”). 20575 (firms indicated that they responded to the COVID-19 pandemic by relying “extensively on technology to support their effective transition to the remote work environment and enhance the supervision of geographically dispersed associated persons, many of whom have been working from home since early 2020 and may continue to do so in some manner in the current environment. These technological tools facilitating their supervisory practices include surveillance systems, electronic tracking programs or applications, and electronic communications, including video conferencing tools.”).

²⁴⁰ Proposed Rule 3110.19(d) (“A member that elects to designate any office or location of the member as an RSL pursuant to [proposed Rule 3110.19] shall provide FINRA with a current list of all locations designated as RSLs by the 15th day of the month following each calendar quarter in the manner and format (*e.g.*, through an electronic process or such other process) as FINRA may prescribe.”).

²⁴¹ NASAA I at 2; see Davenport at 2.

²⁴² See letter from James Rabenstein, Vice President, NISC and NSLLC Chief Compliance Officer, Nationwide Office of the Chief Legal Officer, Nationwide Financial Services, Inc. and

3110.19(e)(5).²⁵⁵ As originally proposed in Amendment No. 1, the risk assessment would have required members to consider, among other things, “any regulatory communications from a Regulator, including but not limited to, subpoenas, preliminary or routine regulatory inquiries or requests for information, deficiency letters, ‘blue sheet’ requests or other trading questionnaires, or examinations indicating that the associated person at such office or location failed reasonably to supervise another person subject to their supervision.”²⁵⁶ The commenters that asked for modifications both questioned whether the italicized language modified the preceding illustrative list or only “examinations.”²⁵⁷

In response to the commenters’ concern about ambiguity in the scope of proposed Rule 3110.19(e)(5), FINRA reorganized the proposed rule text to improve its readability.²⁵⁸ As modified by Amendment No. 2, proposed Rule 3110.19(e)(5) reads as follows: “any regulatory communications from a Regulator, indicating that the associated person at such office or location failed to reasonably supervise another person subject to their supervision, including but not limited to, subpoenas, preliminary or routine regulatory inquiries or requests for information, deficiency letters, ‘blue sheet’ requests or other trading questionnaires, or examinations.”²⁵⁹

One opposing commenter stated that the risk assessment’s requirement “to ‘consider’ higher risk criteria” is insufficient.²⁶⁰ For example, this commenter stated that red flags and many of the risk assessment’s factors should constitute eligibility exclusions, not just factors for a member to consider.²⁶¹ In addition, the commenter

criticized FINRA’s “complete lack of guidance as to how to weigh and assess the various risk criteria,” including the volume and nature of customer complaints.²⁶²

In response, FINRA stated that it “expects that a firm will consider customer complaints and weigh their volume and nature based on the firm’s business, products, and customer base among other factors generally considered by the firm when making risk-based assessments in other contexts, such as in how a firm may establish and maintain a supervisory system that is appropriately tailored to the firm’s business and structure, whether unannounced visits to an office or location may be appropriate, or whether heightened supervisory procedures may need to be imposed.”²⁶³

As stated above, the proposed rule change’s member- and location-level exclusions prohibit the designation of RSLs in certain circumstances that may indicate a higher potential risk of non-compliance. But other factors not explicitly identified among the exclusions can, in certain circumstances, indicate heightened levels of risk either before or after RSL designation. Proposed Rule 3110.19(e) will help to mitigate residual risk not explicitly addressed in the conditions, firm-level exclusions, and location-level exclusions. Specifically, the proposed rule change would require a member firm to assess and document for each associated person at a candidate RSL certain indicia of risk, including the volume and nature of customer complaints, any firm-imposed heightened supervisory plans, and any regulatory communications indicating that the associated person failed reasonably to supervise another person subject to their supervision, prior to RSL designation. In addition, the proposed rule change would require a member to account for any higher risk activities occurring at the location, any higher risk associated persons assigned to the location, and any red flags when designating a location as an RSL. Furthermore, the proposed rule change emphasizes consideration of red flags as part of a member firm’s ongoing determination of whether it is

reasonable to maintain an RSL designation. In this way, the proposed rule change helps to ensure that a member firm designating RSLs appropriately accounts for the full range of risks associated with each proposed RSL. For these reasons, the proposed rule change is reasonable.

A commenter asserted that the five factors in the risk assessment should instead be eligibility exclusions and noted the absence of guidance as to how to weigh and assess the various risk factors.²⁶⁴ As an assessment of the risk associated with each factor will depend on the facts and circumstances of each case, no single factor lends itself to an automatic exclusion. For example, customer complaints may, in certain cases, indicate an unacceptable level of risk, but in other cases, complaints may be overly broad or lack factual development to indicate the level of risk. Moreover, as discussed below, this is an ongoing risk assessment, and its outcome could change with new circumstances or as the member firm obtains additional information. Therefore, it is reasonable for FINRA to instead require that firms consider each factor as part of a person-specific risk assessment prior to RSL designation. Similarly, it is reasonable that the proposed rule change provides member firms flexibility as to how to weigh and assess the various risk factors.

6. Frequency of Inspections

RSL designation would permit firms to inspect the location on a regular periodic schedule (presumed to be at least every three years) instead of the annual schedule otherwise required for OSJs and supervisory branch offices.²⁶⁵

²⁶⁴ PIABA II at 4.

²⁶⁵ Proposed Rule 3110.19(a); FINRA Rules 3110(c)(1)(C) and 3110.13. Virtu Financial, Inc., and Nationwide submitted out-of-scope comments regarding the frequency and method of inspections. Virtu asked FINRA to modify the proposed rule change “to codify that all personal residences where only electronic activities are carried out, whether those be supervisory or other securities-related activities, are non-branch locations and reconsider the need to conduct any physical inspections of an associated person’s residence and instead rely on technological monitoring tools and electronic recordkeeping.” Letter from Thomas M. Merritt, Deputy General Counsel, Virtu Financial, Inc., to Vanessa Countryman, Secretary, Commission, dated Aug. 1, 2023, at 2 (“Virtu”). Nationwide asked FINRA to permit certain limited-purpose OSJs, supervisory branch offices, and RSLs to be inspected remotely and/or on a five-year inspection cycle. Nationwide at 1–2. Because the proposed rule change is designed to establish a new location designation (RSL) for certain personal residences at which supervisory activities occur, the recommendations regarding the method of inspection are outside the scope of the proposed rule change. Because Nationwide appears to request an amended inspection schedule for any limited-purpose OSJ, supervisory branch office, or RSL—

²⁵⁵ SIFMA II at 1–2 (offering general support for the proposed rule change); Fidelity II at 2 (“We conceptually support the addition of a risk assessment and appreciate there may be instances where use of the RSL is not appropriate.”).

²⁵⁶ Proposed Rule 3110.19(e)(5) (emphasis added); Amendment No. 1 at 8.

²⁵⁷ SIFMA II at 2–3 (“It is not clear whether the emphasized phrase is meant to modify all the listed types of communications or only examinations. It may be difficult to determine how these non-investigatory communications indicate a risk presented by an RSL absent an indication of supervisory concern.”); Fidelity II at 2 (“It is not clear whether the phrase ‘indicating that the associated person at such office or location failed reasonably to supervise another person subject to their supervision’ is meant to modify all the listed types of communications or only examinations.”)

²⁵⁸ FINRA Response II at 8; Amendment No. 2 at 4.

²⁵⁹ Proposed Rule 3110.19(e)(5); Amendment No. 2.

²⁶⁰ PIABA II at 4.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ FINRA Response II at 7; see FINRA Response I at 7 (“FINRA emphasizes that the enumerated list of factors is non-exhaustive. While consumer-initiated, investment-related arbitration or civil litigation is not listed as one of the enumerated factors under proposed Rule 3110.19(e), FINRA agrees that the presence of such arbitration or civil litigation would be a factor for a firm to consider as part of the risk assessment.”).

Two commenters opposed this less-frequent inspection cycle and contended that RSLs should be inspected annually.²⁶⁶ Emphasizing the importance of effective supervision, one commenter stated that “[l]ax or otherwise ineffective supervision can result in the failure to stop preventable harms before they occur, or even exacerbate harms that have already begun.”²⁶⁷ Although the commenter did not dispute the emergence of the hybrid work environment and supervision technologies, it contended that those developments have no “bearing on the appropriate frequency or depth of scrutiny of supervisory activities.”²⁶⁸ It also contended that “FINRA has not shown that supervisory functions present sufficiently ‘lower risk’ to warrant loosening oversight of individuals performing those functions.”²⁶⁹

In response, FINRA declined to require annual inspections for RSLs, explaining that “impos[ing] an annual inspection cycle on an RSL would adversely impact the utility” of the proposed rule change.²⁷⁰ FINRA stressed that “the inspection requirement is only one part” of a member firm’s “ongoing obligation” to supervise under Rule 3110, and “a firm’s inspection of an office or location is not the only occasion during which a firm supervises its associated persons.”²⁷¹ Indeed, FINRA stated that Rule 3110 “does not preclude a firm from conducting inspections of its offices or locations more frequently or conducting unannounced visits.”²⁷² FINRA also stated that the proposed rule change includes “a rigorous set of safeguards and conditions that . . . align with the regulatory purposes of Rule 3110.”²⁷³

The proposed rule change permits—but does not require—member firms to inspect their RSLs on a less frequent inspection cycle. This proposed rule change is reasonable for two reasons.

regardless of its status as a personal residence—the request to for a five-year inspection cycle is likewise outside the scope of the proposed rule change. FINRA stated, however, that it would consider these recommendations “more generally as part of any future initiatives to consider the OSJ and branch office definitions more broadly.” FINRA Response I at 13; FINRA Response II at 9.

²⁶⁶ NASAA I at 3; NASAA II at 5; PIABA I at 3 (“[R]esidential supervisory locations should at minimum be subject to annual in person audits, if not more frequent unannounced visits, rather than periodic inspections every three years.”).

²⁶⁷ NASAA I at 3.

²⁶⁸ *Id.* at 4.

²⁶⁹ *Id.* at 3; see NASAA II at 5.

²⁷⁰ FINRA Response I at 10–12.

²⁷¹ *Id.* at 12.

²⁷² *Id.*

²⁷³ *Id.* at 11.

First, the proposed rule change is reasonable in light of Rule 3110’s general obligation to establish and maintain a reasonably designed supervisory system that is tailored to its unique business operations and associated risks. Although an RSL designation would permit a member firm to inspect a location on a less frequent schedule, the proposed rule change would not limit inspections to this less frequent schedule. Instead, Rule 3110 contemplates that a member firm may, in certain circumstances, choose to conduct more frequent or unannounced visits to an RSL in furtherance of its obligation to supervise effectively. In this way, the proposed rule change is consistent with that obligation.

Relatedly, the Rule 3110 requirement to maintain a reasonably designed supervisory system is an ongoing obligation. A firm may need to reconsider a residence’s RSL designation, and the corresponding relief from annual inspection, if circumstances suggest that the designation may no longer be appropriate. Importantly, proposed Rule 3110.19(e) indicates that firms should review red flags when determining whether it is reasonable to maintain an RSL designation. The various terms and conditions associated with initial RSL designation therefore are only the beginning of an ongoing assessment of a location’s qualification for RSL designation and less frequent inspections.

Second, the proposed rule change is reasonable in light of its terms and conditions. The member- and location-level eligibility exclusions would identify—and exclude—certain firms and locations with characteristics that may indicate a higher potential risk of non-compliance.²⁷⁴ Additionally, an eligible member firm may designate its eligible location as an RSL only if it complies with ten conditions, such as limitations on customer interactions, a recordkeeping requirement, and a mandatory technology assessment.²⁷⁵ Even if an eligible member firm is prepared to comply with those ten conditions, it must still “develop a reasonable risk-based approach to designating [the eligible location] as an RSL, and conduct and document a risk assessment for the associated person assigned to” the proposed RSL.²⁷⁶ These layers of protection are designed to limit RSL designation (and its less-frequent inspection cycle) to locations without

indicia of increased potential risk of non-compliance. With those safeguards, a regular periodic inspection schedule is reasonable for those locations that can comply with the proposed rule change’s various terms and conditions.

IV. Solicitation of Comments on Amendment No. 2

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 2 is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission’s internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-FINRA-2023-006 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-FINRA-2023-006. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission’s Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. 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-FINRA-2023-006 and

²⁷⁴ Proposed Rule 3110.19(b), (c).

²⁷⁵ Proposed Rule 3110.19(a).

²⁷⁶ Proposed Rule 3110.19(e).

should be submitted on or before December 15, 2023.

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment Nos. 1 and 2

The Commission finds good cause to approve the proposed rule change, as modified by Amendment Nos. 1 and 2, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 2 in the **Federal Register**.²⁷⁷ In Amendment No. 2, FINRA modified the proposed rule change—in direct response to comments received—to clarify the substantive intent of proposed Rule 3110.19(e)(5). FINRA did not propose to change any substantive obligation of the proposed rule change. To reduce ambiguity regarding its scope, FINRA instead proposed to reorganize a single sentence describing a single factor in the mandatory risk assessment.²⁷⁸ The basis for this amendment is the same as the basis for the original proposed rule change, as modified by Amendment No. 1, which the Commission previously noticed for public comment.

After consideration of the comments FINRA received on the proposed rule change, the Commission concludes that Amendment No. 2 represents a reasonable extension of, and is substantially similar to, the language originally proposed for proposed Rule 3110.19(e). The Commission also concludes that Amendment No. 2 responds to comments received, adds clarity to the proposed rule change, and does not raise any novel regulatory concerns. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,²⁷⁹ to approve the proposed rule change, as modified by Amendment Nos. 1 and 2, on an accelerated basis.

VI. Conclusion

For the reasons set forth above, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1 and 2, is consistent with Section 15A(b)(6) of the Exchange Act, which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and, in general, protect investors and the public interest.²⁸⁰

It is therefore ordered pursuant to Section 19(b)(2) of the Exchange Act ²⁸¹

that the proposed rule change (SR–FINRA–2023–006), as amended by Amendment Nos. 1 and 2, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁸²

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–25880 Filed 11–22–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98982; File No. SR–FINRA–2023–007]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change To Adopt Supplementary Material .18 (Remote Inspections Pilot Program) Under FINRA Rule 3110 (Supervision)

November 17, 2023.

I. Introduction

On April 14, 2023, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change SR–FINRA–2023–007 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”) ¹ and Rule 19b–4 ² thereunder, to adopt a voluntary, three-year remote inspections pilot program to allow eligible member firms to elect to fulfill their obligation under paragraph (c) (Internal Inspections) of FINRA Rule 3110 (Supervision) by conducting inspections of eligible branch offices,³ offices of supervisory jurisdiction

(“OSJ”),⁴ and non-branch locations⁵ remotely without an on-site visit to such locations,⁶ subject to specified safeguards and limitations (the “Pilot”).⁷ The proposed rule change was published for public comment in the **Federal Register** on May 4, 2023.⁸ The Commission received thirteen comment letters in response to the Notice.⁹ On June 7, 2023, FINRA consented to an extension of the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to August 2, 2023.¹⁰ On

⁴ An OSJ is any office of a member firm at which any one or more of the following functions take place: (1) order execution or market making; (2) structuring of public offerings or private placements; (3) maintaining custody of customers’ funds or securities; (4) final acceptance (approval) of new accounts on behalf of the member firm; (5) review and endorsement of customer orders, pursuant to FINRA Rule 3110(b)(2); (6) final approval of retail communications for use by persons associated with the member firm, pursuant to FINRA Rule 2210(b)(1), except for an office that solely conducts final approval of research reports; or (7) having responsibility for supervising the activities of persons associated with the member firm at one or more other branch offices of the member firm. See FINRA Rule 3110(f)(1).

⁵ Seven types of locations—often referred to as “unregistered offices” or “non-branch locations”—are excluded from the definition of “branch office”: (1) any location that is established solely for customer service or back office type functions where no sales activities are conducted and that is not held out to the public as a branch office; (2) any location that is the associated person’s primary residence, subject to certain conditions; (3) any location, other than a primary residence, that is used for securities business for less than 30 business days in any one calendar year, subject to certain conditions; (4) any office of convenience, where associated persons occasionally and exclusively by appointment meet with customers, which is not held out to the public as an office; (5) any location that is used primarily to engage in non-securities activities and from which the associated person(s) effects no more than 25 securities transactions in any one calendar year (provided that any retail communication identifying such location also sets forth the address and telephone number of the location from which the associated person(s) conducting business at the non-branch locations are directly supervised); (6) the “floor” of a registered national securities exchange where a member firm conducts a direct access business with public customers; and (7) a temporary location established in response to the implementation of a business continuity plan. See FINRA Rule 3110(f)(2)(A)(i)–(vii).

⁶ Unless otherwise specified, the Commission uses the term “location” in this Order to refer to any location where a member firm does business, such as an OSJ, supervisory branch office, non-supervisory branch office, or non-branch location, as applicable.

⁷ See proposed Rule 3110.18.

⁸ Exchange Act Release No. 97398 (Apr. 28, 2023), 88 FR 28620 (May 4, 2023) (File No. SR–FINRA–2023–007) (“Notice”).

⁹ The comment letters are available at <https://www.sec.gov/comments/sr-finra-2023-007/srfinra2023007.htm>.

¹⁰ See letter from Sarah Kwak, Associate General Counsel, Office of General Counsel, FINRA, to

²⁸² 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ A “branch office” is defined as: (1) “any location where one or more associated persons of a member firm regularly conducts the business of effecting any transactions in, or inducing or attempting to induce the purchase or sale of, any security, or is held out as such”; or (2) “any location that is responsible for supervising the activities of persons associated with the member at one or more non-branch locations of the member.” FINRA Rule 3110(f)(2)(A) and (B). A branch office is either “supervisory” (*i.e.*, it supervises one or more non-branch locations) or “non-supervisory” (*i.e.*, it does not supervise one or more non-branch locations). See FINRA Rule 3110(c)(1).

²⁷⁷ See 15 U.S.C. 78s(b)(2)(C)(iii).

²⁷⁸ See *supra* notes 258 through 259 and accompanying text.

²⁷⁹ 15 U.S.C. 78s(b)(2).

²⁸⁰ 15 U.S.C. 78o–3(b)(6).

²⁸¹ 15 U.S.C. 78s(b)(2).

August 1, 2023, FINRA filed an amendment to modify the proposed rule change (“Amendment No. 1”).¹¹ On August 2, 2023, the Commission published a notice of filing of Amendment No. 1 and an order instituting proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1 (hereinafter, the “proposed rule change” unless otherwise specified).¹² The Commission received ten comment letters in response to the notice of Amendment No. 1 and order instituting proceedings.¹³ On August 29, 2023, FINRA responded to the comment letters received in response to the Notice.¹⁴ On September 22, 2023, FINRA consented to an extension of the time period in which the Commission must approve or disapprove the proposed rule change to December 30, 2023.¹⁵ On October 25, 2023, FINRA responded to comments received in response to the notice of Amendment No. 1 and order instituting proceedings.¹⁶

This Order approves the proposed rule change.

A. Description of the Proposed Rule Change

FINRA stated that technological advancements and an emerging remote workplace prompted FINRA to further study the effectiveness of remote inspections as part of a reasonably designed supervisory system.¹⁷ As a result of this evaluation, FINRA determined the Pilot would provide it “the opportunity to gauge the

effectiveness of remote inspections as part of a modernized, reasonably designed supervisory system that reflects the current work environment and availability of technologies that did not exist when the on-site inspection originally was conceived.”¹⁸ After describing the current regulatory framework and FINRA’s stated reasons for proposing the Pilot, the Commission describes the proposed rule change.

B. Background

1. FINRA Rule 3110 (Supervision)

FINRA Rule 3110(a) (Supervisory System) requires a member firm to establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and applicable FINRA rules (hereinafter, a “reasonably designed supervisory system”).¹⁹ As part of a reasonably designed supervisory system, FINRA Rule 3110(c) (Internal Inspections) requires a member firm to conduct a review, at least annually, of the businesses in which it engages in a manner reasonably designed to assist the member firm in detecting and preventing violations of, and achieving compliance with, applicable securities laws and regulations, and with applicable FINRA rules. FINRA Rule 3110(c) also requires a review of the activities of each of the member firm’s locations, including a periodic examination of customer accounts to detect and prevent irregularities or abuses, and each member firm also must retain a written record of the date upon which each review and inspection is conducted.²⁰

FINRA Rule 3110(c) sets forth three main components for conducting internal inspections. First, a member firm must conduct an inspection of each location on a designated frequency. The designated frequency varies depending on the classification of the location and the nature of the securities activities for which each location is responsible: OSJs and supervisory branch offices must be inspected at least annually;²¹ non-supervisory branch offices must be inspected at least every three years;²² and non-branch locations must be inspected on a periodic schedule, presumed to be at least every three years.²³ FINRA has interpreted the rule

to require that inspections take place on-site, irrespective of the type of office.²⁴

Second, a member firm must make and retain a written record of each inspection. Specifically, a member firm must retain a written record of the date upon which each review and inspection occurred;²⁵ reduce each location’s inspection to a written report;²⁶ and keep each inspection report on file either for a minimum of three years or, if the location’s inspection schedule is longer than three years, at least until the next inspection report has been written.²⁷ If applicable to the location being inspected, the inspection report must include the testing and verification of the member firm’s policies and procedures, including supervisory policies and procedures, in specified areas.²⁸

Third, a member firm must address potential conflicts of interest related to inspections of its locations. For example, a member firm must: (1) have procedures reasonably designed to prevent the effectiveness of the inspections from being compromised due to the conflicts of interest that may be present with respect to the location;²⁹ and (2) ensure that the person conducting the inspection is not an associated person assigned to the location or is not directly or indirectly supervised by, or otherwise reporting to,

Periodic Inspection Schedules). On November 17, 2023, the Commission issued an approval order for File Number FINRA–2023–006, which adopted new Supplementary Material .19 (Residential Supervisory Location) under FINRA Rule 3110 (Supervision). FINRA Rule 3110.19 treats a private residence at which an associated person engages in certain supervisory activities as a non-branch location, subjecting it to inspections on a regular periodic schedule (presumed to be at least every three years) instead of the annual schedule required for OSJs and supervisory branch offices.

²⁴ See FINRA Regulatory Notice 17–38 (Nov. 2017), <https://www.finra.org/rules-guidance/notices/17-38>.

²⁵ See FINRA Rule 3110(c)(1).

²⁶ See FINRA Rule 3110(c)(2).

²⁷ *Id.*

²⁸ See FINRA Rule 3110(c)(2)(A) (providing that the inspection report must include, without limitation, the testing and verification of the member firm’s policies and procedures, including supervisory policies and procedures for: (1) safeguarding customer funds and securities; (2) maintaining books and records; (3) supervising supervisory personnel; (4) transmitting funds from customers to third party accounts, from customer accounts to outside entities, from customer accounts to locations other than a customer’s primary residence, and between customers and registered representatives, including the hand delivery of checks; and (5) changing customer account information, including address and investment objectives changes and validation of such changes).

²⁹ FINRA Rule 3110(c)(3)(A).

Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, dated June 7, 2023, <https://www.finra.org/sites/default/files/2023-06/sr-fina-2023-007-extension-no-1.pdf>.

¹¹ See Amendment No. 1, <https://www.finra.org/sites/default/files/2023-08/SR-FINRA-2023-007-Amendment-1.pdf>.

¹² Exchange Act Release No. 98046 (Aug. 2, 2023), 88 FR 53569 (Aug. 8, 2023) (File No. SR–FINRA–2023–007).

¹³ See *supra* note 9.

¹⁴ See letter from Sarah Kwak, Associate General Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated August 29, 2023, <https://www.sec.gov/comments/sr-fina-2023-007/sr-fina-2023007-252179-579662.pdf> (“FINRA Response to Comments I”).

¹⁵ See letter from Sarah Kwak, Associate General Counsel, Office of General Counsel, FINRA, to Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, dated September 22, 2023, <https://www.finra.org/sites/default/files/2023-09/sr-fina-2023-007-ext2.pdf>.

¹⁶ See letter from Kosha Dalal, Vice President and Associate General Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated October 25, 2023, <https://www.sec.gov/comments/sr-fina-2023-007/sr-fina-2023007-281119-686483.pdf> (“FINRA Response to Comments II”).

¹⁷ See Notice at 28620.

¹⁸ See Notice at 28620.

¹⁹ See FINRA Rule 3110(a).

²⁰ See FINRA Rule 3110(c)(1).

²¹ See FINRA Rule 3110(c)(1)(A).

²² See FINRA Rule 3110(c)(1)(B).

²³ See FINRA Rules 3110(c)(1)(C) and 3110.13 (General Presumption of Three-Year Limit for

an associated person assigned to that location.³⁰

FINRA Rule 3110.12 describes the components of a reasonable review. In particular, the rule requires a member firm to establish and maintain supervisory procedures that take into consideration, among other things, the member firm's size, organizational structure, scope of business activities, number and location of the member firm's offices, the nature and complexity of the products and services offered by the member firm, the volume of business done, the number of associated persons assigned to a location, the disciplinary history of registered representatives or associated persons, and any indicators of irregularities or misconduct (*i.e.*, "red flags").³¹

2. FINRA's Stated Reasons for the Proposed Rule Change

FINRA has identified, among others, three factors supporting consideration of this Pilot. First, in response to the COVID pandemic, FINRA adopted Rule 3110.17 to provide member firms the

option, subject to specified conditions, to complete remotely their calendar year inspection obligations without an on-site visit to their locations.³² Under FINRA Rule 3110.17, member firms generally have been performing remote inspections to satisfy their inspection obligations since 2021.³³ FINRA stated that during this period, the variance between member firms' rates of inspection findings through an on-site process and findings through a remote process were not material.³⁴ This relief was extended on several occasions, and is currently scheduled to last until the earlier of June 30, 2024, or the effective date of the Pilot.³⁵

Second, FINRA stated that "developments in technology have enhanced firms' overall and ongoing supervision and monitoring of the activities occurring at branch offices and non-branch locations" such that an on-site visit may not be required as part of every inspection.³⁶ Specifically, recordkeeping, correspondence, opening customer accounts, placing trades, and transmitting customer funds and securities are increasingly done electronically.³⁷ As such, a large portion of inspection work can be conducted electronically, prior to any on-site visit to the location, and electronic reviews of many locations have become one component of a member firm's overall supervisory system of associated persons and locations.³⁸

³² See Notice at 28625.

³³ *Id.*

³⁴ *Id.* FINRA stated that its overall examination findings in recent years across all member firm examinations conducted during the period in which firms were conducting fully remote inspections or operating in a fully remote or hybrid work environment have remained within the bounds of general norms. See *id.*

³⁵ See Exchange Act Release No. 98560 (Sept. 27, 2023), 88 FR 68258 (Oct. 3, 2023) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2023-012) ("2024 Extension"); see also Exchange Act Release No. 96241 (Nov. 4, 2022), 87 FR 67969 (Nov. 10, 2022) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2022-030) (extending the relief through December 31, 2023); Exchange Act Release No. 94018 (Jan. 20, 2022), 87 FR 4072 (Jan. 26, 2022) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2022-001) (extending the relief through December 31, 2022); Exchange Act Release No. 93002 (Sept. 15, 2021), 86 FR 52508 (Sept. 21, 2021) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2021-023) (extending the relief through June 30, 2022).

³⁶ See Notice at 28622.

³⁷ *Id.* at 28623.

³⁸ See *id.* FINRA stated that it observed member firms making broad use of technology to supervise the activities of their associated persons remotely to: identify undisclosed private securities transactions and outside business activities; identify problematic electronic communications; surveil trades and movements of customer assets; conduct interviews with supervisors and other associated persons assigned to the office or location;

Third, FINRA stated that, in general, the U.S. workforce has demanded greater workplace flexibility and the securities industry is subject to the same national pressures as it aims to recruit and retain diverse, talented, and qualified employees.³⁹ For example, FINRA stated that member firms have conveyed that the flexibility of hybrid work has made a positive impact in attracting more diverse talent and retaining existing talent.⁴⁰ However, retaining the hybrid workplace model means that more locations are subject to inspections and, but for this Pilot, those locations would have to be physically inspected. According to FINRA, "a system of risk-based on-site and remote inspections will allow firms to more efficiently deploy compliance resources and to use an on-site component only when appropriate."⁴¹

With the confluence of advances in compliance technology and the shift to a remote or hybrid work environment made more pronounced by the pandemic, FINRA stated that the optimal use of on-site inspections deserves further consideration.⁴²

C. The Proposed Rule Change

As stated above, FINRA Rule 3110(c)(1) currently provides that an inspection of a location must occur on a designated frequency that varies depending on the classification of the location as an OSJ, branch office, or non-branch location.⁴³ FINRA is proposing to amend FINRA Rule 3110 to adopt a voluntary, three-year pilot program to allow eligible member firms to elect to fulfill their inspection obligations under FINRA Rule 3110(c) by conducting inspections of eligible OSJs, branch offices, and non-branch locations remotely without an on-site visit to such locations, subject to specified safeguards and limitations (such member firms hereinafter referred to as "participating member firms"). To help mitigate the potential risks associated with not conducting an on-

take and record online office tours; and review associated persons' computers in real-time using tools such as remote desktop software. *Id.* at 28625.

³⁹ See *id.* at 28624.

⁴⁰ *Id.* FINRA stated that the proposed rule change may also support the competitiveness of the broker-dealer industry for individuals who seek professional positions in compliance, as "[t]he expectation of workplace flexibility and remote work by such individuals may lead them away from the broker-dealer industry if other segments of financial services or professional occupations offer more flexible workforce arrangements, with regulatory frameworks that offer more discretion in how the supervision is conducted." See *id.* at 28637.

⁴¹ See *id.* at 28636–37.

⁴² See *id.* at 28637.

⁴³ See *id.* at 28621.

³⁰ FINRA Rule 3110(c)(3)(B). FINRA Rule 3110(c)(3)(C) provides a limited exception from this requirement if a member firm determines compliance is not possible either because of its size or its business model. FINRA Rule 3110.14 (Exception to Persons Prohibited from Conducting Inspections) reflects FINRA's expectation that a member firm generally will rely on the exception in instances where it has only one location or has a business model where small or single-person locations report directly to an OSJ manager who is also considered the location's branch office manager. However, these situations are non-exclusive, and a member firm may still rely on the exception in other instances where it cannot comply because of its size or business model, provided it complies with the documentation requirements under the rule. See Notice at 28622 n.22.

³¹ Red flags that suggest the existence or occurrence of violations, prompting an unannounced visit, may include: customer complaints; a large number of elderly customers; a concentration in highly illiquid or risky investments; an unexplained increase or change in the types of investments or trading concentration that a representative is recommending or trading; an unexpected improvement in a representative's production, lifestyle, or wealth; questionable or frequent transfers of cash or securities between customer or third party accounts, or to or from the representative; a representative that serves as a power of attorney, trustee or in a similar capacity for a customer or has discretionary control over a customer's account(s); representatives with disciplinary records; customer investments in one or a few securities or class of securities that is inconsistent with member firm policies related to such investments; churning; trading that is inconsistent with customer objectives; numerous trade corrections, extensions, liquidations; or significant switching activity of mutual funds or variable products held for short time periods. See Notice at 28622 n.23 (citing SEC Division of Market Regulation, Staff Legal Bulletin No. 17: Remote Office Supervision (Mar. 19, 2004) ("SLB 17"), <https://www.sec.gov/interps/legal/mrslb17.htm>); see also NASD Notice to Members 98–38 (May 1998) ("Notice 98–38") and NASD Notice to Members 99–45 (Jun. 1999) ("Notice 99–45").

site inspection of every location, the proposed rule change would establish safeguards that limit eligibility to participate in the Pilot to certain member firms and locations based on criteria designed to minimize risk.⁴⁴ These safeguards and limitations would: (1) exclude certain member firms from participating in the Pilot; (2) exclude certain locations of participating member firms from participating in the Pilot; (3) impose certain conditions that a participating member firm and its eligible locations would be required to meet prior to participating in the Pilot; and (4) require any participating member firm to provide specified data to FINRA on a regular basis.⁴⁵ These safeguards and limitations, as well as others, are discussed in more detail below.

1. Length of Pilot

Proposed Rule 3110.18(a) would permit participating member firms to perform required inspections of OSJs, branch offices, and non-branch locations remotely under the applicable provisions of FINRA Rule 3110(c)(1), subject to specified safeguards and limitations. The proposed Pilot would automatically sunset on a date that is three years after its effective date.⁴⁶

2. Member Firm-Level Requirements

Proposed Rule 3110.18(f) would establish: (1) a list of criteria that would render a member firm ineligible to participate in the Pilot; and (2) a list of conditions to which participating member firms would be required to adhere to during the Pilot.⁴⁷

a. Member Firm-Level Ineligibility Criteria

Under proposed Rule 3110.18(f)(1), a member firm would be ineligible to conduct remote inspections of any of its locations if at any time during the Pilot the member firm: (1) is or becomes designated as a Restricted Firm under

FINRA Rule 4111 (“Restricted Firm”);⁴⁸ (2) is or becomes designated as a Taping Firm under FINRA Rule 3170 (“Taping Firm”);⁴⁹ (3) receives a notice from FINRA pursuant to FINRA Rule 9557 regarding compliance with FINRA Rule 4110 (Capital Compliance), Rule 4120 (Regulatory Notification and Business Curtailment), or Rule 4130 (Regulation of Activities of Section 15C Members Experiencing Financial and/or Operational Difficulties);⁵⁰ (4) is or becomes suspended from membership by FINRA;⁵¹ (5) had its FINRA membership become effective within the prior 12 months based on the date in the Central Registration Depository (“CRD”);⁵² or (6) is or has been found within the past three years by the Commission or FINRA to have violated FINRA Rule 3110(c).⁵³

b. Member Firm-Level Conditions

i. Recordkeeping System

Proposed Rule 3110.18(f)(2)(A) would require each participating member firm to have a recordkeeping system that: (1) makes, keeps current, and preserves records required to be made, kept current, and preserved under applicable securities laws and regulations, FINRA rules, and the participating member firm’s own written supervisory procedures under FINRA Rule 3110; (2) ensures such records are not physically or electronically maintained and

⁴⁸ See proposed Rule 3110.18(f)(1)(A). In general, FINRA Rule 4111 (Restricted Firm Obligations) requires member firms that are identified as “Restricted Firms” to deposit cash or qualified securities in a segregated, restricted account; adhere to specified conditions or restrictions; or comply with a combination of such obligations. See Notice at 28629 n.74.

⁴⁹ See proposed Rule 3110.18(f)(1)(B). In general, FINRA Rule 3170 (Tape Recording of Registered Persons by Certain Firms) requires a member firm to establish, enforce, and maintain special written procedures for supervising the telemarketing activities of all of its registered persons, including the tape recording of conversations, if the firm has hired more than a specified percentage of registered persons from firms that meet FINRA Rule 3170’s definition of “disciplined firm.” See Notice at 28629 n.75.

⁵⁰ See proposed Rule 3110.18(f)(1)(C).

⁵¹ See proposed Rule 3110.18(f)(1)(D).

⁵² See proposed Rule 3110.18(f)(1)(E). FINRA stated that CRD is the central licensing and registration system that FINRA operates for the benefit of the Commission, FINRA and other self-regulatory organizations, state securities regulators, and broker-dealers. The information maintained in the CRD system is reported by registered broker-dealers, associated persons, and regulatory authorities in response to questions on specified uniform registration forms. See Notice at 28629 n.76; see generally FINRA Rule 8312 (FINRA BrokerCheck Disclosure).

⁵³ See proposed Rule 3110.18(f)(1)(F). FINRA stated that the term “found” as used in this proposed criterion would carry the same meaning as in FINRA Rule 4530.03 (Meaning of “Found”). See Notice at 28630 n.77.

preserved at the location subject to remote inspection; and (3) gives the participating member firm prompt access to such records.⁵⁴

ii. Surveillance and Technology Tools

Proposed Rule 3110.18(f)(2)(B) would require each participating member firm to determine that its surveillance and technology tools are appropriate to supervise the types of risks presented by each remotely supervised location. Proposed Rule 3110.18(f)(2)(B) would also set forth a non-exclusive list of surveillance and technology tools a participating member firm may use, including: (1) firm-wide tools, such as electronic recordkeeping systems, electronic surveillance of email and correspondence, electronic trade blotters, regular activity-based sampling reviews, and tools for visual inspections; (2) tools specifically applied to such location based on the activities of associated persons, products offered, restrictions on the activity of the location (including holding out to customers and handling of customer funds or securities); and (3) system security tools, such as secure network connections and effective cybersecurity protocols.

3. Location-Level Requirements

Proposed Rule 3110.18(g) would establish: (1) a list of criteria that would render a location of a participating member firm ineligible for remote inspection; and (2) a list of conditions a location would be required to satisfy to be eligible for remote inspection.

a. Location-Level Ineligibility Criteria

Under proposed Rule 3110.18(g)(1), a participating member firm’s location would not be eligible for a remote inspection if at any time during the Pilot: (1) one or more associated persons at such location is or becomes subject to a mandatory heightened supervisory plan under the rules of the Commission, FINRA, or a state regulatory agency;⁵⁵ (2) one or more associated persons at such location is or becomes statutorily disqualified, unless such disqualified person (A) has been approved (or is otherwise permitted pursuant to FINRA rules and the federal securities laws) to associate with a member firm and (B) is not subject to a mandatory heightened supervisory plan described in proposed Rule 3110.18(g)(1)(A) or otherwise as a condition to approval or permission for such association;⁵⁶ (3) the member firm

⁵⁴ See proposed Rule 3110.18(f)(2)(A).

⁵⁵ See proposed Rule 3110.18(g)(1)(A).

⁵⁶ Section 3(a)(39) of the Exchange Act identifies a list of events that disqualify someone from

⁴⁴ See *id.* (stating that “FINRA believes that proposed Rule 3110.18, on balance, preserves investor protection objectives through the proposed safeguards while also providing FINRA the opportunity to gauge the effectiveness of remote inspections as part of a modernized, reasonably designed supervisory system that reflects the current work environment and availability of technologies that did not exist when the on-site inspection originally was conceived.”).

⁴⁵ See *id.* at 28620.

⁴⁶ In addition, if FINRA Rule 3110.17 (the temporary remote inspections relief currently in place) has not already expired by its own terms, Rule 3110.17 will automatically sunset on the effective date of the Pilot. See proposed Rule 3110.18(m); see also Notice at 28634; 2024 Extension at 68258.

⁴⁷ See proposed Rule 3110.18(f).

is or becomes subject to FINRA Rule 1017(a)(7) as a result of one or more associated persons at such location (hereinafter, a “continuing membership review”);⁵⁷ (4) one or more associated persons at such location has an event in the prior three years that required a “yes” response to any item in Questions 14A(1)(a) and (2)(a), 14B(1)(a) and (2)(a), 14C, 14D and 14E on Form U4 (Uniform Application for Securities Industry Registration or Transfer Registration) (“Form U4”);⁵⁸ (5) one or more associated persons at such location is or becomes subject to a disciplinary action taken by the participating member firm that is or was reportable under FINRA Rule 4530(a)(2);⁵⁹ (6) one or more associated persons at such location is engaged in proprietary trading, including the incidental crossing of customer orders, or the direct supervision of such activities;⁶⁰ or (7) the location handles customer funds or securities.⁶¹

b. Location-Level Conditions

Proposed Rule 3110.18(g)(2) would require a specific location of a participating member firm to satisfy

membership in, participation in, or association with a member of a self-regulatory organization. 15 U.S.C. 78c(a)(39).

⁵⁷ See proposed Rule 3110.18(g)(1)(C); *see also* Notice at 28631 n.83. In general, a member firm must file a Continuing Membership Application when a natural person seeking to become an owner, control person, principal or registered person of the member firm has, in the prior five years, one or more defined “final criminal matters” or two or more “specified risk events” unless the member firm has submitted a written request to FINRA seeking a materiality consultation for the contemplated activity. FINRA Rule 1017(a)(7); *see generally* FINRA Regulatory Notice 21–09 (Mar. 2021) (announcing FINRA’s adoption of rules to address brokers with a significant history of misconduct), <https://www.finra.org/rules-guidance/notices/21-09>.

⁵⁸ See proposed Rule 3110.18(g)(1)(D); *see also* Notice at 28631 n.84. Form U4’s Questions 14A(1)(a), 14(2)(a), 14B(1)(a), and 14B(2)(a) elicit reporting of criminal convictions, and Questions 14C, 14D, and 14E pertain to regulatory action disclosures. *See* Form U4, <https://www.finra.org/sites/default/files/form-u4.pdf>.

⁵⁹ See proposed Rule 3110.18(g)(1)(E); *see also* Notice at 28631 n.85. A member firm must report to FINRA if an associated person of the member firm is the subject of any disciplinary action taken by the member firm involving suspension, termination, the withholding of compensation or of any other remuneration in excess of \$2,500, the imposition of fines in excess of \$2,500 or is otherwise disciplined in any manner that would have a significant limitation on the individual’s activities on a temporary or permanent basis. *See* FINRA Rule 4530.

⁶⁰ See proposed Rule 3110.18(g)(1)(F).

⁶¹ See proposed Rule 3110.18(g)(1)(G). In accordance with existing guidance, the meaning and interpretation of the term “handled” that currently appears in Rule 3110(f)(2)(A)(ii) would remain consistent in the proposed Pilot. *See* Notice at 28631 n.86 (citing NASD Notice to Members 06–12 (Mar. 2006)).

certain conditions to be eligible for a remote inspection. These conditions are: (1) electronic communications would be required to be made through the participating member firm’s electronic system; (2) the associated person’s correspondence and communications with the public would be required to be subject to the participating member firm’s supervision in accordance with FINRA Rule 3110; and (3) no books or records of the participating member firm required to be made and kept current, and preserved under applicable securities laws and regulations, FINRA rules, and the participating member firm’s own written supervisory procedures under FINRA Rule 3110, can be physically or electronically maintained and preserved at such location.⁶²

4. Risk Assessment

Proposed Rule 3110.18(b)(1) (Standards for Reasonable Review) would require that prior to electing a remote inspection for a location, a participating member firm would be required to develop a reasonable risk-based approach to using remote inspections and conduct and document a risk assessment for that location. The risk assessment would require the participating member firm to document the factors considered, including the factors set forth in FINRA Rule 3110.12 and would require the participating member firm take into account any higher-risk activities that take place at, or higher-risk associated persons that are assigned to, that location.⁶³ Proposed Rule 3110.18(b)(2) (Other Factors to Consider for Risk Assessment) sets forth a non-exhaustive list of factors that a participating member firm would be required to consider and document as part of the risk assessment for each location, including: (1) the volume and nature of customer complaints; (2) the volume and nature of outside business activities, particularly investment-related; (3) the volume and complexity of products offered; (4) the nature of the customer base, including vulnerable adult investors; (5) whether associated persons are subject to heightened supervision; (6) failures by associated persons to comply with the participating member firm’s written supervisory procedures; and (7) any recordkeeping violations.⁶⁴ In addition, proposed Rule 3110.18(b)(2) states that participating member firms should conduct on-site inspections or make

more frequent use of unannounced, on-site inspections for high-risk locations or locations where there are red flags.⁶⁵ Amendment No. 1 modified proposed Rule 3110.18(b)(2) to add that, consistent with FINRA Rule 3110(a), a participating member firm’s supervisory system would be required to take into consideration any red flags when determining whether to conduct a remote inspection of a location.⁶⁶

5. Written Supervisory Procedures for Remote Inspections

As originally proposed, Rule 3110.18(c) would have required a participating member firm to adopt written supervisory procedures regarding remote inspections that are reasonably designed to detect and prevent violations of, and achieve compliance with, applicable securities laws and regulations, and with applicable FINRA rules. Under the proposed provision, reasonably designed procedures for conducting remote inspections of locations would be required to address, among other things: (1) the methodology, including technology, that may be used to conduct remote inspections; (2) the factors considered in the risk assessment made for each applicable location; (3) the procedures specified in proposed Rules 3110.18(h)(1)(G)⁶⁷ and (h)(4)⁶⁸ of the data and information collection section of the proposed rule; and (4) the use of other risk-based systems employed generally by the participating member firm to identify and prioritize for review those areas that pose the greatest risk of potential violations of applicable securities laws and regulations, and of applicable FINRA rules.⁶⁹ Amendment No. 1 modified proposed Rule 3110.18(c) to state that a participating member firm would be required to “establish, maintain, and enforce”

⁶⁵ *Id.*; *see also supra* note 31 and accompanying text.

⁶⁶ See Amendment No. 1. In addition to the substantive modifications made by Amendment No. 1 discussed here and below, FINRA stated that Amendment No. 1 contains non-substantive updates to the proposed rule text to improve readability. *See id.*

⁶⁷ Proposed Rule 3110.18(h)(1)(G) requires written supervisory procedures in the following four areas: (1) procedures for escalating significant findings; (2) procedures for new hires; (3) procedures for supervising brokers with a significant history of misconduct; and (4) procedures related to outside business activities (“OBAs”) and doing business as (“DBA”) designations.

⁶⁸ Proposed Rule 3110.18(h)(4) states that a participating member firm shall establish, maintain, and enforce written policies and procedures that are reasonably designed to comply with the data and information collection, and transmission requirements of the Pilot.

⁶⁹ See proposed Rule 3110.18(c).

⁶² See proposed Rule 3110.18(g)(2).

⁶³ See proposed Rule 3110.18(b)(1).

⁶⁴ See proposed Rule 3110.18(b)(2).

written supervisory procedures regarding remote inspections rather than solely “adopt” such procedures.⁷⁰

6. Effective Supervisory System

Proposed Rule 3110.18(d) (Effective Supervisory System) states that the requirement to conduct inspections of locations is one part of the member firm’s overall obligation to have an effective supervisory system, and therefore a member firm would be required to maintain its ongoing review of the activities and functions occurring at all locations, whether or not the member firm conducts inspections remotely. Proposed Rule 3110.18(d) additionally states that a participating member firm’s use of a remote inspection of a location would be held to the same standards for review applicable to on-site inspections as set forth in FINRA Rule 3110.12 (Standards for Reasonable Review), which requires that the review must be reasonably designed to assist in detecting and preventing violations of, and achieving compliance with, applicable securities laws and regulations and with FINRA rules, and that the member firm shall establish and maintain supervisory procedures that must take into consideration, among other things, any red flags.⁷¹ Finally, proposed Rule 3110.18(d) would provide that where a participating member firm’s remote inspection of a location identifies any red flags, the participating member firm may need to impose additional supervisory procedures for that location or may need to provide for more frequent monitoring or oversight of that location, including potentially a subsequent physical, on-site visit on an announced or unannounced basis.⁷²

7. Documentation Requirement

Proposed Rule 3110.18(e) would require a participating member firm to maintain and preserve a centralized record for each Pilot Year⁷³ in which it participates that separately identifies:

(1) all locations that were inspected remotely; and (2) any locations for which the participating member firm determined to impose additional supervisory procedures or more frequent monitoring, as provided in proposed Rule 3110.18(d). Further, proposed Rule 3110.18(e) would require a participating member firm’s documentation of the results of a remote inspection for a location to identify any additional supervisory procedures or more frequent monitoring for that location imposed as a result of the remote inspection, including whether an on-site inspection was conducted at such location.⁷⁴

8. Data and Information Collection Requirement

a. Data and Information During Pilot

As originally proposed, proposed Rule 3110.18(h)(1) would have required a participating member firm to collect and provide to FINRA on a quarterly basis and in the manner and format determined by FINRA the following data and information:⁷⁵ (1) the total number of locations with an inspection completed during each calendar quarter;⁷⁶ (2) the number of locations from that total quarterly number that were inspected remotely;⁷⁷ (3) the number of those locations from that total quarterly number that were inspected on-site;⁷⁸ (4) the number of those locations in each calendar quarter that were subject to an on-site inspection because of a finding;⁷⁹ (5) the number of locations for which a remote inspection was conducted in the calendar quarter that identified a finding, the number of those findings, and a list of the most significant findings;⁸⁰ and (6) the number of locations for which an on-site inspection was conducted in the calendar quarter that identified a finding, the number of those findings, and a list of the most significant findings.⁸¹ Amendment No. 1 modified proposed Rule 3110.18(h)(1) to change

the requirement to provide a list of “significant findings” by deleting the word “most” from the phrase “most significant findings.”⁸²

In addition, at the time a participating member firm first delivers the quarterly data described above, it would also be required to provide to FINRA the following written supervisory procedures for conducting remote inspections: (1) procedures for escalating significant findings; (2) procedures for new hires; (3) procedures for supervising brokers with a significant history of misconduct; and (4) procedures related to outside business activities and “doing business as” designations.⁸³

b. Additional Data and Information for Pilot Year 1, if Less Than Full Calendar Year

As originally proposed, if the first year of the Pilot (“Pilot Year 1”)⁸⁴ would cover a period of time that is less than a full calendar year, the proposed rule change would have required a participating member firm to collect and provide to FINRA the following data and information no later than December 31 of Pilot Year 1:⁸⁵ (1) the number of locations with an inspection completed during the full calendar year of Pilot Year 1;⁸⁶ (2) the number of locations referenced in item (1) that were inspected remotely during the full calendar year of Pilot Year 1;⁸⁷ and (3) the number of locations referenced in item (1) that were inspected on-site

⁸² See Amendment No. 1. According to FINRA, a “significant finding” would be one that should prompt the member firm to take further action that could include escalation to the appropriate channels at the firm for further review, the result of which may be enhanced monitoring or surveillance of a particular event or activity through more frequent inspections (remotely or on-site), on an announced or unannounced basis, of the location, or other targeted reviews of the root cause of the finding. FINRA stated that examples of some findings that may prompt escalation or further internal review by the appropriate firm personnel include, among other things, the use of unapproved communication mediums, customer complaints, or undisclosed outside business activities or private securities transactions. See Amendment No. 1 (citing Notice at 28632 n.92).

⁸³ See proposed Rule 3110.18(h)(1)(G)(i)–(iv). If a participating member firm amends its written supervisory procedures for remote inspections, it is required to provide such amendments to FINRA with its next delivery of quarterly data. See proposed Rule 3110.18(h)(1)(G).

⁸⁴ “Pilot Year 1” is defined in proposed Rule 3110.18(l). See also *supra* note 73.

⁸⁵ The participating member firm would be required to provide separate counts for OSJs, supervisory branch offices, non-supervisory branch offices, and non-branch locations consistent with FINRA Rule 3110(c)(1)(A)–(C).

⁸⁶ See proposed Rule 3110.18(h)(2)(A) as originally proposed.

⁸⁷ See proposed Rule 3110.18(h)(2)(B) as originally proposed.

⁷⁰ See Amendment No. 1.

⁷¹ See also *supra* note 31 (discussing red flags).

⁷² See proposed Rule 3110.18(d).

⁷³ Proposed Rule 3110.18(l) would set forth the meanings underlying “Pilot Year” as follows: (1) Pilot Year 1 would be the period beginning on the effective date of the Pilot and ending on December 31 of the same year; (2) Pilot Year 2 would mean the calendar year period following Pilot Year 1, beginning on January 1 and ending on December 31; (3) Pilot Year 3 would mean the calendar year period following Pilot Year 2, beginning on January 1 and ending on December 31; and (4) if applicable, where Pilot Year 1 covers a period that is less than a full calendar year, then Pilot Year 4 would mean the period following Pilot Year 3, beginning on January 1 and ending on a date that is three years after the effective date of the Pilot. See proposed Rule 3110.18(l).

⁷⁴ See proposed Rule 3110.18(e).

⁷⁵ The participating member firm would be required to provide separate counts for OSJs, supervisory branch offices, non-supervisory branch offices, and non-branch locations consistent with FINRA Rule 3110(c)(1)(A)–(C). See proposed Rule 3110.18(h)(1).

⁷⁶ See proposed Rule 3110.18(h)(1)(A).

⁷⁷ See proposed Rule 3110.18(h)(1)(B).

⁷⁸ See proposed Rule 3110.18(h)(1)(C).

⁷⁹ See proposed Rule 3110.18(h)(1)(D). For purposes of this paragraph, the term “finding” means a discovery made during an inspection that led to a remedial action or was listed on the participating member firm’s inspection report. See proposed Rule 3110.18(h)(1).

⁸⁰ See proposed Rule 3110.18(h)(1)(E).

⁸¹ See proposed Rule 3110.18(h)(1)(F).

during the full calendar year of Pilot Year 1.⁸⁸

Rule 3110.18(h)(2) as originally proposed did not divide data and information collection and reporting into inspections that occurred prior to, and after, the effective date of the Pilot, but rather would have required reporting for the full calendar year of Pilot Year 1. Amendment No. 1 amended proposed Rule 3110.18(h)(2) so that participating member firms would be required to collect and provide information under this provision for the time period between January 1 of Pilot Year 1 and the day before the effective date of the Pilot, in addition to the other data requirements set forth in the Pilot.⁸⁹ More specifically, if Pilot Year 1 covers a period of time that is less than a full calendar year, the proposed rule change, as modified by Amendment No. 1, would require a participating member firm to collect and provide to FINRA the following data and information no later than December 31 of Pilot Year 1:⁹⁰ (1) the number of locations with an inspection completed between January 1 of Pilot Year 1 and the day before the effective date of the Pilot;⁹¹ (2) the number of locations referenced in item (1) that were inspected remotely between January 1 of Pilot Year 1 and the day before the effective date of the Pilot;⁹² and (3) the number of locations referenced in item (1) that were inspected on-site between January 1 of Pilot Year 1 and the day before the effective date of the Pilot.⁹³

In addition, Amendment No. 1 modified proposed Rule 3110.18(h)(2) to impose two new obligations for participating member firms to collect and provide to FINRA certain data and information. Specifically, if Pilot Year 1 covers a period of time that is less than a full calendar year, the proposed rule change would require a participating member firm to collect and provide to FINRA the following additional data and information no later than December 31 of Pilot Year 1: (1) the number of locations referenced in item (2) above where findings were identified, the

number of those findings, and a list of the significant findings;⁹⁴ and (2) the number of locations referenced in item (3) above where findings were identified, the number of those findings, and a list of the significant findings.⁹⁵

c. Additional Data and Information for Calendar Year 2019

As originally proposed, Rule 3110.18(h)(3) would have required a participating member firm to collect and provide to FINRA the following calendar year 2019 data and information (“2019 data”) no later than December 31 of Pilot Year 1:⁹⁶ (1) the number of locations with an inspection completed during calendar year 2019;⁹⁷ and (2) the number of locations referenced in item (1) where findings were identified, the number of those findings, and a list of the most significant findings.⁹⁸ Amendment No. 1 modified the proposed rule change to require a participating member firm to “act in good faith using best efforts” to collect and provide to FINRA such data, as FINRA rules in general only require that member firms preserve these records for a period of three years.⁹⁹ Amendment No. 1 also clarified the data and information requirement to require that participating member firms provide a list of “significant findings” by deleting the word “most” from the phrase “most significant findings.”¹⁰⁰

d. Written Policies and Procedures

Proposed Rule 3110.18(h)(4) would require a participating member firm to establish, maintain, and enforce written policies and procedures that are reasonably designed to comply with the data and information collection, and transmission requirements of proposed Rule 3110.18(h).¹⁰¹

⁹⁴ See proposed Rule 3110.18(h)(2)(D); *see also* Amendment No. 1.

⁹⁵ See proposed Rule 3110.18(h)(2)(E); *see also* Amendment No. 1.

⁹⁶ The participating member firm would be required to provide separate counts for OSJs, supervisory branch offices, non-supervisory branch offices, and non-branch locations consistent with FINRA Rule 3110(c)(1)(A)–(C).

⁹⁷ See proposed Rule 3110.18(h)(3)(A) as originally proposed.

⁹⁸ See proposed Rule 3110.18(h)(3)(B) as originally proposed.

⁹⁹ See proposed Rule 3110.18(h)(3); *see also* FINRA Rule 3110(c)(2), stating that an inspection report must be kept on file by the member firm for a minimum of three years, unless the regular periodic schedule is longer than a three-year cycle, in which case the report must be kept on file at least until the next inspection report has been written.

¹⁰⁰ See proposed Rule 3110.18(h)(3)(B); *see also* Amendment No. 1; *supra* note 82 and accompanying text.

¹⁰¹ See proposed Rule 3110.18(h)(4).

9. Election To Participate in Pilot

In general, proposed Rule 3110.18(i) would require a participating member firm, at least five calendar days before the beginning of a Pilot Year,¹⁰² to provide FINRA an opt-in notice in the manner and format determined by FINRA. The proposed rule states that by providing such opt-in notice to FINRA, the member firm agrees to participate in the Pilot for the duration of such Pilot Year and to comply with the requirements of Rule 3110.18.¹⁰³ A member firm that provides an opt-in notice for a Pilot Year would be automatically deemed to have elected and agreed to participate in the Pilot for subsequent Pilot Years until the Pilot expires.¹⁰⁴ To opt out, proposed Rule 3110.18(i) would require a participating member firm to provide FINRA with an opt-out notice in the manner and format determined by FINRA at least five calendar days before the end of the then current Pilot Year.¹⁰⁵ The proposed rule change also states that FINRA may, in exceptional cases and where good cause is shown, waive the applicable timeframes for the required opt-in or opt-out notices.¹⁰⁶

10. Failure To Satisfy Conditions

Proposed Rule 3110.18(j) states that a member firm that fails to satisfy the conditions of Rule 3110.18, including the requirement to timely collect and submit the data and information to FINRA as set forth in proposed Rule 3110.18(h), would be ineligible to participate in the Pilot and would be required to conduct on-site inspections of each location on the required cycle in accordance with FINRA Rule 3110(c).¹⁰⁷

11. Determination of Ineligibility

Proposed Rule 3110.18(k) would authorize FINRA to make a determination in the public interest and for the protection of investors that a participating member firm is no longer eligible to participate in the Pilot if the participating member firm fails to comply with the requirements of Rule 3110.18.¹⁰⁸ In such instances, FINRA would provide written notice to the participating member firm of such determination and the participating member firm would no longer be eligible to participate in the Pilot and

¹⁰² See *supra* note 73.

¹⁰³ As stated in the Notice, a member firm that participates in a Pilot Year would be committed to complying with the terms of proposed Rule 3110.18 for that entire Pilot Year. *See* Notice at 28633 n.97.

¹⁰⁴ See proposed Rule 3110.18(i).

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See proposed Rule 3110.18(j).

¹⁰⁸ See proposed Rule 3110.18(k).

⁸⁸ See proposed Rule 3110.18(h)(2)(C) as originally proposed.

⁸⁹ See proposed Rule 3110.18(h)(2)(A)–(C); *see also* Amendment No. 1.

⁹⁰ The participating member firm would be required to provide separate counts for OSJs, supervisory branch offices, non-supervisory branch offices, and non-branch locations consistent with FINRA Rule 3110(c)(1)(A)–(C).

⁹¹ See proposed Rule 3110.18(h)(2)(A); *see also* Amendment No. 1.

⁹² See proposed Rule 3110.18(h)(2)(B); *see also* Amendment No. 1.

⁹³ See proposed Rule 3110.18(h)(2)(C); *see also* Amendment No. 1.

would be required to conduct on-site inspections of required locations in accordance with FINRA Rule 3110(c).¹⁰⁹

II. Discussion and Commission Findings

After careful review of the proposed rule change, the comment letters, and FINRA's responses to the comments, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities association.¹¹⁰ Specifically, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act, which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.¹¹¹

Pursuant to FINRA Rule 3110, member firms must “establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules.”¹¹² Rule 3110 provides that “[e]ach member shall establish and maintain supervisory procedures that must take into consideration, among other things, the firm's size, organizational structure, scope of business activities, number and location of the firm's offices, the nature and complexity of the products and services offered by the firm, the volume of business done, the number of associated persons assigned to a location, the disciplinary history of registered representatives or associated persons, and any indicators of irregularities or misconduct (*i.e.*, ‘red flags’), etc.”¹¹³ Importantly, Rule 3110 provides that “[f]inal responsibility for proper supervision . . . rest[s] with the member.”¹¹⁴ A reasonably designed supervisory system must include an inspection of each location subject to supervision.

The Pilot is consistent with these obligations, permitting a participating

member firm the flexibility to consider whether remote inspections of its eligible locations would be consistent with the member firm's broader obligation to establish and maintain a reasonably designed supervisory system. At the same time, to help mitigate the potential risks associated with not conducting an on-site inspection of certain locations, the proposed rule change would establish safeguards that limit eligibility to participate in the Pilot to certain member firms and locations and that impose on member firms electing to participate in the Pilot affirmative obligations tailored to the risks. Similarly, the Pilot would mandate the collection of data and information that should help FINRA make well-informed decisions about improvements to, and the prudence of, any permanent rule changes. Accordingly, as explained in more detail below, the Commission finds that the Pilot is consistent with Section 15A(b)(6) of the Exchange Act.

A. Member Firm-Level Requirements

The proposed rule change would impose various safeguards and limitations that preclude certain member firms from participating in the Pilot. The Commission addresses the safeguards and limitations, and any related comments, in turn.

1. Member Firm Ineligibility Criteria

As stated above, under proposed Rule 3110.18(f)(1), a member firm would be ineligible to participate in the Pilot if at any time during the pilot period the member firm is subject to any of six firm-level ineligibility criteria.¹¹⁵ FINRA stated that these proposed ineligibility criteria “would appropriately limit the potential population of pilot program participants to those firms that may be better positioned to conduct remote inspections.”¹¹⁶ For example, FINRA stated that “a member firm that is experiencing issues complying with its

capital requirements or has been suspended from membership by FINRA is more likely to face significant operational challenges that may negatively impact the firm's inspection program.”¹¹⁷ Additionally, FINRA stated that new member firms are often still implementing business plans and “may not have sufficient experience to develop a sufficiently robust inspection program.”¹¹⁸ Moreover, firms with recent FINRA Rule 3110(c) (Internal Inspections) violations have demonstrated challenges in developing or maintaining robust inspection programs and should not be able to participate, according to FINRA.¹¹⁹

Three commenters offered general support for the firm-level ineligibility criteria, each expressing the idea that these ineligibility criteria “would help to ensure that firms and locations that present higher risks to investors would remain subject to in-person inspection requirements, thereby helping to protect investors from unnecessary risks under the pilot program.”¹²⁰ No commenter opposed these firm-level ineligibility criteria.

FINRA reasonably determined to exclude a member firm from participation in the Pilot if the member firm is subject to any of the six proposed firm-level ineligibility criteria. Each of these criteria identifies—and excludes—member firms with characteristics that may indicate increased risk of non-compliance. Specifically, Restricted

¹¹⁷ *Id.* FINRA also stated that rules related to Restricted Firms and Taping Firms expressly address member firms that pose higher risks, and for that reason, they would be ineligible to participate in the Pilot. *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Letter from Andrew Hartnett, NASAA President and Deputy Commissioner, Iowa Insurance Division, North American Securities Administrators Association, Inc., to Sherry R. Haywood, Assistant Secretary, Commission, dated May 25, 2023 (“NASAA I”); at 6; *see also* letter from Bernard V. Canepa, Managing Director & Associate General Counsel, Securities Industry and Financial Markets Association, to Vanessa A. Countryman, Secretary, Commission, dated May 25, 2023 (“SIFMA”) at 2 (describing the Pilot as including “numerous safeguards to ensure onsite inspections are conducted when appropriate” and as “well designed,” noting that it scopes out “certain, higher-risk . . . firms”); letter from Eversheds Sutherland LLP on behalf of the Committee of Annuity Insurers, to Secretary, Commission, dated May 25, 2023 (“CAI”) at 2–3 (stating that by “disallowing certain firms . . . from participating in remote inspections if they present a higher risk of possible investor harm,” FINRA is appropriately balancing investor protection and permitting the regulatory regime to evolve). *See also generally* letter from David T. Bellaire, Esq., Executive Vice President & General Counsel, Financial Services Institute, to Secretary, Commission, dated May 25, 2023 (“FSI”) at 3–4; Letter from Mark Quinn, Director of Regulatory Affairs, Cetera Financial Group, to Sherry R. Haywood, Assistant Secretary, Commission, dated May 25, 2023 (“Cetera I”) at 1.

¹⁰⁹ *See id.*

¹¹⁰ In approving this rule change, the Commission has considered the rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

¹¹¹ 15 U.S.C. 78o–3(b)(6).

¹¹² FINRA Rule 3110(a).

¹¹³ FINRA Rule 3110.12.

¹¹⁴ FINRA Rule 3110(a)(1)–(7) identify certain minimum requirements for the reasonably designed supervisory system. *See generally* FINRA Rule 3110.

¹¹⁵ Member firms would be generally ineligible to participate in the Pilot if at any time during the Pilot the member firm: (1) is or becomes designated as a Restricted Firm; (2) is or becomes designated as a Taping Firm; (3) receives a notice from FINRA pursuant to FINRA Rule 9557 regarding compliance with FINRA Rule 4110 (Capital Compliance), Rule 4120 (Regulatory Notification and Business Curtailment), or Rule 4130 (Regulation of Activities of Section 15C Members Experiencing Financial and/or Operational Difficulties); (4) is or becomes suspended from membership by FINRA; (5) had its FINRA membership become effective within the prior 12 months based on the date in the CRD; or (6) is or has been found within the past three years by the Commission or FINRA to have violated FINRA Rule 3110(c) (Internal Inspections). *See* proposed Rule 3110.18(f)(1).

¹¹⁶ *See* Notice at 28630.

Firms have a history of misconduct or a high concentration of registered persons with a significant history of misconduct that gave rise to the designation,¹²¹ while Taping Firms are subject to heightened regulatory oversight because they employ a “significant number of registered persons [who] previously worked for firms that have been expelled from the industry or have had their registrations revoked for inappropriate sales practices.”¹²² Moreover, if the Commission or FINRA has found that a member firm has violated FINRA Rule 3110(c) within the past three years, the member firm has demonstrated a recent difficulty implementing a compliant inspection program.¹²³ Member firms covered by these exclusions therefore have a history of non-compliance or have registered representatives who have a history of (or come from a member firm with a history of) non-compliance. It is therefore reasonable for FINRA to determine that member firms that fall into these categories are not eligible for participation in the Pilot and the flexibility that it provides in designing their supervisor systems.

Furthermore, Rule 9557 notices are sent to member firms that are experiencing financial or operational difficulties.¹²⁴ Additionally, suspension of a member firm by FINRA would be based on FINRA’s determination that the member firm has failed to comply with its regulatory requirements or suspension is needed for the safety of investors, creditors, or other members because of the member firm’s financial or operational difficulties.¹²⁵ Such member firms raise concerns about their ability to comply with their obligations and may present risk to others. As such, it is reasonable to conclude that these member firms should not be eligible for the proposed rule change that is

designed to afford member firms greater flexibility in designing their supervisory systems.

Moreover, member firms that have been FINRA members for less than 12 months may need additional time to develop their supervisory and compliance systems to effectively comply with applicable securities laws and rules.¹²⁶ This time period also provides FINRA and other regulators with time to conduct inspections of new member firms to determine their compliance with their regulatory obligations before they may be eligible for the flexibility provided in the proposed rule.¹²⁷ It is therefore reasonable for FINRA to determine that firms must be operating for a certain amount of time before they can be eligible for participation in the Pilot. One year provides a reasonable balance between providing member firms with the flexibility for supervision allowed in the proposed rule and concerns that member firms need to develop experience operating before they are given such flexibility. In sum, these proposed ineligibility criteria limit Pilot participation to certain member firms without indicia that their business operations, supervisory system, or inspection programs may lack the maturity or safeguards to fully address the potential risks associated with remote inspections are reasonable.¹²⁸

2. Member Firm Conditions for Eligibility To Participate in the Pilot

a. Firm Recordkeeping System

As stated above, proposed Rule 3110.18(f)(2)(A) would require a participating member firm to meet certain requirements regarding its recordkeeping system, including that it have a recordkeeping system and that the participating member firm have prompt access to the records required by that system and that those records are not physically or electronically maintained at remotely inspected

locations.¹²⁹ One commenter expressed support for this provision, stating that it is responsive to concerns about a participating member firm’s access to and control over records and “will better enable firms to supervise their associated persons.”¹³⁰ No commenter objected to this provision of the proposed rule change.

The proposed rule change’s recordkeeping conditions are reasonable. A key component of remote—as opposed to on-site—inspection is prompt access to the records of the remotely inspected location from an alternative location. Because the proposed rule change couples this prompt-access requirement with a prohibition of the storage of a remotely inspected location’s records at the location itself, the member firm need not conduct an on-site visit to gather and review records during an inspection. The proposed rule change therefore should facilitate timely and effective remote inspection of locations participating in the Pilot and decrease, though not always eliminate, the need for on-site inspections. For these reasons, the proposed condition is reasonable.

b. Surveillance and Technology Tools

As noted above, proposed Rule 3110.18(f)(2)(B) would require that each participating member firm determine that its surveillance and technology tools are appropriate to supervise the types of risks presented by each remotely inspected location. These tools may include, but are not limited to, firm-wide electronic tools, tools specifically applied to a location, and system security tools.¹³¹ FINRA stated

¹²⁹ Each participating member firm would be required to have a recordkeeping system that: (1) makes, keeps current, and preserves records required to be made, kept current, and preserved under applicable securities laws and regulations, FINRA rules, and the participating member firm’s own written supervisory procedures under FINRA Rule 3110; (2) ensures such records are not physically or electronically maintained and preserved at the location subject to remote inspection; and (3) gives the participating member firm prompt access to such records. *See* proposed Rule 3110.18(f)(2)(A).

¹³⁰ NASAA I at 6–7. In a comment letter related to FINRA–2022–021 (the original Pilot proposal), NASAA requested that FINRA require participating member firms to maintain written supervisory procedures for “technology used to ensure that records are maintained within the firm’s access and control.” *See* letter from Andrew Hartnett, President, NASAA, to Sherry R. Haywood, Assistant Secretary, Commission, dated December 7, 2022 (“NASAA Dec. 2022”) at 5, <https://www.sec.gov/comments/sr-firra-2022-021/srfinra2022021-20152479-320342.pdf>.

¹³¹ The participating member firm would be required to determine that its surveillance and technology tools are appropriate to supervise the types of risks presented by each such remotely

¹²¹ Proposed Rule 3110.18(f)(1)(A); *see* FINRA, Rule 4111 Frequently Asked Questions, <https://www.finra.org/rules-guidance/key-topics/protecting-investors-from-misconduct/faq>.

¹²² Proposed Rule 3110.18(f)(1)(B); *see* FINRA, FINRA Taping Rule (FINRA Rule 3170), <https://www.finra.org/rules-guidance/guidance/taping-rule>.

¹²³ Proposed Rule 3110.18(f)(1)(F).

¹²⁴ Proposed Rule 3110.18(f)(1)(C); *see* FINRA Rule 9557 (Procedures for Regulating Activities Under Rules 4110, 4120 and 4130 Regarding a Member Experiencing Financial or Operational Difficulties); *see also* FINRA Regulatory Notice 09–71 (Dec. 2009) (announcing SEC approval of consolidated FINRA rules governing financial responsibility), <https://www.finra.org/rules-guidance/notices/09-71>.

¹²⁵ Proposed Rule 3110.18(f)(1)(D). A suspended firm may have been suspended because of a violation of “federal securities laws, rules or regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or FINRA rules.” FINRA Rule 8310(a)(3), (5); *see* FINRA Rule 9550 Series.

¹²⁶ Proposed Rule 3110.18(f)(1)(E).

¹²⁷ *See* Exchange Act Rule 15b2–2, 17 CFR 240.15b2–2 (generally requiring inspection of a newly registered broker dealer within six months for compliance with applicable financial responsibility rules and within 12 months for all other applicable regulatory requirements).

¹²⁸ *Cf.* Exchange Act Release No. 90635 (Dec. 10, 2020), 85 FR 81540 (Dec. 16, 2020) (Order Approving File No. SR–FINRA–2020–011 to Address Brokers With a Significant History of Misconduct); Exchange Act Release No. 92525 (July 30, 2021), 86 FR 42925 (Aug. 5, 2021) and 86 FR 49589 (Sept. 3, 2021) (Corrected Order Approving File No. SR–FINRA–2020–041 to Adopt FINRA Rules 4111 (Restricted Firm Obligations) and 9561 (Procedures for Regulating Activities Under Rule 4111)).

that it believes that the absence of “adequate surveillance and technology tools would raise questions about the reasonableness of remote inspections” and therefore proposed the non-exhaustive list to help set regulatory expectations for remote inspections.¹³²

One commenter opposed the principle-based nature of the proposed condition by stating that the listed technology and surveillance tools should be “mandatory, rather than permissive.”¹³³ This commenter stated that the listed technologies are “critical,” should be “standard features of all risk assessments and remote inspections,” and are the “bare minimum necessary for a firm to participate safely.”¹³⁴ In particular, this commenter pointed to videoconferencing and related technology as “crucial to a rigorous inspection.”¹³⁵ Similarly, another commenter who opposed the Pilot expressed skepticism in particular about FINRA’s reliance on the increased use of technology to support approval of the proposed rule change, stating that remote inspections would leave “considerable opportunity for advisors to skirt the rules.”¹³⁶

In response, FINRA stated that, while the proposed condition would require that a member firm *must* determine that its surveillance and technology tools are appropriate, it believes that flexibility among the use of specific tools that *may* be used for remote inspections is appropriate because these tools may vary among member firms depending upon their business activities, size, and structure.¹³⁷ FINRA also stated that the proposed list of surveillance and

technology tools is non-exhaustive in order to account for ongoing advances in technologies.¹³⁸ For these reasons, FINRA declined to modify the proposed rule change. However, while FINRA did not mandate video conferencing technology or portable cameras, as suggested, it did include “visual inspection tools” as a general description of this technology in its non-exhaustive list of tools.¹³⁹

FINRA further noted that the proposed rule change would separately require a participating member firm to adopt reasonably designed written supervisory procedures that *must* include, among other things, a description of the methodology, including the technology, that a participating member firm may use to conduct remote inspections.¹⁴⁰

Given variances in firm size, business models, and risk, and the rapid development and use of technology among member firms, FINRA reasonably determined to provide flexibility to each participating member firm to determine that its surveillance and technology tools are appropriate to supervise the types of risks presented by each remotely inspected location. Requiring a member firm to determine that its existing surveillance and technology tools are appropriate to supervise the types of risks presented by each remotely inspected location before participating in the Pilot is reasonable and should help ensure that participating member firms employ appropriate tools to manage the potential risks posed by the remote inspection of eligible locations. The Commission acknowledges the commenter’s request to require that participating member firms use the technology tools identified by FINRA to perform remote inspections. Indeed, a number of commenters indicated that they already rely extensively on technology to supervise their associated persons, and FINRA relied broadly on technological developments in the securities industry in support of this proposal.¹⁴¹

However, while the proposed rule change takes a principle-based approach rather than mandating specific surveillance tools, it does set expectations for the supervision of locations participating in the Pilot. First, a participating member firm *must*

determine that its surveillance and technology tools are appropriate, starting by taking stock of the methodology, including the technology, that the participating member firm may use to conduct remote inspections and incorporating it into its written supervisory procedures. Second, FINRA identifies surveillance and technology tools that a participating member firm may consider, including firm-wide electronic tools, tools specifically applied to a location, and system security tools, which will help clarify FINRA’s expectations and assist participating member firms with operationalizing the rules. These requirements, combined with other safeguards and limitations, along with a participating member firm’s overarching obligation under FINRA Rule 3110(a) to maintain an effective supervisory system, serve a crucial gatekeeping role for member firms to participate in the Pilot. Furthermore, even a participating member firm with state-of-the-art tools may ultimately determine that an unannounced on-site inspection, or more frequent inspections, are appropriate to discharge its obligation to reasonably supervise that location.¹⁴² For the reasons set forth above, the proposed condition is reasonable.

B. Location-Level Requirements

1. Location-Level Ineligibility Criteria

As noted above, proposed Rule 3110.18(g)(1) would prohibit remote inspections for any location subject to any of seven location-level ineligibility criteria. Six of these seven location-level ineligibility criteria address locations with associated persons who: (1) are subject to a mandatory heightened supervisory plan; (2) are statutorily disqualified; (3) have caused the participating member firm to undergo a continuing membership review pursuant to FINRA Rule 1017(a)(7); (4) are required to make disclosures about certain criminal and regulatory actions; (5) are subject to certain disciplinary actions taken by the participating member firm; or, (6) are engaged in proprietary trading. The seventh criteria

supervised location. These tools may include but are not limited to: (1) firm-wide tools such as electronic recordkeeping systems; electronic surveillance of email and correspondence; electronic trade blotters; regular activity-based sampling reviews; and tools for visual inspections; (2) tools specifically applied to such location based on the activities of associated persons, products offered, restrictions on the activity of the location (including holding out to customers and handling of customer funds or securities); and (3) system security tools such as secure network connections and effective cybersecurity protocols. See proposed Rule 3110.18(f)(2)(B).

¹³² See FINRA Response to Comments I at 11.

¹³³ NASAA I at 7; see also, e.g., NASAA Dec. 2022 at 6.

¹³⁴ NASAA I at 7. NASAA also added that it would not be inconsistent to establish a defined floor despite the principle-based standard of reasonable supervision. *Id.*

¹³⁵ *Id.*

¹³⁶ See letter from Hugh Berkson, President, Public Investors Advocate Bar Association, to Vanessa Countryman, Commission, dated May 24, 2023 (“PIABA I”) at 3; letter from Hugh Berkson, President, Public Investors Advocate Bar Association, to Vanessa Countryman, Commission, dated August 28, 2023 (“PIABA II”) at 3.

¹³⁷ See FINRA Response to Comments I at 11.

¹³⁸ *Id.*

¹³⁹ *Id.* at 11 n.27.

¹⁴⁰ *Id.* at 12; see also proposed Rule 3110.18(c).

¹⁴¹ See Notice at 28622; see also, e.g., letter from Raymond James & Associates, Inc. and Raymond James Financial Services, Inc. to Vanessa A. Countryman, Secretary, Commission, dated May 23, 2023 (collectively “Raymond James I”) at 1.

¹⁴² See proposed Rule 3110.18(b)(2) (“In addition, consistent with Rule 3110.12, members should conduct on-site inspections or make more frequent use of unannounced, on-site inspections for high-risk offices or locations or where there are indicators of irregularities or misconduct (*i.e.*, ‘red flags’).”); see also proposed Rule 3110.18(d) (“Where a member’s remote inspection of an office or location identifies any ‘red flags,’ the member may need to impose additional supervisory procedures for that office or location or may need to provide for more frequent monitoring of that office or location including potentially a subsequent on-site visit on an announced or unannounced basis.”); *supra* note 31 (discussing red flags).

would make locations that handle customer funds or securities ineligible for the Pilot.¹⁴³ FINRA stated that these seven location-level ineligibility criteria are “events or activities of an associated person of the member firm that . . . [are] more likely to raise investor protection concerns based on the individual’s record of specified regulatory or disciplinary events.”¹⁴⁴ FINRA stated that it believes that “these objective categorical restrictions will provide safeguards that will help ensure that firms maintain effective supervisory procedures during the pilot period.”¹⁴⁵

Two commenters offered general support for these exclusions.¹⁴⁶ As discussed in more detail below, one commenter recommended that FINRA expand the exclusion for locations with associated persons that are required to make disclosures about certain criminal and regulatory actions set forth in proposed Rule 3110.18(g)(1)(D),¹⁴⁷ and another asked FINRA to clarify the exclusions for locations that engage in proprietary trading or handle customer funds or securities as set forth in proposed Rules 3110.18(g)(1)(F) and (G).¹⁴⁸ No commenter offered specific support for, or opposition to, any of the remaining ineligibility criteria.

a. Criminal Convictions and Adjudicated Regulatory Actions

Proposed Rule 3110.18(g)(1)(D) would exclude a location from the Pilot where one or more associated persons at such location is required to disclose certain criminal convictions or regulatory actions on Form U4.¹⁴⁹ One commenter

recommended that FINRA expand this ineligibility criterion to include locations with associated persons who: have a “substantial number” of customer complaints; are subject to pending regulatory investigations; have been terminated for cause; or have “significant” judgments or liens.¹⁵⁰ The commenter stated that such associated persons are “problematic” and thus the locations at which they work should be subject to on-site inspections, which offer greater scrutiny.¹⁵¹

In response, FINRA declined to expand the location-level ineligibility criteria, stating that, as currently proposed, the ineligibility criteria are based on clear, objective factors.¹⁵² Nonetheless, FINRA agreed with the commenter that the presence of such disclosures would be factors a participating member firm should consider as part of its required risk assessment.¹⁵³ FINRA concluded that the risk assessment, along with other provisions of the proposed rule change, such as the requirement that a participating member firm establish, maintain, and enforce written supervisory procedures for remote inspections, would provide the appropriate safeguards related to whether a particular location should be eligible to undergo a remote inspection.¹⁵⁴

An individual with certain regulatory or criminal-action disclosures on Form U4 has a history of criminal conviction(s) or regulatory finding(s) that may indicate an increased risk of non-compliance. Because of the heightened risks associated with such registered persons, it is reasonable for the proposed rule change to exclude locations from the Pilot where one or more associated persons at such location is required to disclose certain criminal convictions or regulatory actions on Form U4. The Commission also recognizes, however, that there may be other indicators of heightened risk.

Customer complaints, investigations, terminations, and judgments or liens may, in certain circumstances, indicate

heightened levels of risk. However, they are not formal investigations or proceedings initiated by a regulator charged with enforcing securities laws, regulations, and rules. For example, they may be overly broad in scope or lack the factual development of a comparable regulatory action. Because assessing the risk associated with customer complaints, investigations, terminations, and judgments or liens may require investigation and a consideration of the totality of the circumstances, FINRA reasonably determined that—in lieu of creating a blanket exclusion for such locations—these factors could be considered in the mandatory risk assessment of each location to determine whether a remote inspection is appropriate. Specifically, it is reasonable for participating member firms to gauge the level of risk of a location by, among other things, requiring participating member firms to: (1) consider the “volume and nature of customer complaints” in the mandatory risk assessment prior to inspecting a location remotely; and (2) take into consideration any red flags when determining whether to conduct a remote inspection of a location. For these reasons, the proposed ineligibility criteria are reasonable.

b. Proprietary Trading and Handling Customer Funds or Securities

As stated above, locations that engage in proprietary trading or handle customer funds or securities would be excluded from the Pilot.¹⁵⁵ One supportive commenter requested that FINRA provide a clearer definition of the types of trading activities that would trigger these exclusions, fearing that certain common activities could be interpreted in a way that would result in eliminating a significant number of branches from eligibility for remote inspections.¹⁵⁶

In response, FINRA stated that these two ineligibility criteria are based on “significant activities potentially impacting the operations and financial stability of the firm and, as a result, may also significantly impact customers and the markets generally.”¹⁵⁷ In reference to the proprietary trading exclusion, FINRA stated that providing an exhaustive list of the types of trading activities that would trigger this exclusion “is not practicable” because the analysis is fact-specific, but would consider providing additional guidance,

¹⁴³ See proposed Rule 3110.18(g)(1).

¹⁴⁴ See Notice at 28630; *see also* Notice at 28631 (“FINRA believes the proposed list of ineligibility categories is appropriately derived from existing rule-based criteria that are part of processes to identify . . . associated persons that may pose greater concerns due to the specified activities and nature of disclosures of regulatory or disciplinary events on the uniform registration forms.”); FINRA Response to Comments II at 10 (“FINRA believes that these proposed criteria impose appropriate controls and conditions regarding participation in the proposed Pilot Program to further promote investor protection.”).

¹⁴⁵ Notice at 28631.

¹⁴⁶ See SIFMA at 2 (noting that the proposed rule change scopes out “certain, higher-risk locations [and] individuals”); *see also* CAI at 3. *See also generally* NASAA I at 6 (stating that “the ineligibility criteria would help to ensure that firms and locations that present higher risks to investors would remain subject to in-person inspection requirements, thereby helping to protect investors from unnecessary risks under the pilot program.”).

¹⁴⁷ See PIABA I at 4; PIABA II at 4.

¹⁴⁸ See letter from Jessica R. Giroux, General Counsel & Head of Fixed Income Policy, American Securities Association, to Vanessa Countryman, Secretary, Commission, dated August 29, 2023 (“ASA II”) at 3.

¹⁴⁹ See Form U4 Questions 14A(1)(a) and (2)(a), 14(B)(1)(a) and (2)(a), and Questions 14C, 14D, and 14E.

¹⁵⁰ See PIABA I at 4; PIABA II at 4. PIABA stated that FINRA should exclude individuals with “a substantial number” of customer complaints but did not suggest a particular number or threshold. *Id.* Similarly, PIABA suggested that FINRA exclude locations with associated persons who have “significant” judgments or liens, without commenting on a specific amount. *Id.*

¹⁵¹ *Id.*

¹⁵² See FINRA Response to Comments I at 12.

¹⁵³ *Id.* at 13. The risk assessment would require a participating member firm’s consideration of higher-risk activities occurring at a location, higher-risk associated persons that are assigned to a location, and the presence of red flags. *See* proposed Rule 3110.18(b).

¹⁵⁴ *Id.*

¹⁵⁵ See proposed Rules 3110.18(g)(1)(F) and (G).

¹⁵⁶ See ASA II at 3 (stating that the processing and supervisory activities related to accepting funds or securities happen at nearly every branch location).

¹⁵⁷ FINRA Response to Comments II at 10.

as appropriate.¹⁵⁸ With regard to the handling of customer funds and securities, FINRA stated that in addition to having the potential for significant impact on customers, this ineligibility criteria is derived from one of several existing conditions that a member firm must satisfy in order to deem a primary residence as a non-branch location.¹⁵⁹

Proprietary trading activities can rapidly and adversely impact the operational and financial stability of a member firm, and the resulting instability can pose a significant risk of harm to the member firm's customers. In light of this risk, FINRA reasonably determined that a location conducting propriety trading should remain subject to on-site inspection and not be permitted to participate in a temporary pilot program designed to evaluate the prudence of a permanent remote-inspection program. For this reason, the proposed exclusion is reasonable.¹⁶⁰

Similarly, a member firm handling its customers' funds or securities increases, among other things, the risk of loss of those customers' assets. In light of that risk, FINRA reasonably determined that a location handling customer funds or securities should remain subject to on-site inspection and not be permitted to participate in a temporary pilot program designed to evaluate the prudence of a permanent remote-inspection program. For this reason, the proposed exclusion is reasonable.

c. Other Location-Level Ineligibility Criteria

The proposed rule change would also prohibit remote inspections for any location with an associated person who: (1) is subject to a mandatory heightened supervisory plan under the rules of the Commission, FINRA, or a state regulatory agency; (2) is statutorily disqualified, unless such disqualified person (A) has been approved (or is otherwise permitted pursuant to FINRA rules and the federal securities laws) to

associate with a member firm and (B) is not subject to a mandatory heightened supervisory plan under item (1), above, or otherwise as a condition to approval or permission for such association; (3) causes the member firm to undergo a continuing membership review pursuant to FINRA Rule 1017(a)(7); or, (4) is subject to certain disciplinary actions by the participating member firm.¹⁶¹ FINRA stated that these location ineligibility criteria are necessary to address the indicia of increased risk posed by some locations and represent appropriate controls and conditions regarding participation in the Pilot.¹⁶² No commenter offered specific support for, or opposition to, any of these exclusions.

FINRA reasonably determined to exclude each of these locations from the Pilot given the increased risk each category of person could pose. First, if a regulator has imposed a heightened supervisory plan on a specific associated person, the regulator has determined that they require additional supervision to help ensure their compliance with securities laws, regulations, and rules. Second, an individual subject to a statutory disqualification has engaged in violative conduct that may indicate an increased risk of non-compliance.¹⁶³ Third, an individual who has triggered a continuing membership review pursuant to FINRA Rule 1017(a)(7) is seeking to become an owner, control person, principal, or registered person of the member firm and has, in the previous five years, one or more "final criminal matters" or two or more "specified risk events."¹⁶⁴ Fourth, an individual who is subject to a reportable disciplinary action initiated by a

member firm has necessarily engaged in misconduct that warranted the member firm's imposition of significant discipline.¹⁶⁵ Because each of these proposed exclusions identifies a category of person who has a history of law violations, misconduct, or non-compliance with laws and rules designed to protect investors, the proposed rule change reasonably requires an on-site inspection for each location from which such associated persons operate, rather than allowing those locations to be inspected remotely. Therefore, FINRA reasonably determined to exclude such locations from eligibility in the Pilot.

2. Location-Level Conditions

a. Location-Level Recordkeeping System

The proposed rule change would require a participating location to make all electronic communications through the participating member firm's electronic system, subject all communications with the public to the firm's supervision, and preclude books and records from being physically or electronically maintained and preserved at the location.¹⁶⁶ FINRA stated that it believes this provision "appropriately conveys a reasonable set of conditions related to communications of associated persons and the creation and preservation of books and records at a specific office or location."¹⁶⁷ No commenter expressly supported or objected to these proposed changes.

The proposed rule change's location-level recordkeeping conditions are

¹⁶⁵ See proposed Rule 3110.18(g)(1)(E). A member firm must report to FINRA if an associated person of the member firm is the subject of any disciplinary action taken by the member firm involving suspension, termination, the withholding of compensation or of any other remuneration in excess of \$2,500, the imposition of fines in excess of \$2,500 or is otherwise disciplined in any manner that would have a significant limitation on the individual's activities on a temporary or permanent basis. See FINRA Rule 4530.

¹⁶⁶ As part of the requirement to develop a reasonably designed risk-based approach to using remote inspections, and the requirement to conduct and document a risk assessment for each location in accordance with the risk assessment provision of the Pilot, a specific location of the participating member firm would be required to also satisfy the following conditions: (1) electronic communications (e.g., email) are made through the participating member firm's electronic system; (2) the associated person's correspondence and communications with the public are subject to the participating member firm's supervision in accordance with FINRA Rule 3110; and (3) no books or records of the member firm required to be made and kept current, and preserved under applicable securities laws and regulations, FINRA rules and the participating member firm's own written supervisory procedures under FINRA Rule 3110 are physically or electronically maintained and preserved at such location. See proposed Rule 3110.18(g)(2).

¹⁶⁷ See Notice at 28631.

¹⁵⁸ *Id.* at 11. Because of the fact-specific nature of the definition of proprietary trading, FINRA stated that it believes that this commenter's request would be better addressed through FINRA's interpretative guidance process so that FINRA has the opportunity to fully consider relevant facts and circumstances. *Id.*

¹⁵⁹ *Id.* at 10–11. FINRA also stated that it has previously provided guidance on the meaning and interpretation of the term "handled" that currently appears in Rule 3110(f)(2)(A)(ii) and such existing guidance would apply to the Pilot. *Id.* at 11.

¹⁶⁰ Because additional guidance about the types of trading activities that would trigger the proprietary trading ineligibility criteria could assist participating member firms in complying with the Pilot, the Commission notes that FINRA has offered to consider issuing such guidance through its interpretive guidance process, as appropriate. See FINRA Response to Comments II at 11.

¹⁶¹ See proposed Rules 3110.18(g)(1)(A)–(C) and (E); see also *supra* note 59.

¹⁶² See FINRA Response to Comments II at 10.

¹⁶³ Section 3(a)(39) of the Exchange Act identifies a list of events that disqualify someone from membership in, participation in, or association with a member of a self-regulatory organization. 15 U.S.C. 78c(a)(39).

¹⁶⁴ Proposed Rule 3110.18(g)(1)(C) (exclusion applicable where the person responsible for triggering a continuing membership review is located at the location subject to inspection); FINRA Rule 1017(a)(7). "The term 'final criminal matter' means a criminal matter that resulted in a conviction of, or plea of guilty or nolo contendere ('no contest') by, a person that is disclosed, or is or was required to be disclosed, on the applicable Uniform Registration Forms." FINRA Rule 1011(h). "Specified risk events" include certain investment-related, consumer-initiated (1) customer arbitration awards, (2) civil judgments, (3) customer arbitration settlements, or (4) civil litigation settlements. FINRA Rule 1011(p)(1), (2). "Specified risk events" also include certain investment-related civil actions or regulatory actions that result in (1) monetary sanctions for a dollar amount at or above \$15,000 or (2) a bar, expulsion, revocation, rescission, or suspension. See FINRA Rule 1011(p)(3), (4).

reasonable. As discussed above, a key component of remote—as opposed to on-site—inspection is prompt access to the records of the remotely inspected location from an alternative location. The proposed location-level recordkeeping conditions strengthen this component of the Pilot. Prompt access should help provide the participating member firm with the necessary insight into the location's operations, both at the outset and on an ongoing basis. Mandating the use of the participating member firm's electronic system for the location's electronic communications and requiring the firm to supervise the location's correspondence and communications help to ensure that the participating location's activities lend themselves to remote inspection. Because the proposed conditions prohibit the storage of a participating location's records at the location itself, the participating member firm need not conduct an on-site visit to gather and review records during an inspection. The proposed rule change therefore should facilitate timely and effective remote inspection of locations participating in the Pilot and decrease, though not always eliminate, the need for on-site inspections.

C. Risk Assessment

The proposed rule change would require a participating member firm to conduct and document a risk assessment for each location prior to choosing to conduct a remote inspection for that location.¹⁶⁸ The risk assessment would require that a participating member firm take into account any higher risk activities at, or higher risk associated persons assigned to, that location, as well as mandate consideration of a non-exhaustive list of factors, including: (1) the volume and nature of customer complaints; (2) the volume and nature of outside business activities, particularly investment-related; (3) the volume and complexity of products offered; (4) the nature of the customer base, including vulnerable adult investors; (5) whether associated persons are subject to heightened supervision; (6) failures by associated persons to comply with the participating member firm's written supervisory procedures; and (7) any recordkeeping violations.¹⁶⁹ According to FINRA, the inclusion of this non-exhaustive list would help ensure that participating member firms consider certain high risk criteria when

determining whether to conduct a remote inspection.¹⁷⁰ FINRA further stated that it “expects that higher risk factors at a particular location would cause a firm to conduct on-site inspections of such location.”¹⁷¹

Five commenters generally supported the proposed risk assessment.¹⁷² Three of these commenters stated that the requirement to conduct risk assessments for each location would promote investor protection.¹⁷³ A fourth commenter stated that the use of a risk assessment would enable a participating member firm to dedicate more resources to specialized inspections targeting higher risk areas.¹⁷⁴ The fifth commenter expressed general support for the provision.¹⁷⁵

Two of the five supporting commenters also suggested modifications to the proposed rule change.¹⁷⁶ One commenter expressed concern that FINRA would use the benefit of hindsight to evaluate a participating member firm's determination to conduct a remote inspection where one of the listed risk factors is present.¹⁷⁷ In response, FINRA disagreed, emphasizing that “the ‘reasonably designed’ standard requires that the supervisory system, of which an inspection program is a part, ‘be a product of sound thinking and within the bounds of common sense, taking into consideration the factors that are unique to a member's business[.]’”¹⁷⁸ FINRA also noted that the presence of one particular enumerated factor or others may not be dispositive as to whether an on-site or remote inspection of a location is appropriate, and such factors should be reviewed in their

totality under the facts and circumstances.¹⁷⁹

The second commenter sought additional conditions to the risk assessment. First, this commenter stated that a participating member firm should be required to conduct and document a risk assessment after identifying red flags and fully consider any significant change in circumstances that may warrant higher scrutiny.¹⁸⁰ In the alternative, this commenter stated that FINRA should revise proposed Rule 3110.18(b)(1) to require a risk assessment for each location before “each” remote inspection of that location. The commenter explained its concern that participating member firms may ignore red flags and rely on a previous risk assessment to continue inspecting a location remotely because the rule would require that a risk assessment be conducted “prior to electing a remote inspection.”¹⁸¹

Second, this commenter stated that a participating member firm should be required to provide FINRA with documentation of all risk assessments conducted after identifying red flags during the Pilot. The commenter reasoned that it would “maintain accountability” to require a participating member firm to articulate a sound basis for its decisions upon identifying red flags.¹⁸² Moreover, this commenter stated that the data would aid FINRA's and the Commission's understanding of risk assessment practices and consider the merits of any potential policy changes around remote inspections.¹⁸³

To address this concern, FINRA amended the proposed rule change to expressly require that, consistent with FINRA Rule 3110(a), a participating member firm “take into consideration any red flags when determining whether to conduct a remote inspection of an office or location.”¹⁸⁴ FINRA stated, “[w]here there are indications of problems or red flags at any office or location, FINRA expects members to investigate them as they would for any other office or location subject to FINRA Rule 3110(c), which may include an unannounced, on-site inspection of the office or location.”¹⁸⁵ FINRA also noted that red flags “would be required to be considered not only when an office or location is first determined to be

¹⁷⁰ See Notice at 28627.

¹⁷¹ *Id.*

¹⁷² See SIFMA; Raymond James I; Cetera I; NASAA I; FSI.

¹⁷³ See Cetera I at 1 (stating that the Pilot “includes significant safeguards that are designed to maintain or enhance investor protection” including requiring participating member firms to conduct and document risk-based assessments); SIFMA at 2 (“[The Pilot] includes numerous safeguards to ensure onsite inspections are conducted when appropriate, such as requiring firms to perform a risk assessment that considers a non-exhaustive list of risk factors, and scoping out certain, higher-risk locations, individuals, and firms from the pilot.”); FSI at 3–4 (“The required risk-based assessment, coupled with restrictions that limit or restrict the ability of certain higher-risk firms and firm offices from participating in remote inspections, will ensure that investors are protected.”).

¹⁷⁴ Raymond James I at 2 (stating that risk assessments would also allow participating member firms to tailor their inspection programs to attract and retain a broader candidate pool who may not be interested in, or be able to, travel).

¹⁷⁵ NASAA I at 4.

¹⁷⁶ FSI; NASAA I.

¹⁷⁷ See FSI at 4.

¹⁷⁸ FINRA Response to Comments I at 8 (quoting Notice 99–45).

¹⁷⁹ See *id.*

¹⁸⁰ NASAA I at 4–5.

¹⁸¹ *Id.* at 4–5.

¹⁸² *Id.* at 5.

¹⁸³ *Id.*

¹⁸⁴ Proposed Rule 3110.18(b)(2); see also Amendment No. 1.

¹⁸⁵ FINRA Response to Comments I at 7 (quoting Notice at 28634).

¹⁶⁸ See proposed Rule 3110.18(b)(1); see also *supra* note 63 and accompanying text.

¹⁶⁹ See proposed Rule 3110.18(b)(1) and (b)(2); see also *supra* note 64 and accompanying text.

appropriate for a remote inspection but, consistent with Rule 3110(a)'s overall obligation for a firm to establish and maintain a reasonably designed supervisory system, as part of a firm's ongoing determination to conduct subsequent inspections of the office or location remotely."¹⁸⁶ One commenter expressed support for this amendment, stating that it "strengthen[ed] the Pilot's safeguards."¹⁸⁷

FINRA declined to amend the proposed rule change to require participating member firms provide FINRA the risk assessments conducted after identifying red flags. FINRA stated that the Pilot already requires submission of comprehensive data and information to FINRA that is sufficient for FINRA to conduct its assessment.¹⁸⁸ FINRA also noted that it could obtain such assessments during a FINRA examination, which should provide sufficient accountability.¹⁸⁹

As stated above, the proposed rule change's ineligibility criteria, safeguards, and limitations prohibit member firms and locations from participating in the Pilot in certain higher-risk circumstances. However, other factors not explicitly identified among the exclusions can, in certain circumstances, indicate heightened levels of risk either before or after determining whether a remote inspection is appropriate. The risk assessment required by the proposed rule change will help to mitigate residual risk not addressed by the ineligibility criteria and the affirmative conditions imposed to participate in the Pilot. Specifically, the proposed rule change would require a participating member firm to consider certain indicia of risk for each candidate location for remote inspection, including the volume and nature of customer complaints; the volume and nature of outside business activities, particularly investment-related; the volume and complexity of products offered; the nature of the customer base, including vulnerable adult investors; whether associated persons are subject to heightened supervision; failures by associated persons to comply with the member's written supervisory procedures; and any recordkeeping violations. In addition, the proposed rule change would mandate that a

participating member firm consider higher-risk activities, higher-risk persons, and red flags occurring at any location when determining whether a remote inspection is or continues to be appropriate. Furthermore, the proposed rule change emphasizes consideration of red flags as part of a participating member firm's ongoing determination of whether to remotely inspect a location. In this way, the proposed rule change helps to ensure that a participating member firm appropriately accounts for the full range of risks associated with each location throughout the term of the Pilot. For these reasons, the proposed rule change is reasonable.

The commenter requested that participating member firms submit documentation of risk assessments following the identification of red flags, but FINRA reasonably determined not to require such documentation, given that it would be required to be maintained by the participating member firms and be made available to FINRA and the Commission during an examination. In addition, the proposed rule change already contains provisions requiring quarterly submission of data and information to FINRA, including submission of "significant findings," which should help FINRA to study trends and promptly identify any regulatory oversight concerns, as well as provide FINRA with periodic data to evaluate a participating member firm's continued participation in the Pilot. For these reasons, the proposed risk assessment provision is reasonable.

D. Written Supervisory Procedures

The proposed rule change would require that a participating member firm "establish, maintain, and enforce" certain written supervisory procedures for conducting remote inspections.¹⁹⁰ Reasonably designed written supervisory procedures for conducting remote inspections would be required to address, among other things: (1) the methodology, including technology, that may be used to conduct remote inspections; (2) the factors considered in the risk assessment made for each applicable location pursuant to the risk assessment provision of the Pilot; (3) the procedures specified elsewhere in the Pilot regarding escalating significant findings, new hires, supervising brokers with a significant history of misconduct, OBA and DBA designations, and data and information collection and transmission; and (4) the use of other risk-based systems employed generally by the participating member firm to

identify and prioritize for review those areas that pose the greatest risk of potential violations of applicable securities laws and regulations, and of applicable FINRA rules.¹⁹¹ FINRA stated that it "expects firms to take into account the factors affecting their systems and businesses in crafting reasonably designed policies and procedures" to comply with the Pilot.¹⁹²

One commenter recommended that the proposed rule change also require each participating member firm's written supervisory procedures to include four additional factors: (1) the specific technologies that the participating member firm would use for remote inspections and evidence that the participating member firm and its supervisory personnel have sufficient access to and proficiency with those technologies; (2) the circumstances in which the participating member firm will conduct physical inspections, both in the ordinary course and as a result of red flags; (3) whether and how the participating member firm intends to conduct unannounced inspections; and (4) how the participating member firm will use its remote inspection procedures to control for the possibility of active deception such as concealment, removal, or destruction of evidence of misconduct.¹⁹³

In response, FINRA stated that the proposed written supervisory procedures provision reflects a balanced approach between dictating the content of a participating member firm's written supervisory procedures for remote inspections and maintaining flexibility in alignment with FINRA Rule 3110's principle-based view of what constitutes reasonably designed written supervisory procedures.¹⁹⁴ Nevertheless, FINRA also stated that many of this commenter's recommendations are already addressed by specific terms in its rules and in the proposed rule change. For example, proposed Rule 3110.18(c) would require a participating member firm's reasonably designed supervisory procedures to address the technology tools that may be used to conduct

¹⁹¹ See *id.*

¹⁹² See Notice at 28629.

¹⁹³ NASAA I at 5–6 (stating that "it is not inconsistent with a principle-based approach to establish certain minimums or otherwise set boundaries around the principle to ensure at least a minimum level of efficacy and investor protection.").

¹⁹⁴ FINRA Response to Comments I at 9; see also *id.* at 9 n.21 (quoting Notice 99–45) ("[w]ritten supervisory procedures are not static documents that can be used for an indefinite period of time without modification. A firm's existing supervisory system may become outdated or ineffective as a result of changes in the firm's business lines, products, practices, or new or amended securities laws.").

¹⁸⁶ FINRA Response to Comments II at 8.

¹⁸⁷ Letter from Jim McHale, Executive Vice President, Head of WIM Compliance and Peter Macchio, Executive Vice President, Head of CIB Compliance, Wells Fargo, to Vanessa Countryman, Secretary, Commission, dated August 29, 2023 ("Wells Fargo") at 1.

¹⁸⁸ See FINRA Response to Comments I at 7.

¹⁸⁹ *Id.*

¹⁹⁰ See proposed Rule 3110.18(c); see also proposed Rule 3110.18(h)(1)(G), (h)(4).

remote inspections. FINRA stated that it believes that the failure to have adequate surveillance and technology tools, and the knowledge of and access to them, would raise questions about the reasonableness of remote inspection.¹⁹⁵ Proposed Rule 3110.18(b)(2) also would require, among other things, participating member firms to conduct on-site inspections or more frequent unannounced, on-site inspections of a location where there are indicators of irregularities or misconduct;¹⁹⁶ and proposed Rule 3110.18(c) would require participating member firms to “establish, maintain, and enforce written supervisory procedures regarding remote inspections that are reasonably designed to detect and prevent violations of and achieve compliance with applicable securities laws and regulations, and with FINRA rules.”¹⁹⁷ In addition, FINRA stated that, overall, FINRA Rule 3110 established a framework that requires a firm to have a reasonably designed supervisory system, including written supervisory procedures, to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules. As such, FINRA declined to amend the proposed rule change to explicitly include the commenter’s suggested prescriptive elements.¹⁹⁸

Requiring participating member firms to establish, maintain, and enforce written supervisory procedures for conducting remote inspections is reasonable and should help such member firms detect and prevent violations of and achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules. In particular, requiring those procedures to address technology, risk assessment factors, data and information collection and transmission, and other risk-based systems to identify and prioritize for review areas that pose the greatest risk should reasonably address aspects of remote inspections that may raise a threat of heightened risk of compliance failures. While the proposed rule change prescribes several items that would be required to be addressed, participating member firms are not limited to these items alone and have flexibility to tailor their procedures to their business activities and other relevant factors to meet the obligation under FINRA Rule 3110 that the procedures be “reasonably designed to detect and prevent violations of and

achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules.”¹⁹⁹ In addition, the proposed rule change makes clear that the requirement to conduct inspections of locations is only one part of the member firms’ overall obligation to have an effective supervisory system.²⁰⁰ For these reasons, the proposed written supervisory provisions are reasonable.

E. Effective Supervisory System

As stated above, the proposed rule change would hold a remote inspection of a location to the same standards applicable to on-site inspections.²⁰¹ Specifically, the proposed rule change would reiterate that the requirement to conduct inspections of locations is one part of the member firm’s overall obligation to have an effective supervisory system and therefore a participating member firm would be required to maintain its ongoing review of the activities and functions occurring at all locations, whether or not the member firm conducts inspections remotely.²⁰² In addition, where a participating member firm’s remote inspection of a location identifies any red flags, the proposed rule states that the participating member firm may need to impose additional supervisory procedures for that location or may need to provide for more frequent monitoring of that location, including potentially a subsequent on-site visit on an announced or unannounced basis.²⁰³ No commenter offered specific support for, or opposition to, this proposed provision.

The proposed rule change is reasonable and will serve as an

appropriate reminder to participating member firms that any location subject to a remote inspection is still subject to the same standard for review as that of an on-site inspection. As such, there should be no diminution in on-going supervision, regardless of the method a participating member firm uses to inspect its locations. The proposed rule change should also help ensure that participating member firms are aware that even if a location is eligible for a remote inspection at one point in time, a participating member firm may need to take additional steps (e.g., an on-site visit on an announced or unannounced basis) should it become aware of any red flags associated with that location.²⁰⁴ For these reasons, the proposed rule change is reasonable.

F. Documentation Requirement

As stated above, the proposed rule change would require that a participating member firm maintain and preserve a centralized record for each year of the Pilot that identifies: (1) all locations that were inspected remotely; and (2) any locations for which the participating member firm determined to impose additional supervisory procedures or more frequent monitoring.²⁰⁵ FINRA stated that requiring the retention of such written reports would act as an important safeguard for the Pilot.²⁰⁶ No commenter expressly supported or objected to these proposed changes.

Documenting locations that were inspected remotely, as well as locations where additional supervisory procedures or more frequent monitoring were imposed, is reasonable and should provide regulators with relevant information when conducting their examination and risk monitoring responsibilities. Specifically, this information should help regulators assess the reasonableness of a participating member firm’s use of remote inspection as one component of a reasonably designed supervisory system. For these reasons, the proposed documentation requirement is reasonable.

G. Data Collection

1. Quarterly Data and Information

As stated above, the proposed rule change would require participating member firms to collect and submit

¹⁹⁹ See FINRA Rule 3110(a).

²⁰⁰ See also FINRA Response to Comments I at 9 (“FINRA believes that proposed Rule 3110.18(c), which must be read with proposed Rule 3110.18(d) and Rule 3110, would provide the appropriate guardrails that NASAA seeks while also remaining aligned with the core tenet of Rule 3110—that is, a member firm must have a ‘reasonably designed’ supervisory system, including written supervisory procedures, to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules.”).

²⁰¹ Proposed Rule 3110.18(d).

²⁰² *Id.*

²⁰³ *Id.* FINRA has emphasized, in guidance issued to member firms, that a well-designed branch inspection program is important to both a firm’s supervisory program as well as a firm’s risk management program. For example, Regulatory Notice 11–54 stated, “[a]n effective risk assessment process will help drive the frequency, intensity and focus of branch office inspections; it should also serve as an important consideration in the decision to conduct the [inspection] on an announced or unannounced basis. Therefore, branch offices should be continuously monitored with respect to changes in their overall business, products, people and practices.” See FINRA Regulatory Notice 11–54 (Nov. 2011), <https://www.finra.org/rules-guidance/notices/11-54>.

¹⁹⁵ FINRA Response to Comments II at 6.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ FINRA Response to Comments I at 9.

²⁰⁴ See proposed Rule 3110.18(b); see also Notice at 28628.

²⁰⁵ Proposed Rule 3110.18(e). A participating member firm’s documentation would be required to include whether an on-site inspection was conducted at such location because of the results of a remote inspection. *Id.*

²⁰⁶ See Notice at 28635.

certain data and information to FINRA on a quarterly basis. Specifically, it would cover information about the number and nature of inspections completed during the quarter, and a list of the significant findings, among other things.²⁰⁷ The proposed rule change also would require that a participating member firm establish, maintain, and enforce written policies and procedures that are reasonably designed to comply with the data and information collection, and transmission requirements of the Pilot.²⁰⁸ FINRA stated that it believes that “formalized, uniform collection of data is critical” for it to meaningfully assess the effectiveness of remote inspections and shape potential permanent amendments to FINRA Rule 3110(c).²⁰⁹

Several commenters agreed that the data and information requirements would benefit the Pilot by providing FINRA the information it needs to make informed decisions about potential future rule changes regarding remote inspections.²¹⁰ Two commenters suggested modifications to the proposed rule change, stating that requiring quarterly reporting was too onerous.²¹¹ In particular, one of these commenters stated that quarterly reporting “creates an outsized burden on smaller, middle-market, and regional firms” due to the detailed data and information required.²¹² The other commenter described the expected burden on larger

firms and requested FINRA change the reporting frequency to twice a year.²¹³

In response, FINRA declined to amend the required frequency of data and information reporting.²¹⁴ FINRA stated that it “believes that the cadence and amount of comprehensive data are appropriate and necessary for FINRA to effectively study trends and firms’ experiences with their remote inspection programs in a timely manner.”²¹⁵ However, FINRA also stated that it is exploring ways for participating member firms to provide the data and information to FINRA in a more efficient and timely manner.²¹⁶

One commenter recommended that FINRA amend the proposed rule change to require participating member firms provide “all findings” made during remote inspections or, at a minimum, “all significant findings” as opposed to “most significant findings.”²¹⁷ The commenter reasoned that allowing subjectivity and discretion in data reporting would undermine the uniformity of the data and hinder FINRA’s ability to assess trends and developments.²¹⁸ The commenter maintained that “all findings” would therefore be appropriate because any finding significant enough to be documented in an inspection report should be reported.²¹⁹

In response, FINRA amended the proposed rule change to require participating member firms to report “significant findings” rather than “most significant findings.”²²⁰ FINRA, however, declined to require participating member firms to report “all findings” because it would yield overly broad data, making it “challenging to discern key trends in a meaningful way.”²²¹ FINRA stated that providing participating member firms

“the agency to assess what constitutes their significant findings” would enhance FINRA’s ability to review a discrete set of data that would focus on key areas of concern, which would help it assess the effectiveness of remote inspections.²²²

The same commenter acknowledged FINRA’s amendment and requested that FINRA define the term “significant findings” with more precision to avoid varying subjective judgments that might skew the data used to evaluate the effectiveness of the Pilot.²²³ In response, FINRA stated that it provided several clarifying examples of findings that may prompt escalation or further internal review, including the use of unapproved communication mediums, customer complaints, or undisclosed outside business activities or private securities transactions.²²⁴ FINRA further explained that it decided to include flexibility in the definition of “significant findings” because a finding that is significant for one participating member firm “may differ from another participant due to their respective attributes (e.g., size, business model, organizational structure) and tailored supervisory system.”²²⁵ Moreover, findings that may suggest a pattern could be deemed “significant” for purposes of the proposed Pilot.²²⁶ As a result, FINRA stated that it believes that participating member firms “should have the ability to exercise their reasonable judgment of what findings are significant based on the relevant facts and circumstances.”²²⁷ FINRA stated it believes that this proposed approach is consistent with the principle-based framework of Rule 3110.²²⁸ In addition, while the commenter suggested that FINRA take a more prescriptive approach, FINRA reiterated its belief that the proposed rule change’s definition of “significant findings” would provide a balanced approach to obtain meaningful data and information to appropriately assess the

²⁰⁷ See proposed Rule 3110.18(h)(1).

²⁰⁸ Proposed Rule 3110.18(h)(4) is also referenced in proposed Rule 3110.18(c) (Written Supervisory Procedures), discussed above.

²⁰⁹ See Notice at 28632.

²¹⁰ See, e.g., SIFMA at 2; CAI at 3; Wells Fargo at 2; Raymond James I at 2; NASAA I at 8; FSI at 4; letter from Gail Merken, Chief Compliance Officer, Janet Dyer, Chief Compliance Officer, John McGinty, Chief Compliance Officer, Fidelity Investments; Janet Dyer, Chief Compliance Officer, National Financial Services LLC; and John McGinty, Chief Compliance Officer, Fidelity Distributors Company LLC, to Vanessa Countryman, Secretary, Commission, dated May 25, 2023, at 1; letter from Barbara Armeli, Managing Director, Chief Compliance Officer, Charles Schwab & Co., Inc. and Lynn Konop, Managing Director, Chief Compliance Officer, TD Ameritrade, Inc., to Vanessa Countryman, Secretary, Commission, dated May 25, 2023, at 1; letter from Gail Merken, Chief Compliance Officer, Janet Dyer, Chief Compliance Officer, John McGinty, Chief Compliance Officer, Fidelity Investments; Janet Dyer, Chief Compliance Officer, National Financial Services LLC; and John McGinty, Chief Compliance Officer, Fidelity Distributors Company LLC, to Vanessa Countryman, Secretary, Commission, dated August 29, 2023, at 1–2. See also generally Cetera I at 1.

²¹¹ See letter from Mark Seffinger, Chief Compliance Officer; LPL Financial, to Vanessa Countryman, Secretary, Commission, dated May 25, 2023 (“LPL I”) at 2; letter from Christopher A. Iacovella, President & Chief Executive Officer, American Securities Association, to Vanessa Countryman, Secretary, Commission, dated May 25, 2023 (“ASA I”) at 2.

²¹² ASA I at 2.

²¹³ LPL I at 2.

²¹⁴ FINRA Response to Comments I at 14.

²¹⁵ *Id.*

²¹⁶ *Id.*; see also FINRA Response to Comments I at 14 n.33.

²¹⁷ See NASAA I at 8–9; see also letter from Andrew Hartnett, NASAA President and Deputy Commissioner, Iowa Insurance Division, North American Securities Administrators Association, Inc., to Sherry R. Haywood, Assistant Secretary, Commission, dated August 29, 2023 (“NASAA II”) at 2.

²¹⁸ See NASAA I at 8.

²¹⁹ *Id.*

²²⁰ FINRA Response to Comments I at 15; see also *supra* note 82 (describing the definition of “significant findings.”). FINRA has used the same definition for “significant finding” in the Notice, Amendment No. 1, and FINRA Response to Comments I. *Id.*

²²¹ FINRA Response to Comments I at 15–16; see also Notice at 28632. FINRA noted that it could obtain any additional findings in a participating member firm’s inspection reports during a FINRA examination. See FINRA Response to Comments I at 16.

²²² FINRA Response to Comments I at 15; see also *supra* note 82 (describing the definition of “significant findings.”).

²²³ NASAA II at 2–3. The commenter stated that, without a more precise standard, participating member firms will inevitably reach different conclusions. *Id.* at 3. In addition, this commenter repeated the request to require participating member firms provide “all findings” to FINRA. *Id.* at 2.

²²⁴ See FINRA Response to Comments II at 8 n.25.

²²⁵ *Id.* at 8.

²²⁶ *Id.* at 9 n.28.

²²⁷ *Id.* at 8–9.

²²⁸ *Id.* at 9.

effectiveness of a participating member firm's inspection program.²²⁹

Quarterly reporting of Pilot data should allow FINRA to review and assess data about participating member firms' inspection programs in a timely manner. While a quarterly reporting obligation is more burdensome than a less frequent one, participation in the Pilot is voluntary, and a quarterly schedule should help FINRA to study trends in the data and information and more promptly identify any regulatory oversight concerns than with a less frequent reporting interval. A more frequent reporting cycle would also provide FINRA with more up-to-date data to evaluate a participating member firm's continued participation in the Pilot.

A commenter expressed concerns about the potential subjectivity of the data and information that would be collected during the Pilot if parties were required to report only "significant findings." However, FINRA has made a reasonable distinction between the quantity and the quality of the data it would seek from participating member firms during the Pilot, and narrowing the focus to study significant areas of concern should help serve the Pilot's purpose to assess the effectiveness of remote inspections. Also, to help alleviate concerns around subjectivity, FINRA defined "significant finding" in the proposed rule change and provided examples to further clarify its meaning, which will help standardize reporting of data by participating member firms.²³⁰ The proposed principle-based approach to this aspect of data reporting should allow firms flexibility to determine what types of findings need to be reported based on their unique business models. Further, as FINRA stated, whether a finding is significant may change depending on the relevant facts and circumstances. Moreover, findings that may suggest a pattern could be deemed "significant" for purposes of the proposed Pilot even where they might not be considered significant individually. Thus, having reasonable flexibility is beneficial. Accordingly, FINRA's principle-based approach to interpreting the term "significant finding" is reasonable. For these reasons, the Commission finds the

proposed data and information collection provision is reasonable.

2. Additional Data and Information if the First Year of the Pilot is Less Than a Full Year

As stated above, if Pilot Year 1 covers less than a full calendar year, the proposed rule change would require a participating member firm to provide additional data and information to cover the period of time between January 1 and the day prior to the effective date of the Pilot.²³¹ FINRA stated that this would enable it to capture, in the aggregate, complete inspection counts (including remote and on-site) for the entire calendar year in addition to the quarterly data it would receive during the Pilot.²³² Aside from general comments in support of the Pilot's data and information requirements discussed above, no commenter offered specific support for, or opposition to, this provision.

The proposed rule change should provide FINRA with a fuller picture of the nature, amount, and outcomes of the inspections conducted by participating member firms and allow FINRA to aggregate the data and information provided with the quarterly data received during the Pilot to obtain a full picture of inspections completed for the entire calendar year. More specifically, the requirement to provide this additional data and information to FINRA should help address the potential gap of time that would result in FINRA lacking complete data if the first year of the Pilot is less than a full calendar year. The data and information should also provide FINRA with useful information regarding those remote inspections conducted under the temporary relief of FINRA Rule 3110.17 if those inspections are completed between January 1 and the day before

the effective date of the Pilot. Therefore, the proposed data and information collection should improve FINRA's ability to assess the effectiveness of the Pilot during its pendency. For these reasons, the proposed data and information collection provision is reasonable.

3. Additional Data and Information for Calendar Year 2019

As originally proposed, the proposed rule change would have required that a participating member firm collect and provide to FINRA data about inspections completed in 2019.²³³

One commenter expressed support for the collection of 2019 data, stating that it would "significantly enhance" FINRA's ability to more broadly judge the efficacy of remote supervisions.²³⁴ Two other commenters similarly acknowledged the value in obtaining this data and information from participating member firms, but raised concerns that some member firms may no longer maintain inspection reports from 2019 since inspection reports are generally only required to be maintained for a period of three years.²³⁵ These two commenters stated that a member firm should not be excluded from participation in the Pilot if it is unable to provide the 2019 data to FINRA, despite having complied with the applicable record retention requirement. Instead, they recommended that FINRA amend the proposed rule change to require participating member firms to collect and provide to FINRA the 2019 data "if available in the firm's records" and to require member firms to make a "best efforts" attempt to collect it.²³⁶

In response, FINRA amended the proposed rule change to require

²³³ See proposed Rule 3110.18(h)(3). The data and information would include: (1) the number of locations with an inspection completed during calendar year 2019; and (2) the number of locations referenced in item (1) where findings were identified, the number of those findings, and a list of the most significant findings. *Id.* As originally proposed, the proposed rule change required a list of the "most significant findings," which FINRA amended to "significant findings." See Amendment No. 1.

²³⁴ NASAA I at 8.

²³⁵ See CAI at 3; FSI at 4–5. Both commenters cite FINRA Rule 3010(c)(2), which states: "An inspection and review by a member . . . must be reduced to a written report and kept on file by the member for a minimum of three years, unless the inspection is [of a non-branch location] and the regular periodic schedule is longer than a three-year cycle, in which case the report must be kept on file at least until the next inspection report has been written."

²³⁶ FSI at 5; see also CAI at 3 ("[T]here is concern that the requirement to provide such information from 2019 may exclude certain firms from being able to participate since they may not be able to provide information for 2019 inspections.").

²²⁹ *Id.* In particular, the commenter suggested that there be a "more precise standard (or set of standards) for when a 'finding' is 'significant.'" NASAA II at 3, n.12 (pointing to the "very clear reporting standards in FINRA Rule 4530). In response, FINRA declined to change the definition, stating the current approach is consistent with the principle-based framework of FINRA Rule 3110. See FINRA Response to Comments II at 8–9.

²³⁰ See *supra* note 82.

²³¹ See proposed Rule 3110.18(h)(2); see also Amendment No. 1. The additional data and information would include: (1) the number of locations with an inspection completed between January 1 of the first Pilot Year and the day before the effective date of the Pilot; (2) the number of locations referenced in item (1) that were inspected remotely between January 1 of the first Pilot Year and the day before the effective date of the Pilot; and (3) the number of locations referenced in item (1) that were inspected on-site between January 1 of first Pilot Year and the day before the effective date of the Pilot. In addition, Amendment No. 1 imposed two new obligations to collect and produce data and information to FINRA. Specifically, participating member firms would also be required to collect and provide to FINRA the following: (4) the number of locations referenced in item (2) where findings were identified, the number of those findings, and a list of the significant findings; and (5) the number of locations referenced in item (3) where findings were identified, the number of those findings, and a list of the significant findings.

²³² See Notice at 28632.

participating member firms to “act in good faith using best efforts” to collect and provide the 2019 data to FINRA (“good faith exception”).²³⁷ As such, FINRA stated that if a participating member firm is unable to provide these data, the member firm would not necessarily be precluded from participating in the Pilot. FINRA acknowledged that not all member firms will have maintained the 2019 data, but strongly encouraged firms that plan to participate in the Pilot to retain their 2019 data, as it would enhance the value of the Pilot for any future rulemaking regarding remote inspections.²³⁸

One commenter opposed this amendment to the proposed rule change, stating that it was insufficient. This commenter recommended that FINRA further amend the proposed rule change to require any member firm seeking to avail itself of this exception to “document the precise steps in support of [its] ‘best efforts in good faith’” to recover its 2019 data.²³⁹

In response, FINRA stated that because the concepts of “good faith” and “best efforts” are commonly understood legal standards, there is no need to require a participating member firm to document the steps it took to recover its 2019 data.²⁴⁰ Furthermore, FINRA stated that while some participating member firms may keep their inspection reports beyond the minimum rule-based retention period, they are not required to do so.²⁴¹ Thus, FINRA declined to amend the proposed rule change.²⁴²

The proposed rule change is reasonable and should help ensure that FINRA has the data and information it needs to best meet a key objective for the Pilot—to determine the effectiveness of the Pilot. Since 2019 is the last full calendar year that member firms were required to include an on-site visit in their inspections, the 2019 data should represent a baseline of data about on-site inspections against which FINRA could measure changes due to using remote inspections. Specifically, the proposed rule change would enable FINRA to compare the 2019 data with

the quarterly data that would be collected during the Pilot to identify and assess any differences. Some participating member firms may not have maintained 2019 inspection reports beyond the time period required by FINRA Rule 3110(c)(2) and such member firms should not be excluded from participating in the Pilot for that reason. As such, FINRA reasonably determined that such member firms may continue to participate if they act in good faith using best efforts to provide the data and information in order to maintain a level of accountability and mitigate concerns that a participating member firm would purposely withhold this information.

H. Other Safeguards and Limitations Provisions

1. Length of Pilot

As stated above, under the proposed rule change the Pilot would expire three years after its effective date. FINRA stated that it believes the Pilot would provide FINRA the appropriate amount of time and population sample to better evaluate the use of remote inspections in the current hybrid work environment.²⁴³ No commenter expressly supported or objected to these proposed changes.

The proposed length of the Pilot should suffice to allow FINRA to evaluate the efficacy of the Pilot, and to consider any adjustments as necessary. For these reasons, the scope of the Pilot provision is reasonable.

2. Method of Pilot Participation

As stated above, the proposed rule change would set forth the process for opting in and out of the Pilot.²⁴⁴ FINRA stated that it believes the proposed process would lend continuity to the data and information collected during the Pilot.²⁴⁵ No commenter expressly supported or objected to these proposed changes.

The proposed process for opting in and out of the Pilot is reasonable and should help FINRA obtain consistent data and information from participating member firms, helping it assess the Pilot’s effectiveness. Specifically, setting

minimum commitments for participation and requiring a set time period for opting out should help ensure that FINRA will receive a full set of data from any participating member firm for any given Pilot Year. In addition, such commitments should help safeguard against a participating member firm trying to exit the Pilot in order to avoid submitting problematic data or complying with other conditions in the Pilot. For these reasons, the Pilot participation provision is reasonable.

3. Failure To Satisfy Conditions and Determination of Ineligibility

As stated above, the proposed rule change would deem a participating member firm that failed to satisfy the safeguards and limitations of the Pilot, including the requirement to timely collect and submit data, ineligible to participate in the Pilot, thus requiring it to conduct on-site inspections of each location.²⁴⁶ In addition, as stated above, the proposed rule change would give FINRA discretion to make a determination in the public interest and for the protection of investors that a member firm is no longer eligible to participate in the Pilot if the member firm fails to comply with the Pilot’s requirements.²⁴⁷ FINRA stated that it proposed this second provision to address concerns regarding allowing FINRA to more effectively assess whether particular member firms pose a higher risk when monitoring for compliance with the Pilot.²⁴⁸ Specifically, FINRA stated that the proposed rule change would permit FINRA to exclude higher risk firms and locations that were not otherwise excluded from participation by the Pilot’s other safeguards and limitations.²⁴⁹ No commenter expressly supported or objected to these proposed changes.

The Pilot’s safeguards and limitations, discussed herein, are reasonable and should help reduce the potential risk of non-compliance among member firms participating in the Pilot. Member firms who fail to satisfy the conditions of the Pilot should not be eligible to participate in the Pilot or conduct remote inspections and should be required to conduct all inspections on-site. Additionally, FINRA would have the flexibility to address situations

²³⁷ See proposed Rule 3110.18(h)(3); see also Amendment No. 1.

²³⁸ FINRA Response to Comments I at 16.

²³⁹ NASAA II at 4 (reasoning that it is unlikely an exception is needed because firms routinely retain data for far longer than is required by rule; however, if FINRA keeps this exception, the commenter’s suggested language would help protect the integrity of the Pilot against firms that are “slipshod” in their document retention (or are actively seeking to evade the Pilot requirements)).

²⁴⁰ See FINRA Response to Comments II at 10.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ See Notice at 28635.

²⁴⁴ See proposed Rule 3110.18(i). A member firm seeking to participate would be required to provide FINRA an opt-in notice at least five calendar days before the beginning of the Pilot Year and agree to participate and comply with the Pilot requirements for the duration of such Pilot Year. A participating member firm would be deemed to have elected and agreed to participate in the Pilot in subsequent Pilot Years until the Pilot expires. To opt out, a participating member firm would need to provide FINRA with notice at least five calendar days before the end of the current Pilot Year.

²⁴⁵ See Notice at 28633.

²⁴⁶ See proposed Rule 3110.18(j).

²⁴⁷ See proposed Rule 3110.18(k).

²⁴⁸ See Notice at 28633; see also, e.g., letter from Melanie Senter Lubin, President, NASAA, to J. Matthew DeLesDernier, Assistant Secretary, Commission, regarding FINRA–2022–021, dated August 23, 2022, at 8–9 (relaying concerns regarding FINRA’s ability to monitor the Pilot).

²⁴⁹ See Notice at 28633.

where a participating member firm may pose a heightened risk of non-compliance but has not been otherwise excluded by the safeguards and limitations of the Pilot. For these reasons, proposed Rule 3110.18(j) and proposed Rule 3110.18(k) are reasonable.

III. Conclusion

For the reasons set forth above, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 15A(b)(6) of the Exchange Act, which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and, in general, protect investors and the public interest.²⁵⁰

It is therefore ordered pursuant to Section 19(b)(2) of the Exchange Act²⁵¹ that the proposed rule change (SR-FINRA-2023-007), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁵²

Sherry R. Haywood,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

Release No. 34-98977; File No. SR-FINRA-2023-016]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change To Amend FINRA Rule 2210 (Communications With the Public) To Permit Projections of Performance of Investment Strategies or Single Securities in Institutional Communications

November 17, 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 13, 2023, the Financial Industry Regulatory Authority, Inc. (“FINRA”) 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 FINRA. 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

FINRA is proposing to amend FINRA Rule 2210 (Communications with the Public). Currently Rule 2210 prohibits projections of performance or targeted returns³ in member communications, subject to specified exceptions. The proposed rule change would allow a member to project the performance or provide a targeted return with respect to a security or asset allocation or other investment strategy in an institutional communication or a communication distributed solely to qualified purchasers as defined in the Investment Company Act of 1940 (“Investment Company Act”) that promotes or recommends specified non-public offerings, subject to stringent conditions to ensure these projections are carefully derived from a sound basis.

The text of the proposed rule change is available on FINRA’s website at <http://www.finra.org>, at the principal office of FINRA 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, FINRA 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. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

³ Targeted returns reflect the aspirational performance goals for an investment or investment strategy. Projections of performance reflect an estimate of the future performance of an investment or investment strategy, which is often based on historical data and assumptions. Projections of performance are commonly established through mathematical modeling. See Investment Advisers Act Release No. 5653 (December 22, 2020), 86 FR 13024, 13081 n.699 (March 5, 2021) and accompanying text.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Rule 2210’s General Prohibition of Projections and Its Exceptions

Rule 2210 provides that communications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast.⁴ The general prohibition against performance projections is intended to protect investors who may lack the capacity to understand the risks and limitations of using projected performance in making investment decisions.

This general standard does not prohibit certain types of communications, however. First, Rule 2210 allows a hypothetical illustration of mathematical principles, provided it does not predict or project the performance of an investment or investment strategy.⁵ The “hypothetical illustration of mathematical principles” exception to the prohibition of projections applies to tools that serve the function of a calculator that computes the mathematical outcome of certain assumed variables without predicting the likelihood of either the assumed variables or the outcome. For example, this exception applies to a calculator that computes a net amount of savings that an investor would earn over an assumed period of time with assumed variables of rates of returns, frequency of compounding, and tax rates.⁶

Second, the general prohibition on projections does not preclude a member from employing an investment analysis tool, or a written report produced by an investment analysis tool, that includes projections of performance provided it meets the requirements of FINRA Rule 2214 (Requirements for the Use of Investment Analysis Tools).⁷ FINRA adopted the predecessor to Rule 2214 in 2004 to allow members to offer or employ technological tools that use a mathematical formula to calculate the probability that investment outcomes (such as reaching a financial goal) would occur.⁸

An “investment analysis tool” is an interactive technological tool that

⁴ See FINRA Rule 2210(d)(1)(F).

⁵ See FINRA Rule 2210(d)(1)(F)(i).

⁶ On the other hand, this exception would not apply to a calculator that predicted the likelihood of achieving these assumed variables and outcomes. See *Notice to Members* 04-86 (November 2004), n.3.

⁷ See FINRA Rule 2210(d)(1)(F)(ii).

⁸ See *Notice to Members* 04-86, *supra* note 6.

²⁵⁰ 15 U.S.C. 78o-3(b)(6).

²⁵¹ 15 U.S.C. 78s(b)(2).

²⁵² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

produces simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices.⁹ Investors may use an investment analysis tool either independently or with the assistance from a member and may receive written reports generated by the tool that include projected performance that is consistent with Rule 2214's requirements.¹⁰

Third, members may include a price target in a research report on debt or equity securities, provided that the price target has a reasonable basis, the report discloses the valuation methods used to determine the price target, and the price target is accompanied by disclosure concerning risks that may impede achievement of the price target.¹¹

In addition, a communication with the public regarding security futures or options may contain projected performance figures (including projected annualized rates of return), provided that the communication meets specified requirements.¹² Among other things, the communication must be accompanied or preceded by a standardized risk disclosure statement, the communication may not suggest certainty of the projected performance, parameters relating to such performance figures must be clearly established, and the projections must disclose and reflect all relevant costs, commissions, fees, and interest charges (as applicable).¹³

Need for an Additional Exception

FINRA understands that some broker-dealer customers, in particular institutional investors, request other types of projected performance that the current rules do not allow. These customers may request information that includes projections of performance or targeted returns concerning investment opportunities to help them make informed investment decisions but are unable to receive this information from members due to the prohibition on projections. For example, a member's views regarding the projected performance of an investment strategy

or single security may be useful to institutional investors and qualified purchasers ("QPs"), as defined under the Investment Company Act,¹⁴ who are eligible to invest in certain non-public offerings that are relying on exceptions from registration under the Securities Act of 1933 ("Securities Act") and the Investment Company Act.

In addition, projected performance may be useful for institutional investors and QPs that either have the financial expertise to evaluate investments and to understand the assumptions and limitations associated with such projections, or that have resources that provide them with access to financial professionals who possess this expertise. Such investors often test their own opinions against performance projections they receive from other sources, including issuers and investment advisers. Because Rule 2210 generally precludes a member from providing projected performance or targeted returns in marketing communications distributed to institutional investors and QPs, these investors cannot obtain a member's potentially different and valuable perspective.

FINRA recognizes, however, that any proposed rule amendment that would allow projections of performance or targeted returns in specified communications must not increase the risk of potential harm to retail investors. As discussed below, the proposed rule change is narrowly tailored to address the need for projections or targeted returns by restricting their use only in specified scenarios involving institutional investors or QPs, well-established categories of persons that have been previously determined to be financially sophisticated or able to engage expertise for purposes of the securities laws.¹⁵ As a general matter,

the proposed rule change would not alter the current prohibitions on including projections of performance or targeted returns in most types of retail communications. In addition, even in situations where a natural person qualifies as an institutional investor or QP, Exchange Act Regulation Best Interest¹⁶ would require members to act in the investor's best interest when making a recommendation of a securities transaction or investment strategy involving securities, regardless of whether a projection is used as a basis for the recommendation.

Proposed Amendments

The proposed rule change would create a new, narrowly tailored, exception to the general prohibition of projections. First, the proposed rule change would permit institutional communications to include projections of performance or targeted returns. An institutional communication is any written (including electronic) communication that is distributed or made available only to institutional investors,¹⁷ but does not include a member's internal communications.¹⁸

¹⁶ See 17 CFR 240.15l-1 ("Reg BI").

¹⁷ Rule 2210(a)(4) provides that "institutional investor" means any:

(A) person described in Rule 4512(c), regardless of whether the person has an account with a member;

(B) governmental entity or subdivision thereof;

(C) employee benefit plan, or multiple employee benefit plans offered to employees of the same employer, that meet the requirements of Section 403(b) or Section 457 of the Internal Revenue Code and in the aggregate have at least 100 participants, but does not include any participant of such plans;

(D) qualified plan, as defined in Section 3(a)(12)(C) of the Exchange Act, or multiple qualified plans offered to employees of the same employer, that in the aggregate have at least 100 participants, but does not include any participant of such plans;

(E) member or registered person of such a member; and

(F) person acting solely on behalf of any such institutional investor.

Rule 4512(c) defines "institutional account" to mean the account of: (1) a bank, savings and loan association, insurance company or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Advisers Act or with a state securities commission; or (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least \$50 million.

¹⁸ See Rule 2210(a)(3). The definition of "institutional investor" provides in part that no member may treat a communication as having been distributed to an institutional investor if the member has reason to believe that the communication or any excerpt thereof will be forwarded or made available to a retail investor. See FINRA Rule 2210(a)(4). Accordingly, if a member distributed or made available a communication containing projected performance or a targeted return to an institutional investor, and the member had reason to believe the institutional investor would forward or make available that

¹⁴ Section 2(a)(51)(A) of the Investment Company Act defines the term "qualified purchaser" as (i) any natural person who owns not less than \$5 million in investments (as defined by the SEC); (ii) a family-owned company that owns not less than \$5 million in investments; (iii) a trust not formed for the purpose of acquiring the securities offered, as to which each trustee or other person authorized to make decisions with respect to the trust, and each settlor or other person who has contributed assets to the trust, is a person described in clauses (i), (ii), or (iv); and (iv) any other person, acting for its own account or the account of other qualified purchasers, who in the aggregate owns and invests on a discretionary basis not less than \$25 million in investments. See 15 U.S.C. 80a-2(a)(51)(A).

¹⁵ See, e.g., Privately Offered Investment Companies, Investment Company Act Release No. 22597 (April 3, 1997), 62 FR 17512 (April 9, 1997) (adopting rules to implement a legislative exclusion from regulation under section 3(c)(7) of the Investment Company Act for privately offered investment companies "whose investors are all highly sophisticated investors, termed 'qualified purchasers'").

⁹ See FINRA Rule 2214(b).

¹⁰ For a more detailed discussion of the differences between FINRA Rule 2214 and the proposal, see Comparison to Projections Permitted by FINRA Rule 2214, *infra*.

¹¹ See FINRA Rule 2210(d)(1)(F)(iii).

¹² See FINRA Rules 2215 (Communications with the Public Regarding Security Futures) and 2220 (Options Communications).

¹³ See FINRA Rules 2215(b)(3) and 2220(d)(3).

Second, the proposed rule change would permit projected performance and targeted returns in communications that are distributed or made available only to QPs and that promote or recommend a private placement that is sold solely to QPs (“QP private placement communications”).¹⁹ Recipients of QP private placement communications are referred to herein as “QP private placement investors.”²⁰ Institutional investors and QP private placement investors are referred to herein collectively as “Projection-Eligible Investors.”

Even within these narrow circumstances, the proposed rule change would impose additional investor protection obligations. The exception would be conditioned on: (1) the member adopting and implementing written policies and procedures reasonably designed to ensure that the communication is relevant to the likely financial situation and investment objectives of the investor receiving the communication and to ensure compliance with all applicable requirements and obligations; (2) the member having a reasonable basis for the criteria used and assumptions made in calculating the projected performance or targeted return, and retaining written records supporting the basis for these criteria and assumptions;²¹ (3) the

communication to a retail investor, FINRA would not consider the communication to be an institutional communication for purposes of the proposed rule change’s requirements.

¹⁹ The proposed rule change would create a new exception from the prohibition on performance projections for communications that are distributed or made available only to QPs and that promote or recommend either a Member Private Offering that is exempt from the requirements of FINRA Rule 5122 pursuant to Rule 5122(c)(1)(B), or a private placement exempt from the requirements of FINRA Rule 5123 pursuant to Rule 5123(b)(1)(B). Both Rule 5122(c)(1)(B) and Rule 5123(b)(1)(B) exempt from those rules’ requirements private offerings sold solely to qualified purchasers, as defined in Section 2(a)(51)(A) of the Investment Company Act.

²⁰ In most cases, an individual investor who has \$5 million or more in investments, but who does not have at least \$50 million in assets, will be both a qualified purchaser under the Investment Company Act and a retail investor for purposes of Rule 2210. Accordingly, some QP private placement communications will be either correspondence or retail communications under the rule. See FINRA Rule 2210(a)(2), (a)(5), and (a)(6).

²¹ FINRA recognizes that there are some differences between targeted returns and projections of performance. As discussed above, targeted returns are aspirational and may be used as a benchmark or to describe an investment strategy or objective to measure the success of a strategy. Projections of performance, on the other hand, use historical data and assumptions to predict a likely return. Thus, targeted returns may not involve all (or any) of the assumptions and criteria applied to generate a projection. However, FINRA does not believe that the difference between targeted returns and projections of performance is always readily apparent to the recipient of a

communication prominently disclosing that the projected performance or targeted return is hypothetical in nature and that there is no guarantee that the projected or targeted performance will be achieved; and (4) the member providing sufficient information to enable the investor to understand (i) the criteria used and assumptions made in calculating the projected performance or targeted return, including whether the projected performance or targeted return is net of anticipated fees and expenses; and (ii) the risks and limitations of using the projected performance or targeted return in making investment decisions, including reasons why the projected performance or targeted return might differ from actual performance.

Written Policies and Procedures

The proposed rule change would require a member to adopt and implement written policies and procedures reasonably designed to ensure that the communication is relevant to the likely financial situation and investment objectives of the investor receiving the communication and to ensure compliance with all applicable requirements and obligations. In adopting written policies and procedures concerning the investor’s likely financial situation and investment objectives, members should consider including content that requires the member to consider the audience that receives a communication that presents projected performance or a targeted return. In particular, such a communication should only be distributed where the member reasonably believes the investors have access to resources to independently analyze this information or have the financial expertise to understand the risks and limitations of such presentations. If an investor does not have this financial expertise and receives a communication containing a projection or targeted return, FINRA would expect that the written policies and procedures be reasonably designed to ensure that the investor has the resources necessary to access financial professionals that possess this expertise.²²

For example, members could meet the requirement to adopt and implement policies and procedures reasonably

communication. Accordingly, the presentation of both projections of performance and targeted returns would be subject to the same conditions, including that both must have a reasonable basis.

²² FINRA would not view the mere fact that an investor would be interested in high returns as satisfying the requirement that the projected performance or targeted return is relevant to the likely financial situation and investment objectives of the intended audience.

designed to ensure that the projected performance or targeted returns are relevant to the likely financial situation and intended audience of the institutional communication or QP private placement communication by relying on its past experiences with particular types of institutional investors and QP private placement investors who seek this information. A firm may wish to further tailor its intended audience for such a communication to persons or entities that have expressed interest in particular types of securities, or who have invested in similar securities in the past.

In addition, even in situations where an investor has the financial expertise or resources necessary to understand the risks and limitations of a projection or targeted return, if the member recommends a securities transaction or investment strategy involving securities to an investor who is a “retail customer” as defined in Reg BI,²³ the member must establish, maintain, and enforce written policies and procedures reasonably designed to achieve compliance with Reg BI.²⁴

Reasonable Basis Requirement

The “reasonable basis” requirement follows well-established precedents. FINRA Rules 2210 and 2241 (Research Analysts and Research Reports) require a price target in a research report to have a reasonable basis.²⁵ SEC rules also require performance projections contained in specified documents to be based on good faith and have a reasonable basis.²⁶

FINRA believes that it is important for members to consider appropriate factors in forming a reasonable basis for the criteria used and assumptions made in calculating projected performance or a targeted return pursuant to proposed Rule 2210(d)(1)(F)(iv). Accordingly, FINRA is proposing to include a new Supplementary Material to Rule 2210 that would list some, but not all, factors

²³ Reg BI defines “retail customer” to mean a natural person, or the legal representative of such natural person, who (i) receives a recommendation of any securities transaction or investment strategy involving securities from a broker, dealer, or natural person who is an associated person of a broker or dealer, and (ii) uses the recommendation primarily for personal, family, or household purposes. See 17 CFR 240.151–1(b)(1).

²⁴ See 17 CFR 240.151–1(a)(2)(iv).

²⁵ See FINRA Rule 2210(d)(1)(F)(iii) and FINRA Rule 2241(c)(1)(B).

²⁶ See Securities Act Regulation S–K, 17 CFR 229.10(b) (providing in part that the use in documents specified in Securities Act Rule 175 and Exchange Act Rule 3b–6 of management’s projections of future economic performance have a reasonable basis and reflect its good faith assessment of a registrant’s future performance).

that members should consider in developing a reasonable basis. FINRA incorporated some of the relevant factors that members of the financial research and analysis industry use when considering the basis for a recommendation to a customer.²⁷

Proposed Supplementary Material 2210.01 would provide that, in forming a reasonable basis for the criteria used and assumptions made in calculating projected performance or a targeted return pursuant to proposed Rule 2210(d)(1)(F)(iv), with no one factor being determinative, members should consider multiple factors. Such factors may include, but are not limited to, the following:

(1) Global, regional, and country macroeconomic conditions (for example, considering potential civil or political instability or weather conditions that may impact projected performance);

(2) Documented fact-based assumptions concerning the future performance of capital markets;

(3) In the case of a single security issued by an operating company, the issuing company's operating and financial history;

(4) The industry's and sector's current market conditions and the state of the business cycle (for example, including a consideration of any characteristics unique to the industry and sector, such as the effect of rising mortgage rates on the housing sector);

(5) If available, reliable multi-factor financial models based on macroeconomic, fundamental, quantitative, or statistical inputs, taking into account the assumptions and potential limitations of such models, including the source and time horizon of data inputs;

(6) The quality of the assets included in a securitization (taking into consideration, for example, the ability to assess the credit quality of underlying assets through available data and the performance of similar pools);

(7) The appropriateness of selected peer-group comparisons (for example, the relative similarities or differences among the components of a selected peer group versus the subject issuer, the number of constituents in the peer

group, and the reasonableness of the comparison);

(8) The reliability of research sources (including, for example, whether there is a relationship between the issuer and the research source that could pose a conflict of interest; whether the research has been subject to peer review before publication; whether the research is based on reliable or verifiable factual information);

(9) The historical performance and performance volatility of the same or similar asset classes;

(10) For managed accounts or funds, the past performance of other accounts or funds managed by the same investment adviser or sub-adviser, provided such accounts or funds had substantially similar investment objectives, policies, and strategies as the account or fund for which the projected performance or targeted returns are shown;

(11) For fixed income investments and holdings, the average weighted duration and maturity;

(12) The impact of fees, costs, and taxes; and

(13) Expected contribution and withdrawal rates by investors.

Proposed Supplementary Material 2210.01(b) also would provide that members may not base projected performance or a targeted return upon (i) hypothetical, back-tested performance or (ii) the prior performance of a portfolio or model that was created solely for the purpose of establishing a track record.²⁸

Disclosure Requirements

The requirement to provide sufficient information in the communication to enable the intended audience to understand the criteria used and assumptions made in calculating the projected performance or targeted return is not intended to prescribe any particular methodology or calculation of such performance. Nor does FINRA expect a firm to disclose proprietary or confidential information regarding the firm's methodology and criteria. Firms would be expected, however, to provide

a general description of the methodology used sufficient to enable the investors to understand the basis of the methodology, as well as the assumptions underlying the projection or targeted return. Without this basic information, particularly regarding assumptions about future events, it is more likely that a projection or targeted return would mislead a potential investor.

The proposed rule change also would require a member to provide sufficient information in the communication to enable a Projection-Eligible Investor to understand the risks and limitations of using the projected performance or targeted return in making investment decisions, including reasons why the projected performance or targeted return might differ from actual performance. This requirement is intended to help ensure that such investors do not unreasonably rely on a projection or targeted return given its uncertainty and risks.

For example, an institutional communication or QP private placement communication may need to disclose, as a reason why the projected performance or targeted return might differ from actual performance, that the projection does not reflect actual cash flows into and out of an investment portfolio. This is particularly true when a projection is expressed as an internal rate of return ("IRR"), since forward-looking IRR shows a return earned by investors over a particular period, calculated on the basis of future cash flows to and from investors.²⁹ If the actual future cash flows differ from the assumptions, the actual IRR may differ from the projected IRR.

General Standards and Supervision Under Rule 2210

As with all communications with the public, institutional communications and QP private placement communications that contain projected performance or targeted returns must meet Rule 2210's general standards, including the requirements that communications be fair and balanced,

²⁷ Some, but not all, of the proposed factors in the proposed Supplementary Material come from the CFA Institute's discussion of Standard V in the Institute's Standards of Practice Handbook. Standard V requires, among other things that CFA Institute Members and Candidates "[h]ave a reasonable and adequate basis, supported by appropriate research and investigation, for any investment analysis, recommendation, or action." See CFA Institute, *Standards of Practice Handbook* 155–156 (11th ed. 2014).

²⁸ See *MassMutual Institutional Funds*, 1995 SEC No-Act. LEXIS 747 (September 28, 1995) (permitting the use of open-end management investment company performance that included the performance of unregistered predecessor separate investment accounts ("SIAs") whose assets were transferred to the investment company, based in part upon the representation that the predecessor SIAs were created for purposes entirely unrelated to the establishment of a performance record). FINRA would not consider an investment manager's proprietary seed capital accounts that were created for purposes unrelated to the establishment of a performance record to be prohibited by proposed Supplementary Material 2210.01(b)(iii).

²⁹ IRR is also known as money-weighted returns and reflects the percentage rate earned on each dollar invested for each period the dollar was invested. IRR is calculated as the discount rate that makes the net present value of all cash flows from an investment equal to zero. This can be contrasted to a time-weighted return, which is the compounded growth rate of \$1 over the time period. Average annual total returns used by mutual funds pursuant to Securities Act Rule 482 are an example of time-weighted returns. Time-weighted returns ignore the size and timing of investment cash flows and, therefore, provide a measure of manager or strategy performance, while IRR measures how a specific portfolio performed in absolute terms. See *Regulatory Notice* 20–21 (July 2020).

provide a sound basis for evaluating the facts in regard to any particular security or type of security, and not contain false, exaggerated, unwarranted, promissory or misleading content.³⁰ Accordingly, in addition to the reasonable basis standard, any communication containing a projection or targeted return would be prohibited from presenting exaggerated or unwarranted projections or targeted returns. FINRA believes this constraint would prohibit a member from presenting a projection that purports to show, for example, longer term returns for an equity security offered shortly before or after the date of the communication, as it would be viewed as unwarranted and lacking a sound basis due to the difficulty in predicting future securities markets and economic conditions.

Members currently must adopt appropriate procedures for the supervision and review of both institutional and retail communications.³¹ If the proposed rule change is adopted, these supervisory procedures would need to include the review of projections of performance or targeted returns used in both institutional communications and QP private placement communications, including compliance with the proposed rule change's specific conditions. In addition, members generally would be required to approve prior to use any QP private placement communication that falls within Rule 2210's definition of "retail communication."³²

Members that use third-party vendors to perform core business or regulatory oversight functions must establish and maintain a supervisory system, including written supervisory procedures, for any activities or functions performed by third-party vendors that are reasonably designed to ensure compliance with applicable securities laws and regulations and with applicable FINRA rules.³³ Accordingly, if a member relies on third-party models or software to create a projection or targeted return, the member would be expected to establish and maintain a

supervisory system reasonably designed to ensure that any projections or targeted returns created by a third-party vendor are used consistently with the proposed rule change's requirements.

For example, the member would need to ensure that there is a reasonable basis for the criteria used and assumptions made in calculating the projected performance or targeted return and would need to retain written records supporting the basis for such criteria and assumptions. Members should make reasonable efforts to determine whether the model or software is sound and should make reasonable inquiries into the source and accuracy of the data used to create the projection or targeted return. If the member has reason to suspect that the third-party model or software lacks a sound basis, the member should investigate the matter and, if it cannot be reasonably assured that the model or software is sound, must not use it. Among factors that a member may wish to employ to evaluate the third-party model or software are the assumptions used to create the projection or target, the rigor of its analysis, the date and timeliness of any research used to create the model or software, and the objectivity and independence of the entity that created the model or software.

As discussed above, members also must keep in mind that if they use a projection of performance or targeted return in connection with a recommendation of a securities transaction or investment strategy involving securities to a retail customer, the recommendation must meet the requirements of Reg BI.³⁴

Comparison to Projections Permitted by FINRA Rule 2214

There are several key differences between the types of projections that Rule 2214 permits as compared to those that the proposed rule change would allow. First, Rule 2214 differs from the proposed rule change in terms of how a projection may be communicated. Rule 2214 allows a projection of performance that is created by an investment analysis tool that any retail customer uses on a one-on-one

interactive basis, either independently or with a member's assistance, and that provides individualized results to each user. In contrast, unlike Rule 2214, under the proposed rule change, there is no interactive element associated with the receipt of projections. Instead, firms could provide projections or targeted returns to Projection-Eligible Investors using any form of communication that otherwise complies with the proposed rule change, applicable requirements of FINRA rules, and the federal securities laws.

Second, Rule 2214 requires the tool to produce simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies are undertaken. Although the rule does not expressly require the use of a particular type of statistical analysis, in many cases firms (or their vendors) use Monte Carlo simulations for this process.³⁵ In contrast, the proposed rule change would not require communications to Projection-Eligible Investors that include performance projections or targeted returns to consider potential returns under various scenarios and the probability of success for each scenario.

Third, Rule 2214's disclosure requirements differ somewhat from those under the proposed rule change. Rule 2214 requires an investment analysis tool, a written report generated by the tool, or a related retail communication to:

- Describe the criteria and methodology used, including the investment analysis tool's limitations and key assumptions;
- explain that results may vary with each use and over time;
- if applicable, describe the universe of investments considered in the analysis, explain how the tool determines which securities to select, disclose if the tool favors certain securities and, if so, explain the reason for the selectivity, and state that other investments not considered may have characteristics similar or superior to those being analyzed; and

³⁵ Monte Carlo simulation involves the use of a computer to represent the operations of a complex financial system. A characteristic feature of Monte Carlo simulation is the generation of a large number of random samples from specified probability distributions to represent the operation of the system. Monte Carlo simulation is used in planning in financial risk management and in valuing complex securities. Monte Carlo simulation is a complement to analytical methods but provides only statistical estimates, not exact results. See CFA Institute, Common Probability Distributions (CFA Program Level I, 2023 Curriculum), available at <https://www.cfainstitute.org/membership/professional-development/refresher-readings/common-probability-distributions>.

³⁰ See FINRA Rule 2210(d)(1)(A) and (B).

³¹ See FINRA Rule 2210(b)(1) and (b)(3).

³² As discussed above, if a QP is an individual that has less than \$50 million in assets, the QP generally will be a retail investor under Rule 2210 since the QP does not fall within the definition of institutional investor. In such cases, if the QP private placement communication were distributed or made available to more than 25 QPs that fall within the definition of retail investor within a 30-day period, it would be a retail communication that a registered principal generally must approve prior to use. See FINRA Rule 2210(b)(1).

³³ See Regulatory Notice 21-29 (August 2021).

³⁴ See 17 CFR 240.15l-1. The definition of "retail customer" under Reg BI differs from the definition of "retail investor" under FINRA Rule 2210, which includes any person other than an institutional investor, regardless of whether the person has an account with a member. See FINRA Rule 2210(a)(6). Accordingly, a natural person could be a "retail customer" for purposes of Reg BI but an "institutional investor" under Rule 2210 (e.g., a natural person with at least \$50 million in total assets). See *supra* note 17 (definition of "institutional investor" under FINRA Rule 2210(a)(4)).

- display a prescribed disclosure concerning the hypothetical nature of the projections, that they do not reflect actual investment results, and that they are not guarantees of future results.³⁶

In contrast, the proposed rule change would require a communication to prominently disclose that the projected performance or targeted return is hypothetical in nature and that there is no guarantee that the projection of performance or targeted return will be achieved.³⁷ In addition, a member would have to provide “sufficient information to enable the investor to understand (i) the criteria used and assumptions made in calculating the projected performance or targeted return, including whether the projected performance or targeted return is net of anticipated fees and expenses; and (ii) the risks and limitations of using the projected performance or targeted return in making investment decisions, including reasons why the projected performance or targeted return might differ from actual performance.”³⁸

While the proposed rule change’s methodology disclosure requirement resembles the methodology disclosure requirements in Rule 2214, they are worded differently to reflect different types of communications to which the proposed rule change and Rule 2214 apply. For example, an investment analysis tool permitted by Rule 2214 may recommend that an investor consider an alternative account portfolio to improve the range of its potential returns but limit the securities that may populate the portfolio. This limitation is important information to investors when considering whether to change their investments. In contrast, the proposed rule change is more likely to apply to a projection or targeted return that is included in a communication promoting a single security or investment strategy distributed to Projection-Eligible Investors, and thus would impose different disclosure requirements relative to those scenarios.

Fourth, Rule 2214 does not restrict the types of investors who may use an investment analysis tool or receive a report generated by the tool, as both institutional investors and retail investors may receive a projection of performance under Rule 2214. The reports also must include clear and prominent specified disclosures, such as a description of the criteria and methodology used, the tool’s limitations and key assumptions, and other risk and investor protection-related

information.³⁹ In contrast, the proposed rule change would limit receipt of projections or targeted returns to Projection-Eligible Investors as defined in the rule.

Comparison to IA Marketing Rule’s Hypothetical Performance Standards

The proposed changes are in many respects consistent with the Commission’s Investment Adviser Marketing rule (“IA Marketing Rule”).⁴⁰ In this regard, the IA Marketing Rule permits investment advisers to present hypothetical performance, which includes “targeted or projected performance returns with respect to any portfolio or to the investment advisory services with regard to the securities offered”⁴¹ in an advertisement if the investment adviser meets specified conditions and does not violate the IA Marketing Rule’s other requirements. In particular, an investment adviser must:

- Adopt and implement policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the likely financial situation and investment objectives of the intended audience;
- Provide sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating such hypothetical performance; and
- Provide (or, if the intended audience is an investor in a private fund provide or offer to provide promptly) sufficient information to enable the intended audience to understand the risks and limitations of using such hypothetical performance in making investment decisions.⁴²

These requirements are similar to the proposed rule change’s requirements concerning investors that may receive a communication containing a projection or targeted return and its disclosure requirements. In addition, similar to Rule 2210, the IA Marketing Rule prohibits any advertisement that includes any untrue statement of a material fact or omits to state a material fact necessary to make the statement made under the circumstances not misleading.⁴³

³⁹ See FINRA Rule 2214(c) and (d).

⁴⁰ See Investment Advisers Act Release No. 5653 (December 22, 2020), 86 FR 13024 (March 5, 2021) (adoption of Advisers Act Rule 206(4)–1 (Investment Adviser Marketing)) (“IA Marketing Rule Release”).

⁴¹ See 17 CFR 275.206(4)–1(e)(8).

⁴² See 17 CFR 275.206(4)–1(d)(6). An investment adviser presenting hypothetical performance is not required to comply with certain of the conditions in paragraph (d), such as the requirement to present performance for one-, five-, and ten-year periods.

⁴³ 17 CFR 275.206(4)–1(a).

As discussed above, the proposed rule change includes other requirements that are not specifically included in the IA Marketing Rule. Nevertheless, FINRA anticipates that it would interpret requirements in the proposed rule change that align with similar requirements in the IA Marketing Rule consistently with how the Commission has interpreted those IA Marketing Rule requirements. Thus, member firms should be able to comply with these proposed requirements in a manner similar to how investment advisers must comply with similar requirements applicable to the use of hypothetical performance under the IA Marketing Rule.⁴⁴

Contributions to Investor Protection

FINRA believes that approval of the proposed rule change would contribute to investor protection by enabling Projection-Eligible Investors to access projections when considering specific investments or strategies. For example, under the current rule, Projection-Eligible Investors are not permitted to receive projections from broker-dealers, despite the fact that such projections may assist them in evaluating potential securities purchases or sales, choosing appropriate investment strategies, or creating strategic plans for their business operations. Under the proposed rule change, Projection-Eligible Investors would have access to projected performance or targeted returns that must comply with Rule 2210’s existing prohibition of false or misleading statements or claims and the proposed rule change’s disclosure requirements and prohibition on using back-tested performance to create the projected performance or targeted return.⁴⁵

FINRA believes the proposed rule change would also contribute to investor protection by encouraging issuers of publicly offered or privately placed securities to select members that are subject to appropriate regulation and oversight for participation in securities offerings. FINRA recognizes that Projection-Eligible Investors are already able to receive projected or targeted returns in communications from parties other than registered broker-dealers,

⁴⁴ See IA Marketing Rule Release, *supra* note 40, 86 FR 13024, 13083–85.

⁴⁵ See proposed Supplementary Material 2210.01(b).

³⁶ See FINRA Rule 2214(c).

³⁷ See proposed FINRA Rule 2210(d)(1)(F)(iv)d.

³⁸ See proposed FINRA Rule 2210(d)(1)(F)(iv)e.

such as unregistered intermediaries⁴⁶ or the securities' issuer.⁴⁷

Accordingly, the current prohibition of registered broker-dealers including projected performance or targeted returns in institutional communications or QP private placement communications creates an incentive for issuers to avoid the registered broker-dealer channel to offer securities and instead either use an unregistered firm, or market securities directly to potential investors. The proposed rule change would allow members to provide the same or similar information regarding projected performance or targeted returns that investors are receiving from issuers or other unregistered intermediaries, but subject to substantial requirements that enhance investor protections.

The proposed rule change also would allow Projection-Eligible Investors to receive and compare projections provided by members with projections from other entities, with appropriate safeguards. For example, it is very common for issuers to offer their securities directly to investors using performance projections in their marketing communications or offering documents.⁴⁸ Approval of the proposed rule change would not level the

regulatory playing field between members, unregistered firms, and issuers with respect to projected performance, but it would allow members to present projections and targeted returns to Projection-Eligible Investors subject to existing and proposed investor protections.

If the Commission approves the proposed rule change, FINRA will announce the implementation date of the rule change in a *Regulatory Notice*.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁴⁹ which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

FINRA believes that the proposed rule change strikes the right balance between protecting investors and allowing more investment information to be communicated to an appropriate audience. As discussed above, the proposed rule change would not expand the very limited exceptions that allow specified types of projected performance or targeted returns in communications to retail investors, such as price targets contained in research reports or reports generated by interactive investment analysis tools, other than QP private placement investors that meet the definition of "retail investor" under Rule 2210.⁵⁰

FINRA believes that the proposed rule change will provide additional sources of information for Projection-Eligible Investors in their investment decision making. As mentioned previously, Projection-Eligible Investors often develop their own opinions regarding the future performance of an investment based on the multiple sources of information at their disposal. They test these opinions against the views and data provided by other sources, which often summarize their conclusions in terms of a projection of performance of the investment. This is particularly true in the offering of securities by issuers, including hedge funds and other investment vehicles. Rule 2210(d)(1)(F) currently does not permit members to share their views on projection-related data with Projection-Eligible Investors in these situations due to its restrictions on members' communicating projected performance information.

Even so, the proposed changes will provide safeguards for communications

that contain projections of performance or targeted returns. The proposed changes would require members to adopt and implement policies and procedures reasonably designed to ensure that the communication is relevant to the likely financial situation and investment objectives of the Projection-Eligible Investor receiving the communication. They would mandate that members have a reasonable basis for the criteria used and assumptions made in calculating the projections of performance or targeted returns.

The proposed changes also would require a member to provide sufficient information to enable the Projection-Eligible Investor to understand the criteria used and assumptions made in calculating the projected performance or targeted return, and to understand the risks and limitations of using projected performance or targeted returns in making investment decisions.

As discussed above, the proposed changes recognize that Projection-Eligible Investors are already able to receive projected performance or targeted returns in communications from parties other than broker-dealers and more closely aligns the ability of broker-dealers to offer projections to such investors with the abilities of issuers and other non-member firms to offer projections. The proposed rule change also would allow Projection-Eligible Investors to receive and compare projections provided by members with projections from other entities, with appropriate safeguards designed to protect investors.

FINRA believes that Projection-Eligible Investors would be better protected if issuers instead offered their securities through broker-dealers, which are subject to a much more rigorous set of rules governing communications than issuers, and that are subject to regulatory oversight from the Commission, FINRA and state securities regulators. The proposed rule change may enable more issuers to use broker-dealers for their securities offerings. In addition, Projections-Eligible Investors who are retail customers under Reg BI will receive the additional protections of that rule.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA 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.

⁴⁶ For example, Congress recently amended the Exchange Act to create a new registration exemption for certain mergers and acquisition brokers ("M&A Brokers"). M&A Brokers are not subject to any federal or self-regulatory organization rules governing their communications (other than general anti-fraud provisions), including any prohibitions on including projections or targeted returns in their communications. See Consolidated Appropriations Act of 2023, Public Law 117-328 (2022) (codified at 15 U.S.C. 78o(b)(13)).

⁴⁷ The majority of private offerings governed by Securities Act Regulation D (17 CFR 230.501 *et seq.*) are sold directly by issuers without any broker-dealer involvement. Approximately 20 percent of Regulation D offerings involve "intermediaries," such as broker-dealers. See Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offerings 2009-2017, SEC Division of Economic and Risk Analysis (August 2018), https://www.sec.gov/files/dera-white-paper_regulation-d_082018.pdf. Thus, only a small percentage of investors in private placements are afforded the protections of FINRA rules and other relevant broker-dealer regulations that apply when a Regulation D offering involves a FINRA member firm.

⁴⁸ Under FINRA rules, offering materials are considered communications with the public for purposes of Rule 2210 if a member was involved in preparing the materials. If a private placement memorandum ("PPM") or other marketing document presents information that is not fair and balanced or that is misleading, then the member that assisted in its preparation may be found to have violated Rule 2210. Moreover, sales literature concerning securities offerings that a member distributes generally constitutes a communication by that member to the public, regardless of whether the member assisted in its preparation. See *Regulatory Notice* 23-08 (May 2023) at page 11; see also *Regulatory Notice* 10-22 (April 2010) and *Regulatory Notice* 20-21 (July 2020).

⁴⁹ 15 U.S.C. 78o-3(b)(6).

⁵⁰ See *supra* note 20.

Economic Impact Assessment

FINRA has undertaken an economic impact assessment, as set forth below, to analyze the regulatory need for the proposed rulemaking, its potential economic impacts, including anticipated costs and benefits, and the alternatives FINRA considered in assessing how to best meet its regulatory objectives.

1. Regulatory Need

Among other things, commenters during the retrospective review of rules governing communications with the public expressed concerns that the current prohibition on projections of performance imposes undue restrictions on broker-dealer customers, and in particular institutional investors and QP private placement investors, without providing them a concomitant benefit.⁵¹ The amendments in this proposed rule change are intended to improve the flow of information by allowing members to communicate to Projection-Eligible Investors, subject to conditions, information regarding the projected performance of an individual security and similar communications related to an asset allocation or other investment strategy.

2. Economic Baseline

The economic baseline used to evaluate the impact of the proposed amendments is the current regulatory framework. This baseline serves as the primary point of comparison for assessing economic impacts, including the incremental benefits and costs of the proposed rule change.

FINRA believes that many members providing products and services to Projection-Eligible Investors would likely choose to rely on the proposed exception for projections. FINRA estimates that there are a significant number of such members.⁵²

Some of these members may have Projection-Eligible Investor customers that already have access to or are receiving projections-related communications from a member that is dually registered, a member's advisory affiliate, or an investment adviser owned by an associated person of the member, as part of the clients' investment advisory relationship. For example, some dually registered members and dually registered representatives communicate information regarding projected performance to their investment advisory clients already.⁵³ Similarly, members that are not registered as investment advisers may still have registered representatives that have customers with access to investment advisory services.⁵⁴ Members and their registered representatives that are investment advisers that provide projections of performance of, among other things, individual securities (such as investments in private funds managed by the member of a related investment adviser) to their advisory clients may not be impacted by the proposal, since they are already able to provide this information in some circumstances when acting as an investment adviser.

FINRA also notes that Projection-Eligible Investors may be solicited to purchase individual securities directly by an issuer without the involvement of a broker-dealer, and that issuers often use performance projections and targeted returns in their

communications with Projection-Eligible Investors.⁵⁵

3. Economic Impacts

FINRA anticipates that the proposed rule change will impact primarily Projection-Eligible Investors and those broker-dealer firms that serve these customers. Retail investors could be impacted if an institutional investor receives a projection for an investment that the retail investor is also considering. In these situations, the retail investor may receive relatively less information regarding performance projections or targeted returns for the investment than their institutional counterparts. However, Reg BI is designed to mitigate this potential harm by requiring a broker-dealer to act in a retail customer's best interest when recommending a securities transaction or investment strategy involving securities.

Anticipated Benefits

The proposed rule change would allow members to communicate, for example, information regarding the projected performance of an individual security to Projection-Eligible Investors. Such communications have the potential to better inform Projection-Eligible Investors about the individual security and the underlying assumptions upon which the recommendations are based.⁵⁶ FINRA anticipates that these benefits primarily would accrue to customers that either do not make their own performance projections or wish to compare their own projections against projections furnished by their broker-dealer, and do not have an investment advisory relationship with the member, and thus are not already receiving communications related to anticipated returns. For these benefits to accrue, the performance projections or targeted returns must be objectively informative, and the magnitude of benefit depends on the extent to which customers value these communications and find them informative. Additionally, the proposed rule change would benefit dually registered firms by creating comparable investment adviser and broker-dealer standards for communications that include performance projections and targeted returns to customers who have both investment advisory and brokerage accounts with such firms. This would

QPs, the information from Rule 5122/5123 filings in 2018–2021 indicates how many firms *may* have been involved in private placement offerings to QP customers.

⁵³ FINRA estimates that, as of December 31, 2021, approximately 480 member firms are dually registered as broker-dealers and investment advisers. FINRA further estimates that these dually registered firms have approximately 421,000 registered representatives, and 241,000 (or about 57 percent) of these individuals are dually registered as both investment adviser and broker-dealer representatives. FINRA estimates that approximately 160–170 of the dually registered firms have a total of 1,600–1,700 representatives that are solely registered as investment adviser representatives. FINRA notes that in addition to the dually registered representatives, these investment adviser representatives may also be communicating projections-related communications to their investment advisory clients.

⁵⁴ FINRA estimates that, as of December 31, 2021, approximately 2,900 member firms are only registered as broker-dealers and these firms have approximately 267,000 registered representatives. FINRA further estimates that approximately 73,000 of these individuals are registered both as investment adviser and broker-dealer representatives. These dually registered representatives may have customers with access to projections-related communications through their investment advisory relationships with other firms.

⁵¹ See letters responding to *Regulatory Notice* 14–14 (April 2014) from the Financial Services Roundtable (May 22, 2014) and the Securities Industry and Financial Markets Association (May 23, 2104), both available at www.finra.org. Additionally, commenters on *Regulatory Notice* 17–06 (February 2017) urged FINRA to revise the proposal to permit projections of performance of single securities in communications to QPs. See *infra* notes 65–71 and accompanying text.

⁵² Based on Consolidated Audit Trail (CAT) data for 2021, there were 1,169 firms that conducted equity transactions for customers. Of those 1,169 firms, 859 firms conducted equity transactions for institutional customers in 2021. It is not known how many firms conducted equity transactions for QPs. Also, it is not known how many firms conducted debt and OTC transactions for customers. However, based on Rule 5122/5123 filings, it is known that about 360–380 firms were involved in private placement offerings to accredited investors in any given year between 2018 and 2021. While not all accredited investors are

⁵⁵ See Exchange Act Rule 3a4–1, 17 CFR 240.3a4–1.

⁵⁶ Similar benefits would apply to the proposed amendments that would allow members to communicate information to institutional investors regarding the projected performance of a particular asset allocation or other investment strategy.

eliminate confusion for customers that have both types of accounts and reduce the effort needed for dually registered firms to comply with two separate sets of requirements related to such communications. Finally, the proposed rule change would contribute to investor protection by reducing the incentive for issuers to use unregistered firms or to market securities directly to potential investors instead of using registered broker-dealers.

Anticipated Costs

The proposed rule change would impose costs on members that choose to rely on the exception and communicate performance projections or targeted returns for an individual security or asset allocation or other investment strategy to Projection-Eligible Investors. Hence, FINRA anticipates that only members expecting the benefits to exceed the implementation costs would choose to incur these costs.

Members that would rely on the proposed exception to distribute communications to Projection-Eligible Investors that contain performance projections or targeted returns would incur costs associated with supervising these communications and complying with the proposed rule change's conditions. However, the proposed rule change does not alter the existing core supervision requirements for the review and supervision of institutional communications and QP private placement communications, thereby allowing members to adopt procedures that are appropriate to their business.

As discussed above, to the extent that performance projections are reliable and informative, allowing members to provide projected performance or targeted returns for an investment opportunity only to institutional investors may create an information imbalance as compared to retail investors who are considering the same investment opportunity. Because such retail investors will not be eligible to receive these communications, they may be at an informational disadvantage when making investment decisions. In developing the proposed changes, FINRA carefully considered the risks, and associated costs, of presenting targeted returns or performance projections to retail investors. FINRA believes that it is appropriate, through this proposed rule change, to permit members to provide communications containing performance projections and targeted returns to institutional investors and QP private placement investors.

Competitive Effects

Currently, members that are dually registered or that employ dually registered persons may provide customers with performance projections in their other registered capacity. Thus, the proposed rule change may improve the competitive position of members that are not dually registered or that do not employ dually registered persons since the amendments will allow them to provide a potentially valuable service to their Projection-Eligible Investor customers.

4. Alternatives Considered

In considering how to best meet its regulatory objectives, FINRA considered alternatives to certain aspects of this proposed rule change.

In this regard, FINRA considered whether members should be permitted to provide projections of performance or targeted returns in all retail communications, including for asset allocation, other investment strategies or for single investment products, such as mutual funds and ETFs. FINRA carefully weighed the potential benefit of providing such a communication to persons other than Projection-Eligible Investors against the potential harm. FINRA has chosen to focus this proposed rule change on communications to Projection-Eligible Investors because they are more likely to have the sophistication and resources to evaluate any performance projections or targeted returns they receive in the context of other information they are evaluating when making an investment decision.

FINRA also considered whether the proposed rule change should require members to provide a range of targets or projections, rather than a single projection, for investment planning illustrations. FINRA believes that, while a range of projections would be useful in particular situations, it is not necessary in all situations and can be confusing in certain situations. For these reasons, FINRA decided to give members the flexibility to determine whether a range of projections would be useful.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Background

In February 2017, FINRA published *Regulatory Notice 17-06* (the "Notice"), requesting comment on proposed amendments that would have created an exception to the rule's prohibition on projecting performance to permit

members to distribute customized hypothetical investment planning illustrations that include the projected performance of an asset allocation or other investment strategy, but not an individual security, subject to specified conditions (the "Notice proposal"). A copy of the *Notice* is available on FINRA's website at <http://www.finra.org>.

The comment period expired on March 27, 2017. FINRA received 23 comments in response to the *Notice*. Twenty One commenters supported the proposal and two commenters opposed the proposal. A list of the commenters in response to the *Notice* and copies of the comment letters received in response to the *Notice* are available on FINRA's website.⁵⁷ A summary of the comments and FINRA's response is provided below.

Comments on Proposal

Comparison to Investment Adviser Advertising Standards

Supporters noted that the rule change would lessen the regulatory inconsistencies regarding the use of performance projections between broker-dealers and stand-alone investment advisers and would eliminate the current opportunities for regulatory arbitrage.⁵⁸ Commenters also observed that allowing dually registered representatives to use projections in investment planning illustrations with customers would remove the current compliance difficulty with such situations. This difficulty arises particularly when it is uncertain at the time of the illustration's use whether the customer will open a fee-based or commission-based account.⁵⁹

However, some commenters contended that, even with this proposed changes, the FINRA communications rules still would impose greater burdens on broker-dealers than communications standards governing other financial intermediaries, such as SEC guidance applicable to investment advisers or the CFTC rules governing commodity pool operators.⁶⁰ WealthForge noted that FINRA's prohibition on projections of performance puts broker-dealers that are offering private funds under Securities Act Regulation D at a disadvantage as compared to Regulation D offerings that are not made through a broker-dealer, since no express restrictions on

⁵⁷ See SR-FINRA-2023-016 (Form 19b-4, Exhibit 2b) for a list of abbreviations assigned to commenters (available on FINRA's website at <http://www.finra.org>).

⁵⁸ See EDA, Fidelity, FSI, ICI, IRI, IPA, M Holdings, Wellington, Wells Fargo.

⁵⁹ See FSI, IPA, M Holdings.

⁶⁰ See MMI, SIFMA.

projections on performance apply to an issuer's communications.

As discussed above, subsequent to FINRA's publication of the *Notice* proposal for comment, the SEC adopted the IA Marketing Rule, which permits the presentation of performance, including hypothetical targeted or projected performance returns, in investment adviser advertisements, provided that the adviser meets specified conditions and does not violate the IA Marketing Rule's other requirements.⁶¹

The proposed rule text incorporates much of the rule text in the IA Marketing Rule's provisions permitting the presentation of hypothetical performance. A key difference is that the IA Marketing Rule does not expressly prohibit including hypothetical performance in retail investment adviser advertisements; instead, these provisions impose conditions based on the "intended audience" of an investment adviser advertisement. In this regard, the IA Marketing Rule Release states that "[w]e intend for advertisements including hypothetical performance information to only be distributed to investors who have access to resources to independently analyze this information and who have the financial expertise to understand the risks and limitations of these types of presentations."⁶² In contrast, the proposed rule change expressly would permit the presentation of projected or targeted returns only in institutional communications and QP private placement communications.

Despite these differences, however, in practice both rules are intended to limit the use of projected or targeted returns to communications that are distributed to persons who have the resources or financial expertise to understand the risks and limitations associated with such performance. As noted above, the IA Marketing Rule is intended to ensure that advertisements containing hypothetical performance only be distributed to persons possessing the resources and expertise to understand such performance's risks and limitations.⁶³

The proposed rule change also would require members to have a reasonable basis for the criteria and assumptions used to calculate the projected or targeted returns, and the Supplementary Material would list factors, among others, that a member should consider

in forming such a reasonable basis. While the IA Marketing Rule does not expressly require targeted or projected performance returns to have a reasonable basis, it requires performance presentations to be fair and balanced and not misleading, requires all investment adviser advertisement discussions of potential benefits to clients or investors also to provide fair and balanced treatment of material risks and limitations associated with the potential benefits, and requires that any material statement of fact have a reasonable basis that the adviser can substantiate upon SEC demand.⁶⁴

In addition, investment adviser communications that include targeted or projected performance returns must provide sufficient information to enable the intended audience to understand the risks and limitations of relying on targeted or projected performance returns to make investment decisions, which likely would require similar disclosures regarding the hypothetical nature of such performance.

Accordingly, FINRA believes that the proposed rule change generally would not impose substantially greater burdens on broker-dealers that present projections of performance or targeted returns as compared to investment advisers that present such performance.

Projections of Single Security Performance

The *Notice* proposal would have prohibited the projection of performance of a single security regardless of whether an illustration is used with a retail investor or an institutional investor. The *Notice* requested comment on whether the proposed rule change should permit the use of performance projections for single investment products that operate like an asset allocation or other investment strategy for which projections might be appropriate. A number of commenters responded that the proposal should allow projections for single investment products that operate similar to a diversified asset allocation model (such as ETFs, diversified mutual funds, unit investment trusts, variable annuities, and private equity and real estate funds).⁶⁵

For the reasons discussed above, FINRA does not agree that the proposed rule change should be revised to permit members to distribute communications to retail investors that include performance projections for single securities whose returns depend on the performance of an underlying investment portfolio, such as an ETF, mutual fund, UIT, variable annuity, or private or real estate fund.

Many commenters stated that FINRA should either amend the proposal, or issue a new proposal, to allow members to use performance projections in any type of communication with institutional investors, including sales literature concerning single securities.⁶⁶ These commenters noted that a broker-dealer that is raising capital for a new private equity fund may not include projected performance returns for existing investments in the new fund's pitch book and other marketing materials, due to FINRA rules.⁶⁷ 3PM noted that this approach would be consistent with the differentiation of institutional investors under FINRA's suitability rule and FINRA's interpretive letters permitting the use of related performance in institutional communications.

Commenters stated that institutional investors often ask to see projected performance, and that the risk of investor harm from such use is diminished, since institutional investors either have investment sophistication or can hire someone who does.⁶⁸ These commenters noted that PPMs often contain performance projections, so it would make sense to allow these projections in sales material.⁶⁹ Multiple commenters requested that FINRA permit the use of projected performance of a single security in institutional communications since the rules governing capital acquisition brokers do not prohibit the use of projections of performance in private placement marketing materials, and the same justifications exist for permitting projections of performance in institutional communications.⁷⁰

Several commenters further stated that FINRA should permit projections of performance in communications

important insight into what an investment manager seeks to achieve. Similarly, the SIFMA observed that data about targeted returns are highly material to potential investors.

⁶⁶ See ACA, Credit Suisse, EDA, IPA, MMI, Monument, SIFMA, 3PM, Wellington.

⁶⁷ See ACA, Monument.

⁶⁸ See MMI, 3PM.

⁶⁹ See ACA, Monument.

⁷⁰ See IPA, Monument, NYSBA Committee.

⁶¹ See 17 CFR 275.206(4)–1(d); see also 17 CFR 275.206(4)–1(a).

⁶² See IA Marketing Rule Release, *supra* note 40, 86 FR 13024, 13078.

⁶³ See *supra* note 62, 86 FR 13024, 13083.

⁶⁴ 17 CFR 275.206(4)–1(a)(2) and (4).

⁶⁵ See CAI, EDA, IRI, Monument, NYSBA Committee, 3PM, WealthForge. FINRA heard similar views from parties that commented on FINRA's retrospective review of the communications rules. See *Regulatory Notice* 14–14 (April 2014). The Financial Services Roundtable recommended that FINRA permit projections of performance, since in its view projections play an important role in educating investors and allowing them to compare products, and they provide an

distributed to QPs.⁷¹ These commenters noted that capital acquisition brokers (“CABs”) already may distribute communications that include projections of performance to QPs, as CAB Rule 016(i) defines “institutional investor” to include qualified purchasers.⁷² NYSBA commented that “[r]egular FINRA members should have the same freedom to provide projected performance information to Rule 016(i) institutional investors as CABs, not merely for reasons of competitive fairness and equal treatment, but because the same fundamental principle applies: institutional investors have sufficient sophistication to evaluate the projected performance and the weight to be given to it in the overall investment decision.”

As discussed above, FINRA recognizes that projections of issuer performance or targeted returns are more common in offering documents, such as PPMs, for unregistered securities offerings. FINRA also believes that institutional investors, as defined in FINRA Rule 2210(a)(4), and QP private placement investors often either have the investment sophistication and experience, or are able to hire advisers with investment acumen, necessary to avoid the potential harm that may occur when single security performance projections or targeted returns are presented in retail communications.⁷³ While FINRA does not necessarily agree that non-CAB members should have the same rules governing their communications as CABs, in this circumstance FINRA believes that there is no additional risk to investors for a non-CAB firm to distribute communications with projections of performance or targeted returns to QP private placement investors than for a CAB’s similar communication to QPs. In this regard, a CAB is already permitted to include projections of performance in its communications to QPs to whom it is seeking to sell newly issued unregistered securities.⁷⁴

For these reasons, FINRA has amended the *Notice* proposal to create a new exception that permits institutional communications and QP private placement communications to project the performance or provide a targeted return of a single security,⁷⁵ as well as the performance of an asset allocation or other investment strategy, subject to specified conditions.

Requiring a Range of Outcomes

The *Notice* also asked whether the proposal should require members to provide a range of projections in investment planning illustrations, rather than permitting a single projection of performance. Industry commenters noted that, while members should be allowed to provide a range of performance projections in illustrations rather than a single performance figure, FINRA should not require a range. Instead, these commenters recommended that FINRA allow members to have the flexibility to determine whether providing a range of performance projections makes sense in particular situations.⁷⁶ Other commenters recommended that FINRA require projections to include a range of outcomes, including outcomes that assume a declining market.⁷⁷

FINRA believes that it is not necessary to require in all cases that institutional communications and QP private placement communications that include projections of performance present a range of possible outcomes. FINRA believes that members should have the flexibility to determine whether a range of outcomes would be useful in particular situations.

Reasonable Basis Standard

M Holdings supported the reasonable basis standard because it provides members with flexibility given that investment strategies have different features and costs. However, many commenters requested that FINRA provide more clarity as to the “reasonable basis” standard. In addition, commenters asked that FINRA allow a portfolio manager’s previous

performance record with particular investments to be one factor of a reasonable basis for projecting future performance.⁷⁸ Other commenters expressed concern that the proposal would allow too much leeway as to what is considered a reasonable basis, and that FINRA needs to provide specific guidance as to what would be permissible.⁷⁹

3PM noted that the use of specific and relevant market indices, peer group comparisons, and other widely acceptable absolute and relative historical investment performance of a specific investment strategy should be considered as factors supporting a projection of performance. 3PM also noted that a fund manager may need to adjust its projected performance if a fund grows to a point where the manager will no longer be able to find enough appropriate investments that meet the fund’s investment criteria (*i.e.*, the fund experiences “style drift”).

GSU urged FINRA to require the communication to unambiguously and specifically disclose all information used to generate the projection, including an explanation of the reasonable basis behind the projection. CAI requested that FINRA simply eliminate the requirement that projections have a reasonable basis on the ground that it is too subjective, and that the proposal’s required disclosures are sufficient to protect investors.

FINRA disagrees that the proposed rule should not require performance projections to have a reasonable basis. As discussed above, both the SEC and FINRA already apply a reasonable basis standard in other contexts involving forecasts and projections. Additionally, FINRA would be concerned that, absent such a requirement, members could include wildly optimistic projections in communications solely for the purpose of promoting the sale of a security or an investment planning service, rather than providing useful information to an investor.

As discussed above, FINRA agrees that many factors may provide a reasonable basis for a performance projection, which will vary depending on the context. The proposed rule change would include factors, among others, that a member should consider in forming such a reasonable basis. In addition, a reasonable basis might be established, for example, by reference to the historical performance and performance volatility of asset classes, the duration of fixed income investments, the effects of

⁷¹ See IPA, Monument, NYSBA Committee.

⁷² See Capital Acquisition Broker Rule 016(i)(6).

⁷³ As discussed above, in addition to the requirement that the recipient be either an institutional investor or QP private placement investor, the proposed rule change would require members to have written policies and procedures reasonably designed to ensure that the communication containing the projection or targeted return is relevant to the likely financial situation and investment objectives of the investor receiving the communication.

⁷⁴ Among other things, a CAB is permitted to act as a placement agent or finder on behalf of an issuer in connection with the sale of newly issued, unregistered securities to institutional investors. See CAB Rule 016(c)(1)(F)(i) (definition of “Capital Acquisition Broker”). The term “institutional investor” includes persons meeting the definition of

“qualified purchaser” in section 2(a)(51) of the Investment Company Act. See CAB Rule 016(i)(6). Because CAB Rule 221 (Communications with the Public) does not prohibit CABs from including projections of performance in their communications with the public, QPs may already receive projected performance from a CAB in connection with the offer or sale of newly issued unregistered securities.

⁷⁵ The proposed rule change would allow institutional communications to include hypothetical projections of performance of any single security, including stocks as well as registered investment companies.

⁷⁶ See EDA, IRI, M Holdings.

⁷⁷ See GSU, PIABA, 3PM.

⁷⁸ See MMI, SIFMA.

⁷⁹ See NASAA, PIABA.

macroeconomic factors such as inflation and changes in currency valuation, the impact of fees, costs and taxes, and expected contribution and withdrawal rates by the customer. A more detailed discussion of the factors a member should use in forming a reasonable basis can be found above in the Purpose section of this proposed rule change.

Customized Illustrations

The *Notice* proposal would have permitted “a customized hypothetical investment planning illustration that projects performance of an asset allocation or other investment strategy and not an individual security,” subject to specified conditions. Multiple commenters asked that the proposal be amended not to require that illustrations be “customized,” or that FINRA provide more clarity as to what “customized” means. These commenters stated that many investors may fit the same investment profile, and thus arguably a member should be able to present these investors with the same projections of performance.⁸⁰ They also noted that performance projections for particular asset classes are often based on generally accepted investment theory and are not customized for individual accounts. Fidelity suggested using language from FINRA Rule 2211(b)(5)(B), which permits the use of a personalized hypothetical variable product illustration “which reflects factors relating to an individual customer’s circumstances.”

Wells Fargo recommended that FINRA expand the rule to allow members to provide customers with non-customized asset allocation projections based on “firm capital market assumptions.” Wells Fargo stated that forward-looking illustrations of an asset allocation strategy’s projected growth rate, volatility measures, yield and downside risk would be vital information to help investors understand their portfolios.

As discussed above, FINRA has determined not to proceed with amendments that would permit the use of “a customized hypothetical investment planning illustration” with retail investors. Instead, FINRA has determined to amend the *Notice* proposal to permit institutional communications and QP private placement communications to project performance or provide a targeted return, subject to specified conditions. Accordingly, the comments on the meaning of “customized” in the proposed amendments are now irrelevant to this proposed rule change.

Interplay With Other Projections Exceptions

Fidelity recommended that FINRA amend both FINRA Rule 2210(d)(1)(F)(i) (permitting hypothetical illustrations of mathematical principles) and proposed Rule 2210(d)(1)(F)(iv) to refer to a “specific investment” rather than “investment” or “specific security,” respectively, and to delete the reference to “investment strategy” in paragraph (d)(1)(F)(i) so that there is no conflict with the language in proposed paragraph (d)(1)(F)(iv).

Commenters also asked that FINRA clarify how this rule change would impact communications that rely on other provisions that permit performance projections, such as reports generated by investment analysis tools pursuant to FINRA Rule 2214, or hypothetical illustrations of mathematical principles, or hypothetical illustrations concerning variable insurance products.⁸¹ In particular, IRI requested clarification on whether an investment analysis tool report generated pursuant to Rule 2214 may project the performance of a single security, and whether projections of an asset allocation strategy’s performance in a personalized illustration may also show the performance of specific securities. The ICI requested clarification as to whether Rule 2214 would apply to illustrations of different asset allocations and different withdrawal rates in retirement in educational material.

FINRA does not intend to modify the requirements of other exceptions to the prohibition on projections contained in Rule 2210(d)(1)(F) as part of creating a new exception for projected performance and targeted returns in institutional communications and QP private placement communications. Accordingly, FINRA does not believe it is necessary or appropriate to modify the current language contained in these exceptions. A communication that qualifies under another exception to the prohibition on performance projections would not need to be modified to meet the requirements for including performance projections or targeted returns in institutional communications or QP private placement communications pursuant to proposed Rule 2210(d)(1)(F)(iv). FINRA has included in the Purpose section above a detailed discussion of the differences between the proposal and Rule 2214.⁸² To the extent that members need further guidance regarding Rule 2214, FINRA

believes that such guidance should be provided separately from this rule filing.

CAI inquired how the proposal would impact existing FINRA staff guidance on communications with the public, such as a 1998 letter interpreting the application of FINRA communications rules to communications of members that are dually registered as broker-dealers and investment advisers, and guidance that permitted the use of blended fund performance in specified asset allocation illustrations.⁸³ CAI suggested that FINRA withdraw or modify the 1998 interpretive letter to clarify that member communications promoting investment advisory services are not subject to FINRA’s communications rules.

FINRA does not intend for the proposed rule change to impact prior guidance on the application of Rule 2210 to communications made by dually registered members or the use of blended performance. Accordingly, FINRA does not believe it is necessary to withdraw the 1998 interpretive letter or provide additional guidance about the presentation of blended performance.

Supervision of Communications With Projections

CAI opposed the proposed requirement that a registered principal either approve each investment planning illustration that includes projected performance or a template on which such projections are based. Instead, it suggested that members should be able to supervise *all* illustrations, including those not based on a template, in the same manner as correspondence. In contrast, 3PM recommended that FINRA require a registered principal to approve any performance projections prior to use based on whether there is a reasonable basis to rely on the methodology, assumptions and limitations provided with the projected performance. Wells Fargo asked for clarification as to whether the proposed rule change would alter how a member is required to supervise electronic communications that include a performance projection under FINRA Rule 3110.

As discussed above, FINRA has determined not to proceed with a new exception from the prohibitions on

⁸¹ See CAI, ICI, IRI.

⁸² See Comparison to Projections Permitted by FINRA Rule 2214, *supra*.

⁸³ See Interpretive Letter to Dawn Bond, FSC Securities Corporation (July 30, 1998), <https://www.finra.org/rules-guidance/guidance/interpretive-letters/dawn-bond-fsc-securities-corporation> and “Blended Fund Family Performance Concerns NASD Regulation,” NASD Regulatory & Compliance Alert, Vol. 10, No. 3 at p. 10 (November 1996), <https://www.finra.org/sites/default/files/RCA/p524569.pdf>.

⁸⁰ See Fidelity, ICI, MMI.

projecting performance in non-QP retail communications; however, a QP private placement communication that includes a projection or targeted return may fall within the definition of retail communication to the extent that it is distributed or made available to more than 25 QP private placement investors that are not institutional investors under Rule 2210 within a 30-day period.

Accordingly, to the extent that a member distributes such a retail communication to QP private placement investors, a registered principal will be required to review and approve the communication prior to use. In addition, members must adopt written policies and procedures reasonably designed to ensure compliance with all applicable requirements and obligations, including the obligation for the member to have a reasonable basis for the criteria used and assumptions made in calculating the projected performance or targeted return.⁸⁴

The proposed rule change would not alter the standards for review of electronic communications. Thus, the proposed rule change's review standards would apply equally to paper and electronic personalized illustrations that include performance projections.

Required Disclosures

Two commenters stated that, if FINRA moves forward with the proposal, FINRA should clarify with specificity the required disclosures that must be given to investors, and provide guidance on how members may calculate and present projections.⁸⁵ For example, NASAA noted that FINRA should state how members calculate fees, costs or commissions in relation to hypothetical performance, how members must compose an asset allocation or investment strategy, and how a projection would have a reasonable basis where it was inconsistent with the historical performance of the asset allocation. NASAA also recommended that FINRA require disclosure of the underlying securities that make up the customized hypothetical illustration, and if applicable, that the broker-dealer's past projections proved to be inaccurate.

PIABA expressed concern that retail investors will regard projections of performance of asset classes as forecasts or predictions of how their investments will perform going forward, and that boilerplate disclaimers are insufficient to avoid investor confusion. 3PM recommended that FINRA require, in addition to the proposal's disclosure

standards, a statement that the broker-dealer believes there is a reasonable basis to believe the projected performance is representative of the security or fund it represents, a description of the methodology used to develop the projected performance, and an explanation as to why the methodology used is a good predictor of the projected performance.

As discussed above, FINRA no longer proposes to permit projections of performance of an asset allocation or other investment strategy in non-QP retail communications beyond what is currently permitted under Rule 2210(d)(1)(F). Nevertheless, FINRA has modified the disclosure requirements in the proposed rule with respect to institutional communications and QP private placement communications. In this regard, institutional communications and QP private placement communications that include projections of performance or targeted returns would have to prominently disclose that the projected performance or targeted return is hypothetical in nature and that there is no guarantee that the projected or targeted performance will be achieved. Members also would have to provide sufficient information to enable the Projection-Eligible Investor to understand the criteria used and assumptions made in calculating the projected performance or targeted return, and to understand the risks and limitations in using projected performance or targeted returns in making investment decisions. FINRA believes that these required disclosures strike an appropriate balance of alerting Projection-Eligible Investors to the hypothetical nature and uncertainty of such a projection without providing so much disclosure that its effectiveness is diminished.

FINRA does not believe it is either appropriate or feasible to create more detailed requirements on how members should calculate performance projections or targeted returns. Because these projections or targeted returns may occur in a variety of contexts, FINRA believes it is better to allow members to create their own standards provided that they have a reasonable basis. As discussed above, members still would be required to make all presentations consistent with Rule 2210's fair and balanced standard,⁸⁶ and FINRA believes that it is better to consider these communications on a case-by-case basis.

Other Comments

Several commenters contended that an investment adviser's fiduciary duty under the Advisers Act provides greater investor protections than the suitability standard applicable to broker-dealers under FINRA rules, and that this higher standard mitigates the potential risks of advisers using projections.⁸⁷ NASAA stated that past SEC no-action letters to investment advisers, such as *Clover Capital*,⁸⁸ provide more "regulatory rigor" than the FINRA rule proposal with regard to hypothetical performance. NASAA also stated that, despite FINRA's statement that back-tested performance typically is not a reasonable basis for a projection, it is "virtually inevitable" that back-testing would be used. Several commenters recommended that FINRA keep its current prohibitions on projections to avoid potential manipulations or bias by brokers, at least until broker-dealers are subject to a fiduciary duty.⁸⁹

While FINRA disagrees that the *Notice* proposal lacked regulatory rigor as compared to standards under the Advisers Act, as discussed above, the revised proposal incorporates many of the same requirements for the presentation of targeted or projected performance returns that are contained in the IA Marketing Rule, which has supplanted past SEC no-action letters concerning the presentation of performance in investment adviser advertisements. In addition, the proposed rule change includes specific disclosure and reasonableness requirements that members must meet to use this exception to the prohibition on performance projections. As discussed above, FINRA does not propose to allow members to use back-tested performance as one of the bases for creating a performance projection.

GSU recommended that all projections-related communications, and the means by which they are generated, must be subject to stringent document retention guidelines, and that these communications be presumptively discoverable in case of a dispute and explicitly included in FINRA's Discovery List 1. IPA urged FINRA to adopt the proposal because it appeared that the Department of Labor's ("DOL") Fiduciary Rule proposal will require members to include projections of performance in retirement plan statements.

Members that distribute institutional communications and QP private

⁸⁴ See proposed Rule 2210(d)(1)(F)(iv)b. and c.

⁸⁵ See GSU, NASAA.

⁸⁶ See FINRA Rule 2210(d)(1)(A).

⁸⁷ See GSU, NASAA.

⁸⁸ See *Clover Capital Management, Inc.*, 1986 SEC No-Act. LEXIS 2883 (October 28, 1986).

⁸⁹ See GSU, NASAA, PIABA.

placement communications that include projections of performance or targeted returns will be required to retain records related to their activities in this area as required by Exchange Act Rules 17a–3 and 17a–4. FINRA does not believe that the proposed rule change should address discovery rules used in arbitration, as they are beyond its scope.

FINRA notes that, subsequent to the publication of the *Notice*, Congress passed the Setting Every Community Up for Retirement Enhancement Act of 2019 (“SECURE Act”).⁹⁰ Among other things, the SECURE Act amended the Employee Retirement Income Security Act (“ERISA”) to require an annual lifetime income disclosure in statements sent to participants in benefit plans governed by ERISA. Pursuant to the SECURE Act, the DOL adopted an interim final rule that specifies the requirements for such lifetime income stream disclosures.⁹¹ The proposed amendments to Rule 2210 would not impact members that are required to provide such disclosures in plan benefit statements. In this regard, FINRA historically has interpreted Rule 2210’s filing and content standards as not applying to communications that are required by other regulatory agencies, including communications required by DOL rules.⁹²

Credit Suisse requested a number of new rules and guidance addressing the use of performance information in communications, including: (1) allowing institutional communications to show both actual and related performance on a gross basis; (2) clarifying that targeted returns contained in fund promotional material are not projections of performance, or permit the use of targeted returns in institutional communications; (3) confirming that estimated returns about underlying fund investments are not subject to the prohibitions on projections of performance; and (4) clarifying that model returns and back-tested performance can provide a reasonable basis for projected performance and targeted returns in institutional communications. Fidelity urged FINRA to focus on harmonizing its rules governing related performance with SEC staff interpretations under the Advisers Act, and to focus on principles-based disclosure solutions across all forms of communications,

including social media and mobile devices.

While FINRA appreciates these suggestions, it believes that some of these recommendations (such as those concerning related or back-tested performance) extend beyond the scope of the proposal’s intent, and thus are not germane to this proposed rule filing. FINRA believes that it has addressed the other comments, such as those concerning targeted returns.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove such proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission’s internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR–FINRA–2023–016 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–FINRA–2023–016. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written

communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission’s Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. 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–FINRA–2023–016 and should be submitted on or before December 15, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹³

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023–25881 Filed 11–22–23; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice: 12269]

U.S. Advisory Commission on Public Diplomacy; Meeting

ACTION: Notice of meeting.

SUMMARY: The U.S. Advisory Commission on Public Diplomacy (ACPD) will hold an in-person public meeting with online (Zoom) access. The meeting will focus on the integration of diversity, equity, inclusion, and accessibility (DEIA) principles into U.S. government public diplomacy programming abroad, based on a forthcoming ACPD special report titled “Public Diplomacy and DEIA Promotion: Telling America’s Story to the World.” A panel of experts will discuss the opportunities and challenges associated with engaging global audiences on these important issues. This meeting is open to the public, including the media and members and staff of governmental and non-governmental organizations.

DATES: Tuesday, December 12, 2023, 12 p.m. until 1:15 p.m.

⁹³ 17 CFR 200.30–3(a)(12).

⁹⁰ The SECURE Act was enacted as Division O of the Further Consolidated Appropriations Act, 2020, Public Law 116–94 (2019).

⁹¹ See Department of Labor, “Pension Benefit Statements—Lifetime Income Illustrations,” 85 FR 59132 (September 18, 2020).

⁹² See, e.g., *Regulatory Notice* 12–02 (January 2012).

ADDRESSES: The event will take place at the U.S.C. Annenberg Center on Communication Leadership and Policy, University of Southern California, 1771 N St. NW, Washington, DC 20036.

To register for the event, please go to https://iipstate.my.site.com/CRMEventRegistration/s/registration-page?event=JtfG7kPP_m2ijMppK2bGeUsBccisxjOvvk_71TntFbk_.

Doors will open at 11:30 a.m.

FOR FURTHER INFORMATION CONTACT: To request reasonable accommodation, please email ACPD Program Assistant Kristy Zamy at ZamaryKK@state.gov; phone at 202–351–9284. Please send any request for reasonable accommodation no later than Tuesday, November 28, 2023. Requests received after that date will be considered but might not be possible to fulfill.

SUPPLEMENTARY INFORMATION: Since 1948, the ACPD has been charged with appraising activities intended to understand, inform, and influence foreign publics and to increase the understanding of, and support for, these same activities. The ACPD conducts research that provides honest assessments of public diplomacy efforts, and disseminates findings through reports, white papers, and other publications. It also holds public symposiums that generate informed discussions on public diplomacy issues and events. The Commission reports to the President, Secretary of State, and Congress and is supported by the Office of the Under Secretary of State for Public Diplomacy and Public Affairs.

For more information on the U.S. Advisory Commission on Public Diplomacy, please visit <https://www.state.gov/bureaus-offices/under-secretary-for-public-diplomacy-and-public-affairs/united-states-advisory-commission-on-public-diplomacy>, or contact Executive Director Vivian S. Walker at WalkerV@scmmat.state.gov or Senior Advisor Jeff Ridenour at RidenourJM@state.gov.

(Authority: 22 U.S.C. 2651a, 22 U.S.C. 1469, 5 U.S.C. 1001 *et seq.*, and 41 CFR 102–3.150)

Jeffrey M. Ridenour,

Senior Advisor, U.S. Advisory Commission on Public Diplomacy, Department of State.

[FR Doc. 2023–25909 Filed 11–22–23; 8:45 am]

BILLING CODE 4710–45–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket: FAA–2023–2249]

Notice of Availability; Adoption of the United States Air Force's Final Environmental Impact Statement—Airspace Optimization for Readiness at Mountain Home Air Force Base, Idaho, and the Record of Decision for Federal Aviation Administration Actions

AGENCY: Federal Aviation Administration (FAA), Department of Transportation.

ACTION: Notice of availability (NOA) for the adoption of the United States Air Force (USAF) final environmental impact statement (FEIS) and FAA's record of decision (ROD).

SUMMARY: The FAA announces its decision to adopt the USAF FEIS—Airspace Optimization for Readiness at Mountain Home Air Force Base (MHAFB), Mountain Home, Idaho. Based on its independent review and evaluation of the FEIS and supporting documents, the FAA is adopting the FEIS and issuing a ROD for the modification of special use airspace (SUA) at the Mountain Home Range Complex (MHRC).

FOR FURTHER INFORMATION CONTACT: Lonnie Covalt, Operations Support Group, Western Service Center, 2200 216th Street, Des Moines, WA 98198; telephone (206) 231–3998.

SUPPLEMENTARY INFORMATION:

Background

As described in the FEIS, the Proposed Action consists of USAF military flight training operations at low altitudes in the Paradise North Military Operations Area (MOA), Paradise South MOA, Owyhee South MOA, and Jarbidge South MOA. USAF would conduct supersonic operations at lower altitudes within the same four MOAs. To accommodate the Proposed Action, the FAA would modify SUA to ensure safe operations continue within the National Airspace System and allow for optimized airspace at the MHRC.

The MHRC and the SUA associated with MHAFB provide airspace for combat air power and combat support training to U.S. forces—and its allies—and support unit-level and larger force combat skills training. In addition, mission activities such as search and rescue training, survival training, convoy escort training, and ground-based air defense radio detection and ranging (radar) threat simulation occur on the land areas of the MHRC. The airspace and ranges primarily support

Idaho-based units from MHAFB Air National Guard units from Gowen Field in Boise, Idaho, in addition to other USAF and Department of Defense (DoD)-approved users. The MHRC SUA consists of six MOAs and two Restricted Areas (RA) with associated ranges for inert weapons use. The airspace overlies portions of Idaho, Nevada, and Oregon.

The Draft Environmental Impact Statement (DEIS) underwent a 109-day public comment period from July 9, 2021, to October 25, 2021, and there were 2,894 comment letters (not including duplicate submittals) submitted during the public comment period via mail, email, written at public hearings, verbal at public hearings, and the public website. A summary of the DEIS public involvement, agency coordination, and tribal consultation is contained in the FEIS. The FAA circularized the aeronautical proposal. The FEIS was made available to the public for 30 days on March 3, 2023, through a NOA in the **Federal Register** (88 FR 13443). The USAF issued their ROD on July 14, 2023, and a NOA of USAF's ROD was published in the **Federal Register** on August 2, 2023 (88 FR 50849).

Implementation

After evaluating the aeronautical study and the FEIS, the FAA has issued a ROD for the requested SUA. The Proposed Action consists of changes to lower the altitude of the floors within the MHAFB Military Operations Areas (MOA) of Paradise North MOA, Paradise South MOA, Owyhee South MOA, and Jarbidge South MOA. The designated altitudes are at 100 feet (ft) above ground level (AGL) up to 17,999 ft mean sea level (MSL). The times of use are between 0730–2200 mountain time, Monday through Friday; other times by Notice of Air Missions (NOTAM) expected use is estimated to be 260 days per year, 12 hours per day. The legal descriptions for the modified MOAs will be published in the National Flight Data Digest.

In accordance with Section 102 of the National Environmental Policy Act of 1969 (NEPA), the Council on Environmental Quality's (CEQ) regulations for implementing NEPA (40 CFR parts 1500–1508), and other applicable authorities (including FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, paragraph 8–2, and FAA Order JO 7400.2P, Procedures for Handling Airspace Matters, paragraph 32–2–3), the FAA has conducted an independent review and evaluation of the USAF FEIS. As a cooperating agency with responsibility for approving SUA under 49 U.S.C.

40103(b)(3)(A), the FAA provided subject matter expertise and coordinated with the USAF during the environmental review process.

The FAA signed the ROD on [November 17, 2023]. The ROD is available on the FAA website at: https://www.faa.gov/air_traffic/environmental_issues.

Issued in Des Moines, WA, on November 17, 2023.

Lonnie Covalt,

Lead Environmental Protection Specialist, Operations Support Group, Western Service Center.

[FR Doc. 2023–25978 Filed 11–22–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2023–0049]

Agency Information Collection Activities: Notice of Request for Reinstatement of a Previously Approved Information Collection

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of request for reinstatement of a previously approved information collection.

SUMMARY: The FHWA has forwarded the information collection request described in this notice to the Office of Management and Budget (OMB) for approval of a new (periodic) information collection. We published a **Federal Register** Notice with a 60-day public comment period on this information collection on May 26, 2023. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by December 26, 2023.

ADDRESSES: You may submit comments identified by DOT Docket ID Number 0049 by any of the following methods:

Website: For access to the docket to read background documents or comments received go to the Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Fax: 1–202–493–2251.

Mail: Docket Management Facility, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

Hand Delivery or Courier: U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE,

Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Melissa Corder, 202–366–5853, Office of Real Estate Services, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, between 7:30 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: State Right-of-Way Operations Manuals.

OMB Control #: 2125–0586.

Background: It is the responsibility of each State Department of Transportation (State) to acquire, manage and dispose of real property in compliance with the legal requirements of State and Federal laws and regulations. Part of providing assurance of compliance is to describe in a right-of-way procedural (operations) manual the organization, policies, and procedures of the State to such an extent that these guide State employees, local acquiring agencies, and contractors who acquire and manage real property that is used for a federally funded transportation project. Procedural manuals assure the FHWA that the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (Uniform Act) (implementing regulation 49 CFR 24) will be met; as well as Federal laws under Title 23 U.S.C. (implementing regulation 23 CFR 710) will be met. The State responsibility to prepare and maintain an up-to-date, right-of-way procedural manual is set out in 23 CFR 710.201(c). In addition to the scheduled manual updates, lengthy, in-depth updates of each manual will be required due to the amending of 49 CFR 24 regulations as prompted by the enactment of the Moving Ahead for Progress in the 21st Century Act (MAP–21). States are required to update manuals to reflect changes in Federal requirements for programs administered under Title 23 U.S.C (23 CFR regulations) and Title 42 U.S.C. (49 CFR 24 regulations). The regulation allows States flexibility in determining how to meet the manual requirement. This flexibility allows States to prepare manuals in the format of their choosing, to the level of detail necessitated by State complexities. Each State decides how it will provide service to individuals and businesses affected by Federal or federally assisted projects, while at the same time reducing the burden of government regulation. The updated State manuals may be submitted to FHWA electronically or made available by posting on the State

website. This collection is in line with DOT's strategic goal of organizational excellence.

Respondents: Required update of manual—52 State Departments of Transportation, including the District of Columbia and Puerto Rico (52 respondents).

23 CFR 710 regulatory revisions—52 State Departments of Transportation, including District of Columbia, and Puerto Rico (52 respondents).

49 CFR 24 regulatory revisions—167 grantees (respondents) will have manuals that need to be updated.

Frequency: Regular update of manual—Annual basis and certify every 5 years.

23 CFR 710 regulatory revisions—a one-time collection.

49 CFR 24 regulatory revisions—a one-time collection.

Estimated Average Burden per Response: Regular update of manual—15 hours.

23 CFR 710 regulatory revisions—225 hours.

49 CFR 24 regulatory revisions—225 hours.

Estimated Total Annual Burden Hours:

Regular update of manual: 52 respondents × 15 hours = 780 burden hours.

23 CFR 710 regulatory revisions: 52 respondents × 225 hours = 11,700 burden hours.

49 CFR 24 regulatory revisions: 167 respondents × 225 hours = 37,575 burden hours.

Total: 780 hrs. + 11,700 hrs. + 37,575 hrs. = 50,055 total burden hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FHWA's performance; (2) the accuracy of the estimated burdens; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; and 49 CFR 1.48.

Issued On: November 20, 2023.

Jazmyne Lewis,
Information Collection Officer.

[FR Doc. 2023–25930 Filed 11–22–23; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION**Federal Motor Carrier Safety Administration**

[Docket No. FMCSA–2023–0141]

Qualification of Drivers; Exemption Applications; Narcolepsy

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT)

ACTION: Notice of denial.

SUMMARY: FMCSA announces its decision to deny the application from one individual who requested an exemption from the Federal Motor Carrier Safety Regulations (FMCSRs) prohibiting operation of a commercial motor vehicle (CMV) in interstate commerce by persons with either a clinical diagnosis of narcolepsy or any other condition that is likely to cause a loss of consciousness or any loss of ability to control a CMV.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, DOT, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001, (202) 366–4001, fmcsamedical@dot.gov. Office hours are from 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing materials in 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–2023–0141) 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 September 27, 2023, FMCSA published a notice announcing receipt of an application from one individual with a diagnosis of narcolepsy and requested comments from the public (88 FR 66553). The individual requested an exemption from 49 CFR 391.41(b)(8) which prohibits operation of a CMV in interstate commerce by persons with either a clinical diagnosis of narcolepsy or any other condition that is likely to cause a loss of consciousness or any loss of ability to control a CMV. The public comment period ended on October 27, 2023, and no comments were received.

FMCSA has evaluated the eligibility of the applicant and concluded that granting an exemption would not provide a level of safety that would be equivalent to, or greater than, the level of safety that would be obtained by complying with § 391.41(b)(8). A summary of the applicant’s medical history related to the narcolepsy exemption request was discussed in the September 27, 2023, **Federal Register** notice and will not be repeated here.

The Agency considered information from the 2009 Evidence Report, “Narcolepsy (with and without cataplexy) and Commercial Motor Vehicle Driver Safety,” and the January 2010 Medical Review Board (MRB) recommendation that individuals with narcolepsy be ineligible for a commercial driver’s license, even with treatment. A copy of the Evidence Report is included in the docket.

Narcolepsy is a chronic neurological disorder caused by autoimmune destruction of hypocretin-producing neurons inhibiting the brain’s ability to regulate sleep-wake cycles normally. Persons with narcolepsy experience frequent excessive daytime sleepiness, comparable to how individuals without narcolepsy feel after 24 to 48 hours of sleep deprivation, as well as disturbed nocturnal sleep, which is often confused with insomnia. See National Institutes of Health Narcolepsy information at <https://www.ninds.nih.gov/health-information/disorders/narcolepsy>.

The 2009 Evidence Report, “Narcolepsy (with and without cataplexy) and Commercial Motor Vehicle Driver Safety,” addressed whether or not individuals with narcolepsy are at an increased risk for

motor vehicle crashes; whether or not currently recommended treatments for narcolepsy reduce the risk for motor vehicle crashes; and the impact of various medication therapies for narcolepsy on driver safety.

The evidence report reviewed studies from the available literature and evaluated outcomes on measures of Excessive Daytime Sleepiness (EDS), cataplexy, event rate, measures of cognitive and psychomotor function, and driving performance. The currently available direct and indirect evidence supports the contention that drivers with narcolepsy are at an increased risk for a motor vehicle crash when compared to otherwise similar individuals who do not have the disorder. The direct evidence from three crash studies conducted of non-CMV drivers showed that individuals with narcolepsy are at an increased risk for a crash compared to individuals who do not have narcolepsy. The indirect evidence from studies of driving tests and driving simulation examined factors associated with simulated driving outcomes such as driving performance, tracking error, fewer correct responses, and more instances of going out of bounds compared to healthy controls. While there are limitations in the quality of the studies that examined direct crash risk, both the direct and indirect studies showed a strong effect size and statistical significance. The American Academy of Sleep Medicine (AASM) and the European Federation of Neurological Societies recommend modafinil as the first treatment option and methylphenidate as the second treatment option. The AASM also recommends amphetamine, methamphetamine, or dextroamphetamine as alternative treatments. During literature searches, no studies that directly examined the impact of treatment with modafinil, armodafinil, sodium oxybate (used with narcolepsy with cataplexy), or antidepressants on crash risk or driving performance were identified. Therefore, conclusions regarding treatment with these medications on crash risk and driving performance could not be made.

Currently available evidence suggests that amphetamines and/or methylphenidate are effective in improving symptoms of EDS in individuals with narcolepsy (quality of studies range from “moderate to low”). However, these improvements do not result in levels of daytime sleepiness that can be considered to be normal in the vast majority of individuals. Therefore, conclusions regarding the impact of treatment with amphetamines, methylphenidate, or other related

stimulant drugs on cognitive and psychomotor function among individuals with narcolepsy could not be made.

In January 2010, FMCSA's MRB recommended that individuals with narcolepsy be ineligible for a commercial driver's license, even with treatment.

III. Discussion of Comments

FMCSA received no comments in this proceeding.

IV. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.

The Agency's decision regarding this exemption application is based on an individualized assessment of the applicant's medical information, available medical and scientific data concerning narcolepsy, and any relevant public comments received.

V. Conclusion

The Agency has determined that the available medical and scientific literature and research provides insufficient data to enable the Agency to conclude that granting this exemption would achieve a level of safety equivalent to, or greater than, the level of safety maintained without the exemption. Therefore, the following applicant has been denied an exemption from the physical qualification standards in § 391.41(b)(8):

Kevin Cunningham (TN)

The applicant has, prior to this notice, received a letter of final disposition regarding their exemption request. The decision letter fully outlined the basis for the denial and constitute final action by the Agency. The name of the individual published in this notice summarizes the Agency's recent denials as required under 49 U.S.C. 31315(b)(4).

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023-25919 Filed 11-22-23; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2023-0025]

Qualification of Drivers; Exemption Applications; Hearing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of applications for exemption; request for comments.

SUMMARY: FMCSA announces receipt of applications from 10 individuals for an exemption from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) to operate a commercial motor vehicle (CMV) in interstate commerce. If granted, the exemptions would enable these hard of hearing and deaf individuals to operate CMVs in interstate commerce.

DATES: Comments must be received on or before December 26, 2023.

ADDRESSES: You may submit comments identified by the Federal Docket Management System Docket No. FMCSA-2023-0025 using any of the following methods:

- *Federal eRulemaking Portal:* Go to www.regulations.gov/, insert the docket number (FMCSA-2023-0025) in the keyword box and click "Search." Next, choose the only notice listed, and click on the "Comment" button. Follow the online instructions for submitting comments.

- *Mail:* Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Washington, DC 20590-0001.

- *Hand Delivery:* West Building Ground Floor, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal Holidays.

- *Fax:* (202) 493-2251.

To avoid duplication, please use only one of these four methods. See the "Public Participation" portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, DOT, 1200 New Jersey Avenue SE, Room W64-224, Washington, DC 20590-0001, (202) 366-4001, fmcsamedical@dot.gov. Office hours are 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA-2023-0025), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to <https://www.regulations.gov/docket/FMCSA-2023-0025>. Next, sort the results by "Posted (Newer-Older)," choose the only notice listed, click the "Comment" button, and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Comments

To view comments go to www.regulations.gov. Insert the docket number (FMCSA-2023-0025) in the keyword box and click "Search." Next, choose the only 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.

C. Privacy Act

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption requests. 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

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statutes also allow the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The 10 individuals listed in this notice have requested an exemption from the hearing requirement in 49 CFR 391.41(b)(11). Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

The physical qualification standard for drivers regarding hearing found in § 391.41(b)(11) states that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.

This standard was adopted in 1970 and was revised in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, (35 FR 6458, 6463 (Apr. 22, 1970) and 36 FR 12857 (July 8, 1971), respectively).

On February 1, 2013, FMCSA announced in a Notice of Final Disposition titled, "Qualification of Drivers; Application for Exemptions; National Association of the Deaf," (78 FR 7479), its decision to grant requests from 40 individuals for exemptions from the Agency's physical qualification standard concerning hearing for interstate CMV drivers. Since that time the Agency has published additional notices granting requests from hard of hearing and deaf individuals for exemptions from the Agency's physical

qualification standard concerning hearing for interstate CMV drivers.

III. Qualifications of Applicants

Jesse Aguiar

Jesse Aguiar, 49, holds a class D driver's license in Arizona.

Antonio Brown

Antonio Brown, 46, holds a class E driver's license in Louisiana.

Daniel Crawford

Daniel Crawford, 42, holds a class D driver's license in Virginia.

Scott Humpal

Scott Humpal, 42, holds a class C driver's license in California.

Ryan King

Ryan King, 27, holds a class C driver's license in North Carolina.

Jordan Marqus

Jordan Marqus, 29, holds a class 10 driver's license in Rhode Island.

John Mast

John Mast, 47, holds a class D driver's license in Ohio.

Lacey McLaughlin

Lacey McLaughlin, 24, holds a class C driver's license in North Carolina.

Barry Schmidt

Barry Schmidt, 62, holds a class R driver's license in Colorado.

Grover Vincent

Grover Vincent, 44, holds a class CM driver's license in Texas.

IV. Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315(b), FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated under the **DATES** section of the notice.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023-25927 Filed 11-22-23; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Safety Advisory 2023-07; Review and Implement New Predictive Weather Modeling and Proactive Safety Processes Across the National Rail Network To Prevent Weather-Related Accidents and Incidents

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of safety advisory.

SUMMARY: Since the beginning of 2021, 123 rail accidents/incidents have been reported to FRA as having been caused, in whole or in part, by severe weather conditions or weather-related events (e.g., hurricanes, tornadoes, wildfires, flooding, mudslides, and summer heat). These extreme weather conditions and events not only present hazards to railroad workers, operations and infrastructure but can also severely impact the customers and communities relying on the railroads for travel and transportation of critical goods. To reduce weather-related accidents/incidents and improve the efficiency of the national rail network during severe weather events, FRA is issuing this Safety Advisory to recommend that railroads review existing policies, procedures, and operating rules related to predicting, monitoring, communicating, and operating during severe weather conditions or subsequent to extreme weather events. FRA also recommends that railroads collaborate to develop best practices for utilizing weather forecasting technologies, predictive weather models, and weather-related action plans throughout the industry.

FOR FURTHER INFORMATION CONTACT: Mr. Charles P. King, Director, Office of Railroad Infrastructure and Mechanical Equipment, at 202-329-5031 or Charles.King@dot.gov.

Disclaimer: This Safety Advisory is considered guidance pursuant to DOT Order 2100.6A (June 7, 2021). Except when referencing laws, regulations, policies, or orders, the information in this Safety Advisory does not have the force and effect of law and is not meant to bind the public in any way. This document does not revise or replace any previously issued guidance.

SUPPLEMENTARY INFORMATION:

Background

From January 2021 through the end of July 2023, there have been 123

accidents/incidents reported to FRA where one of the cause codes was related to weather conditions (cause

codes M102, M103, M105, M199, and T109 on FRA Form 6180.54). Over half of these accidents/incidents were main-

track derailments. A detailed breakdown is provided below:

Accident cause	Number of incidents	Number of mainline derailments
M102—Extreme environmental condition—TORNADO	11	4
M103—Extreme environmental condition—FLOOD	16	10
M105—Extreme environmental condition—EXTREME WIND VELOCITY	40	12
M199 ¹ —Other extreme environmental conditions	7	0
T109—Track alignment irregular (buckled/sun kink)	49	40

FRA has previously issued Safety Advisories concerning weather-related accidents/incidents. On September 4, 1997, FRA issued Safety Advisory 97–1, recommending safety practices to reduce the risk of casualties from train derailments caused by damage to tracks, roadbeds, and bridges resulting from uncontrolled water flows and similar weather-related phenomena. FRA amended Safety Advisory 97–1 on November 14, 1997, by revising the recommendation concerning the transmission of flash flood warnings to train dispatchers or other employees controlling the movement of trains.

Additionally, FRA issued Safety Advisory 2012–03 on July 16, 2012, to remind track owners, railroads, and their employees of the importance of complying with their continuous welded rail (CWR) plan procedures and reviewing their current internal engineering instructions that address inspecting CWR track to identify conditions that increase the likelihood of buckling of rail. To heighten awareness of the potential consequences of an unexpected track buckle, particularly considering the unusually high and prolonged, record-breaking temperatures that affected much of the United States in the summer of 2012, Safety Advisory 2012–03 highlighted a series of train accidents that were caused by the rail buckling under severe heat conditions (commonly referred to as sun kinks in the rail). The number of mainline derailments caused by track buckles or sun kinks continues to be unacceptable to FRA.

In addition to FRA's Safety Advisories, MxV Rail Service released a Technology Digest Article earlier this year, addressing some of the challenges the rail industry is experiencing with weather and heat-related track defects.²

Recommendations

In light of the continued occurrence of weather-related rail accidents/incidents, FRA is making the following recommendations to railroads:

1. Railroads should evaluate their communication and training programs, rules, policies, and procedures related to severe weather and ensure those programs are adequate to ensure weather-related action plans can be promptly implemented. In evaluating these rules, policies, and procedures, railroads should ensure preparation and response training curriculums are up to date and include critical information necessary for operating personnel, whether simulated drills are performed to test employee response and recovery from severe weather events, whether employees receive sufficient training on weather monitoring software (including updated new training when software enhancements are introduced); whether policies and procedures for communicating weather events are adequate; whether backup communication and dispatching systems are present and tested regularly; and whether evacuation and safety plans are all-encompassing, to include railroad personnel working in the field and those in transit (e.g., on the rails, in yards, and traveling on roadways).

2. Railroads should evaluate their weather forecasting policies and procedures. In assessing the relevant policies and procedures, railroads should consider integrating weather forecasting policies and procedures (and the outcomes from those policies and procedures) into dispatch operations and whether those policies and procedures should be incorporated into positive train control systems. Railroads should additionally consider whether the National Oceanic and Atmospheric Administration (NOAA) and United States Geological Survey (USGS) predicting, and monitoring capabilities are utilized adequately and consistently within those policies and procedures.

3. Railroads should evaluate their operating infrastructure to identify

critical and geographical elements susceptible to severe weather events. Railroads should identify operating infrastructure sensitive to extreme weather events and review plans and policies to monitor the infrastructure proactively and reactively. Railroads should consider issues such as whether technology can be introduced to monitor critical infrastructure in real-time and how weather-related action plans can be revised to establish standardized interfaces with other railroads, agencies, and municipalities (e.g., United States Coast Guard and local and State authorities) in the event of a weather-related event. Railroads should review and update these plans and policies periodically and ensure weather-related action plans address specific risks to the identified critical infrastructure.

4. Railroads should evaluate existing weather-related action plans and ensure that those plans detail the necessary proactive planning, maintenance, communication, and other actions necessary to address the risks presented by severe weather conditions. As part of these action plans, railroads should consider developing and implementing an auditing program for severe weather alert systems or other alternative methods to ensure such systems remain in working condition. Railroads should ensure such systems are tested routinely, and their functionality is consistent with all current weather-related action plans.

5. Railroads should establish standard operating thresholds to ensure their weather-related action plans adequately prepare for severe weather events. Railroads should ensure sufficient rules, policies, and procedures are implemented and periodically reviewed and updated to enable effective determinations as to when it is safe to operate in extreme weather conditions and when it is not (considering environmental exposures for railroad personnel and other relevant factors). Rules, policies, and procedures should address weather events such as wind,

¹ Includes all other environmental conditions such as falling trees, rockslides, ice or snow, etc.

² MxV Rail Technology Digest TD23–015, *Climatic Impacts on Railroad Infrastructure* (July 2023) (available at <https://www.mxvrail.com/technology-digest/>).

heat, cold, flooding, flash flooding, tornadoes, hurricanes, fire, visibility, snow, ice, sand drifts, earthquakes, landslides, and environmental factors such as the air quality index.

6. Railroads should work together to develop best practices for utilizing weather forecasting technologies, predictive weather models, and weather-related action plans throughout the industry. In doing so, railroads should consider how much deviation exists between railroads related to operational weather rules, policies, and procedures. Railroads should consider whether those deviations are justified and to what extent rail safety would benefit from industry-wide standardization of weather-related rules, policies, procedures, and weather-related action plans in general. Railroads should also consider whether individual railroad weather-related rules, policies, and action plans include adequate collaboration with tenant and interchange railroads.

Conclusion

FRA encourages all railroad industry members to take actions consistent with the recommendations of this Safety Advisory to prevent weather-related accidents/incidents. FRA may modify this Safety Advisory, issue additional

safety advisories, or take other appropriate action necessary to ensure the highest level of safety on the Nation's railroads, including pursuing other corrective measures under its rail safety authority.

Issued in Washington, DC.

John Karl Alexy,

*Associate Administrator for Railroad Safety
Chief Safety Officer.*

[FR Doc. 2023-25924 Filed 11-22-23; 8:45 am]

BILLING CODE 4910-06-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 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 effective date(s).

FOR FURTHER INFORMATION CONTACT:

OFAC: Bradley T. 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 Compliance & Evaluation, tel.: 202-622-2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (<https://www.treasury.gov/ofac>).

Notice of OFAC Action(s)

On November 16, 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 authorities listed below.

BILLING CODE 4810-AL-P

Individuals

1. CVIJETINOVIC, Savo (a.k.a. “TIGAR”; a.k.a. “TIGER”), Bijeljina, Bosnia and Herzegovina; DOB 27 Dec 1959; POB Lopare, Bosnia and Herzegovina; nationality Bosnia and Herzegovina; citizen Bosnia and Herzegovina; Gender Male; Passport B0252296 (Bosnia and Herzegovina) expires 08 May 2025; National ID No. 87120231E (Bosnia and Herzegovina) expires 15 May 2028 (individual) [RUSSIA-EO14024].

Designated pursuant to Section 1(a)(iii) of Executive Order 14024 of April 15, 2021, “Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation” (E.O. 14024), 86 FR 20249 (April 19, 2021), 3 CFR 2021 Comp., p. 542, for being or having been a leader, official, senior executive officer, or member of the board of directors of Inzinjering-BN Bijeljina D.O.O., an entity whose property and interests in property are blocked pursuant to E.O. 14024.

2. DAVIDOVIC, Miodrag (Cyrillic: ДАВИДОВИЋ, Миодраг) (a.k.a. “DAKA” (Cyrillic: “ДАКА”)), Montenegro; DOB 01 Mar 1957; POB Niksic, Montenegro; nationality Montenegro; Gender Male; Passport B38HP2825 (Montenegro) expires 26 Mar 2028 (individual) [BALKANS-EO14033].

Designated pursuant to Sections 1(a)(i) and 1(a)(v) of Executive Order 14033 of June 8, 2021, “Blocking Property and Suspending Entry into the United States of Certain Persons Contributing to the Destabilizing Situation in the Western Balkans” (E.O. 14033), 86 FR 31079 (June 10, 2021), 3 CFR 2021 Comp., p. 591, for being responsible for or complicit in, or having directly or indirectly engaged in, actions or policies that threaten the peace, security, stability, or territorial integrity of any area or state in the Western Balkans; and for being responsible for or complicit in, or having directly or indirectly engaged in, corruption related to the Western Balkans, including corruption by, on behalf of, or otherwise related to a government in the Western Balkans, or a current or former government official at any level of government in the Western Balkans, such as the misappropriation of public assets, expropriation of private assets for personal gain or political purposes, or bribery.

3. DJOKIC, Petar (a.k.a. DOKIC, Petar), Bosnia and Herzegovina; DOB 29 Jul 1961; POB Brcko, Bosnia and Herzegovina; nationality Bosnia and Herzegovina; Gender Male; National ID No. 01110KK43 (Bosnia and Herzegovina) (individual) [BALKANS-EO14033].

Designated pursuant to section 1(a)(iii) of E.O. 14033 for being responsible for or complicit in, or having directly or indirectly engaged in, a violation of, or an act that has obstructed or threatened the implementation of, any regional security, peace, cooperation, or mutual recognition agreement or framework or accountability mechanism related to the Western Balkans, including the Prespa Agreement of 2018; the Ohrid Framework Agreement of 2001; United Nations Security Council Resolution 1244; the Dayton Accords; or the Conclusions of the Peace Implementation Conference Council held in London in December 1995, including the decisions or conclusions of the High Representative, the Peace Implementation Council, or its Steering Board; or the International Criminal Tribunal for the former Yugoslavia, or, with respect to the former Yugoslavia, the International Residual Mechanism for Criminal Tribunals.

4. KAMCEVA, Ratka Kunoska (a.k.a. KUNOSKA-KAMCEVA, Ratka), North Macedonia, The Republic of; DOB 16 Oct 1945; nationality North Macedonia, The Republic of; Gender Female (individual) [BALKANS-EO14033] (Linked To: KAMCEV, Jordan).

Designated pursuant to section 1(a)(vi) of E.O. 14033 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, Jordan Kamcev, a person whose property and interests in property are blocked pursuant to E.O. 14033.

5. MICUNOVIC, Branislav (Cyrillic: МИЋУНОВИЋ, Бранислав) (a.k.a. “BRANA” (Cyrillic: “БРАНА”); a.k.a. “BRANO” (Cyrillic: “БРАНО”)), Montenegro; DOB 09 Jan 1953; POB Niksic, Montenegro; nationality Montenegro; Gender Male (individual) [BALKANS-EO14033].

Designated pursuant to section 1(a)(v) of Executive Order 14033 for being responsible for or complicit in, or having directly or indirectly engaged in, corruption related to the Western Balkans, including corruption by, on behalf of, or otherwise related to a government in the Western Balkans, or a current or former government official at any level of government in the Western Balkans, such as the misappropriation of public assets, expropriation of private assets for personal gain or political purposes, or bribery.

6. PEROVIC, Dusko (Cyrillic: ПЕРОВИЋ, Душко; Cyrillic: ПЕРОВИЧ, Душко) (a.k.a. PEROVICH, Dushan (Cyrillic: ПЕРОВИЧ, Душан)), Russia; Bosnia and Herzegovina; DOB 03 Jan 1960; nationality Montenegro; Gender Male (individual) [BALKANS-EO14033].

Designated pursuant to section 1(a)(vii) of E.O. 14033 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Milorad Dodik, a person whose property and interests in property are blocked pursuant to E.O. 14033.

7. SAMSONENKO, Irina (f.k.a. KOSENKO, Irina), Skopje, North Macedonia, The Republic of; DOB 16 Jan 1973; POB Rostov-on-Don, Russia; nationality North Macedonia, The Republic of; Gender Female; National ID No. 1601973455122 (North Macedonia, The Republic of) (individual) [BALKANS-EO14033] (Linked To: KAMCEV, Jordan).

Designated pursuant to section 1(a)(vi) of E.O. 14033 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, Jordan Kamcev, a person whose property and interests in property are blocked pursuant to E.O. 14033.

8. SAMSONENKO, Sergey (a.k.a. SAMSONENKO, Sergej), Skopje, North Macedonia, The Republic of; DOB 17 Nov 1967; POB Rostov-on-Don, Russia; nationality North Macedonia, The Republic of; Gender Male; Passport B0518816 (North Macedonia, The Republic of) expires 06 Mar 2024; National ID No. 1711967450100 (North Macedonia, The Republic of) (individual) [BALKANS-EO14033] (Linked To: KAMCEV, Jordan).

Designated pursuant to section 1(a)(vi) of E.O. 14033 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, Jordan Kamcev, a person whose property and interests in property are blocked pursuant to E.O. 14033.

Entities

1. BET CITY INTERNATIONAL D.O.O. SKOPJE, ADVERTISING, MARKETING, AND SERVICES COMPANY (a.k.a. BET SITI INTERNESHNL SKOPJE D.O.O.), Skupi 3A, Skopje 1020, North Macedonia, The Republic of; Tax ID No. 4057017537543 (North Macedonia, The Republic of) [BALKANS-EO14033] (Linked To: SAMSONENKO, Sergey; Linked To: KAMCEV, Jordan).

Designated pursuant to section 1(a)(vii) of E.O. 14033 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Jordan Kamcev, a person whose property and interests in property are blocked pursuant to E.O. 14033, and Sergey Samsonenko, a person whose property and interests in property are blocked pursuant to E.O. 14033.

2. INZINJERING-BN BIJELJINA D.O.O. (a.k.a. DRUSTVO SA OGRANICENOM ODGOVORNOSCU INZINJERING-BN BIJELJINA; a.k.a. INZINJERING-BN BIJELJINA LIMITED LIABILITY COMPANY), Dusana Baranina 1A, 76300, Bijeljina, Bosnia and Herzegovina; Organization Established Date 12 Sep 2017; Tax ID No. 4404222340002 (Bosnia and Herzegovina); Registration Number 59-01-0064-17 (Bosnia and Herzegovina) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14033 for operating or having operated in the aerospace sector of the Russian Federation economy.

3. KAMCHEV KONSALTING SKOPJE DOOEL (a.k.a. KAMCHEV CONSULTING), Skupi 3A, Karposh 1020, North Macedonia, The Republic of; Organization Established Date 31 Jan 2008; Tax ID No. MK4030008017701 (North Macedonia, The Republic of) [BALKANS-EO14033] (Linked To: KAMCEVA, Ratka Kunoska).

Designated pursuant to Section 1(a)(vii) of E.O. 14033 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Ratka

Kunoska Kamceva, a person whose property and interests in property are blocked pursuant to E.O. 14033.

4. ORKA FAJNANS SKOPJE DOOEL (a.k.a. ORKA FINANCE), Skupi 3A, Karposh 1020, North Macedonia, The Republic of; Organization Established Date 08 Feb 2010; Tax ID No. MK4057010505107 (North Macedonia, The Republic of) [BALKANS-EO14033] (Linked To: KAMCEVA, Ratka Kunoska).

Designated pursuant to section 1(a)(vii) of E.O. 14033 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Ratka Kunoska Kamceva, a person whose property and interests in property are blocked pursuant to E.O. 14033.

5. ORKA HOLDING AD (Cyrillic: ОРКА ХОЛДИНГ), Skupi 3A, Skopje 1000, North Macedonia, The Republic of; Organization Established Date 13 May 2005; Tax ID No. 4030005550719 (North Macedonia, The Republic of); Business Registration Number 5989876 (North Macedonia, The Republic of) [BALKANS-EO14033] (Linked To: KAMCEV, Jordan).

Designated pursuant to section 1(a)(vii) of E.O. 14033 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Jordan Kamcev, a person whose property and interests in property are blocked pursuant to E.O. 14033.

6. SISTINA LAJF KEAR SENTAR SKOPJE DOOEL (a.k.a. LIFE CARE CENTER DOOEL; a.k.a. LIVE KER CENTER), Skupi 3A, Karposh 1020, North Macedonia, The Republic of; Tax ID No. MK4058012514363 (North Macedonia, The Republic of) [BALKANS-EO14033] (Linked To: SAMSONENKO, Irina).

Designated pursuant to section 1(a)(vii) of E.O. 14033 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Irina Samsonenko, a person whose property and interests in property are blocked pursuant to E.O. 14033.

Dated: November 16, 2023.
Bradley T. Smith,
*Director, Office of Foreign Assets Control,
U.S. Department of the Treasury.*
[FR Doc. 2023–25928 Filed 11–22–23; 8:45 am]
BILLING CODE 4810–AL–C

**DEPARTMENT OF VETERANS
AFFAIRS**
**Advisory Committee on Women
Veterans, Notice of Meeting**

The Department of Veterans Affairs
(VA) gives notice under the Federal

Advisory Committee Act, 5 U.S.C. ch.
10, that the Advisory Committee on
Women Veterans will conduct a virtual
meeting on December 12–13, 2023. The
meeting will begin and ends as follows:

Date	Time	Location
December 12, 2023	1:00 p.m.–4:00 p.m. Eastern Standard Time (EST)	WEBEX link and call-in information below.
December 13, 2023	12:00 p.m.–3:00 p.m. (EST)	WEBEX link and call-in information below.

The meeting sessions are open to the public.
The purpose of the Committee is to advise the Secretary of Veterans Affairs regarding the needs of women Veterans with respect to health care, rehabilitation, compensation, outreach

and other programs and activities administered by VA designed to meet such needs. The Committee makes recommendations to the Secretary regarding such programs and activities.
On Tuesday, December 12, 2023, the agenda includes updates on National

Cemetery Administrations and Veterans Benefits Administrations initiatives, the Intimate Partner Violence Assistance Program and Office of Women’s Health initiatives.
On Wednesday, December 13, 2023, the agenda includes time allotted for

public comment starting at 12:15 p.m. and ending no later than 12:45 p.m. (EST). The comment period may end sooner, if there are no comments presented or they are exhausted before the end time. Individuals interested in providing comments during the meeting are allowed no more than three minutes for their statements. Following the comment period, the committee will receive updates on the Women Veterans Call Center, Veteran homelessness, assault and harassment prevention and

Office of Transition and Economic Development initiatives.

Those who want to submit written statements for the Committee's review should submit them to the Center for Women Veterans at 00W@mail.va.gov no later than December 5, 2023. Any member of the public who wishes to participate virtually may use the following access information: (<https://veteransaffairs.webex.com/veteransaffairs/j.php?MTID=m8da37e2dd5011>

b1d36529b042f34608b; meeting number: 2761 190 0779 password: EJdqNuh@324. Join by phone at 14043971596 (USA toll number); Access code: 27611900779).

Dated: November 20, 2023.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2023–25995 Filed 11–22–23; 8:45 am]

BILLING CODE 8320–01–P



FEDERAL REGISTER

Vol. 88

Friday,

No. 225

November 24, 2023

Part II

Department of the Treasury

31 CFR Part 33

Department of Health & Human Services

Centers for Medicare & Medicaid Services
Office of the Secretary

42 CFR Parts 435 and 600

45 CFR Parts 153, 155, and 156

Patient Protection and Affordable Care Act, HHS Notice of Benefit and Payment Parameters for 2025; Updating Section 1332 Waiver Public Notice Procedures; Medicaid; Consumer Operated and Oriented Plan (CO-OP) Program; and Basic Health Program; Proposed Rule

DEPARTMENT OF THE TREASURY**31 CFR Part 33****DEPARTMENT OF HEALTH AND HUMAN SERVICES****Centers for Medicare & Medicaid Services****42 CFR Parts 435 and 600****Office of the Secretary****45 CFR Parts 153, 155, and 156****[CMS–9895–P]****RIN 0938–AV22****Patient Protection and Affordable Care Act, HHS Notice of Benefit and Payment Parameters for 2025; Updating Section 1332 Waiver Public Notice Procedures; Medicaid; Consumer Operated and Oriented Plan (CO–OP) Program; and Basic Health Program**

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

ACTION: Proposed rule.

SUMMARY: This proposed rule includes payment parameters and provisions related to the HHS-operated risk adjustment program, as well as 2025 user fee rates for issuers offering qualified health plans (QHPs) through Federally-facilitated Exchanges (FFE) and State-based Exchanges on the Federal platform (SBE-FPs). This proposed rule also includes proposed requirements related to the auto re-enrollment hierarchy; essential health benefits; failure to file and reconcile; non-standardized plan option limits and an exceptions process; standardized plan options; special enrollment periods (SEPs); direct enrollment (DE) entities; Insurance Affordability Program enrollment eligibility verification process; requirements for agents, brokers, web-brokers, and DE entities assisting Exchange consumers; network adequacy; public notice procedures for section 1332 waivers; prescription drug benefits; updates to the Consumer Operated and Oriented Plan (CO–OP) Program; State flexibility on the financial methodology used for Medicaid eligibility determinations for non-modified adjusted gross income (MAGI) populations; and State flexibility on the effective date of coverage in the Basic Health Program (BHP). A summary of this proposed rule

may be found at <https://www.regulations.gov/>.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, by January 8, 2024.

ADDRESSES: In commenting, please refer to file code CMS–9895–P.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to <http://www.regulations.gov>. Follow the “Submit a comment” instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–9895–P, P.O. Box 8016, Baltimore, MD 21244–8016.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–9895–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT:

Jeff Wu, (301) 492–4305, Rogelyn McLean, (301) 492–4229, Grace Bristol, (410) 786–8437, for general information.

Joshua Paul, (301) 492–4347, Jackie Wilson, (301) 492–4286, or John Barfield, (301) 492–4433, for matters related to HHS-operated risk adjustment.

John Barfield, (301) 492–4433, or Leanne Scott, (410) 786–1045, for matters related to user fees.

Brian Gubin, (410) 786–1659, for matters related to agent, broker, and web-broker guidelines.

Marisa Beatley, (301) 492–4307, for matters related to the verification process related to eligibility for insurance affordability programs and current sources of income.

Carolyn Kraemer, (301) 492–4197, for matters related to auto re-enrollment in the Exchanges.

Nicholas Eckart, (301) 492–4452, for matters related to enrollment of qualified individuals into QHPs and termination of Exchange enrollment or coverage for qualified individuals.

Hollynd Boyden, (667) 414–0105, for matters related to the monthly 150 percent Federal poverty level special enrollment period.

Alexandra Gribbin, (667) 290–9977, for matters related to dental coverage.

Nikolas Berkobien, (667) 290–9903, for matters related to standardized plan options and non-standardized plan option limits.

LeAnn Brodhead, (667) 290–8805, for matters related to the essential health benefits prescription drug benefit.

Carolyn Sabini, (667) 290–9750, for matters related to the essential health benefits benchmark plan policy.

Agata Pelka, (667) 290–9979, for matters related to mandates in addition to the essential health benefits.

Emily Martin, (301) 492–4423, or Deborah Hunter, (443) 386–3651, for matters related to network adequacy and ECPs.

Shilpa Gogna, (301) 492–4257, or Jenny Chen, (301) 492–5156, for matters related to approval of a State Exchange and State Exchange Blueprint requirements.

Lina Rashid, (443) 902–2823, or Kimberly Koch (202) 381–6934, for matters related to section 1332 waivers.

Jacquelyn Rudich, (301) 492–5211, for matters related to netting of payments.

Kevin Kendrick, (301) 509–6612, for matters related to the CO–OP program.

Carrie Grubert, (410) 786–8319, for matters related to the Basic Health Program (BHP) provision.

Gene Coffey, (410) 786–2234, for matters related to Medicaid eligibility.

Arshdeep Dhanoa, (301) 492–4400, for matters related to incarceration verification for QHP eligibility and periodic data matching for dual and deceased enrollees.

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I. Executive Summary

We propose changes to the provisions and parameters implemented through prior rulemaking to implement the Patient Protection and Affordable Care Act (ACA).¹ These proposals are

¹ The Patient Protection and Affordable Care Act (Pub. L. 111–148) was enacted on March 23, 2010. The Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152), which amended and revised several provisions of the Patient Protection and Affordable Care Act, was enacted on March 30, 2010. In this rulemaking, the two statutes are referred to collectively as the “Patient Protection and Affordable Care Act,” “Affordable Care Act,” or “ACA.”

published under the authority granted to the Secretary by the ACA and the Public Health Service (PHS) Act.² In this proposed rule, we propose changes related to some of the ACA provisions and parameters we previously implemented and propose to implement new provisions. We also propose a change to Medicaid financial eligibility provisions to provide States with greater flexibility to extend Medicaid eligibility to specific populations based on the State’s circumstances. Our goal with these proposals is providing quality, affordable coverage to consumers while minimizing administrative burden and ensuring program integrity. The changes proposed in this rule are also intended to help advance health equity and mitigate health disparities.

II. Background

A. Legislative and Regulatory Overview

Title I of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) added a new title XXVII to the Public Health Service Act (PHS Act) to establish various reforms to the group and individual health insurance markets.

These provisions of the PHS Act were later augmented by other laws, including the ACA.

Subtitles A and C of title I of the ACA reorganized, amended, and added to the provisions of part A of title XXVII of the PHS Act relating to group health plans and health insurance issuers in the group and individual markets. The term “group health plan” includes both insured and self-insured group health plans.

Section 2702 of the PHS Act, as added by the ACA, establishes requirements for guaranteed availability of coverage in the group and individual markets.

Section 1301(a)(1)(B) of the ACA directs all issuers of qualified health plans (QHPs) to cover the essential health benefit (EHB) package described in section 1302(a) of the ACA, including coverage of the services described in section 1302(b) of the ACA, adherence to the cost-sharing limits described in section 1302(c) of the ACA, and meeting the Actuarial Value (AV) levels established in section 1302(d) of the ACA. Section 2707(a) of the PHS Act, which is effective for plan or policy years beginning on or after January 1, 2014, extends the requirement to cover the EHB package to non-grandfathered individual and small group health insurance coverage, irrespective of whether such coverage is offered through an Exchange. In addition,

² See sections 1311, 1312, 1313, 1321, 1332, and 1343 of the ACA and section 2792 of the PHS Act.

section 2707(b) of the PHS Act directs non-grandfathered group health plans to ensure that cost sharing under the plan does not exceed the limitations described in section 1302(c)(1) of the ACA.

Section 1302 of the ACA provides for the establishment of an EHB package that includes coverage of EHBs (as defined by the Secretary of HHS), cost-sharing limits, and AV requirements. The law directs that EHBs be equal in scope to the benefits provided under a typical employer plan, and that they cover at least the following 10 general categories: ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; and pediatric services, including oral and vision care. Section 1302(d) of the ACA describes the various levels of coverage based on AV. Consistent with section 1302(d)(2)(A) of the ACA, AV is calculated based on the provision of EHB to a standard population. Section 1302(d)(3) of the ACA directs the Secretary of HHS to develop guidelines that allow for de minimis variation in AV calculations. Sections 1302(b)(4)(A) through (D) of the ACA establish that the Secretary must define EHB in a manner that: (1) reflects appropriate balance among the 10 categories; (2) is not designed in such a way as to discriminate based on age, disability, or expected length of life; (3) takes into account the health care needs of diverse segments of the population; and (4) does not allow denials of EHBs based on age, life expectancy, disability, degree of medical dependency, or quality of life.

Section 1311(c) of the ACA provides the Secretary the authority to issue regulations to establish criteria for the certification of QHPs. Section 1311(c)(1)(B) of the ACA requires, among the criteria for certification that the Secretary must establish by regulation, that QHPs ensure a sufficient choice of providers. Section 1311(e)(1) of the ACA grants the Exchange the authority to certify a health plan as a QHP if the health plan meets the Secretary’s requirements for certification issued under section 1311(c) of the ACA, and the Exchange determines that making the plan available through the Exchange is in the interests of qualified individuals and qualified employers in the State. Section 1311(c)(6)(C) of the ACA directs the Secretary of HHS to require an Exchange

to provide for special enrollment periods and section 1311(c)(6)(D) of the ACA directs the Secretary of HHS to require an Exchange to provide for a monthly enrollment period for Indians, as defined by section 4 of the Indian Health Care Improvement Act.

Section 1311(d)(3)(B) of the ACA permits a State, at its option, to require QHPs to cover benefits in addition to EHB. This section also requires a State to make payments, either to the individual enrollee or to the issuer on behalf of the enrollee, to defray the cost of these additional State-required benefits.

Section 1312(c) of the ACA generally requires a health insurance issuer to consider all enrollees in all health plans (except grandfathered health plans) offered by such issuer to be members of a single risk pool for each of its individual and small group markets. States have the option to merge the individual and small group market risk pools under section 1312(c)(3) of the ACA.

Section 1312(e) of the ACA provides the Secretary with the authority to establish procedures under which a State may allow agents or brokers to (1) enroll qualified individuals and qualified employers in QHPs offered through Exchanges and (2) assist individuals in applying for advance payments of the premium tax credit (APTC) and cost-sharing reductions (CSRs) for QHPs sold through an Exchange.

Section 1312(f)(1)(B) of the ACA provides that an individual shall not be treated as a qualified individual for enrollment in a QHP if, at the time of enrollment, the individual is incarcerated, other than incarceration pending the disposition of charges.

Sections 1313 and 1321 of the ACA provide the Secretary with the authority to oversee the financial integrity of State Exchanges, their compliance with HHS standards, and the efficient and non-discriminatory administration of State Exchange activities. Section 1313(a)(5)(A) of the ACA provides the Secretary with the authority to implement any measure or procedure that the Secretary determines is appropriate to reduce fraud and abuse in the administration of the Exchanges. Section 1321 of the ACA provides for State flexibility in the operation and enforcement of Exchanges and related requirements.

Section 1321(a) of the ACA provides broad authority for the Secretary to establish standards and regulations to implement the statutory requirements related to Exchanges, QHPs and other components of title I of the ACA,

including such other requirements as the Secretary determines appropriate. When operating an FFE under section 1321(c)(1) of the ACA, HHS has the authority under sections 1321(c)(1) and 1311(d)(5)(A) of the ACA to collect and spend user fees. Office of Management and Budget (OMB) Circular A–25 Revised establishes Federal policy regarding user fees and specifies that a user charge will be assessed against each identifiable recipient for special benefits derived from Federal activities beyond those received by the public.

Section 1321(d) of the ACA provides that nothing in title I of the ACA must be construed to preempt any State law that does not prevent the application of title I of the ACA. Section 1311(k) of the ACA specifies that Exchanges may not establish rules that conflict with or prevent the application of regulations issued by the Secretary.

Section 1322 of the ACA establishes the Consumer Operated and Oriented Plan (CO–OP) program, which is a loan program that funds the establishment of private, non-profit, consumer-operated, consumer-oriented health plan issuers of QHPs. The ACA requires, among other requirements, that substantially all of a CO–OP’s activities consist of issuing QHPs in the individual and small group markets, and that a CO–OP be governed by a board of directors where a majority is elected by members covered by policies issued by the CO–OP.

Section 1331 of the ACA provides States with the option to operate a Basic Health Program (BHP).

Section 1332 of the ACA provides the Secretary of HHS and the Secretary of the Treasury (collectively, the Secretaries) with the discretion to approve a State’s proposal to waive specific provisions of the ACA, provided the State’s section 1332 waiver plan meets certain requirements. Section 1332(a)(4)(B) of the ACA requires the Secretaries to issue regulations regarding procedures for the application and approval of section 1332 waivers.

Section 1343 of the ACA establishes a permanent risk adjustment program to provide payments to health insurance issuers that attract higher-than-average risk populations, such as those with chronic conditions, funded by charges collected from those issuers that attract lower-than-average risk populations, thereby reducing incentives for issuers to avoid higher-risk enrollees. Section 1343(b) of the ACA provides that the Secretary, in consultation with States, shall establish criteria and methods to be used in carrying out the risk adjustment activities under this section.

Consistent with section 1321(c) of the ACA, the Secretary is responsible for operating the HHS risk adjustment program in any State that fails to do so.³

Section 1401(a) of the ACA added section 36B to the Internal Revenue Code (the Code), which, among other things, requires that a taxpayer reconcile APTC for a year of coverage with the amount of the premium tax credit (PTC) the taxpayer is allowed for the year.

Section 1402 of the ACA provides for, among other things, reductions in cost sharing for EHB for qualified low- and moderate-income enrollees in silver level QHPs offered through the individual market Exchanges. This section also provides for reductions in cost sharing for Indians enrolled in QHPs at any metal level.

Section 1411(c) of the ACA requires the Secretary to submit certain information provided by applicants under section 1411(b) of the ACA to other Federal officials for verification, including income and family size information to the Secretary of the Treasury. Section 1411(d) of the ACA provides that the Secretary must verify the accuracy of information provided by applicants under section 1411(b) of the ACA, for which section 1411(c) of the ACA does not prescribe a specific verification procedure, in such manner as the Secretary determines appropriate.

Section 1411(f) of the ACA requires the Secretary, in consultation with the Treasury and Homeland Security Department Secretaries and the Commissioner of Social Security, to establish procedures for hearing and making decisions governing appeals of Exchange eligibility determinations. Section 1411(f)(1)(B) of the ACA requires the Secretary to establish procedures to redetermine eligibility on a periodic basis, in appropriate circumstances, including eligibility to purchase a QHP through the Exchange and for APTC and CSRs.

Section 1411(g) of the ACA allows the use of applicant information only for the limited purpose of, and to the extent necessary for ensuring the efficient operation of the Exchange, including by verifying eligibility to enroll through the Exchange and for APTC and CSRs, and limits the disclosure of such information.

Section 1413 of the ACA directs the Secretary to establish, subject to minimum requirements, a streamlined enrollment process for enrollment in

³ In the 2014 through 2016 benefit years, HHS operated the risk adjustment program in every State and the District of Columbia, except Massachusetts. Beginning with the 2017 benefit year, HHS has operated the risk adjustment program in all 50 States and the District of Columbia.

QHPs and all insurance affordability programs.

Section 5000A of the Code, as added by section 1501(b) of the ACA, requires individuals to have minimum essential coverage (MEC) for each month, qualify for an exemption, or make an individual shared responsibility payment. Under the Tax Cuts and Jobs Act, which was enacted on December 22, 2017, the individual shared responsibility payment is reduced to \$0, effective for months beginning after December 31, 2018. Notwithstanding that reduction, certain exemptions are still relevant to determine whether individuals aged 30 and above qualify to enroll in catastrophic coverage under §§ 155.305(h) and 156.155(a)(5).

Section 1902(r)(2)(A) of the Social Security Act (the Act), which permits States to apply less restrictive methodologies than cash assistance program methodologies in determining eligibility for certain eligibility groups.

1. Premium Stabilization Programs

The premium stabilization programs refer to the HHS risk adjustment, risk corridors, and reinsurance programs established by the ACA.⁴ For past rulemaking, we refer readers to the following rules:

- In the March 23, 2012 **Federal Register** (77 FR 17219) (Premium Stabilization Rule), we implemented the premium stabilization programs.

- In the March 11, 2013 **Federal Register** (78 FR 15409) (2014 Payment Notice), we finalized the benefit and payment parameters for the 2014 benefit year to expand the provisions related to the premium stabilization programs and set forth payment parameters in those programs.

- In the October 30, 2013 **Federal Register** (78 FR 65046), we finalized the modification to the HHS risk adjustment methodology related to community rating States.

- In the November 6, 2013 **Federal Register** (78 FR 66653), we published a correcting amendment to the 2014 Payment Notice to address how an enrollee's age for the risk score calculation would be determined under the HHS risk adjustment methodology.

- In the March 11, 2014 **Federal Register** (79 FR 13743) (2015 Payment Notice), we finalized the benefit and payment parameters for the 2015 benefit year to expand the provisions related to the premium stabilization programs, set forth certain oversight provisions, and

establish payment parameters in those programs.

- In the May 27, 2014 **Federal Register** (79 FR 30240), we announced the 2015 fiscal year sequestration rate for the HHS-operated risk adjustment program.

- In the February 27, 2015 **Federal Register** (80 FR 10749) (2016 Payment Notice), we finalized the benefit and payment parameters for the 2016 benefit year to expand the provisions related to the premium stabilization programs, set forth certain oversight provisions, and establish the payment parameters in those programs.

- In the March 8, 2016 **Federal Register** (81 FR 12203) (2017 Payment Notice), we finalized the benefit and payment parameters for the 2017 benefit year to expand the provisions related to the premium stabilization programs, set forth certain oversight provisions, and establish the payment parameters in those programs.

- In the December 22, 2016 **Federal Register** (81 FR 94058) (2018 Payment Notice), we finalized the benefit and payment parameters for the 2018 benefit year, added the high-cost risk pool parameters to the HHS risk adjustment methodology, incorporated prescription drug factors in the adult models, established enrollment duration factors for the adult models, and finalized policies related to the collection and use of enrollee-level External Data Gathering Environment (EDGE) data.

- In the April 17, 2018 **Federal Register** (83 FR 16930) (2019 Payment Notice), we finalized the benefit and payment parameters for the 2019 benefit year, created the State flexibility framework permitting States to request a reduction in risk adjustment State transfers calculated by HHS, and adopted a new error rate methodology for HHS–RADV adjustments to transfers.

- In the May 11, 2018 **Federal Register** (83 FR 21925), we published a correction to the 2019 HHS risk adjustment coefficients in the 2019 Payment Notice.

- On July 27, 2018, consistent with 45 CFR 153.320(b)(1)(i), we updated the 2019 benefit year final HHS risk adjustment model coefficients to reflect an additional recalibration related to an update to the 2016 enrollee-level EDGE data set.⁵

- In the July 30, 2018 **Federal Register** (83 FR 36456), we adopted the 2017 benefit year HHS risk adjustment methodology as established in the final

rules published in the March 23, 2012 (77 FR 17220 through 17252) and March 8, 2016 (81 FR 12204 through 12352) editions of the **Federal Register**. The final rule set forth an additional explanation of the rationale supporting the use of Statewide average premium in the State payment transfer formula for the 2017 benefit year, including the reasons why the program is operated by HHS in a budget-neutral manner. The final rule also permitted HHS to resume 2017 benefit year HHS risk adjustment payments and charges. HHS also provided guidance as to the operation of the HHS-operated risk adjustment program for the 2017 benefit year in light of the publication of the final rule.

- In the December 10, 2018 **Federal Register** (83 FR 63419), we adopted the 2018 benefit year HHS risk adjustment methodology as established in the final rules published in the March 23, 2012 (77 FR 17219) and the December 22, 2016 (81 FR 94058) editions of the **Federal Register**. In the rule, we set forth an additional explanation of the rationale supporting the use of Statewide average premium in the State payment transfer formula for the 2018 benefit year, including the reasons why the program is operated by HHS in a budget-neutral manner.

- In the April 25, 2019 **Federal Register** (84 FR 17454) (2020 Payment Notice), we finalized the benefit and payment parameters for the 2020 benefit year, as well as the policies related to making the enrollee-level EDGE data available as a limited data set for research purposes and expanding the HHS uses of the enrollee-level EDGE data, approval of the request from Alabama to reduce HHS risk adjustment transfers by 50 percent in the small group market for the 2020 benefit year, and updates to HHS–RADV program requirements.

- On May 12, 2020, consistent with § 153.320(b)(1)(i), we published the 2021 Benefit Year Final HHS Risk Adjustment Model Coefficients on the CCIIO website.⁶

- In the May 14, 2020 **Federal Register** (85 FR 29164) (2021 Payment Notice), we finalized the benefit and payment parameters for the 2021 benefit year, as well as adopted updates to the HHS risk adjustment models' hierarchical condition categories (HCCs) to transition to ICD–10 codes, approved the request from Alabama to reduce HHS risk adjustment transfers by 50

⁴ See ACA section 1341 (transitional reinsurance program), ACA section 1342 (risk corridors program), and ACA section 1343 (HHS risk adjustment program).

⁵ CMS. (2018, July 27). *Updated 2019 Benefit Year Final HHS Risk Adjustment Model Coefficients*. <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/2019-Updtd-Final-HHS-RA-Model-Coefficients.pdf>.

⁶ CMS. (2020, May 12). *Final 2021 Benefit Year Final HHS Risk Adjustment Model Coefficients*. <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Final-2021-Benefit-Year-Final-HHS-Risk-Adjustment-Model-Coefficients.pdf>.

percent in the small group market for the 2021 benefit year, and modified the outlier identification process under the HHS–RADV program.

- In the December 1, 2020 **Federal Register** (85 FR 76979) (Amendments to the HHS-Operated Risk Adjustment Data Validation Under the Patient Protection and Affordable Care Act’s HHS-Operated Risk Adjustment Program (2020 HHS–RADV Amendments Rule)), we adopted the creation and application of Super HCCs in the sorting step that assigns HCCs to failure rate groups, finalized a sliding scale adjustment in HHS–RADV error rate calculation, and added a constraint for negative error rate outliers with a negative error rate. We also established a transition from the prospective application of HHS–RADV adjustments to apply HHS–RADV results to risk scores from the same benefit year as that being audited.

- In the September 2, 2020 **Federal Register** (85 FR 54820), we issued an interim final rule containing certain policy and regulatory revisions in response to the COVID–19 public health emergency (PHE), wherein we set forth HHS risk adjustment reporting requirements for issuers offering temporary premium credits in the 2020 benefit year.

- In the May 5, 2021 **Federal Register** (86 FR 24140) (part 2 of the 2022 Payment Notice), we finalized a subset of proposals from the 2022 Payment Notice proposed rule, including policy and regulatory revisions related to the HHS-operated risk adjustment program, finalization of the benefit and payment parameters for the 2022 benefit year, and approval of the request from Alabama to reduce HHS risk adjustment transfers by 50 percent in the individual and small group markets for the 2022 benefit year. In addition, this final rule established a revised schedule of collections for HHS–RADV and updated the provisions regulating second validation audit (SVA) and initial validation audit (IVA) entities.

- On July 19, 2021, consistent with § 153.320(b)(1)(i), we released Updated 2022 Benefit Year Final HHS Risk Adjustment Model Coefficients on the CCIIO website, announcing some minor revisions to the 2022 benefit year final HHS risk adjustment adult model coefficients.⁷

- In the May 6, 2022 **Federal Register** (87 FR 27208) (2023 Payment Notice), we finalized revisions related to the

HHS-operated risk adjustment program, including the benefit and payment parameters for the 2023 benefit year, HHS risk adjustment model recalibration, and policies related to the collection and extraction of enrollee-level EDGE data. We also finalized the adoption of the interacted HCC count specification for the adult and child models, along with modified enrollment duration factors for the adult model models, beginning with the 2023 benefit year.⁸ We also repealed the ability for States, other than prior participants, to request a reduction in HHS risk adjustment State transfers starting with the 2024 benefit year. In addition, we approved a 25 percent reduction to 2023 benefit year HHS risk adjustment transfers in Alabama’s individual market and a 10 percent reduction to 2023 benefit year HHS risk adjustment transfers in Alabama’s small group market. We also finalized further refinements to the HHS–RADV error rate calculation methodology beginning with the 2021 benefit year.

- In the April 27, 2023 **Federal Register** (88 FR 25740) (2024 Payment Notice), we finalized the benefit and payment parameters for the 2024 benefit year, amended the EDGE discrepancy materiality threshold and data collection requirements, and reduced the risk adjustment user fee. For the 2024 benefit year, we repealed the State flexibility policy, including for prior participant States, and approved 50 percent reductions to HHS risk adjustment transfers for Alabama’s individual and small group markets. In addition, we finalized several refinements to HHS–RADV program requirements, such as shortening the window to confirm SVA findings or file a discrepancy report, changing the HHS–RADV materiality threshold for random and targeted sampling, and no longer exempting exiting issuers from adjustments to risk scores and HHS risk adjustment transfers when they are negative error rate outliers. We also announced the discontinuance of the Lifelong Permanent Condition List (LLPC) and Non-EDGE Claims (NEC) in HHS–RADV beginning with the 2022 benefit year.

2. Program Integrity

We have finalized program integrity standards related to the Exchanges and premium stabilization programs in two rules: the “first Program Integrity Rule” published in the August 30, 2013

Federal Register (78 FR 54069), and the “second Program Integrity Rule” published in the October 30, 2013

Federal Register (78 FR 65045). We also refer readers to the 2019 Patient Protection and Affordable Care Act; Exchange Program Integrity final rule (2019 Program Integrity Rule) published in the December 27, 2019 **Federal Register** (84 FR 71674).

In the April 27, 2023 **Federal Register** (88 FR 25740) (2024 Payment Notice), we finalized a policy to implement improper payment pre-testing and assessment (IPPTA) requirements for State Exchanges to ensure adherence to the Payment Integrity Information Act of 2019. In addition, we finalized allowing additional time for HHS to review evidence submitted by agents and brokers to rebut allegations pertaining to Exchange agreement suspensions or terminations. We also introduced consent and eligibility documentation requirements for agents and brokers.

3. Market Rules

For past rulemaking related to the market rules, we refer readers to the following rules:

- In the April 8, 1997 **Federal Register** (62 FR 16894), HHS, with the Department of Labor and Department of the Treasury, published an interim final rule relating to the HIPAA health insurance reforms. In the February 27, 2013 **Federal Register** (78 FR 13406) (2014 Market Rules), we published the health insurance market rules.

- In the May 27, 2014 **Federal Register** (79 FR 30240) (2015 Market Standards Rule), we published the exchange and insurance market standards for 2015 and beyond.

- In the December 22, 2016 **Federal Register** (81 FR 94058), we provided additional guidance on guaranteed availability and guaranteed renewability.

- In the April 18, 2017 **Federal Register** (82 FR 18346) (Market Stabilization final rule), we further interpreted the guaranteed availability provision.

- In the April 17, 2018 **Federal Register** (83 FR 17058) (2019 Payment Notice), we clarified that certain exceptions to the special enrollment periods only apply to coverage offered outside of the Exchange in the individual market.

- In the June 19, 2020 **Federal Register** (85 FR 37160) (2020 section 1557 final rule), in which HHS discussed section 1557 of the ACA, HHS removed nondiscrimination protections based on gender identity and sexual orientation from the guaranteed availability regulation.

⁷ See CMS. (2021, July 19). *2022 Benefit Year Final HHS Risk Adjustment Model Coefficients*. <https://www.cms.gov/files/document/updated-2022-benefit-year-final-hhs-risk-adjustment-model-coefficients-clean-version-508.pdf>.

⁸ On May 6, 2022, we also published the *2023 Benefit Year Final HHS Risk Adjustment Model Coefficients* at <https://www.cms.gov/files/document/2023-benefit-year-final-hhs-risk-adjustment-model-coefficients.pdf>.

- In part 2 of the 2022 Payment Notice, in the May 5, 2021 **Federal Register** (86 FR 24140), we made additional amendments to the guaranteed availability regulation regarding special enrollment periods and finalized new special enrollment periods related to untimely notice of triggering events, cessation of employer contributions or government subsidies to COBRA continuation coverage, and loss of APTC eligibility.

- In the September 27, 2021 **Federal Register** (86 FR 53412) (part 3 of the 2022 Payment Notice), which was published by HHS and the Department of the Treasury, we finalized additional amendments to the guaranteed availability regulations regarding special enrollment periods.

- In the May 6, 2022 **Federal Register** (87 FR 27208), we finalized a revision to our interpretation of the guaranteed availability requirement to prohibit issuers from applying a premium payment to an individual's or employer's past debt owed for coverage and refusing to effectuate enrollment in new coverage.

4. Exchanges

We published a request for comment relating to Exchanges in the August 3, 2010 **Federal Register** (75 FR 45584). We issued initial guidance to States on Exchanges on November 18, 2010. In the March 27, 2012 **Federal Register** (77 FR 18310) (Exchange Establishment Rule), we implemented the Affordable Insurance Exchanges (Exchanges), consistent with title I of the ACA, to provide competitive marketplaces for individuals and small employers to directly compare available private health insurance options on the basis of price, quality, and other factors. This included implementation of components of the Exchanges and standards for eligibility for Exchanges, as well as network adequacy and essential community provider (ECP) certification standards.

In the August 17, 2011, **Federal Register** (76 FR 51201) we published a proposed rule regarding eligibility determinations, including the regulatory requirement to verify incarceration status. In the March 27, 2012, **Federal Register** (77 FR 18309) we finalized the regulatory requirement to verify incarceration attestation using an approved electronic data source that is current and accurate, and when attestations are not reasonably compatible with information in an approved data source, to resolve the inconsistency.

In the 2014 Payment Notice and the Amendments to the HHS Notice of

Benefit and Payment Parameters for 2014 interim final rule, published in the March 11, 2013 **Federal Register** (78 FR 15541), we set forth standards related to Exchange user fees. We established an adjustment to the FFE user fee in the Coverage of Certain Preventive Services under the Affordable Care Act final rule, published in the July 2, 2013 **Federal Register** (78 FR 39869) (Preventive Services Rule).

In the 2016 Payment Notice, we also set forth the ECP certification standard at § 156.235, with revisions in the 2017 Payment Notice in the March 8, 2016 **Federal Register** (81 FR 12203) and the 2018 Payment Notice in the December 22, 2016 **Federal Register** (81 FR 94058).

In an interim final rule, published in the May 11, 2016 **Federal Register** (81 FR 29146), we made amendments to the parameters of certain special enrollment periods (2016 Interim Final Rule). We finalized these in the 2018 Payment Notice, published in the December 22, 2016 **Federal Register** (81 FR 94058).

In the Market Stabilization final rule, published in the April 18, 2017 **Federal Register** (82 FR 18346), we amended standards relating to special enrollment periods and QHP certification. In the 2019 Payment Notice, published in the April 17, 2018 **Federal Register** (83 FR 16930), we modified parameters around certain special enrollment periods. In the April 25, 2019 **Federal Register** (84 FR 17454), the 2020 Payment Notice established a new special enrollment period.

We published the final rule in the May 14, 2020 **Federal Register** (85 FR 29164) (2021 Payment Notice).

In the January 19, 2021 **Federal Register** (86 FR 6138) (part 1 of the 2022 Payment Notice), we finalized only a subset of the proposals in the 2022 Payment Notice proposed rule. In the May 5, 2021 **Federal Register** (86 FR 24140), we published part 2 of the 2022 Payment Notice. In the September 27, 2021 **Federal Register** (86 FR 53412) (part 3 of the 2022 Payment Notice), in conjunction with the Department of the Treasury, we finalized amendments to certain policies in part 1 of the 2022 Payment Notice.

In the May 6, 2022 **Federal Register** (87 FR 27208), we finalized changes to maintain the user fee rate for issuers offering plans through the FFEs and maintain the user fee rate for issuers offering plans through the SBE-FPs for the 2023 benefit year. We also finalized various policies to address certain agent, broker, and web-broker practices and conduct. We also finalized updates to the requirement that all Exchanges

conduct special enrollment period verifications.

In the April 27, 2023 **Federal Register** (88 FR 25740) (2024 Payment Notice), we revised Exchange Blueprint approval timelines, lowered the user rate fee for QHPs, and amended re-enrollment hierarchies for enrollees. We also finalized policies to update standardized plan options, reduce the risk of plan choice overload by limiting the number of non-standardized plan options that issuers can offer, and ensure correct QHP information. In addition, to prevent gaps in coverage, we amended coverage effective date rules, lengthened the special enrollment period from 60 to 90 days to those who lose Medicaid coverage, and prohibited QHPs on the Federal platform from mid-year coverage terminations for dependent children who reach the applicable maximum age. We also finalized policies on verifying consumer income and permitting door-to-door assisters to solicit consumers. To ensure provider network adequacy, we finalized provider network and ECP policies for QHPs.

5. Essential Health Benefits

We established requirements relating to EHBs in the Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation Final Rule, which was published in the February 25, 2013 **Federal Register** (78 FR 12833) (EHB Rule). In the 2019 Payment Notice, published in the April 17, 2018 **Federal Register** (83 FR 16930), we added § 156.111 to provide States with additional options from which to select an EHB-benchmark plan for plan year (PY) 2020 and subsequent plan years. In the 2023 Payment Notice, published in the May 6, 2022 **Federal Register** (87 FR 27208), we revised § 156.111 to require States to notify HHS of the selection of a new EHB-benchmark plan by the first Wednesday in May of the year that is 2 years before the effective date of the new EHB-benchmark plan, otherwise the State's EHB-benchmark plan for the applicable plan year will be that State's EHB-benchmark plan applicable for the prior year. We displayed the Request for Information; Essential Health Benefits (EHB RFI), published in the December 2, 2022 **Federal Register** (87 FR 74097) to solicit public comment on a variety of topics related to the coverage of benefits in health plans subject to the EHB requirements of the ACA.

6. State Innovation Waivers

In the March 14, 2011 **Federal Register** (76 FR 13553), HHS and the Department of the Treasury (collectively, the Departments)

published the “Application, Review, and Reporting Process for Waivers for State Innovation” proposed rule to implement section 1332(a)(4)(B) of the ACA.

In the February 27, 2012 **Federal Register** (77 FR 11700), the Departments published the “Application, Review, and Reporting Process for Waivers for State Innovation” final rule (2012 Final Rule).

In the October 24, 2018 **Federal Register** (83 FR 53575), the Departments issued the 2018 Guidance, which superseded the previous guidance published in the December 16, 2015 **Federal Register** (80 FR 78131) (2015 Guidance) and set forth requirements that States must meet for waivers, application review procedures, pass-through funding determinations, certain analytical requirements, and operational considerations.

In the November 6, 2020 **Federal Register** (85 FR 71142), the Departments issued an interim final rule (November 2020 IFC), which set forth flexibilities for waivers under section 1332 during the COVID-19 Public Health Emergency.

In the December 4, 2020 **Federal Register** (85 FR 78572), the Departments published the “Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2022 and Pharmacy Benefit Manager Standards; Updates to State Innovation Waiver (Section 1332 Waiver) Implementing Regulations” proposed rule (2022 Payment Notice proposed rule) which proposed to codify certain policies and interpretations of the 2018 Guidance.

In the January 19, 2021 **Federal Register** (86 FR 6138), the Departments published the “Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2022; Updates to State Innovation Waiver (Section 1332 Waiver) Implementing Regulations” final rule (part 1 of the 2022 Payment Notice) which codified many of the policies and interpretations of the 2018 Guidance.

In the September 27, 2021 **Federal Register** (86 FR 53412), part 3 of the 2022 Payment Notice, the Departments published the “Patient Protection and Affordable Care Act; Updating Payment Parameters, Section 1332 Waiver Implementing Regulations, and Improving Health Insurance Markets for 2022 and Beyond” final rule, which superseded and rescinded the policies and interpretations outlined in the 2018 Guidance and repealed the previous codification of the interpretations of statutory guidelines in part 1 of the 2022 Payment Notice. The Departments also

finalized flexibilities in the public notice requirements and post-award public participation requirements for section 1332 waivers under certain emergent situations and processes and procedures for amendments and extensions for approved waiver plans.

7. Consumer Operated and Oriented Plans (CO-OPs)

In the December 13, 2011 **Federal Register** (76 FR 77392), we published the “Patient Protection and Affordable Care Act; Establishment of Consumer Operated and Oriented Plan (CO-OP) Program” final rule (2011 CO-OP Rule), which established the rules governing the CO-OP program to make loans to capitalize eligible prospective CO-OPs. In the May 11, 2016 **Federal Register** (81 FR 29146), we amended several CO-OP standards related to governance requirements to provide greater flexibility, and to facilitate private market transactions that would assist efforts of CO-OPs to arrange access to new sources of needed capital.

8. Basic Health Program (BHP)

In the March 12, 2014, **Federal Register** (79 FR 14111), we published a final rule entitled “Basic Health Program: State Administration of Basic Health Programs; Eligibility and Enrollment in Standard Health Plans; Essential Health Benefits in Standard Health Plans; Performance Standards for Basic Health Programs; Premium and Cost Sharing for Basic Health Programs; Federal Funding Process; Trust Fund and Financial Integrity,” implementing section 1331 of the ACA, which governs the establishment of BHPs.

9. State Flexibility in the Use of Income and Resource Disregards in Medicaid Eligibility

In the January 19, 1993 **Federal Register** (58 FR 4929), we published a final rule with comment period entitled “Medicaid Program; Eligibility and Coverage Requirements,” in which we prescribed, at 42 CFR 435.601, the financial methodologies State Medicaid agencies must apply in determining eligibility for Medicaid, with options to apply less restrictive income and resource methodologies for the eligibility groups specified in section 1902(r)(2) of the Act.

In the August 22, 1994 **Federal Register** (59 FR 43052), we published a final rule entitled “Medicaid Program; Eligibility and Coverage Requirements,” in which we amended 42 CFR 435.601(f)(1) to delete cross-references to other regulatory provisions that had been removed from the CFR.

In the November 30, 2016 **Federal Register** (81 FR 86456), we published a final rule entitled “Medicaid and Children’s Health Insurance Programs: Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Other Provisions Related to Eligibility and Enrollment for Medicaid and CHIP,” in which we amended 42 CFR 435.601(b) to confirm that its provisions govern only individuals who are excepted from application of modified adjusted gross income financial methodologies (MAGI) in accordance with 42 CFR 435.603(j) (relating to “Eligibility Groups for which MAGI-based methods do not apply”). We also established in 42 CFR 435.601(d)(1) the authority for States to apply less restrictive methodologies for medically needy individuals whose income eligibility is determined under 42 CFR 435.831(b)(1) (including medically needy individuals whose eligibility is determined under MAGI-based methodologies that comply with certain rules relating to the financial responsibility of relatives and other individuals described in 42 CFR 435.602).

B. Summary of Major Provisions

The regulations outlined in this proposed rule would be codified in 31 CFR part 33, 42 CFR parts 435 and 600, and 45 CFR parts 153, 155, and 156.

1. 31 CFR Part 33 and 45 CFR Part 155

This proposed rule would amend section 1332 Waivers for State Innovation (referred to throughout this proposed rule as section 1332 waivers) implementing regulations regarding State public notice and comment procedures. The Departments propose changes in 31 CFR part 33 and 45 CFR part 155 that would allow States the flexibility to hold a State public hearing or post-award forum in a virtual format (that is, one that uses telephonic, digital, and/or web-based platforms), or hybrid format (that is, one that provides for both in-person and virtual attendance), which would be considered as the equivalent of holding an in-person meeting. Specifically, the Departments propose changes to 31 CFR 33.112(c) and 45 CFR 155.1312(c) and 31 CFR 33.120(c) and 45 CFR 155.1320(c). The Departments propose that these changes go into effect upon finalization of this rule. Because these changes would relieve a regulatory restriction, the Departments anticipate that they would be made effective immediately upon publication of a final rule.

2. 42 CFR Part 435

We propose to amend 42 CFR 435.601(d) to remove paragraph (d)(4), which would provide States with greater flexibility to adopt income and/or resource disregards in determining Medicaid financial eligibility for individuals excepted from application of financial methodologies based on MAGI (“non-MAGI” methodologies). States are permitted to expand eligibility for individuals who are subject to non-MAGI methodologies by disregarding income and/or resources that would otherwise be required to be considered in the individual’s eligibility determination. However, under current rules, States must apply such income and/or resource disregards to all individuals within each Medicaid eligibility group. Removing paragraph (d)(4) would allow States, when considering expanding eligibility for non-MAGI individuals, to target disregards at discrete members of individuals within an eligibility group.

3. 42 CFR Part 600

We propose to amend 42 CFR 600.320(c) to allow States a third option when choosing the effective date of eligibility for BHP applicants. Under current rules, States have the option to choose between following: either the Medicaid rules at 42 CFR 435.915 or the Exchange rules at 45 CFR 155.420(b)(1). We propose to add an option to the effective date of coverage rules that would allow States to start coverage on the first day of the month following the date of application.

4. 45 CFR Part 153

In accordance with the OMB Report to Congress on the Joint Committee Reductions for Fiscal Year 2024, the HHS-operated risk adjustment program is subject to the fiscal year 2024 sequestration.⁹ Therefore, the HHS-operated risk adjustment program will be sequestered at a rate of 5.7 percent for payments made from fiscal year 2024 resources (that is, funds collected during the 2024 fiscal year).

We propose to recalibrate the 2025 benefit year HHS risk adjustment models using the 2019, 2020, and 2021 benefit year enrollee-level EDGE data. For the 2025 benefit year, we propose to continue applying a market pricing adjustment to the plan liability associated with Hepatitis C drugs in the HHS risk adjustment models (see, for

example, 84 FR 17463 through 17466). We propose a modification to the adjustment for the receipt of CSRs in the HHS risk adjustment models to improve predictive accuracy for the American Indian and Alaska Native (AI/AN) subpopulation who are enrolled in zero and limited cost-sharing plans and to retain the other CSR adjustment factors in the HHS risk adjustment models. We also propose a risk adjustment user fee for the 2025 benefit year of \$0.20 per member per month (PMPM). Additionally, we propose that in certain cases we may require a corrective action plan to address an observation identified in an HHS risk adjustment audit.

5. 45 CFR Part 155

In part 155, we propose to amend § 155.105(b) to require that a State seeking to operate a State Exchange must first operate an SBE-FP for at least one plan year, including its open enrollment period. We believe this requirement would give States sufficient time to create, staff, and structure a State Exchange that could transition to operating its own platform and establish relationships with interested parties critical to a State Exchange’s success in operating a Navigator and consumer outreach program, assuming plan management responsibilities, and communicating effectively with consumers to support enrollment and avoid health care coverage gaps.

We propose to revise § 155.106(a)(2) as it pertains to Exchange Blueprint requirements for States transitioning to a State Exchange. Specifically, we propose to add that we may require that a State submitting a Blueprint Application seeking to operate a State Exchange provide upon request, supplemental documentation to HHS detailing the State’s implementation of its State Exchange functionality as laid out in the State Exchange Blueprint. This could include a State submitting detailed plans regarding its State Exchange consumer assistance programs and activities, such as information on its direct outreach plans. Further, we propose to require that a State applying to transition to a State Exchange must provide the public with a notice and copy of its State Exchange Blueprint Application, as well as conduct periodic public engagements whereby interested parties can learn about the status of a State’s transition to a State Exchange and provide input on that transition.

We propose to amend § 155.170(a)(2) to codify that benefits covered in a State’s EHB benchmark plan would not be considered in addition to EHB, even if they had been required by State action

taking place after December 31, 2011, other than for purposes of compliance with Federal requirements. Under this proposal, there would be no obligation for the State to defray the cost of a State mandate enacted after December 31, 2011 that requires coverage of a benefit if that benefit is included in the State’s EHB-benchmark plan. Benefits that are covered in a State’s EHB-benchmark plan would not be considered in addition to EHB and would remain subject to the various rules applicable to the EHB, including the prohibition on discrimination in accordance with § 156.125, limitations on cost sharing in accordance with § 156.130, and restrictions on annual or lifetime dollar limits in accordance with § 147.126. We believe that this change would promote consumer protections and facilitate compliance with the defrayal requirement by making the identification of benefits in addition to EHB more intuitive.

At § 155.205(a), we propose to establish additional minimum standards for Exchange call center operations. Specifically, we propose to require that all Exchange call centers, other than those of SBE-FPs and Small Business Health Options Program (SHOP) Exchanges that do not provide for enrollment in SHOP coverage through an online SHOP enrollment platform, provide consumer access to a live call center representative during an Exchange’s published hours of operation to assist with submitting their QHP application. We believe speaking to a live representative would help troubleshoot consumer QHP application issues, provide in real time an opportunity for a live representative to explain QHP application terminology to a consumer, provide a live representative to ensure the consumer provides the most correct information to the QHP application—alleviating unnecessary follow-up, and provide greater overall consumer satisfaction.

We propose to amend § 155.205(b)(4) to require that an Exchange operate a centralized eligibility and enrollment platform on the Exchange’s website (or, for an SBE-FP, the Federal eligibility and enrollment platform) such that the Exchange allows for the submission of the single, streamlined application for enrollment in a QHP and insurance affordability programs through the Exchange’s website and performs eligibility determinations for all consumers based on submissions of the single, streamlined application. Further, we propose to amend § 155.302(a)(1) to clarify that the Exchange, through the centralized eligibility and enrollment platform operated on the Exchange’s

⁹ OMB. (2023, March 13). OMB Report to the Congress on the BBEDCA 251A Sequestration for Fiscal Year 2024. https://www.whitehouse.gov/wp-content/uploads/2023/03/BBEDCA_Sequestration_Report_and_Letter_3-13-2024.pdf.

website (or, for an SBE–FP, the Federal eligibility and enrollment platform), is the entity that is responsible for making all determinations regarding the eligibility for QHP coverage and insurance affordability programs regardless of whether an individual files an application for enrollment in a QHP on the Exchange's website (or, for SBE–FPs, on the Federal eligibility and enrollment platform), or on a website operated by a non-Exchange website allowed for under § 155.220 or § 155.221. We also clarify that only entities that an Exchange elects to contract with to operate its centralized eligibility and enrollment platform can perform this function on behalf of an Exchange, such that Exchanges would not be able to solely rely on non-Exchange entities, including a web-broker (defined at § 155.20) or other entities under § 155.220 or § 155.221, from making such eligibility determinations on behalf on the Exchanges.

We also propose to amend § 155.205(b)(5) to require that an Exchange operate a centralized eligibility and enrollment platform on the Exchange's website (or, for an SBE–FP, the Federal eligibility and enrollment platform) so that the Exchange (or, for an SBE–FP, the Federal eligibility and enrollment platform) meets the requirement under § 155.400(c) to maintain record of all effectuated enrollments in QHPs, including changes in effectuated QHP enrollments.

We propose to amend § 155.220(h) to specify that the HHS reconsideration entity is the CMS Administrator, who is a principal officer. This proposal would ensure agents, brokers, and web-brokers utilizing the FFEs and SBE–FPs can submit a request to the CMS Administrator to reconsider HHS' decision to terminate their Exchange agreement(s) for cause.

We propose changes to §§ 155.220 and 155.221 to apply certain standards to web-brokers and Direct Enrollment (DE) entities assisting consumers and applicants across all Exchanges, including in States with State Exchanges. We seek to ensure that certain current minimum Federal standards applicable in the FFEs and SBE–FPs, related to web-broker website display of standardized QHP comparative information, disclaimer language, information on eligibility for APTC/CSRs, operational readiness, and access by downstream agents and brokers, also apply to web-brokers in States with State Exchanges. We similarly propose to extend certain DE entity requirements applicable in the

FFEs and SBE–FPs related to marketing and display of QHPs, providing consumers with correct information and refraining from certain conduct, marketing of non-QHPs, website disclaimer language, and operational readiness to DE entities across all Exchanges, to newly apply to DE entities in States with State Exchanges. These proposals would help establish greater general uniformity with respect to these requirements for web-brokers and DE entities operating in the Exchanges and establish minimum Federal consumer protections in all States, regardless of the Exchange model.

We propose to update regulations in § 155.221(b) to mandate *HealthCare.gov* changes be reflected on DE entity non-Exchange websites within a notice period set by HHS. We also propose requiring that DE entities make these display changes in a manner consistent with what is adopted by HHS for display on *HealthCare.gov* by meeting standards defined by HHS, unless HHS approves a deviation from those standards. This proposal would codify our existing practice of communicating important changes to the *HealthCare.gov* display to EDE entities, expand our existing change request processes to permit entities to request deviations from the required display changes, and require DE entities that do not participate in EDE to comply with these practices. Additionally, this proposal would also require that all display changes which affect the visual aspects of the website that users see and interact with must be prominently displayed on the non-Exchange website such that the changes are clear, noticeable, and understandable to consumers. Finally, this proposal would also require State Exchanges to require their DE entities to implement and prominently display changes adopted for display on the State Exchanges' websites on their non-Exchange websites for purposes of assisting consumers with DE in QHPs offered through the Exchange.

We propose in connection with the failure to file and reconcile process at § 155.305(f)(4) that Exchanges be required to send notices to tax filers for the first year in which they have been determined to have failed to reconcile APTC as an initial warning to inform and educate tax filers that they need to file and reconcile, or risk being determined ineligible for APTC if they fail to file and reconcile for a second consecutive year. Currently, the regulation does not describe notification procedures for tax filers who have failed to reconcile for 1 year. We propose to

require that all Exchanges be required to send informative notices at least annually to tax filers who have failed to reconcile.

We propose to amend § 155.315(e) to provide that all Exchanges can accept applicant incarceration status attestations without further verification, and Exchanges may verify applicant incarceration status using an HHS-approved verification data source. HHS would approve an alternative electronic data source for State Exchanges to use for incarceration verification if it provides data that are current and accurate, and if its use minimizes administrative costs and burdens.

We propose to reinterpret State Exchange and State Medicaid and Children's Health Insurance Program (CHIP) agency use of the Federal Data Services Hub to access and use the income data provided by the Verify Current Income (VCI) Hub service as a State Exchange or a State Medicaid and CHIP agency function because these State entities use this optional service to implement eligibility verification requirements applicable to them. More specifically, State Exchanges and State Medicaid and CHIP agencies have the option to use this information to verify a tax household's annual income attestation for Exchange QHP eligibility and the Medicaid applicant's current household income as required to make insurance affordability program eligibility determinations. We propose to amend § 155.320(c) to reflect this reinterpretation for the Exchanges but are not proposing to amend the Medicaid regulations as the Medicaid regulations already address Medicaid agency verification requirements and are not typically used to delineate Medicaid agency operations in this manner.

We propose to revise § 155.330(d) to require Exchanges to conduct periodic checks for deceased enrollees twice yearly and subsequently end deceased enrollees' QHP coverage. Additionally, we propose to revise § 155.330(d)(3) to grant the Secretary the authority to temporarily suspend the periodic data matching (PDM) requirement during certain situations (for example, a declared national public health emergency). These proposals would align § 155.330(d) with current Federal Exchange policy and operations, prevent overpayment of QHP premiums, and accurately capture household QHP eligibility based on household size.

We propose to amend § 155.335(j)(1) and (2) to require Exchanges to re-enroll individuals who are enrolled in catastrophic coverage, as defined in section 1302(e) of the ACA, into a new

QHP for the coming plan year. Incorporating these individuals enrolled in catastrophic coverage into the auto re-enrollment hierarchy rules at § 155.335(j) would help ensure continuity of coverage in cases where the issuer does not continue to offer a catastrophic plan for the new plan year, or these individuals are no longer eligible for enrollment in a catastrophic plan for the new year, and these individuals do not actively select a different QHP. We also propose to add a new paragraph (j)(5) to § 155.335 to establish that an Exchange may not newly auto re-enroll into catastrophic coverage an enrollee who is currently enrolled in coverage of a metal level as defined in section 1302(d) of the ACA. This change reflects our current practice for Exchanges on the Federal platform.

We propose to amend § 155.400(e)(2) to codify that the flexibility for issuers experiencing billing or enrollment problems due to high volume or technical errors is not limited to extensions of the binder payment.

We propose to amend § 155.410(e)(4)(ii) to revise parameters around the adoption of an alternative open enrollment period by a State Exchange. Specifically, we propose for benefit years beginning on or after January 1, 2025, State Exchanges must adopt an open enrollment period that begins on November 1 of the calendar year preceding the benefit year and ends no earlier than January 15 of the applicable benefit year, with the option to extend the open enrollment period beyond January 15 of the applicable benefit year. We believe this proposal would ensure consumers are not subjected to plan cost increases that they may not be notified about until after open enrollment ends, give Navigators, certified application counselors, and agents and brokers ample time to assist all interested applicants, provide State Exchanges with additional flexibility, reduce consumer confusion, and improve access to health coverage.

At § 155.420(b), we propose to align the effective dates of coverage after selecting a plan during certain special enrollment periods across all Exchanges, including State Exchanges. We would require all State Exchanges to provide coverage that is effective on the first day of the month following plan selection, if a consumer enrolls in a QHP during certain special enrollment periods. This proposal would prevent coverage gaps, particularly for consumers transitioning between different Exchanges or from other insurance coverage.

We propose to amend paragraph § 155.420(d)(16) to revise the parameters around the availability of a special enrollment period for APTC-eligible qualified individuals with a projected household income no greater than 150 percent of the Federal Poverty Level (FPL). Specifically, we are proposing to remove the limitation that this special enrollment period is only available during periods of time when APTC benefits are available such that the applicable taxpayers' applicable percentage is set to zero and that Exchanges have the option to permanently provide this special enrollment period. We believe this proposal would provide affordable coverage available to more uninsured people and additional enrollment opportunities to low-income consumers.

We propose to add § 155.430(b)(1)(iv)(D) to permit an enrollee to retroactively terminate the enrollee's enrollment in a QHP through an Exchange on the Federal platform when the enrollee enrolls in Medicare Parts A or B, and the termination date would be retroactively effective to the day before Medicare coverage begins. This proposal would allow consumers to avoid overlapping coverage and paying unnecessary premiums. State Exchanges would have the option of implementing this proposal, and we seek comment on whether this proposal should instead be mandatory for State Exchanges.

We propose to revise § 155.1050 to require that State Exchanges and SBE-FPs establish and impose quantitative time and distance network adequacy standards for QHPs that are at least as stringent as the FFEs' network adequacy standards established for QHPs under § 156.230. We also propose that State Exchanges and SBE-FPs be required to conduct quantitative network adequacy reviews prior to certifying any plan as a QHP, consistent with the reviews conducted by the FFEs under § 156.230. We further propose to require State Exchanges and SBE-FPs to permit issuers that are unable to meet the specified network adequacy standards to participate in a justification process after submitting their initial network adequacy data to account for variances and potentially earn QHP certification. Finally, we propose to mandate that State Exchanges and SBE-FPs require all issuers seeking QHP certification to submit information to the State Exchange or SBE-FP about whether network providers offer telehealth services. These proposals would be effective for plan years beginning on or after January 1, 2025.

6. 45 CFR part 156

In part 156, we propose user fee rates for the 2025 benefit year for all issuers participating on the Exchanges using the Federal platform. For the 2025 benefit year, we propose an FFE user fee rate of 2.2 percent of total monthly premiums and an SBE-FP user fee rate of 1.8 percent of total monthly premiums. We will issue the 2025 benefit year premium adjustment percentage index and related payment parameters in guidance, consistent with the policy finalized in part 2 of the 2022 Payment Notice.

For benefit years beginning on or after January 1, 2027, we propose three revisions to the standards for State selection of EHB-benchmark plans at § 156.111. First, we propose to consolidate the options for States to change EHB-benchmark plans at § 156.111(a) to reduce the burden on States to decide between three functionally identical choices. Second, we propose to revise the typicality standard at § 156.111(b)(2) so that, in demonstrating that a State's new EHB-benchmark plan provides a scope of benefits that is equal to the scope of benefits of a typical employer plan in the State, the scope of benefits of a typical employer plan in the State would be defined as any scope of benefits that is as or more generous than the scope of benefits in the State's least generous typical employer plan (supplemented by the State as necessary to provide coverage within each EHB category at § 156.110(a)), and as or less generous than the scope of benefits in the State's most generous typical employer plan (supplemented by the State as necessary to provide coverage within each EHB category at § 156.110(a)), among the typical employer plans currently defined at § 156.111(b)(2)(i)(A) and (B). We also propose to remove the generosity standard at § 156.111(b)(2)(ii) and to make a technical revision to the language regarding supplementation at § 156.111(b)(2)(i). Third, we propose to revise § 156.111(e)(3) to require States to submit a formulary drug list as part of their application to change EHB-benchmark plans only if the State is seeking to change their prescription drug EHB.

We propose to remove the regulatory prohibition at § 156.115(d) on issuers from including routine non-pediatric dental services as an EHB, which would provide States the option to add routine adult dental services as an EHB by updating their EHB-benchmark plans pursuant to § 156.111.

We propose to amend § 156.122 to codify that prescription drugs in excess of those covered by a State's EHB-benchmark plan are considered EHB. As a result, they would be subject to requirements including the annual limitation on cost sharing and the restriction on annual and lifetime dollar limits, consistent with § 156.130, unless the coverage of the drug is mandated by State action and is in addition to EHB pursuant to § 155.170, in which case the drug would not be considered EHB. In addition, for plan years beginning on or after January 1, 2026, we propose to amend § 156.122 to provide that the Pharmacy & Therapeutics (P&T) committee must include a consumer representative. We also seek comment on a possible future policy proposal to replace the United States Pharmacopeia (USP) Medicare Model Guidelines (MMG) with the USP Drug Classification system (DC) to classify the prescription drugs required to be covered as EHB under § 156.122(a)(1). In particular, we seek public comment to confirm or further expand our understanding of the risks and benefits associated with replacing the USP MMG with the USP DC in this context.

For PY 2025, we propose to follow the approach finalized in the 2024 Payment Notice concerning standardized plan option metal levels, and to otherwise maintain continuity with our approach to standardized plan options finalized in the 2023 and 2024 Payment Notices.¹⁰ We propose to make only minor updates to the plan designs for PY 2025 to ensure these plans have AVs within the permissible *de minimis* range for each metal level. Our proposed updates to plan designs for PY 2025 are detailed in § 156.201 of the preamble of this proposed rule, specifically in Tables 12 and 13.

In the 2024 Payment Notice (88 FR 25858), we announced our intent to propose an exceptions process that would allow issuers to offer non-standardized plan options in excess of the limit of two per product network type, metal level, inclusion of dental and vision benefit coverage, and service area for PY 2025 and subsequent years. We propose an exceptions process at § 156.202 that would allow issuers to offer more than two non-standardized plan options per product network type,

metal level, inclusion of dental and vision benefit coverage, and service area for PY 2025 and subsequent plan years, if the issuer can demonstrate that these additional non-standardized plans have specific design features that would substantially benefit consumers with chronic and high-cost conditions.

We propose a new regulatory provision that would permit us to allow a CO-OP loan recipient to voluntarily terminate its loan agreement with us and cease to constitute a qualified non-profit health insurance issuer (QNHI), for the purpose of pursuing innovative business plans that are not otherwise consistent with the governance requirements and business standards applicable to a CO-OP borrower. Under the proposed new regulatory provision, we would be able to consider a request by a CO-OP to voluntarily terminate its loan agreement for reasons other than financial viability, provided all outstanding CO-OP loans issued to the loan recipient are repaid in full prior to termination, and we believe granting the request would meaningfully enhance consumer access to quality, affordable, member-focused, non-profit health care options in affected markets.

We propose conforming amendments to the payment and collections process set forth at § 156.1215 to align with the policies and regulations proposed in the Federal Independent Dispute Resolution Operations proposed rule (88 FR 75744). This proposal would provide that administrative fees for utilizing the No Surprises Act Federal independent dispute resolution (IDR) process for health insurance issuers that participate in financial programs under the ACA would be subject to netting as part of HHS' integrated monthly payment and collections cycle. Additionally, we propose to amend § 156.1215 to provide that any amount owed to the Federal government by an issuer and its affiliates for unpaid administrative fees due to the Federal government from these issuers and their affiliates for utilizing the Federal IDR process in accordance with § 149.510(d)(2), after HHS nets amounts owed by the Federal government under these programs, would be the basis for calculating a debt owed to the Federal government.

III. Provisions of the Proposed Regulations

A. 31 CFR part 33 and 45 CFR Part 155—Section 1332 Waivers

1. Background

Section 1332 of the ACA permits States to apply for a section 1332 waiver to pursue innovative strategies for providing their residents with access to

higher value, more affordable health insurance coverage. To allow for greater flexibility in communicating with the public, we are proposing updates to the public hearing process requirements for section 1332 waivers.

Under section 1332(b) of the ACA, the Secretary of HHS and the Secretary of the Treasury (collectively, the Secretaries) may exercise their discretion to approve a request for a section 1332 waiver only if the Secretaries determine that the proposal for the section 1332 waiver meets the following four requirements, referred to as the statutory guardrails: (1) the proposal will provide coverage that is at least as comprehensive as coverage defined in section 1302(b) of the ACA and offered through Exchanges established under title I of the ACA, as certified by the Office of the Actuary of CMS, based on sufficient data from the State and from comparable States about their experience with programs created by the ACA and the provisions of the ACA that would be waived; (2) the proposal will provide coverage and cost-sharing protections against excessive out-of-pocket spending that are at least as affordable for the State's residents as would be provided under title I of the ACA; (3) the proposal will provide coverage to at least a comparable number of the State's residents as would be provided under title I of the ACA; and (4) the proposal will not increase the Federal deficit. The Secretaries retain their discretionary authority to deny requested section 1332 waivers when appropriate given consideration of the application, as a whole, even if a proposal for a section 1332 waiver meets the four statutory guardrails.

The Departments are responsible for monitoring an approved section 1332 waiver's compliance with the statutory guardrails and for conducting evaluations to determine the impact of the section 1332 waiver. Specifically, section 1332(a)(4)(B)(v) of the ACA requires the Secretaries to promulgate regulations that provide for a process for the periodic evaluation of approved section 1332 waivers. The Secretaries must also promulgate regulations that provide for a process under which States with approved section 1332 waivers submit to the Secretaries periodic reports concerning the implementation of the State's waiver program.¹¹

¹⁰ This includes continuation of the differential display of standardized plan options on [HealthCare.gov](https://www.healthcare.gov) and enforcement of the standardized plan options display requirements for approved web-brokers and QHP issuers using a direct enrollment pathway to facilitate enrollment through an FFE or SBE-FP— including both the Classic Direct Enrollment (Classic DE) and Enhanced Direct Enrollment (EDE) Pathways.

¹¹ See ACA section 1332(a)(4)(B)(iv).

2. Proposed Amendments to Normal Public Notice Requirements (31 CFR 33.112, 31 CFR 33.120, 45 CFR 155.1312, and 45 CFR 155.1320)

Sections 1332(a)(4)(B)(i) and (iii) of the ACA provide that the Secretaries shall promulgate regulations that provide for a process for public notice and comment at the State level, including public hearings, and a process for providing public notice and comment at the Federal level after the section 1332 waiver application is received by the Secretaries, respectively, that are both sufficient to ensure a meaningful level of public input. Current regulations at 31 CFR 33.112 and 45 CFR 155.1312 specify State public notice and comment period and participation requirements for proposed section 1332 waiver requests, and 31 CFR 33.116(b) and 45 CFR 155.1316(b) specify the public notice and comment period and approval requirements under the accompanying Federal process.

In the November 2020 interim final rule (85 FR 71142), the Departments revised regulations to set forth flexibilities in the public notice requirements and post-award public participation requirements for section 1332 waivers during the COVID-19 PHE. In the September 2021 final rule (86 FR 53502), the Departments extended those changes beyond the COVID-19 PHE to allow similar flexibilities in the event of future natural disasters; PHEs; or other emergent situations that threaten consumers' access to health insurance coverage, consumers' access to health care, or human life. Currently, in such an event, States may submit a request to the Departments to modify, in part, the State public notice requirements specified in 31 CFR 33.112(a)(1), (b), (c), and (d) and 45 CFR 155.1312(a)(1), (b), (c), and (d), and the Federal public notice requirement specified in 31 CFR 33.116(b) and 45 CFR 155.1316(b), pursuant to 31 CFR 33.118(a) and 45 CFR 155.1318(a).

The criteria to request a modification from the normal public notice requirements during an emergent situation are set forth in 31 CFR 33.118(b)(1) through (5) and 45 CFR 155.1318(b)(1) through (5). Pursuant to 31 CFR 33.118(b)(3) and 45 CFR 155.1318(b)(3), the State's request to modify normal public notice procedures is required to include: the justification for the requested modification from the State public notice procedures as it relates to the emergent situation and the alternative public notice procedures, including public hearings, that it proposes to implement at the State level

and that are designed to provide the greatest opportunity for and level of meaningful public input from impacted interested parties that is practicable given the emergent circumstances motivating the State's request for a modification.

Since the finalization of the flexibilities in 31 CFR 33.118(b)(1) through (5) and 45 CFR 155.1318(b)(1) through (5), almost all States with approved section 1332 waivers ("section 1332 waiver States") submitted requests that were granted by the Departments to conduct their annual post-award forums virtually instead of in-person during the COVID-19 PHE to reduce the risk of transmission of COVID-19. Similarly, during the COVID-19 PHE, States submitting new section 1332 waiver applications, waiver extension requests, or waiver amendment requests also requested to host their State public hearings virtually and these requests were also granted by the Departments. However, with the recent expiration of the Federal COVID-19 PHE¹² (and many State COVID-19 PHEs)¹³ and in line with the requirements of 31 CFR 33.120(c) and 45 CFR 155.1320(c) and 31 CFR 33.112(c) and 45 CFR 155.1312(c), the Departments have ceased granting States' requests to hold public hearings or post-award forums virtually instead of in-person on the basis of the Federal COVID-19 PHE.

Upon review and consideration of the lessons learned during the COVID-19 PHE, the Departments have determined that some current provisions regarding normal State public notice procedures are outdated given the increased accessibility that technology has provided for virtual and telephonic meetings. States have shared that their residents benefitted from the States' opportunity to host public hearings and post-award forums virtually, and that they would like to continue doing so to facilitate attendance. States have also reported to the Departments that hosting meetings virtually during the COVID-19 PHE did not decrease the amount or

quality of meaningful input received. States' experience during this time demonstrated that interested parties were able to virtually attend meetings and submit public comments verbally or in-writing, and States did not report any significant issues relating to virtual platforms that impeded public attendance or participation. States continued to share with the Departments summaries of their post-award forums, as well as all public comments received and actions taken in response to concerns or comments, in accordance with section 1332 waiver annual reporting requirements. In States' new waiver applications, waiver extension requests, and waiver amendment requests, States also shared with the Departments summaries of virtually conducted hearings from their State public comment periods and addressed public comments or concerns received.

Beyond mitigating the spread of COVID-19, information shared by section 1332 waiver States has demonstrated that the opportunity to host post-award forums and public hearings on virtual platforms facilitated comparable or higher levels of public attendance when compared to previously held in-person meetings. For example, at Maryland's annual post-award forums held in 2019 (in-person) and 2020–2022 (virtual), the State saw comparable participation across the years from interested parties. Minnesota also reported comparable attendance at its post-award forums across the years: 4 attendees in 2018 (in-person), 1 in 2019 (in-person), 4 in 2020 (virtual), 9 in 2021 (virtual),¹⁴ and 2 in 2022 (virtual). Likewise, Wisconsin had 6 attendees at its post-award forum in 2019 (in-person), 24 in 2020 (virtual),¹⁵ 11 in 2021 (virtual), and 7 in 2022 (virtual). Wisconsin noted that using a virtual format has allowed individuals who would otherwise not be able to attend in-person to view the State's presentation and that this has proven to be a convenient means for individuals to attend the forum.

States that began waiver implementation after the start of the COVID-19 PHE have also reported successfully hosting virtual post-award forums. For example, Colorado conducted its first post-award forum entirely virtually in 2020 and reported

¹² The Federal COVID-19 PHE ended on May 11, 2023. <https://www.hhs.gov/about/news/2023/05/09/fact-sheet-end-of-the-covid-19-public-health-emergency.html#:~:text=That%20means%20with%20the%20COVID,the%20expiration%20of%20the%20PHE.>

¹³ For example, in Alaska the State's PHE ended on July 1, 2022 (<https://health.alaska.gov/PHE/Pages/default.aspx>); in Colorado the Disaster Recovery Order ended on April 27, 2023 (<https://hcpf.colorado.gov/covid-19-phe-planning>); in Georgia the State of Emergency ended on May 11, 2023 (<https://dph.georgia.gov/press-releases/2023-05-11/dph-news-release-end-public-health-emergency-declaration>); and in Rhode Island the State's COVID-19 Disaster Emergency ended on May 11, 2023 (<https://governor.ri.gov/executive-orders/executive-order-23-05>).

¹⁴ Note that this post-award hearing was also a hearing for the State's waiver extension application, which likely increased attendance.

¹⁵ Note that attendance was relatively higher in 2020 likely due to the forum following the State's first full year of implementing its reinsurance program.

79 attendees.¹⁶ Pennsylvania had 2 attendees at its first post-award forum in 2021 (virtual) and 4 in 2022 (virtual). Pennsylvania noted that due to the expansiveness of the State's geography, there has historically been low in-person attendance, as observed at its in-person public hearings in 2019 for its waiver application, where no members of the public attended the first meeting, and two members of the public attended the second meeting.

States submitting new waiver applications, waiver extension requests, or waiver amendment requests during the COVID-19 PHE also reported successfully conducting their public hearings on virtual platforms. For example, in January 2022, Alaska held a combined post-award forum and State public hearing for its waiver extension application both in-person and with a telephonic option, which 3 members of the public attended either in-person or virtually. In April 2022, Washington held two State public hearings virtually, in which 9 representatives from organizations attended and shared public comments.

There are other Federal programs and agencies that permitted a virtual option in place of in-person public hearings prior to the COVID-19 PHE or that have more recently amended their policies for public input to continue virtual and telephonic options that were first implemented during the COVID-19 PHE. For example, States that are applying for Medicaid section 1115 demonstrations are permitted to use telephonic and web-based conference capabilities for public meetings. In fact, per 42 CFR 431.408(a)(3), a State must use telephonic and/or web conference capabilities for at least one of the two required public hearings to ensure statewide accessibility to the public hearing, unless it can document it has afforded the public throughout the State the opportunity to provide comment, such as holding the two public hearings in geographically distinct areas of the State.

As another example, during the COVID-19 PHE, the Internal Revenue Service (IRS) began holding public hearings on notices of proposed rulemaking telephonically instead of in-person. Following the end of the Federal COVID-19 PHE, the IRS recently announced that, for proposed regulations published in the **Federal Register** after May 11, 2023,¹⁷ public

hearings would be conducted in-person but that a telephonic option would remain available for those who prefer to attend or testify by telephone.

The Departments considered whether to propose requiring States to hold at least one of the required public hearings for waiver applications in-person. However, as explained above, States have successfully hosted post-award forums and public hearings for section 1332 waiver applications virtually to allow for meaningful public input over the last several years. Furthermore, by allowing States the ability to hold all of their meetings virtually, States may better allow for input across different geographies, communities, and populations. We also considered proposing the standard under section 1115 demonstrations where one hearing is required to be done virtually. However, given the successful hosting of virtual meetings with public participation by States for section 1332 waivers, it does not seem necessary to continue to require in-person meetings to solicit public input on section 1332 waivers.

The Departments believe that by allowing States the opportunity to hold post-award forums and public hearings virtually and through digital platforms, States would be able to continue facilitating attendance and participation from interested parties and the public to provide meaningful input. As such, the Departments are of the view that updating the State public notice procedures would enhance public participation in the section 1332 waiver review and monitoring process. This approach would help remove barriers to participation and increase opportunities for engagement in policymaking for communities and local partners who may face barriers to in-person participation (for example, those in rural areas). This approach is also consistent with Executive Order 14094, Executive Order on Modernizing Regulatory Review, as it would proactively engage interested or affected parties, including members of underserved communities, and promote best practices for information accessibility and engagement with interested or affected parties through the use of alternative platforms and media for engaging the public.¹⁸ Further, this approach may improve States' ability to understand and eliminate barriers experienced by underserved or under-

represented communities, and identify opportunities to advance health equity, while diminishing administrative burden related to the integration of in-person and virtual formats.

Therefore, we propose that a virtual (that is, one that uses telephonic, digital, and/or web-based platforms) or hybrid (that is, one that provides for both in-person and virtual attendance) public hearing or forum be considered as the equivalent of holding an in-person meeting. In the 2012 final rule (77 FR 11700), the Departments noted that as set forth in 31 CFR 33.112(c)(1) and 45 CFR 155.1312(c)(1), a State must hold at least two public hearings in distinct locations. Under the proposal in this rule to modify the normal public notice procedures, States would still need to hold at least two public hearings in distinct locations. For example, the Departments clarify that under this rule's proposal to allow flexibility to host these meetings virtually, a State would not be permitted to count a public hearing in which there is simultaneously an in-person location and virtual platform as two hearings (or two locations). Instead, one virtual or hybrid meeting would still count as one public hearing, and two virtual or hybrid meetings would count as two public hearings.

To codify these new proposed policies, we propose to amend 31 CFR 33.112(c) and 45 CFR 155.1312(c) and 31 CFR 33.120(c) and 45 CFR 155.1320(c). More specifically, the Departments propose to amend 31 CFR 33.112(c) and 45 CFR 155.1312(c) to permit States to conduct public hearings in a virtual (that is, one that uses telephonic, digital, and/or web-based platforms) or hybrid (that is, one that provides for both in-person and virtual attendance) format in lieu of conducting an in-person meeting. The Departments also propose to amend 31 CFR 33.120(c) and 45 CFR 155.1320(c) to provide that for a State's annual post-award forum, the public forum shall be conducted in an in-person, virtual (that is, one that uses telephonic, digital, and/or web-based platforms), or hybrid (that is, one that provides for both in-person and virtual attendance) format. The Departments propose that these changes go into effect upon finalization of this rule. Because these changes would relieve a regulatory restriction, the Departments anticipate that they would be made effective immediately upon publication of a final rule.

This proposal is limited to allowing flexibility to host required meetings virtually. States would be required to continue to abide all other public notice requirements, including public notice

¹⁶ Note that this post-award forum was also a hearing for the State's waiver extension application, which likely increased attendance.

¹⁷ Internal Revenue Service, Public Hearings on Proposed Regulations to Be Conducted in Person

with Telephone Options Available, Announcement 2023-16. Accessed at <https://www.irs.gov/pub/irs-drop/a-23-16.pdf>.

¹⁸ 88 FR 21879. <https://www.govinfo.gov/content/pkg/FR-2023-04-11/pdf/2023-07760.pdf>.

procedural requirements for waiver applications, waiver extension and waiver amendment requests, and post-award forums. For example, States would still be required to have a process to consult and collaborate with Federally-recognized tribes,¹⁹ as applicable, as well as take reasonable steps to provide meaningful access for individuals with limited English proficiency and appropriate steps to ensure effective access for and communication with individuals with disabilities, including accessibility of information and communication technology.²⁰ States should recognize that virtual meetings may present additional accessibility challenges for people with communications and mobility disabilities, as well as to those who lack broadband access. Complying with the requirement to ensure effective communication may entail providing American Sign Language interpretation and real-time captioning and ensuring that the virtual platform is interoperable with assistive technology for those with mobility difficulties.

Finally, the Departments clarify that under this proposal, States should have a process by which members of the public can request in-person meetings for the annual post-award forum or State public hearings on waiver applications, waiver extension requests, or waiver amendments requests, and that States should accommodate those requests whenever possible. In addition, States with approved section 1332 waivers and States seeking approval for proposed waivers would continue to have flexibility to submit requests to the Departments during emergent situations to modify certain public participation requirements as set forth in 31 CFR 33.118(b)(1) through (5) and 45 CFR 155.1318(b)(1) through (5).

The Departments seek comment on these proposals.

B. 42 CFR Parts 435 and 600

1. Increase State Flexibility in the Use of Income and Resource Disregards for Non-MAGI Populations (42 CFR 435.601)

We propose to provide States with greater flexibility to adopt income and/or resource disregards in determining financial eligibility under section 1902(r)(2) of the Act for individuals excepted from application of financial methodologies based on modified adjusted gross income (“MAGI-based methodologies”).

Section 1902(r)(2) of the Act requires that States, in determining Medicaid financial eligibility, apply a methodology that may be less restrictive, but which may not be more restrictive, than in the case of individuals seeking eligibility on the basis of being 65 years old or older, having blindness or a disability, under the supplemental security income (SSI) program. In the case for other individuals, the methodology may be less restrictive, but may not be more restrictive than the methodology applied to determine eligibility “under the State plan most closely categorically related.” For the latter populations, prior to the enactment of the ACA, the aid to families with dependent child AFDC program methodologies were generally used (42 CFR 435.601(a), (b), and (d)(2)(ii)). However, section 2002(a) of the ACA amended section 1902(e) of the Act which, at paragraph (14)(A), requires that, notwithstanding section 1902(r)(2) of the Act (or any other provision of title XIX of the Act), States use MAGI-based methodologies in determining individuals’ Medicaid eligibility unless the individual is excepted from such methodologies under section 1902(e)(14)(D) of the Act.²¹ Implemented in our regulations at 42 CFR 435.603(j), these exceptions include, but are not limited to, individuals who are age 65 years old or older; have blindness or a disability; are being evaluated for coverage as medically needy; or request need for coverage of long-term services and supports (LTSS). This means, for example, that in determining financial eligibility for an optional eligibility group in which being at least 65 years old is a requirement, SSI-based methodologies (as the most closely related cash assistance program) and not MAGI-based methodologies apply, and States must apply a methodology no more restrictive than the methodology

of the SSI program. Similarly, in determining eligibility for a medically needy group of parents and caretaker relatives, States must apply a methodology no more restrictive than the methodology of the former AFDC program.²²

Importantly, for any group to which SSI, AFDC, or MAGI-like methodologies apply, States may utilize the authority under section 1902(r)(2)(A) of the Act to apply a “less restrictive” methodology; that is, they may elect to *disregard* income and/or resources that would otherwise be countable under the relevant methodology. For example, under SSI methodologies, \$20 of an individual’s otherwise countable monthly income is disregarded in determining income eligibility. A State Medicaid agency, using the authority under section 1902(r)(2)(A) of the Act, could adopt an additional monthly income disregard of \$100 for an eligibility group to which SSI methodologies apply.²³

In 1993, we implemented the less-restrictive methodology authority in section 1902(r)(2)(A) of the Act at 42 CFR 435.601(d)(4) (58 FR 4908–01, 4929–4930 (January 19, 1993)). We confirmed in the regulation the eligibility groups to which States may apply less restrictive methodologies, which include: optional categorically needy groups described in section 1902(a)(10)(A)(ii) of the Act; medically needy groups described in section 1902(a)(10)(C) of the Act; the mandatory group serving individuals 65 years old or older; who have blindness or disabilities in States that have exercised the option in section 1902(f) of the Act to apply more restrictive criteria to these populations than SSI (so-called “section 209(b) States”); and Qualified Medicare Beneficiaries described in sections

²² Because the AFDC program no longer exists, we have permitted States, where AFDC methodologies otherwise apply, to use MAGI-like methodologies instead of AFDC methodologies in determining eligibility for the medically needy. 42 CFR 435.831(b)(1)(ii). Disregards under section 1902(r)(2)(A) of the Act may be applied to individuals whose eligibility is determined using these “MAGI-like” methodologies. For a discussion of MAGI-like methodologies, see 81 FR 86382, 86415–86418 (November 30, 2016). We have proposed that States have the option to apply MAGI-like methodologies in all circumstances in which AFDC methodologies otherwise apply. 87 FR 54842.

²³ Section 1902(r)(2) of the Act does not limit the amount of an income or a resource disregard. States could, for example, disregard all countable income and/or resources for an eligibility under the authority of section 1902(r)(2) of the Act. Under 42 CFR 435.1007(e), the Federal financial participation (FFP)-related income limits are applied after application of cash assistance income deductions and any disregards in the State plan authorized under section 1902(r)(2) of the Act.

¹⁹ See 31 CFR 33.112(a)(2) and 45 CFR 155.1312(a)(2).

²⁰ See Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, 45 CFR part 80), Section 1557 of the ACA (42 U.S.C. 18116), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794, 45 CFR part 84), and Title II of the Americans with Disabilities Act (42 U.S.C. 1213 *et seq.*, 28 CFR part 35). The HHS Office for Civil Rights enforces applicable Federal civil rights laws that prohibit discrimination on the basis of race, color, national origin, sex, age, or disability, as well as laws protecting the exercise of conscience and religious freedom, including the Religious Freedom Restoration Act (Pub. L. 103–141) (42 U.S.C. 2000bb through 2000bb–4).

²¹ MAGI-based methodologies are the rules described in section 36B(d)(2)(B) of the U.S. Internal Revenue Code.

1902(a)(10)(E) and 1905(p) of the Act. Additionally, the current regulation requires that any less restrictive methodologies elected by a State must be “comparable for all persons within each category of assistance within an eligibility group.” As further explained in 42 CFR 435.601(d)(4): “For example, if the agency chooses to apply less restrictive income or resource methodology to an eligibility group of aged individuals, it must apply that methodology to all aged individuals within the selected group.”

In 2001, we issued guidance on the use of less restrictive methodologies by States (“Medicaid Eligibility Groups and Less Restrictive Methods of Determining Countable Income and Resources Questions and Answers,” May 11, 2001 (May 2001 guidance)). As explained in the May 2001 guidance, an “eligibility group” under section 1902(a)(10)(A)(ii) of the Act for purposes of less restrictive methodologies is created by applying the eligibility requirements described in any of the clauses of section 1902(a)(10)(A)(ii) of the Act (for example, section 1902(a)(10)(A)(ii)(I) of the Act) to one of the categorical populations described in section 1905(a) of the Act (for example, individuals under the age of 21, or at the option of a State, under the age of 20, 19, or 18, as described in section 1905(a)(i) of the Act).

For example, a State could elect to apply the eligibility criteria described in section 1902(a)(10)(A)(ii)(V) of the Act (relating to individuals in medical institutions for at least 30 consecutive days whose incomes do not exceed 300 percent of the SSI Federal benefit rate) to individuals 65 years old or older (the population described in section 1905(a)(iii) of the Act). A State similarly could apply the eligibility criteria described in section 1902(a)(10)(A)(ii)(V) of the Act to other categorical populations described in section 1905(a) of the Act, such as individuals who have blindness or disabilities (section 1905(a)(vii) of the Act) or individuals under age 21 (section 1905(a)(i) of the Act). As explained in the May 2001 guidance, the election of the optional eligibility category at section 1902(a)(10)(A)(ii)(V) of the Act and a population in section 1905(a) of the Act (for example, individuals 65 years old or older) forms a singular *eligibility group*.²⁴

Thus, consistent with 42 CFR 435.601(d)(4), if a State that covers an eligibility group of individuals 65 years old and older who have been in a medical institution for at least 30 consecutive days wants to adopt a resource disregard of \$5,000 of otherwise countable resources, the State must apply the disregard to all 65 and older individuals who are seeking coverage under the group; the State could not target the disregard at only certain 65 and older individuals seeking eligibility in the group, for example individuals age 65 and older with a diagnosed cognitive impairment.

Section 1902(r)(2)(A) of the Act does not expressly impose, and we did not identify a specific legal rationale in the proposed or final rule requiring, the “comparability” mandate that we incorporated into 42 CFR 435.601(d)(4). 54 FR 39421, 39433 (September 26, 1989); 58 FR 4908, 4919 (January 19, 1993). Section 1902 of the Act contains two separate provisions which are commonly referred to as “comparability” rules: section 1902(a)(10)(B) of the Act, which requires that the amount, duration, and scope of the medical assistance available to any categorically needy individuals must not be less than the medical assistance available to any other categorically needy individuals (subject to express exceptions in the statute); and section 1902(a)(17) of the Act, which requires that eligibility standards, subject to certain exceptions, must be “comparable for all groups.”

Upon further analysis, we conclude that neither section 1902(a)(10)(B) of the Act nor section 1902(a)(17) of the Act requires that a State adopting a less restrictive methodology for a given eligibility group apply such methodology to all individuals seeking coverage under the group. First, a State’s use of a less restrictive methodology for an eligibility group would never alter the amount, duration, and scope of medical assistance available within the group, which means the comparability mandate in section 1902(a)(10)(B) of the Act would never be implicated by a less restrictive methodology. Second, the comparability mandate in section 1902(a)(17) of the Act refers to *standards*, not *methodologies*, which are different terms and which we have in the past expressly defined differently. “Standard” refers to the dollar level that a person’s income or resources cannot

exceed to qualify for Medicaid; “methodology” refers to the rules for determining what sources and amounts of income and resources will be counted in determining whether a person’s income exceeds the income and resource standard. 54 FR 39421–01, 39430 (September 26, 1989). Thus, we conclude that the incorporation of a comparability mandate into 42 CFR 435.601(d)(4) was a policy choice that was not mandated by Federal law.

In addition, section 3(b) of the Sustaining Excellence in Medicaid Act (Pub. L. 116–39, enacted in 2019) directed that nothing in section 1902(a)(17) of the Act should be construed as prohibiting a State from adopting income or resource disregards under section 1902(r)(2) of the Act exclusively for people who need home and community-based services (HCBS) authorized under various authorities. In other words, section 3(b) of the Sustaining Excellence in Medicaid Act confirmed that, at least with regard to the use of section 1902(r)(2)-related authority to target income and/or resource disregards at people who need HCBS, the comparability mandate in section 1902(a)(17) of the Act does not impose a bar. We believe that this provides further support for the view that the comparability mandate in section 1902(a)(17) of the Act should not be considered to require comparability in the use of less restrictive methodologies under section 1902(r)(2)(A) of the Act.²⁵

Over the years, a number of States also have sought to target income and/or resource disregards to other populations within an eligibility group without applying the disregard to all, including, for example, individuals with disabilities who have accumulated resources through saving their earned income. Under this example, the eligibility group serving individuals with disabilities who have earned income has comparatively higher resource standard than other eligibility groups with a resource standard to allow these individuals to save their earned income. When these individuals stop working and must qualify in a separate eligibility group to maintain their Medicaid, most typically one with a much lower resource standard, they may be faced with the choice of forgoing Medicaid coverage or exhausting the savings they were effectively incentivized to accumulate in their

²⁴ As also explained in the May 2001 guidance, medically needy groups are created in the same manner; for example, a State that has adopted the medically needy category in section 1902(a)(10)(C) of the Act (that is, the medically needy) and elects to include the population described in section 1905(a)(ii) of the Act (parents and caretaker

relatives) forms a singular medically needy group. Section 1902(a)(10)(C) of the Act requires that States that select the medically needy category must adopt a medically needy group for children under 18 and a medically needy group for pregnant individuals.

²⁵ For further information, see CMS State Medicaid Director Letter 21–004, “State Flexibilities to Determine Financial Eligibility for Individuals in Need of Home and Community-Based Services.” https://www.medicaid.gov/sites/default/files/2021-12/smd21004_0.pdf.

original eligibility group in order to retain their Medicaid eligibility. States cannot address this predicament without effectively increasing the resource standard for everyone in the new group because States currently cannot, consistent with the comparability mandate in 42 CFR 435.601(d)(4), target a resource disregard at applicants for a particular eligibility group based on their previous eligibility in a separate group.

For these reasons, we are proposing to eliminate paragraph (d)(4) from 42 CFR 435.601, which would allow States to target income and/or resource disregards at discrete subpopulations in the same eligibility group, provided the subpopulation is reasonable and does not violate other Federal statutes (for example, it does not discriminate based on race, gender, sexual orientation or disability). We believe this would increase State flexibility and provide States more options to extend eligibility to specific populations based on the State's circumstances. As noted above, this proposed regulatory change would not be applicable to eligibility groups to which MAGI-based financial methodologies apply but could be applied to most non-MAGI eligibility groups. In enacting the Sustaining Excellence in Medicaid Act, Congress recognized that the ability to target income and resource disregards at people who need HCBS provides States a critical tool in their efforts to "rebalance" their LTSS programs and move institutionalized individuals to community-based care. We similarly believe that more broadly eliminating the comparability rule in the use of income and/or resource disregards would enable States to achieve targeted expansions of coverage that best meet their needs, in contrast to the all-or-nothing approach that is effectively required by the current regulation.

It is possible that, in eliminating the comparability rule from 42 CFR 435.601(d), a State might narrow an existing disregard that is broadly available to an eligibility group to discrete members of the group. However, CMS has not received inquiries from States on the feasibility of such an approach to the same extent that we have received questions from States on whether they may use income and/or resource disregards to expand eligibility in a targeted manner. CMS believes that, in the absence of a comparability rule in 42 CFR 435.601(d), States would on the whole utilize disregard-related authority to expand eligibility instead of contracting it.

Consistent with 42 CFR 435.601(f)(2), under the proposed revisions to 42 CFR 435.601(d), States would continue to be required to submit a State plan amendment describing any new less restrictive methodologies the State seeks to apply and the groups to which it seeks to apply such methodologies. We also confirm that eliminating paragraph (d)(4) from 42 CFR 435.601 would not mean that States would be required to target any new income or resource disregards or modify any existing ones. The proposed change simply provides States with additional flexibility to do so.

We propose to amend 42 CFR 435.601 to: eliminate the current language of paragraph (d)(4); and redesignate the current paragraph (d)(5) as paragraph (d)(4). We seek comment on our proposal.

2. Changes to the Basic Health Program Regulations (42 CFR 600.320)

Section 1331 of the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, enacted March 30, 2010), provides States with the option to operate a Basic Health Program (BHP). In the States that elect to operate a BHP, the State's BHP makes affordable health benefits coverage available for lawfully present individuals under age 65 with household incomes between 133 and 200 percent of the Federal poverty level (FPL) (or in the case of a lawfully present non-citizen, ineligible for Medicaid or the Children's Health Insurance Program (CHIP) due to immigration status, with household incomes between zero and 200 percent of the FPL) who are not eligible for Medicaid, CHIP, or other minimum essential coverage. As of the date of this proposed rule, only New York and Minnesota have implemented a BHP.

Under current 42 CFR 600.320(c), States must establish a uniform method of determining the effective date of eligibility for enrollment in a standard health plan following either the Medicaid process at 42 CFR 435.915 exclusive of § 435.915(a) or the Exchange standards at 45 CFR 155.420(b)(1).

Under the Medicaid rules at § 435.915, the effective date of an individual's eligibility is also the effective date of coverage. Under the Exchange rules at 45 CFR 155.420(b)(1), an individual must first be determined to be a qualified individual (that is, eligible to enroll in a QHP through an Exchange). After that determination is made, the individual can make a plan selection. The Exchange coverage

effective date is then determined based on when the qualified individual selects their plan. If the plan selection is made between the first and fifteenth day of the month, coverage will be effective the first day of the month following the plan selection month. If the plan selection is made between the sixteenth and the last day of the month, coverage will be effective the first day of the second month following the plan selection month.

In States selecting the Medicaid process at 42 CFR 435.915 exclusive of § 435.915(a), eligibility for enrollment in a standard health plan in the BHP can be effective on either the date the application was submitted or the first day of the month of such month. In States selecting the Exchange standards at 45 CFR 155.420(b)(1), an individual is eligible to enroll in a standard health plan in the BHP on the first day of the month following the month of application if that individual is found eligible to enroll in a standard health plan between the first and the fifteenth of such month. Furthermore, under the Exchange standards if an individual is found eligible to enroll in a standard health plan between the sixteenth and the last day of any month, the individual will have an eligibility effective date of the first day of the second following month. A State operating a BHP may require an eligible individual to select a plan and/or pay a premium prior to the coverage.

Although the current BHP regulation provides States with some flexibility in establishing an effective eligibility date, it does not permit a State to select a standard in which all applicants who meet all requirements are eligible to enroll in a standard health plan in the BHP effective the first day of the month following the month of application or eligibility determination regardless of when they apply or are found eligible to enroll in a standard health plan in the BHP. As an example, to help to illustrate this point, if an individual applied on July 7, Medicaid rules would allow a BHP to determine an individual eligible for enrollment in a standard health plan on July 1 or July 7. If an individual applied on July 7 and was determined BHP-eligible on July 15, in a State that follows Exchange rules, the individual would be eligible for enrollment in a standard health plan on August 1. If the individual was determined BHP-eligible on July 23 in a State that follows Exchange rules, the individual would be eligible for enrollment in a standard health plan on September 1; the State could not choose to have coverage start on August 1, regardless of the date of application.

Even in a State with real-time eligibility determinations, if the State follows Exchange rules and the application is on July 23, the individual would be eligible for enrollment in a standard health plan on September 1.

We believe eligible individuals should have access to coverage as soon as is feasible. Since the BHP and Exchange standards were first established, HHS has taken steps to provide further flexibility for States to reduce barriers to enrollment and eliminate coverage gaps. Additionally, system improvements have provided faster and more accurate eligibility determinations. For example, in practice, all special enrollment periods on the FFEs now allow coverage to start at the beginning of the month after the qualifying individual's triggering event regardless of the plan selection date.

While the Medicaid process at 42 CFR 435.915, exclusive of § 435.915(a), allows for a State operating a BHP to have the earliest possible effective date for its enrollees, we understand that some States may have operational or regulatory constraints that do not allow them to follow the Medicaid process, but may be able to implement an effective date for all eligible applicants the first day of the month after the month in which the eligibility determination is made, regardless of which day of the month such determination occurs.

Therefore, we propose to revise § 600.320(c) to add a third option at paragraph (c)(iii) that would allow a State operating a BHP to follow an effective date of eligibility for all enrollees on the first day of the month following the month in which BHP eligibility is determined. Because States can require individuals to pay their first month's premium prior to enrolling in a standard health plan, § 600.320(c)(iii) also reflects this State option. Under § 600.320(c)(i), States will continue to have the option to follow the Exchange standards at 45 CFR 155.420(b)(1) and under § 600.320(c)(ii), a State may follow Medicaid standards at 42 CFR 435.915 exclusive of § 435.915(a).

We considered an alternative option of whether to instead allow a State to establish its own uniform effective date policy, outside of following the three

options in this proposed rule, subject to CMS approval and as long as it is no later than the first day of the second month following the date that an individual has been determined BHP-eligible. This alternative option, however, may cause delays in coverage even further. We seek comment on the proposed additional option for determining the effective date of eligibility for enrollment in a standard health plan as well as the alternative option.

C. 45 CFR Part 153—Standards Related to Reinsurance, Risk Corridors, and HHS Risk Adjustment

In subparts A, D, G, and H of part 153, we established standards for the administration of the risk adjustment program. The risk adjustment program is a permanent program created by section 1343 of the ACA that transfers funds from lower-than-average risk, risk adjustment covered plans to higher-than-average risk, risk adjustment covered plans in the individual, small group markets, or merged markets, inside and outside the Exchanges. In accordance with § 153.310(a), a State that is approved or conditionally approved by the Secretary to operate an Exchange may establish a risk adjustment program or have HHS do so on its behalf.²⁶ We did not receive any requests from States to establish and operate a risk adjustment program for the 2025 benefit year. Therefore, HHS will operate risk adjustment in every State and the District of Columbia for the 2025 benefit year.

1. Sequestration

In accordance with the OMB Report to Congress on the Joint Committee Reductions for Fiscal Year 2024, the HHS-operated risk adjustment program is subject to the fiscal year 2024 sequestration.²⁷ The Federal Government's 2024 fiscal year began on October 1, 2023. Therefore, the HHS-operated risk adjustment program will be sequestered at a rate of 5.7 percent

for payments made from fiscal year 2024 resources (that is, funds collected during the 2024 fiscal year).

HHS, in coordination with OMB, has determined that, under section 256(k)(6) of the Balanced Budget and Emergency Deficit Control Act of 1985,²⁸ as amended, and the underlying authority for the HHS-operated risk adjustment program, the funds that are sequestered in fiscal year 2024 from the HHS-operated risk adjustment program will become available for payment to issuers in fiscal year 2025 without further Congressional action. If Congress does not enact deficit reduction provisions that replace the Joint Committee reductions, the program would be sequestered in future fiscal years, and any sequestered funding would become available in the fiscal year following that in which it was sequestered.

Additionally, we note that the Infrastructure Investment and Jobs Act²⁹ amended section 251A(6) of the Balanced Budget and Emergency Deficit Control Act of 1985 and extended sequestration for the HHS-operated risk adjustment program through fiscal year 2031 at a rate of 5.7 percent per fiscal year.^{30 31}

2. HHS Risk Adjustment (§ 153.320)

The HHS risk adjustment models predict plan liability for an average enrollee based on that person's age, sex, and diagnoses (also referred to as hierarchical condition categories (HCCs)), producing a risk score. The HHS risk adjustment methodology utilizes separate models for adults, children, and infants to account for clinical and cost differences in each age group. In the adult and child models, the relative risk assigned to an individual's age, sex, and diagnoses are added together to produce an individual risk score. Additionally, to calculate enrollee risk scores in the adult models, we added enrollment duration factors

²⁸ Public Law 99–177 (1985).

²⁹ Public Law 117–58, 135 Stat. 429 (2021).

³⁰ 2 U.S.C. 901a.

³¹ The Infrastructure Investment and Jobs Act (Pub. L. 117–58) extended sequestration for the HHS-operated risk adjustment program through 2031 at a rate of 5.7 percent per fiscal year.

²⁶ See also 42 U.S.C. 18041(c)(1).

²⁷ OMB. (2023, March 13). OMB Report to the Congress on the BBEDCA 251A Sequestration for Fiscal Year 2024. https://www.whitehouse.gov/wp-content/uploads/2023/03/BBEDCA_Sequestration_Report_and_Letter_3-13-2024.pdf.

beginning with the 2017 benefit year,³² and prescription drug categories (RXC) beginning with the 2018 benefit year.³³ Starting with the 2023 benefit year, we removed the severity illness factors in the adult models and added interacted HCC count factors (that is, additional factors that express the presence of a severity or transplant HCC in combination with a specified number of total payment HCCs or HCC groups on the enrollee's record) to the adult and child models³⁴ applicable to certain severity and transplant HCCs.³⁵

Infant risk scores are determined by inclusion in one of 25 mutually exclusive groups, based on the infant's maturity and the severity of diagnoses. If applicable, the risk score for adults, children, or infants is multiplied by a cost sharing reduction (CSR) adjustment factor. The enrollment-weighted average risk score of all enrollees in a particular risk adjustment covered plan (also referred to as the plan liability risk score (PLRS)) within a geographic rating area is one of the inputs into the State payment transfer formula,³⁶ which determines the State transfer payment or charge that an issuer will receive or be required to pay for that plan for the applicable State market risk pool for a given benefit year. Thus, the HHS risk adjustment models predict average group costs to account for risk across plans, in keeping with the Actuarial Standards Board's Actuarial Standards of Practice for risk classification.

a. Data for HHS Risk Adjustment Model Recalibration for the 2025 Benefit Year

We are proposing to recalibrate the 2025 benefit year HHS risk adjustment models with the 2019, 2020, and 2021 enrollee-level EDGE data. Consistent

with the approach outlined in the 2020 Payment Notice to no longer use MarketScan® data for recalibrating the HHS risk adjustment models, we propose to recalibrate the HHS risk adjustment models for the 2025 benefit year using only enrollee-level EDGE data, and we would continue to use blended, or averaged, coefficients from the 3 years of separately solved models for the 2025 benefit year model recalibration.³⁷ Additionally, as outlined in the 2022 Payment Notice (86 FR 24140, 24152), we propose to use the 3 most recent consecutive years of enrollee-level EDGE data that are available at the time we incorporate the data in the draft recalibrated coefficients published in the proposed rule for the applicable benefit year,³⁸ and would not update the coefficients between the proposed and final rules if an additional year of enrollee-level EDGE data becomes available for incorporation. We believe this promotes stability, better meets the goal of the HHS-operated risk adjustment program and allows issuers more time to incorporate this information when pricing their plans for the upcoming benefit year.

In the 2024 Payment Notice (88 FR 25740 through 25749), we finalized the use of 2018, 2019 and 2020 benefit year enrollee-level EDGE data for recalibration of the 2024 benefit year HHS risk adjustment models for all model coefficients, with no exceptions. As explained in the 2024 Payment Notice proposed rule³⁹ and final rule,⁴⁰ we analyzed the 2020 benefit year data to identify possible impacts of the COVID-19 PHE and our analysis generally found that the 2020 enrollee-level EDGE data were anomalous primarily in the volume and frequencies of certain types of claims, but that the relative costs of specific services, at least those associated with payment HCCs in the HHS risk adjustment models, were largely unaffected. Because the HHS risk adjustment models predict relative costs of care for specific conditions on an enrollee-level basis and tend not to rely on overall patterns of utilization, the minimal impacts to relative costs of care for payment HCCs likewise resulted in minimal impacts on the coefficients fitted by the 2020 enrollee-level EDGE recalibration data.

Considering that the COVID-19 PHE was still in effect throughout the 2021 benefit year,⁴¹ we recognize that some interested parties may continue to be concerned about the use of either the 2020 or 2021 enrollee-level EDGE data for the purposes of HHS risk adjustment model recalibration. In this regard, we conducted additional analyses to determine whether any anomalies in the 2021 benefit year enrollee-level EDGE data were present beyond expected year-to-year variation and whether the use of two years of PHE-impacted data presented any additional concerns. We did not identify any such anomalies and note that all draft coefficients for the 2025 benefit year HHS risk adjustment models in this proposed rule vary from their values in the 2024 HHS risk adjustment models within the range of previous year-to-year coefficient changes.

As such, we propose to determine coefficients for the 2025 benefit year based on a blend of separately solved coefficients from the 2019, 2020, and 2021 benefit years' enrollee-level EDGE data, with the costs of services identified from the data trended between the relevant year of data and the 2025 benefit year.⁴² The draft coefficients listed in Tables 1 through 6 reflect the use of trended 2019, 2020, and 2021 benefit year enrollee-level EDGE data, as well as other HHS risk adjustment model updates proposed in this proposed rule (including, for example, the proposed pricing adjustment for Hepatitis C drugs). However, we note that the draft coefficients could change between the proposed and final rules if we identify an error after publication of this proposed rule or if any proposed model parameters are modified in response to comments. In addition, consistent with

³² For the 2017 through 2022 benefit years, there is a set of 11 binary enrollment duration factors in the adult models that decrease monotonically from one to 11 months, reflecting the increased annualized costs associated with fewer months of enrollments. See, for example, 81 FR 94071 through 94074. These enrollment duration factors were replaced beginning with the 2023 benefit year with HCC-contingent enrollment duration factors for up to 6 months in the adult models. See, for example, 87 FR 27228 through 27230.

³³ For the 2018 benefit year, there were 12 RXCs, but starting with the 2019 benefit year, the two severity-only RXCs were removed from the adult models. See, for example, 83 FR 16941.

³⁴ See Table 1 for a list of factors in the adult models, and Table 2 for a list of factors in the child models.

³⁵ See 87 FR 27224 through 27228.

³⁶ The State payment transfer formula refers to the part of the Federally certified risk adjustment methodology that applies in States where HHS is responsible for operating the program. The formula calculates payments and charges at the State market risk pool level (prior to the calculation of the high-cost risk pool payment and charge terms that apply beginning with the 2018 benefit year). See, for example, 81 FR 94080.

³⁷ 84 FR 17463 through 17466.

³⁸ Although we do receive the next year of enrollee-level EDGE data prior to the proposed rule, that data must go through several quality and analysis checks before it is useable for HHS risk adjustment model recalibration.

³⁹ 87 FR 78215 through 78216.

⁴⁰ 88 FR 25749 through 25753.

⁴¹ See, for example, the Renewal of Determination that a Public Health Emergency Exists dated February 9, 2023. <https://aspr.hhs.gov/legal/PHE/Pages/COVID19-9Feb2023.aspx>.

⁴² As described in the 2016 Risk Adjustment White Paper (<https://www.cms.gov/ccio/resources/forms-reports-and-other-resources/downloads/ra-march-31-white-paper-032416.pdf>) and the 2017 Payment Notice (81 FR at 12218), we subdivide expenditures into traditional drugs, specialty drugs, medical services, and preventive services and determine trend factors separately for each category of expenditure. In determining these trend factors, we consult our actuarial experts, review relevant Unified Rate Review Template (URRT) submission data, analyze multiple years of enrollee-level EDGE data, and consult National Health Expenditure Accounts (NHEA) data as well as external reports and documents published by third parties. In this process, we aim to determine trends that reflect changes in cost of care rather than gross growth in expenditures. As such, we believe the trend factors we used for each expenditure category for the 2025 benefit year are appropriate for the most recent changes in cost of care that we have seen in the market.

§ 153.320(b)(1)(i), if we are unable to finalize the final coefficients in time for publication in the final rule, we would publish the final coefficients for the 2025 benefit year in guidance soon after the publication of the final rule.

We seek comment on the proposal to determine 2025 benefit year coefficients for the HHS risk adjustment models based on a blend of separately solved coefficients from the 2019, 2020, and 2021 enrollee-level EDGE data.

b. Pricing Adjustment for the Hepatitis C Drugs

For the 2025 benefit year, we propose to continue applying a market pricing adjustment to the plan liability associated with Hepatitis C drugs in the HHS risk adjustment models.⁴³ Since the 2020 benefit year HHS risk adjustment models, we have been making a market pricing adjustment to the plan liability associated with Hepatitis C drugs to reflect future market pricing prior to solving for coefficients for the models.⁴⁴ The purpose of this market pricing adjustment is to account for significant pricing changes between the data years used for recalibrating the models and the applicable benefit year of HHS risk adjustment as a result of the introduction of new and generic Hepatitis C drugs.⁴⁵

We have committed to reassessing this pricing adjustment with additional years of enrollee-level EDGE data, as data becomes available. As part of the 2025 benefit year model recalibration analysis, we reassessed the cost trend for Hepatitis C drugs using available enrollee-level EDGE data (including

2021 benefit year data) to consider whether the adjustment was still needed and if it is still needed, whether it should be modified. We found that the data for the Hepatitis C RXC that would be used for the 2025 benefit year recalibration still do not account for the significant pricing changes due to the introduction of new and generic Hepatitis C drugs, and therefore, do not precisely reflect the average cost of Hepatitis C treatments applicable to the benefit year in question.

Specifically, although generic Hepatitis C drugs became available on the market in 2019,⁴⁶ and therefore were available for all 3 years of data proposed to be used for the 2025 benefit year model recalibration, our analysis of the data continued to observe that costs for Hepatitis C drugs are not increasing at the same rate as other drug costs between the data years and the applicable benefit year of HHS risk adjustment, likely due to continued increases in the proportion of Hepatitis C drug prescriptions for generic versions of the drugs. As such, we do not believe that the trends used to reflect growth in the cost of prescription drugs due to inflation and related factors for recalibrating the models will appropriately reflect the average cost of Hepatitis C treatments expected in the 2025 benefit year. Therefore, we continue to believe a market pricing adjustment specific to Hepatitis C drugs in the HHS risk adjustment models for the 2025 benefit year is necessary to account for the lack of growth in Hepatitis C drug prices relative to other

prescription drugs in the market between the data years used for recalibrating the models and the applicable benefit year of HHS risk adjustment due to the introduction of new and generic Hepatitis C drugs in recent years. We intend to continue to assess this pricing adjustment as part of future benefit year model recalibrations using available additional years of enrollee-level EDGE data.

We seek comment on our proposal to continue applying a market pricing adjustment to the plan liability associated with Hepatitis C drugs for the 2025 benefit year.

c. Proposed List of Factors To Be Employed in the HHS Risk Adjustment Models (§ 153.320)

The proposed 2025 benefit year HHS risk adjustment model factors resulting from the equally weighted (averaged) blended factors from separately solved models using the 2019, 2020, and 2021 enrollee-level EDGE data are shown in Tables 1 through 6. The adult, child, and infant models have been truncated to account for the high-cost risk pool payment parameters by removing 60 percent of costs above the \$1 million threshold.⁴⁷ Table 1 contains proposed factors for each adult model, including the age-sex, HCCs, RXCs, RXC-HCC interactions, interacted HCC counts, and enrollment duration coefficients. Table 2 contains the proposed factors for each child model, including the age-sex, HCCs, and interacted HCC counts coefficients. Table 3 lists the proposed HCCs selected for the interacted HCC counts factors that would apply to the adult and child models. Table 4 contains the proposed factors for each infant model. Tables 5 and 6 contain the HCCs included in the infant models' maturity and severity categories, respectively.

⁴⁷ We are not proposing changes to the high-cost risk pool parameters for the 2025 benefit year. Therefore, we would maintain the \$1 million threshold and 60 percent coinsurance rate.

⁴⁶ See Miligan, J. (2018). A perspective from our CEO: Gilead Subsidiary to Launch Authorized Generics to Treat HCV. Gilead. <https://www.gilead.com/news-and-press/company-statements/authorized-generics-for-hcv>. See also AbbVie. (2017). AbbVie Receives U.S. FDA Approval of MAVYRET™ (glecaprevir/pibrentasvir) for the Treatment of Chronic Hepatitis C in All Major Genotypes (GT 1–6) in as Short as 8 Weeks. Abbvie. <https://news.abbvie.com/news/abbvie-receives-us-fda-approval-mavyret-glecaprevir-pibrentasvir-for-treatment-chronic-hepatitis-c-in-all-major-genotypes-gt-1-6-in-as-short-as-8-weeks.htm>.

⁴³ See for example, 84 FR 17463 through 17466.

⁴⁴ The Hepatitis C drugs market pricing adjustment to plan liability is applied for all enrollees taking Hepatitis C drugs in the data used for recalibration.

⁴⁵ Silseth, S., & Shaw, H. (2021). Analysis of prescription drugs for the treatment of hepatitis C in the United States. Milliman White Paper. <https://www.milliman.com/-/media/milliman/pdfs/2021-articles/6-11-21-analysis-prescription-drugs-treatment-hepatitis-c-us.ashx>.

TABLE 1: Proposed Adult HHS Risk Adjustment Model Factors for the 2025 Benefit Year

HCC or RXC No.	Factor	Platinum	Gold	Silver	Bronze	Catastrophic
Demographic Factors						
	Age 21-24, Male	0.189	0.128	0.086	0.057	0.056
	Age 25-29, Male	0.197	0.133	0.088	0.056	0.055
	Age 30-34, Male	0.230	0.160	0.110	0.073	0.072
	Age 35-39, Male	0.249	0.174	0.119	0.077	0.076
	Age 40-44, Male	0.282	0.203	0.143	0.095	0.094
	Age 45-49, Male	0.312	0.228	0.164	0.112	0.111
	Age 50-54, Male	0.381	0.290	0.218	0.161	0.160
	Age 55-59, Male	0.428	0.330	0.254	0.191	0.189
	Age 60-64, Male	0.472	0.365	0.282	0.212	0.210
	Age 21-24, Female	0.285	0.196	0.127	0.078	0.076
	Age 25-29, Female	0.308	0.212	0.137	0.082	0.081
	Age 30-34, Female	0.370	0.268	0.188	0.126	0.125
	Age 35-39, Female	0.428	0.323	0.239	0.174	0.172
	Age 40-44, Female	0.482	0.372	0.284	0.211	0.209
	Age 45-49, Female	0.481	0.369	0.277	0.200	0.198
	Age 50-54, Female	0.519	0.404	0.307	0.226	0.224
	Age 55-59, Female	0.482	0.368	0.271	0.191	0.189
	Age 60-64, Female	0.475	0.358	0.261	0.179	0.176
Diagnosis Factors						
HCC001	HIV/AIDS	0.342	0.265	0.234	0.197	0.196
HCC002	Septicemia, Sepsis, Systemic Inflammatory Response Syndrome/Shock	9.075	8.875	8.830	8.740	8.739
HCC003	Central Nervous System Infections, Except Viral Meningitis	8.379	8.276	8.229	8.151	8.149
HCC004	Viral or Unspecified Meningitis	8.328	8.217	8.161	8.071	8.068
HCC006	Opportunistic Infections	8.532	8.478	8.419	8.333	8.330
HCC008	Metastatic Cancer	23.002	22.629	22.616	22.506	22.506
HCC009	Lung, Brain, and Other Severe Cancers, Including Pediatric Acute Lymphoid Leukemia	12.575	12.312	12.271	12.156	12.155
HCC010	Non-Hodgkin Lymphomas and Other Cancers and Tumors	5.705	5.535	5.473	5.362	5.360
HCC011	Colorectal, Breast (Age < 50), Kidney, and Other Cancers	3.651	3.476	3.405	3.283	3.280
HCC012	Breast (Age 50+) and Prostate Cancer, Benign/Uncertain Brain Tumors, and Other Cancers and Tumors	2.424	2.295	2.230	2.129	2.127
HCC013	Thyroid Cancer, Melanoma, Neurofibromatosis, and Other Cancers and Tumors	0.967	0.875	0.785	0.677	0.674
HCC018	Pancreas Transplant Status	6.320	6.253	6.239	6.228	6.219
HCC019	Diabetes with Acute Complications	0.259	0.214	0.172	0.130	0.128
HCC020	Diabetes with Chronic Complications	0.259	0.214	0.172	0.130	0.128
HCC021	Diabetes without Complication	0.259	0.214	0.172	0.130	0.128

HCC or RXC No.	Factor	Platinum	Gold	Silver	Bronze	Catastrophic
HCC022	Type 1 Diabetes Mellitus, add-on to Diabetes HCCs 19-21	0.311	0.282	0.244	0.180	0.178
HCC023	Protein-Calorie Malnutrition	11.342	11.221	11.179	11.105	11.104
HCC026	Mucopolysaccharidosis	23.821	23.642	23.619	23.556	23.556
HCC027	Lipidoses and Glycogenosis	23.821	23.642	23.619	23.556	23.556
HCC029	Amyloidosis, Porphyria, and Other Metabolic Disorders	6.512	6.413	6.373	6.305	6.303
HCC030	Adrenal, Pituitary, and Other Significant Endocrine Disorders	1.314	1.237	1.184	1.108	1.104
HCC034	Liver Transplant Status/Complications	6.014	6.070	6.119	6.189	6.189
HCC035_1 ^a	Acute Liver Failure/Disease, Including Neonatal Hepatitis	7.464	7.288	7.254	7.181	7.184
HCC035_2	Chronic Liver Failure/End-Stage Liver Disorders	2.319	2.160	2.125	2.042	2.041
HCC036	Cirrhosis of Liver	0.613	0.534	0.490	0.417	0.416
HCC037_1	Chronic Viral Hepatitis C	0.514	0.454	0.403	0.348	0.347
HCC037_2	Chronic Hepatitis, Except Chronic Viral Hepatitis C	0.514	0.454	0.403	0.348	0.347
HCC041	Intestine Transplant Status/Complications	6.014	6.070	6.119	6.189	6.189
HCC042	Peritonitis/Gastrointestinal Perforation/Necrotizing Enterocolitis	11.053	10.907	10.903	10.857	10.857
HCC045	Intestinal Obstruction	5.038	4.837	4.783	4.669	4.668
HCC046	Chronic Pancreatitis	2.467	2.298	2.253	2.167	2.166
HCC047	Acute Pancreatitis	2.467	2.298	2.251	2.147	2.146
HCC048	Inflammatory Bowel Disease	1.108	1.023	0.944	0.820	0.816
HCC054	Necrotizing Fasciitis	8.617	8.468	8.446	8.388	8.388
HCC055	Bone/Joint/Muscle Infections/Necrosis	4.567	4.401	4.381	4.321	4.322
HCC056	Rheumatoid Arthritis and Specified Autoimmune Disorders	1.082	0.993	0.930	0.845	0.843
HCC057	Systemic Lupus Erythematosus and Other Autoimmune Disorders	0.399	0.329	0.249	0.146	0.142
HCC061	Osteogenesis Imperfecta and Other Osteodystrophies	1.924	1.801	1.740	1.639	1.637
HCC062	Congenital/Developmental Skeletal and Connective Tissue Disorders	1.924	1.801	1.740	1.639	1.637
HCC063	Cleft Lip/Cleft Palate	0.922	0.819	0.759	0.678	0.676
HCC066	Hemophilia	72.761	72.491	72.466	72.379	72.380
HCC067	Myelodysplastic Syndromes and Myelofibrosis	11.237	11.118	11.090	11.024	11.020
HCC068	Aplastic Anemia	11.237	11.118	11.090	11.024	11.020
HCC069	Acquired Hemolytic Anemia, Including Hemolytic Disease of Newborn	11.237	11.118	11.090	11.024	11.020
HCC070 ^b	Sickle Cell Anemia (Hb-SS) and Thalassemia Beta Zero	1.690	1.607	1.553	1.479	1.477
HCC071 ^b	Sickle-Cell Disorders, Except Sickle-Cell Anemia (Hb-SS) and Thalassemia Beta Zero; Beta Thalassemia Major	1.690	1.607	1.553	1.479	1.477
HCC073	Combined and Other Severe Immunodeficiencies	4.065	3.975	3.947	3.887	3.885
HCC074	Disorders of the Immune Mechanism	4.065	3.975	3.947	3.887	3.885

HCC or RXC No.	Factor	Platinum	Gold	Silver	Bronze	Catastrophic
HCC075	Coagulation Defects and Other Specified Hematological Disorders	2.148	2.068	2.020	1.947	1.946
HCC081	Drug Use with Psychotic Complications	1.602	1.472	1.377	1.233	1.229
HCC082	Drug Use Disorder, Moderate/Severe, or Drug Use with Non-Psychotic Complications	1.602	1.472	1.377	1.233	1.229
HCC083	Alcohol Use with Psychotic Complications	0.902	0.788	0.716	0.612	0.610
HCC084	Alcohol Use Disorder, Moderate/Severe, or Alcohol Use with Specified Non-Psychotic Complications	0.902	0.788	0.716	0.612	0.610
HCC087_1	Schizophrenia	2.227	2.063	1.986	1.864	1.862
HCC087_2	Delusional and Other Specified Psychotic Disorders, Unspecified Psychosis	2.190	2.030	1.951	1.820	1.818
HCC088	Major Depressive Disorder, Severe, and Bipolar Disorders	0.969	0.871	0.786	0.672	0.669
HCC090	Personality Disorders	0.663	0.586	0.492	0.379	0.376
HCC094	Anorexia/Bulimia Nervosa	2.000	1.894	1.827	1.722	1.719
HCC096	Prader-Willi, Patau, Edwards, and Autosomal Deletion Syndromes	8.590	8.557	8.527	8.484	8.481
HCC097	Down Syndrome, Fragile X, Other Chromosomal Anomalies, and Congenital Malformation Syndromes	0.938	0.875	0.826	0.764	0.763
HCC102	Autistic Disorder	0.718	0.641	0.553	0.455	0.452
HCC103	Pervasive Developmental Disorders, Except Autistic Disorder	0.663	0.586	0.492	0.379	0.376
HCC106	Traumatic Complete Lesion Cervical Spinal Cord	9.112	8.957	8.905	8.806	8.805
HCC107	Quadriplegia	9.112	8.957	8.905	8.806	8.805
HCC108	Traumatic Complete Lesion Dorsal Spinal Cord	6.380	6.241	6.187	6.089	6.087
HCC109	Paraplegia	6.380	6.241	6.187	6.089	6.087
HCC110	Spinal Cord Disorders/Injuries	5.153	4.975	4.928	4.826	4.824
HCC111	Amyotrophic Lateral Sclerosis and Other Anterior Horn Cell Disease	5.090	4.946	4.876	4.755	4.753
HCC112	Quadriplegic Cerebral Palsy	0.730	0.629	0.565	0.467	0.465
HCC113	Cerebral Palsy, Except Quadriplegic	0.424	0.355	0.299	0.219	0.217
HCC114	Spina Bifida and Other Brain/Spinal/Nervous System Congenital Anomalies	1.205	1.120	1.063	0.972	0.969
HCC115	Myasthenia Gravis/Myoneural Disorders and Guillain-Barre Syndrome/Inflammatory and Toxic Neuropathy	5.216	5.134	5.117	5.076	5.076
HCC117	Muscular Dystrophy	1.393	1.304	1.236	1.136	1.134
HCC118	Multiple Sclerosis	2.218	2.101	2.042	1.944	1.941
HCC119	Parkinson's, Huntington's, and Spinocerebellar Disease, and Other Neurodegenerative Disorders	1.393	1.304	1.236	1.136	1.134
HCC120	Seizure Disorders and Convulsions	1.040	0.948	0.884	0.792	0.789

HCC or RXC No.	Factor	Platinum	Gold	Silver	Bronze	Catastrophic
HCC121	Hydrocephalus	9.585	9.491	9.440	9.362	9.360
HCC122 ^c	Nontraumatic Coma, Except Diabetic, Hepatic, or Hypoglycemic; Nontraumatic Brain Compression/Anoxic Damage	10.181	10.044	9.986	9.886	9.884
HCC123	Narcolepsy and Cataplexy	4.533	4.405	4.340	4.237	4.235
HCC125	Respirator Dependence/Tracheostomy Status	21.869	21.665	21.623	21.532	21.534
HCC126	Respiratory Arrest	8.558	8.341	8.300	8.210	8.209
HCC127	Cardio-Respiratory Failure and Shock, Including Respiratory Distress Syndromes	8.558	8.341	8.300	8.210	8.209
HCC128	Heart Assistive Device/Artificial Heart	17.404	17.301	17.262	17.214	17.224
HCC129	Heart Transplant Status/Complications	17.404	17.301	17.262	17.214	17.224
HCC130	Heart Failure	1.896	1.809	1.773	1.707	1.705
HCC131	Acute Myocardial Infarction	4.955	4.737	4.720	4.652	4.653
HCC132	Unstable Angina and Other Acute Ischemic Heart Disease	3.690	3.489	3.452	3.355	3.355
HCC135	Heart Infection/Inflammation, Except Rheumatic	8.848	8.756	8.695	8.602	8.599
HCC137	Hypoplastic Left Heart Syndrome and Other Severe Congenital Heart Disorders	2.122	2.033	1.975	1.895	1.893
HCC138	Major Congenital Heart/Circulatory Disorders	2.122	2.033	1.975	1.895	1.893
HCC139	Atrial and Ventricular Septal Defects, Patent Ductus Arteriosus, and Other Congenital Heart/Circulatory Disorders	2.122	2.033	1.975	1.895	1.893
HCC142	Specified Heart Arrhythmias	1.921	1.819	1.752	1.645	1.645
HCC145	Intracranial Hemorrhage	10.648	10.490	10.444	10.356	10.355
HCC146	Ischemic or Unspecified Stroke	1.428	1.314	1.282	1.212	1.212
HCC149	Cerebral Aneurysm and Arteriovenous Malformation	2.218	2.102	2.044	1.944	1.941
HCC150	Hemiplegia/Hemiparesis	3.309	3.190	3.178	3.134	3.134
HCC151	Monoplegia, Other Paralytic Syndromes	2.494	2.386	2.342	2.264	2.262
HCC153	Atherosclerosis of the Extremities with Ulceration or Gangrene	7.988	7.837	7.849	7.827	7.828
HCC154	Vascular Disease with Complications	5.128	4.989	4.949	4.869	4.868
HCC156	Pulmonary Embolism and Deep Vein Thrombosis	7.621	7.535	7.461	7.345	7.341
HCC158	Lung Transplant Status/Complications	11.099	10.994	10.963	10.924	10.930
HCC159	Cystic Fibrosis	4.156	4.021	3.969	3.883	3.881
HCC160	Chronic Obstructive Pulmonary Disease, Including Bronchiectasis	0.643	0.567	0.491	0.395	0.392
HCC161_1	Severe Asthma	0.643	0.567	0.491	0.395	0.392
HCC161_2	Asthma, Except Severe	0.643	0.567	0.491	0.395	0.392
HCC162	Fibrosis of Lung and Other Lung Disorders	1.615	1.529	1.476	1.391	1.388
HCC163	Aspiration and Specified Bacterial Pneumonias and Other Severe Lung Infections	7.187	7.124	7.105	7.067	7.067

HCC or RXC No.	Factor	Platinum	Gold	Silver	Bronze	Catastrophic
HCC174	Exudative Macular Degeneration	1.224	1.097	1.010	0.878	0.874
HCC183	Kidney Transplant Status/Complications	6.320	6.253	6.239	6.228	6.219
HCC184	End Stage Renal Disease	20.669	20.237	20.330	20.158	20.046
HCC187	Chronic Kidney Disease, Stage 5	0.773	0.689	0.685	0.645	0.633
HCC188	Chronic Kidney Disease, Severe (Stage 4)	0.773	0.689	0.685	0.645	0.633
HCC203	Ectopic and Molar Pregnancy	1.850	1.673	1.534	1.319	1.314
HCC204	Miscarriage with Complications	0.646	0.565	0.439	0.260	0.254
HCC205	Miscarriage with No or Minor Complications	0.646	0.565	0.439	0.260	0.254
HCC207	Pregnancy with Delivery with Major Complications	3.756	3.470	3.289	2.991	2.985
HCC208	Pregnancy with Delivery with Complications	3.756	3.470	3.289	2.991	2.985
HCC209	Pregnancy with Delivery with No or Minor Complications	2.769	2.554	2.335	1.972	1.962
HCC210	(Ongoing) Pregnancy without Delivery with Major Complications	0.815	0.714	0.561	0.370	0.363
HCC211	(Ongoing) Pregnancy without Delivery with Complications	0.530	0.454	0.318	0.170	0.166
HCC212	(Ongoing) Pregnancy without Delivery with No or Minor Complications	0.018	0.005	0.000	0.000	0.000
HCC217	Chronic Ulcer of Skin, Except Pressure	1.557	1.464	1.433	1.375	1.374
HCC218	Extensive Third-Degree Burns	23.714	23.524	23.474	23.384	23.383
HCC219	Major Skin Burn or Condition	2.604	2.484	2.428	2.345	2.344
HCC223	Severe Head Injury	18.201	18.057	17.990	17.882	17.879
HCC226	Hip and Pelvic Fractures	8.018	7.783	7.765	7.688	7.688
HCC228	Vertebral Fractures without Spinal Cord Injury	4.277	4.116	4.047	3.925	3.922
HCC234	Traumatic Amputations and Amputation Complications	4.861	4.706	4.682	4.619	4.618
HCC251	Stem Cell, Including Bone Marrow, Transplant Status/Complications	18.571	18.584	18.547	18.531	18.535
HCC253	Artificial Openings for Feeding or Elimination	5.697	5.584	5.563	5.511	5.511
HCC254	Amputation Status, Upper Limb or Lower Limb	0.936	0.835	0.799	0.738	0.736
Interacted HCC Counts Factors						
	Severe illness, 1 payment HCC	-6.014	-6.070	-6.119	-6.189	-6.189
	Severe illness, 2 payment HCCs	-5.733	-5.806	-5.833	-5.886	-5.886
	Severe illness, 3 payment HCCs	-4.904	-4.952	-4.891	-4.846	-4.844
	Severe illness, 4 payment HCCs	-4.190	-4.178	-4.033	-3.871	-3.865
	Severe illness, 5 payment HCCs	-3.522	-3.432	-3.216	-2.954	-2.945
	Severe illness, 6 payment HCCs	-3.024	-2.835	-2.557	-2.202	-2.192
	Severe illness, 7 payment HCCs	-2.432	-2.116	-1.780	-1.330	-1.318
	Severe illness, 8 payment HCCs	-2.179	-1.784	-1.416	-0.910	-0.896
	Severe illness, 9 payment HCCs	-0.287	0.253	0.676	1.279	1.294
	Severe illness, 10 or more payment HCCs	7.398	8.299	8.836	9.657	9.679
	Transplant severe illness, 4 payment HCCs	3.792	3.704	3.651	3.531	3.516

HCC or RXC No.	Factor	Platinum	Gold	Silver	Bronze	Catastrophic
	Transplant severe illness, 5 payment HCCs	7.054	6.949	6.906	6.792	6.775
	Transplant severe illness, 6 payment HCCs	12.584	12.463	12.431	12.324	12.304
	Transplant severe illness, 7 payment HCCs	15.636	15.506	15.473	15.364	15.346
	Transplant severe illness, 8 or more payment HCCs	31.955	31.916	31.908	31.845	31.825
Enrollment Duration Factors						
	Enrolled for 1 month, at least one payment HCC	11.208	9.742	8.808	7.844	7.818
	Enrolled for 2 months, at least one payment HCC	5.197	4.458	3.958	3.479	3.466
	Enrolled for 3 months, at least one payment HCC	3.378	2.898	2.549	2.224	2.216
	Enrolled for 4 months, at least one payment HCC	2.129	1.799	1.545	1.313	1.307
	Enrolled for 5 months, at least one payment HCC	1.586	1.340	1.143	0.959	0.955
	Enrolled for 6 months, at least one payment HCC	1.039	0.857	0.705	0.560	0.556
Prescription Drug Factors						
RXC 01	Anti-HIV Agents	5.097	4.612	4.345	3.920	3.908
RXC 02	Anti-Hepatitis C (HCV) Agents, Direct Acting Agents	8.273	7.809	7.812	7.711	7.714
RXC 03 ^d	Antiarrhythmics	0.080	0.072	0.064	0.051	0.036
RXC 04	Phosphate Binders	0.901	1.115	1.007	1.206	1.390
RXC 05	Inflammatory Bowel Disease Agents	1.324	1.227	1.105	0.941	0.936
RXC 06	Insulin	1.366	1.193	1.018	0.844	0.838
RXC 07	Anti-Diabetic Agents, Except Insulin and Metformin Only	0.800	0.702	0.582	0.409	0.403
RXC 08	Multiple Sclerosis Agents	15.175	14.409	14.206	13.774	13.767
RXC 09 ^e	Immune Suppressants and Immunomodulators	12.005	11.495	11.478	11.335	11.337
RXC 10	Cystic Fibrosis Agents	17.441	17.041	17.022	16.903	16.902
RXC 01 x HCC001	Additional effect for enrollees with RXC 01 and HCC 001	2.467	2.521	2.790	3.101	3.115
RXC 02 x HCC037_1, 036, 035_2, 035_1, 034	Additional effect for enrollees with RXC 02 and (HCC 037_1 or 036 or 035_2 or 035_1 or 034)	-0.514	-0.454	-0.403	-0.348	-0.347
RXC 03 x HCC142	Additional effect for enrollees with RXC 03 and HCC 142	0.000	0.000	0.000	0.000	0.000
RXC 04 x HCC184, 183, 187, 188	Additional effect for enrollees with RXC 04 and (HCC 184 or 183 or 187 or 188)	0.000	0.000	0.000	0.000	0.000
RXC 05 x HCC048, 041	Additional effect for enrollees with RXC 05 and (HCC 048 or 041)	-0.688	-0.631	-0.570	-0.471	-0.468

HCC or RXC No.	Factor	Platinum	Gold	Silver	Bronze	Catastrophic
RXC 06 x HCC018, 019, 020, 021	Additional effect for enrollees with RXC 06 and (HCC 018 or 019 or 020 or 021)	0.402	0.444	0.532	0.544	0.546
RXC 07 x HCC018, 019, 020, 021	Additional effect for enrollees with RXC 07 and (HCC 018 or 019 or 020 or 021)	-0.258	-0.213	-0.172	-0.130	-0.128
RXC 08 x HCC118	Additional effect for enrollees with RXC 08 and HCC 118	-0.132	0.227	0.497	0.902	0.914
RXC 09 x HCC056 or 057 and 048 or 041	Additional effect for enrollees with RXC 09 and (HCC 048 or 041) and (HCC 056 or 057)	0.343	0.396	0.433	0.492	0.494
RXC 09 x HCC056	Additional effect for enrollees with RXC 09 and HCC 056	-1.082	-0.993	-0.930	-0.845	-0.843
RXC 09 x HCC057	Additional effect for enrollees with RXC 09 and HCC 057	-0.399	-0.329	-0.249	-0.146	-0.142
RXC 09 x HCC048, 041	Additional effect for enrollees with RXC 09 and (HCC 048 or 041)	1.315	1.406	1.499	1.634	1.638
RXC 10 x HCC159, 158	Additional effect for enrollees with RXC 10 and (HCC 159 or 158)	42.562	42.609	42.695	42.807	42.812

a/ HCC numbers that appear with an underscore in this document will appear without the underscore in the DIY software. For example, HCC 35_1 in this table will appear as HCC 351 in the DIY software.

b/ For the proposed 2025 benefit year HHS risk adjustment models, we made the following changes to improve the prediction of sickle cell disease costs: we updated mappings for sickle cell disease so that additional diagnosis codes are included in the model (within HCC 71), ungrouped HCCs 70 and 71 in the adult and child models, and reassigned HCC 70 and 71 to a higher severity in the infant models. To reflect these changes, we also relabeled HCC 70 and HCC 71. These updated mapping and HCC label changes parallel the reclassified Medicare Part C V28 CMS-HCCs. See, for example, the Advance Notice of Methodological Changes for Calendar Year (CY) 2024 for Medicare Advantage (MA) Capitation Rates and Part C and Part D Payment Policies (February 1, 2023). <https://www.cms.gov/files/document/2024-advance-notice-pdf.pdf>.

c/ Consistent with fiscal year 2024 updates to ICD-10 codes (effective October 1, 2023; see <https://www.cms.gov/medicare/coding-billing/icd-10-codes/2024-icd-10-cm>), we updated the label for HCC 122 from “Coma, Brain Compression/Anoxic Damage” to “Nontraumatic Coma, Except Diabetic, Hepatic, or Hypoglycemic; Nontraumatic Brain Compression/Anoxic Damage.” The specific ICD-10 code update that prompted this label change was the addition of code R402A “Nontraumatic coma due to underlying condition”, which we have mapped to HCC 122. HCC 122 is only assigned to enrollees who do not also have a head injury code, because HCC 223 (Severe Head Injury) captures codes for head injury with loss of consciousness and supersedes HCC 122 in a hierarchy. As such, the scope of HCC 122 is better reflected by the updated label. Because this ICD-10 update is effective October 1, 2023, future releases of benefit year 2023 and benefit year 2024 DIY software will also reflect the updated label and diagnosis-to-HCC mapping.

d/ We constrain RXC 03 to be equal to average plan liability for RXC 03 drugs, RXC 04 to be equal to the average plan liability for RXC 04 drugs, and we constrain RXC 03 x HCC142 and RXC 04 x HCC184, 183, 187, 188 to be equal to 0. See CMS. (2016, March 24). March 2016 Risk Adjustment Methodology Discussion Paper. <https://www.cms.gov/ccio/resources/forms-reports-and-other-resources/downloads/ra-march-31-white-paper-032416.pdf> (where we previously discussed the use of constraints in the HHS risk adjustment models).

e/ Similar to recalibration of the 2023 and 2024 benefit year HHS risk adjustment adult models and consistent with the policies adopted in the 2023 and 2024 Payment Notices, the proposed 2025 benefit year factors in this rule reflect the removal of the mapping of hydroxychloroquine sulfate to RXC 09 (Immune Suppressants and Immunomodulators) and the related RXC 09 interactions (RXC 09 x HCC056 or 057 and 048 or 041; RXC 09 x HCC056; RXC 09 x HCC 057; RXC 09x HCC048, 041) from the 2019 benefit year enrollee-level EDGE data sets for purposes of recalibrating the 2025 benefit year adult models. See 87 FR 27232 through 27235. Additionally, the proposed factors for the adult models reflect the use of the final, fourth quarter (Q4) RXC mapping document that was applicable for each benefit year of data included in the current year’s model recalibration (except under extenuating circumstances that can result in targeted changes to RXC mappings). See 87 FR 27231 through 27232.

TABLE 2: Proposed Child HHS Risk Adjustment Model Factors for the 2025 Benefit Year

Factor	Platinum	Gold	Silver	Bronze	Catastrophic
Demographic Factors					
Age 2-4, Male	0.270	0.191	0.141	0.105	0.104
Age 5-9, Male	0.204	0.135	0.096	0.071	0.071
Age 10-14, Male	0.224	0.156	0.115	0.090	0.089
Age 15-20, Male	0.260	0.187	0.137	0.102	0.101
Age 2-4, Female	0.223	0.153	0.113	0.089	0.088
Age 5-9, Female	0.149	0.086	0.053	0.034	0.034
Age 10-14, Female	0.222	0.153	0.113	0.089	0.088
Age 15-20, Female	0.300	0.212	0.145	0.097	0.095
Diagnosis Factors					
HIV/AIDS	4.355	3.942	3.856	3.659	3.657
Septicemia, Sepsis, Systemic Inflammatory Response Syndrome/Shock	14.567	14.370	14.294	14.176	14.174
Central Nervous System Infections, Except Viral Meningitis	13.944	13.811	13.745	13.658	13.656
Viral or Unspecified Meningitis	12.972	12.833	12.741	12.617	12.614
Opportunistic Infections	18.957	18.895	18.813	18.719	18.716
Metastatic Cancer	30.530	30.304	30.243	30.137	30.136
Lung, Brain, and Other Severe Cancers, Including Pediatric Acute Lymphoid Leukemia	8.962	8.738	8.640	8.486	8.484
Non-Hodgkin Lymphomas and Other Cancers and Tumors	7.708	7.523	7.421	7.266	7.263
Colorectal, Breast (Age < 50), Kidney, and Other Cancers	4.194	4.057	3.972	3.844	3.841
Breast (Age 50+) and Prostate Cancer, Benign/Uncertain Brain Tumors, and Other Cancers and Tumors	4.194	4.057	3.972	3.844	3.841
Thyroid Cancer, Melanoma, Neurofibromatosis, and Other Cancers and Tumors	1.265	1.155	1.058	0.937	0.933
Pancreas Transplant Status	11.660	11.580	11.544	11.505	11.503
Diabetes with Acute Complications	2.364	2.121	1.914	1.622	1.615
Diabetes with Chronic Complications	2.364	2.121	1.914	1.622	1.615

Factor	Platinum	Gold	Silver	Bronze	Catastrophic
Diabetes without Complication	2.364	2.121	1.914	1.622	1.615
Protein-Calorie Malnutrition	19.614	19.505	19.457	19.397	19.396
Mucopolysaccharidosis	34.440	34.213	34.169	34.070	34.070
Lipidoses and Glycogenosis	34.440	34.213	34.169	34.070	34.070
Congenital Metabolic Disorders, Not Elsewhere Classified	4.690	4.583	4.523	4.442	4.439
Amyloidosis, Porphyria, and Other Metabolic Disorders	4.690	4.583	4.523	4.442	4.439
Adrenal, Pituitary, and Other Significant Endocrine Disorders	5.289	5.072	5.007	4.902	4.901
Liver Transplant Status/Complications	11.660	11.580	11.544	11.505	11.503
Acute Liver Failure/Disease, Including Neonatal Hepatitis	7.742	7.607	7.570	7.488	7.487
Chronic Liver Failure/End-Stage Liver Disorders	7.742	7.607	7.570	7.488	7.487
Cirrhosis of Liver	3.999	3.881	3.835	3.764	3.763
Chronic Viral Hepatitis C	1.257	1.152	1.093	1.027	1.025
Chronic Hepatitis, Except Chronic Viral Hepatitis C	0.294	0.249	0.198	0.140	0.138
Intestine Transplant Status/Complications	13.387	13.303	13.228	13.137	13.135
Peritonitis/Gastrointestinal Perforation/Necrotizing Enterocolitis	19.019	18.756	18.703	18.597	18.597
Intestinal Obstruction	4.601	4.431	4.343	4.208	4.205
Chronic Pancreatitis	10.235	10.115	10.085	10.007	10.007
Acute Pancreatitis	4.988	4.771	4.687	4.541	4.538
Inflammatory Bowel Disease	9.947	9.582	9.498	9.313	9.311
Necrotizing Fasciitis	4.144	3.957	3.872	3.746	3.745
Bone/Joint/Muscle Infections/Necrosis	4.144	3.957	3.872	3.746	3.745
Rheumatoid Arthritis and Specified Autoimmune Disorders	4.632	4.397	4.315	4.181	4.179
Systemic Lupus Erythematosus and Other Autoimmune Disorders	0.878	0.777	0.679	0.559	0.555
Osteogenesis Imperfecta and Other Osteodystrophies	1.241	1.140	1.069	0.981	0.979
Congenital/Developmental Skeletal and Connective Tissue Disorders	1.241	1.140	1.069	0.981	0.979
Cleft Lip/Cleft Palate	0.972	0.841	0.742	0.616	0.613
Hemophilia	64.093	63.672	63.604	63.429	63.427
Myelodysplastic Syndromes and Myelofibrosis	12.305	12.163	12.117	12.039	12.038
Aplastic Anemia	12.305	12.163	12.117	12.039	12.038
Acquired Hemolytic Anemia, Including Hemolytic Disease of Newborn	12.305	12.163	12.117	12.039	12.038
Sickle Cell Anemia (Hb-SS) and Thalassemia Beta Zero ^a	3.564	3.400	3.303	3.173	3.170
Sickle-Cell Disorders, Except Sickle-Cell Anemia (Hb-SS) and Thalassemia Beta Zero; Beta Thalassemia Major ^a	3.369	3.233	3.160	3.055	3.053
Combined and Other Severe Immunodeficiencies	5.105	4.975	4.918	4.826	4.824
Disorders of the Immune Mechanism	5.105	4.975	4.918	4.826	4.824

Factor	Platinum	Gold	Silver	Bronze	Catastrophic
Coagulation Defects and Other Specified Hematological Disorders	4.043	3.938	3.869	3.779	3.777
Drug Use with Psychotic Complications	2.350	2.204	2.111	1.972	1.969
Drug Use Disorder, Moderate/Severe, or Drug Use with Non-Psychotic Complications	2.350	2.204	2.111	1.972	1.969
Alcohol Use with Psychotic Complications	0.899	0.765	0.658	0.502	0.499
Alcohol Use Disorder, Moderate/Severe, or Alcohol Use with Specified Non-Psychotic Complications	0.899	0.765	0.658	0.502	0.499
Schizophrenia	3.545	3.304	3.188	3.007	3.004
Delusional and Other Specified Psychotic Disorders, Unspecified Psychosis	3.289	3.067	2.940	2.745	2.741
Major Depressive Disorder, Severe, and Bipolar Disorders	2.506	2.319	2.191	2.017	2.013
Personality Disorders	0.348	0.263	0.159	0.043	0.040
Anorexia/Bulimia Nervosa	2.207	2.070	1.977	1.846	1.843
Prader-Willi, Patau, Edwards, and Autosomal Deletion Syndromes	12.082	12.007	11.947	11.870	11.868
Down Syndrome, Fragile X, Other Chromosomal Anomalies, and Congenital Malformation Syndromes	0.867	0.758	0.686	0.583	0.581
Autistic Disorder	2.506	2.319	2.191	2.017	2.013
Pervasive Developmental Disorders, Except Autistic Disorder	0.374	0.303	0.222	0.140	0.139
Traumatic Complete Lesion Cervical Spinal Cord	10.147	9.959	9.908	9.810	9.809
Quadriplegia	10.147	9.959	9.908	9.810	9.809
Traumatic Complete Lesion Dorsal Spinal Cord	9.868	9.664	9.615	9.515	9.514
Paraplegia	9.868	9.664	9.615	9.515	9.514
Spinal Cord Disorders/Injuries	4.750	4.568	4.457	4.285	4.280
Amyotrophic Lateral Sclerosis and Other Anterior Horn Cell Disease	49.556	49.316	49.259	49.139	49.137
Quadriplegic Cerebral Palsy	0.638	0.454	0.383	0.266	0.265
Cerebral Palsy, Except Quadriplegic	0.254	0.134	0.073	0.029	0.028
Spina Bifida and Other Brain/Spinal/Nervous System Congenital Anomalies	1.624	1.514	1.448	1.345	1.342
Myasthenia Gravis/Myoneural Disorders and Guillain-Barre Syndrome/Inflammatory and Toxic Neuropathy	10.278	10.133	10.111	10.053	10.053
Muscular Dystrophy	5.546	5.399	5.326	5.206	5.203
Multiple Sclerosis	9.135	8.789	8.736	8.602	8.604
Parkinson's, Huntington's, and Spinocerebellar Disease, and Other Neurodegenerative Disorders	5.546	5.399	5.326	5.206	5.203
Seizure Disorders and Convulsions	1.556	1.429	1.316	1.169	1.165
Hydrocephalus	11.666	11.630	11.604	11.580	11.579
Nontraumatic Coma, Except Diabetic, Hepatic, or Hypoglycemic; Nontraumatic Brain Compression/Anoxic Damage ^b	11.216	11.250	11.261	11.287	11.287
Narcolepsy and Cataplexy	4.058	3.911	3.807	3.664	3.659
Respirator Dependence/Tracheostomy Status	24.720	24.506	24.442	24.337	24.336

Factor	Platinum	Gold	Silver	Bronze	Catastrophic
Respiratory Arrest	15.720	15.472	15.398	15.267	15.266
Cardio-Respiratory Failure and Shock, Including Respiratory Distress Syndromes	15.720	15.472	15.398	15.267	15.266
Heart Assistive Device/Artificial Heart	13.387	13.303	13.228	13.137	13.135
Heart Transplant Status/Complications	13.387	13.303	13.228	13.137	13.135
Heart Failure	4.067	3.968	3.914	3.830	3.828
Acute Myocardial Infarction	1.060	1.025	1.005	0.979	0.979
Unstable Angina and Other Acute Ischemic Heart Disease	1.060	1.025	1.005	0.979	0.979
Heart Infection/Inflammation, Except Rheumatic	17.077	16.964	16.888	16.786	16.783
Hypoplastic Left Heart Syndrome and Other Severe Congenital Heart Disorders	3.938	3.796	3.682	3.540	3.536
Major Congenital Heart/Circulatory Disorders	0.986	0.896	0.790	0.685	0.682
Atrial and Ventricular Septal Defects, Patent Ductus Arteriosus, and Other Congenital Heart/Circulatory Disorders	0.590	0.506	0.425	0.347	0.345
Specified Heart Arrhythmias	3.118	2.980	2.899	2.785	2.783
Intracranial Hemorrhage	12.686	12.611	12.565	12.497	12.495
Ischemic or Unspecified Stroke	1.470	1.362	1.304	1.210	1.208
Cerebral Aneurysm and Arteriovenous Malformation	1.049	0.952	0.899	0.807	0.804
Hemiplegia/Hemiparesis	5.471	5.353	5.295	5.207	5.205
Monoplegia, Other Paralytic Syndromes	1.374	1.253	1.183	1.072	1.070
Atherosclerosis of the Extremities with Ulceration or Gangrene	11.860	11.625	11.557	11.424	11.422
Vascular Disease with Complications	8.127	7.988	7.947	7.872	7.871
Pulmonary Embolism and Deep Vein Thrombosis	19.738	19.604	19.533	19.426	19.425
Lung Transplant Status/Complications	13.387	13.303	13.228	13.137	13.135
Cystic Fibrosis	48.718	48.241	48.201	48.054	48.055
Chronic Obstructive Pulmonary Disease, Including Bronchiectasis	1.658	1.507	1.403	1.267	1.264
Severe Asthma	1.323	1.171	1.045	0.889	0.885
Asthma, Except Severe	0.320	0.250	0.170	0.102	0.100
Fibrosis of Lung and Other Lung Disorders	1.490	1.361	1.249	1.115	1.111
Aspiration and Specified Bacterial Pneumonias and Other Severe Lung Infections	11.216	11.250	11.261	11.287	11.287
Kidney Transplant Status/Complications	11.660	11.580	11.544	11.505	11.503
End Stage Renal Disease	29.641	29.391	29.371	29.278	29.278
Chronic Kidney Disease, Stage 5	0.787	0.749	0.722	0.685	0.683
Chronic Kidney Disease, Severe (Stage 4)	0.787	0.749	0.722	0.685	0.683
Ectopic and Molar Pregnancy	0.864	0.731	0.565	0.411	0.406
Miscarriage with Complications	0.474	0.369	0.227	0.089	0.086
Miscarriage with No or Minor Complications	0.474	0.369	0.227	0.089	0.086
Pregnancy with Delivery with Major Complications	3.166	2.876	2.634	2.231	2.219
Pregnancy with Delivery with Complications	3.166	2.876	2.634	2.231	2.219
Pregnancy with Delivery with No or Minor Complications	2.399	2.179	1.914	1.475	1.460
(Ongoing) Pregnancy without Delivery with Major Complications	0.420	0.308	0.152	0.039	0.036

Factor	Platinum	Gold	Silver	Bronze	Catastrophic
(Ongoing) Pregnancy without Delivery with Complications	0.420	0.308	0.152	0.039	0.036
(Ongoing) Pregnancy without Delivery with No or Minor Complications	0.276	0.187	0.079	0.037	0.036
Chronic Ulcer of Skin, Except Pressure	1.877	1.782	1.712	1.634	1.632
Extensive Third-Degree Burns	22.876	22.657	22.576	22.440	22.437
Major Skin Burn or Condition	2.441	2.286	2.187	2.056	2.053
Severe Head Injury	22.876	22.657	22.576	22.440	22.437
Hip and Pelvic Fractures	4.636	4.428	4.327	4.191	4.188
Vertebral Fractures without Spinal Cord Injury	4.483	4.293	4.176	3.999	3.994
Traumatic Amputations and Amputation Complications	3.818	3.627	3.528	3.362	3.357
Stem Cell, Including Bone Marrow, Transplant Status/Complications	13.387	13.303	13.228	13.137	13.135
Artificial Openings for Feeding or Elimination	5.711	5.551	5.525	5.451	5.450
Amputation Status, Upper Limb or Lower Limb	3.818	3.627	3.528	3.362	3.357
Interacted HCC Counts Factors					
Severe illness, 1 payment HCC	-11.216	-11.250	-11.261	-11.287	-11.287
Severe illness, 2 payment HCCs	-11.137	-11.200	-11.218	-11.265	-11.266
Severe illness, 3 payment HCCs	-9.692	-9.760	-9.689	-9.658	-9.655
Severe illness, 4 payment HCCs	-8.984	-8.987	-8.809	-8.652	-8.645
Severe illness, 5 payment HCCs	-6.593	-6.543	-6.303	-6.068	-6.059
Severe illness, 6 or 7 payment HCCs	-2.061	-1.828	-1.468	-1.064	-1.051
Severe illness, 8 or more payment HCCs	17.868	18.550	19.132	19.858	19.877
Transplant severe illness, 4 or more payment HCCs	14.488	14.558	14.580	14.612	14.613

a/ For the proposed 2025 benefit year HHS risk adjustment models, we made the following changes to improve the prediction of sickle cell disease costs: we updated mappings for sickle cell disease so that additional diagnosis codes are included in the model (within HCC 71), ungrouped HCCs 70 and 71 in the adult and child models, and reassigned HCC 70 and 71 to a higher severity in the infant models. To reflect these changes, we also relabeled HCC 70 and HCC 71. These updated mapping and HCC label changes parallel the reclassified Medicare Part C V28 CMS-HCCs. See, for example, the Advance Notice of Methodological Changes for Calendar Year (CY) 2024 for Medicare Advantage (MA) Capitation Rates and Part C and Part D Payment Policies (February 1, 2023). <https://www.cms.gov/files/document/2024-advance-notice-pdf.pdf>.

b/ Consistent with fiscal year 2024 updates to ICD-10 codes (effective October 1, 2023; see <https://www.cms.gov/medicare/coding-billing/icd-10-codes/2024-icd-10-cm>), we updated the label for HCC 122 from “Coma, Brain Compression/Anoxic Damage” to “Nontraumatic Coma, Except Diabetic, Hepatic, or Hypoglycemic; Nontraumatic Brain Compression/Anoxic Damage.” The specific ICD-10 code update that prompted this label change was the addition of code R402A “Nontraumatic coma due to underlying condition”, which we have mapped to HCC 122. HCC 122 is only assigned to enrollees who do not also have a head injury code, because HCC 223 (Severe Head Injury) captures codes for head injury with loss of consciousness and supersedes HCC 122 in a hierarchy. As such, the scope of HCC 122 is better reflected by the updated label. Because this ICD-10 update is effective October 1, 2023, future releases of the benefit year 2023 and benefit year 2024 DIY software will also reflect the updated label and diagnosis-to-HCC mapping.

TABLE 3: Proposed HCCs Selected for the HCC Interacted Counts Variables for the Adult and Child Models for the 2025 Benefit Year

Payment HCC	Severity Illness Indicator	Transplant Indicator
HCC 2 Septicemia, Sepsis, Systemic Inflammatory Response Syndrome/Shock	X	
HCC 3 Central Nervous System Infections, Except Viral Meningitis	X	
HCC 4 Viral or Unspecified Meningitis	X	
HCC 6 Opportunistic Infections	X	
HCC 23 Protein-Calorie Malnutrition	X	
HCC 34 Liver Transplant Status/Complications	X	X
HCC 41 Intestine Transplant Status/Complications	X	X
HCC 42 Peritonitis/Gastrointestinal Perforation/Necrotizing Enterocolitis	X	
HCC 96 Prader-Willi, Patau, Edwards, and Autosomal Deletion Syndromes	X	
HCC 121 Hydrocephalus	X	
HCC 122 Nontraumatic Coma, Except Diabetic, Hepatic, or Hypoglycemic; Nontraumatic Brain Compression/Anoxic Damage	X	
HCC 125 Respirator Dependence/Tracheostomy Status	X	
HCC 135 Heart Infection/Inflammation, Except Rheumatic	X	
HCC 145 Intracranial Hemorrhage	X	
HCC 156 Pulmonary Embolism and Deep Vein Thrombosis	X	
HCC 158 Lung Transplant Status/Complications	X	X
HCC 163 Aspiration and Specified Bacterial Pneumonias and Other Severe Lung Infections	X	
HCC 218 Extensive Third-Degree Burns	X	
HCC 223 Severe Head Injury	X	
HCC 251 Stem Cell, Including Bone Marrow, Transplant Status/Complications	X	X
G13 (Includes HCC 126 Respiratory Arrest and HCC 127 Cardio-Respiratory Failure and Shock, Including Respiratory Distress Syndromes)	X	
G14 (Includes HCC 128 Heart Assistive Device/Artificial Heart and HCC 129 Heart Transplant Status/Complications)	X	X
G24 (Includes HCC 18 Pancreas Transplant Status and HCC 183 Kidney Transplant Status/Complications)	X	X

TABLE 4: Proposed Infant HHS Risk Adjustment Model Factors for the 2025 Benefit Year

Group	Platinum	Gold	Silver	Bronze	Catastrophic
Extremely Immature * Severity Level 5 (Highest)	204.040	202.652	202.406	201.915	201.913
Extremely Immature * Severity Level 4	149.999	148.437	148.051	147.377	147.372
Extremely Immature * Severity Level 3	32.887	31.619	31.251	30.693	30.687
Extremely Immature * Severity Level 2	32.887	31.619	31.251	30.693	30.687
Extremely Immature * Severity Level 1 (Lowest)	32.887	31.619	31.251	30.693	30.687
Immature * Severity Level 5 (Highest)	121.913	120.553	120.309	119.828	119.827
Immature * Severity Level 4	71.026	69.564	69.264	68.692	68.689
Immature * Severity Level 3	32.887	31.619	31.251	30.693	30.687
Immature * Severity Level 2	30.558	29.332	28.960	28.403	28.398
Immature * Severity Level 1 (Lowest)	25.110	23.887	23.485	22.871	22.863
Premature/Multiples * Severity Level 5 (Highest)	108.585	107.335	107.096	106.631	106.628
Premature/Multiples * Severity Level 4	29.666	28.404	28.060	27.490	27.486
Premature/Multiples * Severity Level 3	13.527	12.617	12.148	11.482	11.467
Premature/Multiples * Severity Level 2	8.071	7.368	6.849	6.149	6.131
Premature/Multiples * Severity Level 1 (Lowest)	5.765	5.167	4.644	4.023	4.005
Term * Severity Level 5 (Highest)	81.884	80.752	80.438	79.915	79.909
Term * Severity Level 4	16.190	15.254	14.803	14.170	14.158
Term * Severity Level 3	5.770	5.207	4.688	4.061	4.041
Term * Severity Level 2	3.712	3.231	2.707	2.109	2.092
Term * Severity Level 1 (Lowest)	1.968	1.597	1.135	0.784	0.776
Age1 * Severity Level 5 (Highest)	69.391	68.741	68.568	68.287	68.284
Age1 * Severity Level 4	12.653	12.170	11.942	11.641	11.635
Age1 * Severity Level 3	2.829	2.569	2.374	2.179	2.174
Age1 * Severity Level 2	1.855	1.628	1.423	1.216	1.210
Age1 * Severity Level 1 (Lowest)	0.581	0.487	0.431	0.394	0.393
Age 0 Male	0.604	0.566	0.539	0.475	0.473
Age 1 Male	0.090	0.076	0.060	0.042	0.041

TABLE 5: HHS HCCs Included in Infant Model Maturity Categories

Maturity Category	HCC/Description
Extremely Immature	Extremely Immature Newborns, Birth weight < 500 Grams
Extremely Immature	Extremely Immature Newborns, Including Birth weight 500-749 Grams
Extremely Immature	Extremely Immature Newborns, Including Birth weight 750-999 Grams
Immature	Premature Newborns, Including Birth weight 1000-1499 Grams
Immature	Premature Newborns, Including Birth weight 1500-1999 Grams
Premature/Multiples	Premature Newborns, Including Birth weight 2000-2499 Grams
Premature/Multiples	Other Premature, Low Birth weight, Malnourished, or Multiple Birth Newborns
Term	Term or Post-Term Singleton Newborn, Normal or High Birth weight
Age 1	All age 1 infants

TABLE 6: HHS HCCs Included in Infant Model Severity Categories

Severity Category	HCC/Description
Severity Level 5 (Highest)	Metastatic Cancer
Severity Level 5	Pancreas Transplant Status
Severity Level 5	Liver Transplant Status/Complications
Severity Level 5	Intestine Transplant Status/Complications
Severity Level 5	Peritonitis/Gastrointestinal Perforation/Necrotizing Enterocolitis
Severity Level 5	Respirator Dependence/Tracheostomy Status
Severity Level 5	Heart Assistive Device/Artificial Heart
Severity Level 5	Heart Transplant Status/Complications
Severity Level 5	Heart Failure
Severity Level 5	Hypoplastic Left Heart Syndrome and Other Severe Congenital Heart Disorders
Severity Level 5	Lung Transplant Status/Complications
Severity Level 5	Kidney Transplant Status/Complications
Severity Level 5	End Stage Renal Disease
Severity Level 5	Stem Cell, Including Bone Marrow, Transplant Status/Complications
Severity Level 4	Septicemia, Sepsis, Systemic Inflammatory Response Syndrome/Shock
Severity Level 4	Lung, Brain, and Other Severe Cancers, Including Pediatric Acute Lymphoid Leukemia
Severity Level 4	Mucopolysaccharidosis
Severity Level 4	Adrenal, Pituitary, and Other Significant Endocrine Disorders
Severity Level 4	Acute Liver Failure/Disease, Including Neonatal Hepatitis
Severity Level 4	Chronic Liver Failure/End-Stage Liver Disorders
Severity Level 4	Major Congenital Anomalies of Diaphragm, Abdominal Wall, and Esophagus, Age < 2
Severity Level 4	Myelodysplastic Syndromes and Myelofibrosis
Severity Level 4	Aplastic Anemia
Severity Level 4	Combined and Other Severe Immunodeficiencies
Severity Level 4	Traumatic Complete Lesion Cervical Spinal Cord
Severity Level 4	Quadriplegia
Severity Level 4	Amyotrophic Lateral Sclerosis and Other Anterior Horn Cell Disease
Severity Level 4	Quadriplegic Cerebral Palsy
Severity Level 4	Myasthenia Gravis/Myoneural Disorders and Guillain-Barre Syndrome/Inflammatory and Toxic Neuropathy
Severity Level 4	Nontraumatic Coma, Except Diabetic, Hepatic, or Hypoglycemic; Nontraumatic Brain Compression/Anoxic Damage ^a
Severity Level 4	Respiratory Arrest
Severity Level 4	Cardio-Respiratory Failure and Shock, Including Respiratory Distress Syndromes
Severity Level 4	Acute Myocardial Infarction

Severity Category	HCC/Description
Severity Level 4	Heart Infection/Inflammation, Except Rheumatic
Severity Level 4	Major Congenital Heart/Circulatory Disorders
Severity Level 4	Intracranial Hemorrhage
Severity Level 4	Ischemic or Unspecified Stroke
Severity Level 4	Vascular Disease with Complications
Severity Level 4	Pulmonary Embolism and Deep Vein Thrombosis
Severity Level 4	Aspiration and Specified Bacterial Pneumonias and Other Severe Lung Infections
Severity Level 4	Chronic Kidney Disease, Stage 5
Severity Level 4	Artificial Openings for Feeding or Elimination
Severity Level 3	HIV/AIDS
Severity Level 3	Central Nervous System Infections, Except Viral Meningitis
Severity Level 3	Opportunistic Infections
Severity Level 3	Non-Hodgkin Lymphomas and Other Cancers and Tumors
Severity Level 3	Colorectal, Breast (Age < 50), Kidney and Other Cancers
Severity Level 3	Breast (Age 50+) and Prostate Cancer, Benign/Uncertain Brain Tumors, and Other Cancers and Tumors
Severity Level 3	Lipidoses and Glycogenosis
Severity Level 3	Intestinal Obstruction
Severity Level 3	Necrotizing Fasciitis
Severity Level 3	Bone/Joint/Muscle Infections/Necrosis
Severity Level 3	Osteogenesis Imperfecta and Other Osteodystrophies
Severity Level 3	Cleft Lip/Cleft Palate
Severity Level 3	Hemophilia
Severity Level 3	Sickle Cell Anemia (Hb-SS) and Thalassemia Beta Zero ^b
Severity Level 3	Disorders of the Immune Mechanism
Severity Level 3	Coagulation Defects and Other Specified Hematological Disorders
Severity Level 3	Drug Use with Psychotic Complications
Severity Level 3	Drug Use Disorder, Moderate/Severe, or Drug Use with Non-Psychotic Complications
Severity Level 3	Alcohol Use with Psychotic Complications
Severity Level 3	Alcohol Use Disorder, Moderate/Severe, or Alcohol Use with Specified Non-Psychotic Complications
Severity Level 3	Prader-Willi, Patau, Edwards, and Autosomal Deletion Syndromes
Severity Level 3	Traumatic Complete Lesion Dorsal Spinal Cord
Severity Level 3	Paraplegia
Severity Level 3	Spinal Cord Disorders/Injuries
Severity Level 3	Cerebral Palsy, Except Quadriplegic
Severity Level 3	Spina Bifida and Other Brain/Spinal/Nervous System Congenital Anomalies
Severity Level 3	Muscular Dystrophy
Severity Level 3	Parkinson's, Huntington's, and Spinocerebellar Disease, and Other Neurodegenerative Disorders
Severity Level 3	Hydrocephalus
Severity Level 3	Unstable Angina and Other Acute Ischemic Heart Disease
Severity Level 3	Atrial and Ventricular Septal Defects, Patent Ductus Arteriosus, and Other Congenital Heart/Circulatory Disorders
Severity Level 3	Specified Heart Arrhythmias
Severity Level 3	Cerebral Aneurysm and Arteriovenous Malformation
Severity Level 3	Hemiplegia/Hemiparesis
Severity Level 3	Cystic Fibrosis
Severity Level 3	Extensive Third-Degree Burns
Severity Level 3	Severe Head Injury
Severity Level 3	Hip and Pelvic Fractures
Severity Level 3	Vertebral Fractures without Spinal Cord Injury

Severity Category	HCC/Description
Severity Level 2	Viral or Unspecified Meningitis
Severity Level 2	Thyroid Cancer, Melanoma, Neurofibromatosis, and Other Cancers and Tumors
Severity Level 2	Diabetes with Acute Complications
Severity Level 2	Diabetes with Chronic Complications
Severity Level 2	Diabetes without Complication
Severity Level 2	Protein-Calorie Malnutrition
Severity Level 2	Congenital Metabolic Disorders, Not Elsewhere Classified
Severity Level 2	Amyloidosis, Porphyria, and Other Metabolic Disorders
Severity Level 2	Cirrhosis of Liver
Severity Level 2	Chronic Pancreatitis
Severity Level 2	Acute Pancreatitis
Severity Level 2	Inflammatory Bowel Disease
Severity Level 2	Rheumatoid Arthritis and Specified Autoimmune Disorders
Severity Level 2	Systemic Lupus Erythematosus and Other Autoimmune Disorders
Severity Level 2	Congenital/Developmental Skeletal and Connective Tissue Disorders
Severity Level 2	Acquired Hemolytic Anemia, Including Hemolytic Disease of Newborn
Severity Level 2	Sickle-Cell Disorders, Except Sickle-Cell Anemia (Hb-SS) and Thalassemia Beta Zero; Beta Thalassemia Major ^a
Severity Level 2	Down Syndrome, Fragile X, Other Chromosomal Anomalies, and Congenital Malformation Syndromes
Severity Level 2	Seizure Disorders and Convulsions
Severity Level 2	Monoplegia, Other Paralytic Syndromes
Severity Level 2	Atherosclerosis of the Extremities with Ulceration or Gangrene
Severity Level 2	Chronic Obstructive Pulmonary Disease, Including Bronchiectasis
Severity Level 2	Severe Asthma
Severity Level 2	Fibrosis of Lung and Other Lung Disorders
Severity Level 2	Chronic Kidney Disease, Severe (Stage 4)
Severity Level 2	Chronic Ulcer of Skin, Except Pressure
Severity Level 2	Major Skin Burn or Condition
Severity Level 1 (Lowest)	Chronic Viral Hepatitis C
Severity Level 1	Chronic Hepatitis, Except Chronic Viral Hepatitis C
Severity Level 1	Autistic Disorder
Severity Level 1	Pervasive Developmental Disorders, Except Autistic Disorder
Severity Level 1	Multiple Sclerosis
Severity Level 1	Asthma, Except Severe
Severity Level 1	Traumatic Amputations and Amputation Complications
Severity Level 1	Amputation Status, Upper Limb or Lower Limb

a/ Consistent with fiscal year 2024 updates to ICD-10 codes (effective October 1, 2023; see <https://www.cms.gov/medicare/coding-billing/icd-10-codes/2024-icd-10-cm>), we updated the label for HCC 122 from “Coma, Brain Compression/Anoxic Damage” to “Nontraumatic Coma, Except Diabetic, Hepatic, or Hypoglycemic; Nontraumatic Brain Compression/Anoxic Damage.” The specific ICD-10 code update that prompted this label change was the addition of code R402A “Nontraumatic coma due to underlying condition”, which we have mapped to HCC 122. HCC 122 is only assigned to enrollees who do not also have a head injury code, because HCC 223 (Severe Head Injury) captures codes for head injury with loss of consciousness and supersedes HCC 122 in a hierarchy. As such, the scope of HCC 122 is better reflected by the updated label. Because this ICD-10 update is effective October 1, 2023, future releases of the benefit year 2023 and benefit year 2024 DIY software will also reflect the updated label and diagnosis-to-HCC mapping.

b/ For the proposed 2025 benefit year HHS risk adjustment models, we made the following changes to improve the prediction of sickle cell disease costs: we updated mappings for sickle cell disease so that additional diagnosis codes are included in the model (within HCC 71), ungrouped HCCs 70 and 71 in the adult and child models, and reassigned HCC 70 and 71 to a higher severity in the infant models. To reflect these changes, we also relabeled HCC 70 and HCC 71. These updated mapping and HCC label changes parallel the reclassified Medicare Part C V28 CMS-HCCs. See, for example, the Advance Notice of Methodological Changes for Calendar Year (CY) 2024 for Medicare Advantage (MA) Capitation Rates and Part C and Part D Payment Policies (February 1, 2023). <https://www.cms.gov/files/document/2024-advance-notice-pdf.pdf>.

d. Cost-Sharing Reduction Adjustments

We propose to recalibrate the CSR adjustment factors for AI/AN zero cost

sharing and limited cost sharing CSR plan variant enrollees for the 2025 benefit year, and to retain these

proposed AI/AN CSR adjustment factors, if finalized, for all future benefit years unless changed through notice-

and-comment rulemaking. We also propose to maintain the current CSR adjustment factors for silver plan variant enrollees (70 percent, 73 percent, 87 percent, and 94 percent AV plan variants)⁴⁸ for the 2025 benefit year and beyond, unless changed through notice-and-comment rulemaking.

Since the beginning of the HHS-operated risk adjustment program in the 2014 benefit year, we included CSR adjustment factors in the calculations under the State payment transfer formula to account for anticipated increased demand for health care services due to lower cost sharing for CSR enrollees.⁴⁹ At that time, we did not have data available on the individual and small group (including merged) markets' use of services, and therefore, we based the CSR adjustment factors on the available large group market MarketScan® data.⁵⁰ We have proposed and finalized the same CSR adjustment factors since they were first established to maintain stability and certainty for issuers.⁵¹ At the same time, we have continued to study these issues and have explored a range of options to update the CSR adjustments to improve prediction.⁵² Interested parties have also repeatedly requested that HHS re-analyze the CSR adjustment factors and consider making updates.⁵³

Because our prior analysis of the current CSR adjustment factors was based on the extraction and use of national enrollee-level EDGE data

without issuer or geographic markers,⁵⁴ we did not previously have the ability to analyze the distribution of the CSR populations at a more granular level (for example, at the issuer, State or rating area level). However, with policies finalized in the 2023 Payment Notice (87 FR 27241 through 27243) and the 2024 Payment Notice (88 FR 25784 through 25787), we can now extract and use multiple years of enrollee-level EDGE data with plan ID and rating area markers. This allowed for further study of the CSR populations at a more granular level to inform potential proposed changes to these factors, including, for example, whether certain issuers, States, or rating areas have a high percentage of AI/AN enrollment. We have now reconsidered the current CSR adjustment factors using several years of EDGE data available to HHS, including 2021 benefit year enrollee-level EDGE data with plan ID and rating area markers, and analyzed potential changes to the CSR adjustment factors at the State market risk pool level.

Based on further analysis of all CSR adjustment factors, HHS is not proposing changes to the CSR adjustment factors, with the exception of the AI/AN CSR plan variant factors.⁵⁵ Our continued study of these issues found that adjustments to the CSR adjustment factors for AI/AN CSR plan

variant enrollees were needed and would be appropriate. As described in the 2021 Risk Adjustment Technical Paper,⁵⁶ AI/AN CSR plan variant enrollees experienced higher expenditures than non-CSR silver enrollees, which may reflect increased demand associated with enrollee receipt of the AI/AN zero cost sharing or limited cost sharing CSR plan variants or risk characteristics specific to the AI/AN population which are not specifically captured by HCCs or other model factors. Given these findings, we conducted additional analysis using additional benefit years of available enrollee-level EDGE data, including the 2021 benefit year data with the plan ID and rating area markers, and found that AI/AN CSR plan variant enrollees were meaningfully underpredicted in the HHS risk adjustment models. Specifically, we evaluated the predictive accuracy of the current AI/AN CSR plan variant adjustment factors using the risk term PRs in Table 7 to measure the accuracy of the entire risk term (including PLRS, metal IDs, CSR adjustment factors, and geographic cost factors) in predicting plan liability for this cohort, as measured by actual paid PMPM claims. Table 7 shows that in 2021 EDGE data, the risk term PRs demonstrate underprediction for AI/AN zero cost sharing and limited cost sharing bronze plan variants under the CSR adjustment factors for the 2024 benefit year relative to the proposed CSR adjustment factors for the 2025 benefit year and beyond.⁵⁷ The risk term PRs demonstrate similar underprediction for AI/AN zero cost sharing and limited cost sharing bronze plan variants in other EDGE data years.⁵⁸

⁴⁸ See 83 FR 16930 at 16953; 84 FR 17478 through 17479; 85 FR 29190; 86 FR 24181; 87 FR 27235 through 27236; and 88 FR 25772 through 25774.

⁴⁹ 78 FR 15410 at 15421 through 15422.

⁵⁰ See 77 FR 73117 at 73127 and 78 FR 15410 at 15419 through 15420. See also HHS-Operated Risk Adjustment Technical Paper on Possible Model Changes. (2021, October 26). CMS. <https://www.cms.gov/files/document/2021-ra-technical-paper.pdf>. Section A.3.1.

⁵¹ See 83 FR 16930 at 16953; 84 FR 17478 through 17479; 85 FR 29190; 86 FR 24181; 87 FR 27235 through 27236; and 88 FR 25772 through 25774.

⁵² See, for example, the 2024 Payment Notice, 88 FR 25772–25774. Also see Appendix A, HHS-Operated Risk Adjustment Technical Paper on Possible Model Changes. (2021, October 26). CMS. <https://www.cms.gov/files/document/2021-ra-technical-paper.pdf>.

⁵³ Id.

⁵⁴ The 2021 Risk Adjustment Technical Paper provided initial analysis on the CSR adjustment factors and their performance with the geographical indicators. See Appendix A, HHS-Operated Risk Adjustment Technical Paper on Possible Model Changes. (2021, October 26). CMS. <https://www.cms.gov/files/document/2021-ra-technical-paper.pdf>.

⁵⁵ In the 2021 Risk Adjustment Technical Paper, we concluded that, in aggregate, most of the current CSR adjustment factors contribute to a reasonable prediction of what plans are paying for CSR enrollees, with the exception of CSR adjustment factors for AI/AN enrollees. Our continued study of these issues, including the more recent analysis of 2021 benefit year data, affirmed these initial conclusions. Therefore, we propose in this rulemaking to update the CSR adjustment factors for AI/AN zero-cost sharing and limited cost sharing plan variants and propose to maintain the existing CSR adjustment factors for other enrollees. See Appendix A, HHS-Operated Risk Adjustment Technical Paper on Possible Model Changes. (2021, October 26). CMS. <https://www.cms.gov/files/document/2021-ra-technical-paper.pdf>.

⁵⁶ HHS-Operated Risk Adjustment Technical Paper on Possible Model Changes. (2021, October 26). CMS. <https://www.cms.gov/files/document/2021-ra-technical-paper.pdf>.

⁵⁷ Almost 90 percent of total billable member months in AI/AN zero-cost sharing and limited cost sharing CSR plan variants are in bronze plans.

⁵⁸ HHS-Operated Risk Adjustment Technical Paper on Possible Model Changes. (2021, October 26). CMS. <https://www.cms.gov/files/document/2021-ra-technical-paper.pdf>.

TABLE 7: Risk Term Predictive Ratios, Simulated for the 2021 Risk Adjustment Models Using 2021 EDGE Data

Metal Level & CSR Plan Variant	Total Enrollment Months	Risk Term PRs - AI/AN CSR Adjustment Factors for Benefit Year 2021	Risk Term PRs – Proposed AI/AN CSR Adjustment Factors for Benefit Year 2025 and Beyond, as Applied to the 2021 Risk Adjustment Models
Bronze, American Indian/Alaska Native, Zero Cost Sharing	537,986	0.78	0.98
Bronze, American Indian/Alaska Native, Limited Cost Sharing	73,265	0.93	0.95

To address concerns about the observed underprediction among AI/AN CSR plan variant enrollees, we propose to update the CSR adjustment factors for AI/AN zero-cost sharing and limited cost sharing plan variants and use the proposed factors for these enrollees as

shown in Table 8. We recalibrated these factors such that the risk term PRs for each CSR plan variant category equals 1.00 (accurate prediction⁵⁹) but constrained each CSR adjustment factor so that no CSR adjustment factor would be less than 1.00 to avoid creating

incentives for issuers to avoid enrolling AI/AN CSR recipients. As shown in Table 7, the risk term PRs were demonstrated through simulation to improve under the proposed AI/AN CSR adjustment factors for the zero-cost sharing and limited cost sharing plans.

TABLE 8: Proposed CSR Adjustment Factors for the 2025 Benefit Year and Beyond

Plan AV	Current Adjustment Factors for the 2024 Benefit Year	Proposed Adjustment Factors for the 2025 Benefit Year and Beyond
Silver Plan Variant Recipients (and Enrollees in State wrap-around or Medicaid-expansion plans of any metal level, as applicable)		
Plan Variation 94%	1.12	1.12
Plan Variation 87%	1.12	1.12
Plan Variation 73%	1.00	1.00
Standard Plan 70%	1.00	1.00
Zero Cost Sharing Plan Variant Recipients (that is, AI/AN Recipients)		
Platinum (90%)	1.00	1.31
Gold (80%)	1.07	1.39
Silver (70%)	1.12	1.46
Bronze (60%)	1.15	1.51
Limited Cost Sharing Plan Variant Recipients (that is, AI/AN Recipients)		
Platinum (90%)	1.00	1.04
Gold (80%)	1.07	1.10
Silver (70%)	1.12	1.15
Bronze (60%)	1.15	1.19

We believe that these proposed changes to AI/AN CSR adjustment factors are important to our efforts to continuously improve the HHS risk adjustment models with incremental changes to improve model prediction by updating the AI/AN adjustment factors to more accurately predict plan liability

for this subpopulation. We also believe that these proposed changes would increase the incentives for issuers to engage the AI/AN population, whose communities have been historically underserved and who face significant health disparities. We also believe this proposed change would help advance

the agency's health equity goals and align with the policy objectives in the January 20, 2021 Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.⁶⁰

⁵⁹ A subpopulation that is predicted perfectly would have a PR of 1.0.

⁶⁰ 86 FR 7009.

We also propose to retain the proposed 2025 benefit year CSR adjustment factors, if finalized, for future benefit years (that is, the 2026 benefit year and beyond)⁶¹ unless changed through notice-and-comment rulemaking. Although we could analyze and consider potential updates to the CSR adjustment factors every year as part of the annual recalibration of the HHS risk adjustment models, we have found that the implied CSR adjustment factors calculated from 2018 through 2022 plan data were stable across each year of data. We also want to balance our approach to making changes as part of the annual recalibration of the HHS risk adjustment models in future benefit years with the desire to maintain stability and predictability for issuers. With the proposed changes to the AI/AN CSR adjustment factors, we believe the models would better predict risk for AI/AN CSR plan variant enrollees such that we do not expect to update the CSR factors on an annual basis.⁶² However, if we were to pursue changes to any of the CSR adjustment factors in future benefit years, we would propose those updates through notice-and-comment rulemaking.

Lastly, separate from the proposal pertaining to AI/AN CSR adjustment factors, we note that for all plan liability risk score calculations under the State payment transfer formula, we use the CSR adjustment factors that align with the AV of the applicable plan for the enrollee. Thus, for unique State-specific plans, we apply the CSR adjustment factors that correspond to each plan's AV. Specifically, when we identify unique State-specific plans that have higher plan liability than the standard plan variants, we utilize the corresponding CSR adjustment factor in the plan liability risk score calculation that maps to the plan's AV. For example, we use a CSR adjustment factor of 1.12 for all Massachusetts wrap-around plans with AVs above 94 percent in the plan liability risk score

calculation.^{63 64} This approach does not apply in the case of States whose State-specific plans take the form of Medicaid expansion plans offered on the Exchange (for example, Arkansas), because these plans are identical in all their parameters, including AV and degree of plan liability, to other plans offered on the Exchange in those States and are differentiated from their comparable plans only in eligibility criteria and sources of funding.⁶⁵ As we identify unique State-specific plans that have higher plan liability than the standard plan variants, such as those in Massachusetts, we work with the relevant State Department of Insurance and other relevant State institutions to identify the applicable CSR adjustment

⁶³ See, for example, 81 FR 12203 at 12228, 85 FR 29164 at 29190 and 29191, and 88 FR 25740 at 25772 through 25774.

⁶⁴ Massachusetts Cost Sharing Subsidies in ConnectorCare: Design, Administration, and Impact (2021 Aug.). <https://www.mahealthconnector.org/wp-content/uploads/MA-Cost-Sharing-Subsidies-in-ConnectorCare-Brief-083021.pdf>.

⁶⁵ The structure of wrap-around plans in some States, such as Massachusetts, differs from the coverage in States who offer Medicaid expansion plans on the Exchange. For example, in Massachusetts, the higher cost sharing wrap-around plans are variations of lower cost sharing plans. As such, the Massachusetts wrap-around plans do not have the same AVs as their comparable plans. That is why we use a CSR adjustment factor of 1.12 for all Massachusetts wrap-around plans with AVs above 94 percent. In contrast, in Arkansas, its Medicaid expansion plans are identical to other 94 percent and 100 percent AV CSR plan variants offered on the Exchange and are distinguished from these identical plans only in their sources of funding and eligibility criteria. As such, we presently direct issuers in Arkansas who provide Medicaid expansion plans with AVs of 94 percent and 100 percent to use specified plan variant codes for their Medicaid expansion plans only to differentiate the sources of funding and to differentiate between populations eligible for the Medicaid expansion plans from those who are eligible for standard 94 percent and 100 percent AV CSR plan variants. Because the Arkansas Medicaid expansion plans are identical to other 94 percent and 100 percent AV CSR plan variants available in Arkansas and therefore have the same AVs, we would use the proposed CSR adjustment factor of 1.12 for Arkansas 94 percent AV Medicaid-expansion plans and the proposed CSR adjustment factor that corresponds to the silver metal level zero cost sharing variants (that is, the proposed 1.46 CSR adjustment factor for zero cost sharing variants) for Arkansas 100 percent AV Medicaid-expansion plans in the plan liability risk score calculation. See CMS approval of Arkansas's section 1115(a) demonstration, "Arkansas Health and Opportunity for Me." <https://www.medicare.gov/sites/default/files/2021-12/ar-arhome-ca.pdf>.

factor that corresponds to the unique State-specific plan's AV.⁶⁶ We would continue to follow this approach, working with the State to identify the applicable CSR adjustment factor that corresponds to that State's unique State-specific plan's AV, unless changed through notice-and-comment rulemaking.

We seek comment on these proposals.

e. Model Performance Statistics

Each benefit year, to evaluate the HHS risk adjustment model performance, we examine each model's R-squared statistic and predictive ratios (PRs). The R-squared statistic, which calculates the percentage of individual variation explained by a model, measures the predictive accuracy of the model overall. The PR for each of the HHS risk adjustment models is the ratio of the weighted mean predicted plan liability for the model sample population to the weighted mean actual plan liability for the model sample population. The PR represents how well the model does on average at predicting plan liability for that subpopulation.

A subpopulation that is predicted perfectly would have a PR of 1.0. For each of the current and proposed HHS risk adjustment models, the R-squared statistic and the PRs are in the range of published estimates for concurrent HHS risk adjustment models.⁶⁷ Because we propose to blend the coefficients from separately solved models based on the 2019, 2020, and 2021 benefit years' enrollee-level EDGE data, we are publishing the R-squared statistic for each model separately to verify their statistical validity. The R-squared statistics for the proposed 2025 benefit models are shown in Table 9.

⁶⁶ For a list of the unique State-specific CSR levels that have higher plan liability than the standard plan variants, for which we utilize the corresponding CSR adjustment factor that maps to the plan's AV, refer to the applicable benefit year's DIY Software on the CMS website. See, for example, the Draft 2023 Benefit Year DIY Software on the CMS website (August 22, 2023). <https://www.cms.gov/files/document/cy2023-diy-instructions-08222023.pdf>.

⁶⁷ Hileman, G., & Steele, S. (2016). Accuracy of Claims-Based Risk Scoring Models. Society of Actuaries. <https://www.soa.org/4937b5/globalassets/assets/files/research/research-2016-accuracy-claims-based-risk-scoring-models.pdf>.

⁶¹ This includes the CSR adjustment factors in Table 8.

⁶² As outlined previously in this rule, the proposed changes to the CSR adjustment factors focus on the AI/AN CSR plan variants because our analysis found the CSR adjustment factors for other enrollees to be adequate.

TABLE 9: R-Squared Statistic for the Proposed 2025 HHS Risk Adjustment Models

Models	2019 Enrollee-Level EDGE Data	2020 Enrollee-Level EDGE Data	2021 Enrollee-Level EDGE Data
Platinum Adult	0.4448	0.4360	0.4174
Gold Adult	0.4394	0.4302	0.4118
Silver Adult	0.4371	0.4278	0.4094
Bronze Adult	0.4330	0.4236	0.4051
Catastrophic Adult	0.4329	0.4236	0.4051
Platinum Child	0.3569	0.3436	0.3539
Gold Child	0.3541	0.3404	0.3511
Silver Child	0.3522	0.3383	0.3491
Bronze Child	0.3491	0.3351	0.3459
Catastrophic Child	0.3490	0.3350	0.3458
Platinum Infant	0.3165	0.2913	0.3059
Gold Infant	0.3133	0.2878	0.3025
Silver Infant	0.3122	0.2865	0.3012
Bronze Infant	0.3101	0.2842	0.2989
Catastrophic Infant	0.3101	0.2842	0.2989

3. Overview of the HHS Risk Adjustment Methodology (§ 153.320)

In part 2 of the 2022 Payment Notice (86 FR 24183 through 24186), we finalized the proposal to continue to use the State payment transfer formula finalized in the 2021 Payment Notice for the 2022 benefit year and beyond, unless changed through notice-and-comment rulemaking. We explained that under this approach, we will no longer republish these formulas in future annual HHS notice of benefit and payment parameter rules unless changes are being proposed. We are not proposing any changes to the formula in this rule, and therefore, are not republishing the formulas in this rule. We therefore would continue to apply the formula as finalized in the 2021 Payment Notice (86 FR 24183 through 24186)⁶⁸ in the States where HHS operates the risk adjustment program in the 2025 benefit year. Additionally, as finalized in the 2020 Payment Notice (84 FR 17466 through 17468), we will maintain the high-cost risk pool parameters for the 2020 benefit year and beyond, unless amended through notice-and-comment rulemaking. We are not proposing any changes to the high-cost risk pool parameters for the 2025 benefit year; therefore, we would maintain the \$1 million threshold and 60 percent coinsurance rate.⁶⁹

4. HHS Risk Adjustment User Fee for the 2025 Benefit Year (§ 153.610(f))

We propose an HHS risk adjustment user fee for the 2025 benefit year of \$0.20 PMPM. Under § 153.310, if a State

is not approved to operate, or chooses to forgo operating, its own risk adjustment program, HHS will operate risk adjustment on its behalf. For the 2025 benefit year, HHS will operate risk adjustment in every State and the District of Columbia. As described in the 2014 Payment Notice (78 FR 15416 through 15417), HHS' operation of risk adjustment on behalf of States is funded through a risk adjustment user fee. 45 CFR 153.610(f)(2) provides that, where HHS operates a risk adjustment program on behalf of a State, an issuer of a risk adjustment covered plan must remit a user fee to HHS equal to the product of its monthly billable member enrollment in the plan and the PMPM risk adjustment user fee specified in the annual HHS notice of benefit and payment parameters for the applicable benefit year.

OMB Circular No. A-25 established Federal policy regarding user fees, and specifies that a user charge will be assessed against each identifiable recipient for special benefits derived from Federal activities beyond those received by the general public.⁷⁰ The HHS-operated risk adjustment program provides special benefits as defined in section 6(a)(1)(B) of OMB Circular No. A-25 to issuers of risk adjustment covered plans because it mitigates the financial instability associated with potential adverse risk selection.⁷¹ The HHS-operated risk adjustment program also contributes to consumer confidence in the health insurance industry by helping to stabilize premiums across the

individual, merged, and small group markets.

In the 2024 Payment Notice (88 FR 25740), we calculated the Federal administrative expenses of operating the HHS risk adjustment program for the 2024 benefit year to result in a risk adjustment user fee rate of \$0.21 PMPM based on our estimated costs for HHS risk adjustment operations and estimated Billable Member Months (BMM) for individuals enrolled in risk adjustment covered plans. For the 2025 benefit year, HHS proposes to use the same methodology to estimate our administrative expenses to operate the HHS risk adjustment program. These costs cover development of the models and methodology, collections, payments, account management, data collection, data validation, program integrity and audit functions, operational and fraud analytics, interested parties training, operational support, and administrative and personnel costs dedicated to HHS-operated risk adjustment program activities. To calculate the HHS risk adjustment user fee, we divided HHS' projected total costs for administering the HHS risk adjustment program on behalf of States by the expected number of BMM in risk adjustment covered plans in States where the HHS-operated risk adjustment program will apply in the 2025 benefit year.

We estimate that the total cost for HHS to operate the risk adjustment program on behalf of States for the 2025 benefit year will be approximately \$65 million, which is more than the approximately \$60 million estimated for the 2024 benefit year. We are projecting increased costs due to increased

⁶⁸ Discussion provided an illustration and further details on the State payment transfer formula.

⁶⁹ See 81 FR 94081. See also 84 FR 17467.

⁷⁰ See Circular No. A-25 Revised. <https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-025.pdf>.

⁷¹ Id.

contracting costs combined with increased labor costs.

We also project higher enrollment than our prior estimates in the 2024 and 2025 benefit years based on the increased enrollment, as measured by BMM, between the 2021 and 2022 benefit years in the individual non-catastrophic market risk pool in most States, likely due to the increased PTC subsidies provided for in the American Rescue Plan Act of 2021 (ARP).^{72 73} In light of the passage of the Inflation Reduction Act of 2022 (IRA), in which section 12001 extended the enhanced PTC subsidies in section 9661 of the ARP through the 2025 benefit year, we project there will continue to be increased enrollment levels through the 2025 benefit year.⁷⁴ Because we project an increased budget to operate the HHS-operated risk adjustment program and estimated higher enrollment through the end of the 2025 benefit year, we propose a HHS risk adjustment user fee of \$0.20 PMPM for the 2025 benefit year.

We seek comment on the proposed HHS risk adjustment user fee for the 2025 benefit year.

5. Audits and Compliance Reviews of Risk Adjustment Covered Plans (§ 153.620(c))

We propose amending § 153.620(c)(4) to require issuers of risk adjustment covered plans to complete, implement, and provide to HHS written documentation of any corrective action plans when required by HHS if a high-cost risk pool audit results in the inclusion of a finding⁷⁵ or certain observations⁷⁶ in the final audit report.

Currently, under § 153.620(c)(4), the completion, implementation, and submission of documentation of a corrective action plan to HHS is only required if the audit results in the inclusion of a finding in the final audit report. Upon completion of the first benefit year of high-cost risk pool audits (2018 benefit year audits), HHS found that some issuers of risk adjustment covered plans made data submission errors to their EDGE servers that constituted instances of noncompliance but did not result in a financial impact and were therefore only recorded as observations in the final audit report. For example, many issuers failed to provide adequate documentation of their policies and procedures that demonstrate that they are in compliance with the data submission requirements for the HHS-operated risk adjustment program, such as the applicable benefit year's EDGE Server Business Rules.⁷⁷ While such instances of noncompliance did not cause a financial impact, and therefore were not identified as audit findings, fully compliant policies and procedures, and documentation thereof, are critical to ensuring issuer adherence to HHS requirements and the submission of accurate data to an issuer's EDGE server.

Furthermore, in these situations, noncompliance may result from unintentional negligence where issuers lack proper documentation or the ability to locate data due to improper record maintenance and retention procedures. In these cases, the accuracy of the issuer's EDGE data may still be impacted, as EDGE claims data submission is incremental. For example, if an issuer identified an error in one file that does not have a financial impact and subsequently corrects the error in that file only during the submission period, but does not perform an impact analysis to review the accuracy of all claims file submissions and correct all claims file submissions that included the same error, the issuer's EDGE data will be incorrect even though there may be no financial impact with respect to the calculation of HHS risk adjustment State transfers or high-cost risk pool amounts. However, since enrollee-level

data that HHS extracts from issuers' EDGE servers is also used for HHS risk adjustment model recalibration, updates to the AV methodology and calculator, and other analyses for the commercial individual and small group market HHS programs and other Federal HHS related programs (for example, Medicaid expansion QHP population and non-Federal governmental plans),⁷⁸ it is important that issuers of risk adjustment covered plans also take corrective action to address instances of noncompliance, including those that result from audit findings and audit observations, to ensure that all instances of noncompliance identified through audits do not result in unaddressed material impact to the enrollee-level data that HHS extracts from issuers' EDGE servers and are not repeated in future benefit year data submissions. As § 155.620(c)(4) currently only requires corrective action plans for findings, instances of noncompliance that result in audit observations may be unaddressed by issuers. We are concerned that allowing these instances of noncompliance to be unaddressed may impact EDGE data integrity in future benefit years, and by requiring these corrective action plans, we also intend to help prevent EDGE data discrepancies in the future.

For these reasons, HHS is proposing to require corrective action plans for observations identified through HHS risk adjustment (including high-cost risk pool) audits when there is evidence of non-compliance with applicable Federal requirements if required by HHS to improve program and data integrity for accurate data submissions to issuer EDGE servers. HHS would communicate to the issuer, as part of the final audit report, which findings and observations require corrective action. Under this proposal, consistent with the existing framework in § 155.620(c)(4), HHS would require an issuer of a risk adjustment covered plan to provide, within 45 calendar days of the issuance of the final audit report, a written corrective action plan for any audit findings, as well as audit observations when there is evidence of non-compliance with applicable Federal requirements, to HHS for approval, implement that plan, and provide to HHS written documentation of the corrective actions taken to resolve the root cause of the noncompliance identified. This is the same timeline and framework that currently applies to corrective action plans that are required as a result of findings included in the

⁷² ARP, Public Law 117–2 (2021).

⁷³ CMS, (2023, June 30). Summary Report on Permanent Risk Adjustment Transfers for the 2022 Benefit Year. (p. 8). <https://www.cms.gov/files/document/summary-report-permanent-risk-adjustment-transfers-2022-benefit-year.pdf>.

⁷⁴ Inflation Reduction Act, Public Law 1217–169 (2022).

⁷⁵ In the context of high-cost risk pool audits, a “finding” results from cases of confirmed non-compliance or discovery of evidence suggesting noncompliance with applicable Federal requirements related to high-cost risk pool payments, which require a recoupment of these payments. Centers for Medicare & Medicaid Services, Center for Consumer Information and Insurance Oversight (CCIIO). (Dec. 2022). Best Practices Overview: Benefit Year (BY) 2018 HCRP Payment Audits and General EDGE Server Requirements. https://regtap.cms.gov/reg_library_openfile.php?id=4234&type=1 (Login Required).

⁷⁶ In the context of high-cost risk pool audits, an “observation” results from the identification of areas for improvement when there is no evidence of actual non-compliance with applicable Federal requirements or when there may be evidence of non-compliance with applicable Federal requirements that does not require recoupment of these payments. Centers for Medicare & Medicaid Services, Center for Consumer Information and Insurance Oversight (CCIIO). (Dec. 2022). Best

Practices Overview: Benefit Year (BY) 2018 HCRP Payment Audits and General EDGE Server Requirements. https://regtap.cms.gov/reg_library_openfile.php?id=4234&type=1 (Login Required). This proposal is limited to observations where there may be evidence of non-compliance with applicable Federal requirements.

⁷⁷ Centers for Medicare & Medicaid Services, Center for Consumer Information and Insurance Oversight (CCIIO). (Nov. 2022). *EDGE Server Business Rules (ESBR) Version 22.0*. https://regtap.cms.gov/reg_library_openfile.php?id=3765&type=1 (Login Required).

⁷⁸ See, for example, 84 FR at 17488 and 87 FR at 27243.

final audit report.⁷⁹ We propose that this change would be applicable beginning with 2020 benefit year audits, which we anticipate beginning in early 2024.⁸⁰

We seek comment on this proposal.

D. 45 CFR Part 155—Exchange Establishment Standards and Other Related Standards

1. Approval of a State Exchange (§ 155.105)

We propose to amend § 155.105(b) to require that, in addition to meeting all other approval standards under § 155.105(b), a State seeking to operate a State Exchange must first operate a State-based Exchange using the Federal platform (SBE-FP), meeting all requirements under § 155.200(f), for at least one plan year, including its open enrollment period. This proposal is intended to give States sufficient time to create, staff, and structure a State Exchange that could transition to operating its own platform and establish relationships with interested parties critical to a State Exchange's success in operating a Navigator and consumer outreach program, assuming plan management responsibilities, and communicating effectively with consumers to support enrollment and avoid health care coverage gaps.

Sections 1311(b) and 1321(b) of the Affordable Care Act (ACA) allow States to elect to operate their own health insurance Exchanges to provide individuals and employers with health insurance coverage. Section 1321(a)(1)(A) of the ACA directs the Secretary to issue regulations setting standards with respect to the establishment and operation of those Exchanges. Section 155.106 describes different Exchange models that States may utilize. A State's choice of model may depend on the State's specific needs. State Exchanges offer States the ability to maintain more authority over policy and operational decisions, including health insurance issuer relationships, plan certification, and consumer assistance. However, building and maintaining a consumer-oriented, technology-driven marketplace platform requires extensive start-up resources, as well as investment of time and resources in the establishment of relationships with consumers, consumer assisters, partners in the coordination of

eligibility functions, issuers, and other interested parties.

To encourage more State authority over Exchange functions, we provided States with the flexibility to operate a State Exchange while relying on the Federally-facilitated Exchange (FFE) eligibility enrollment technology and infrastructure (known as the "Federal platform") to perform certain Exchange functions. Specifically, as finalized in the 2017 Payment Notice (81 FR 12244 through 12246), the SBE-FP model allows States to maintain their Exchange's legal status as a State Exchange while relying on the Federal platform to perform eligibility and enrollment functions and associated consumer call center and casework functions. Under the SBE-FP model, States retain authority and primary responsibility for plan management functions, including QHP certification, and consumer support functions, such as operating an informational website and toll-free telephone hotline. Under this model, States are also primarily responsible for operating a Navigator program. We charge issuers on the SBE-FPs a user fee calculated as a percentage of the user fee charged to issuers on the FFEs. HHS' Payment Notice final rules set forth the user fee for issuers participating in SBE-FPs every year. SBE-FPs may assess an additional State-level user fee on issuers for the purposes of operating the Exchanges. For Plan Year 2023, three States operated Exchanges under the SBE-FP model.

Over the past several years, we have observed the benefits of States first operating an SBE-FP for at least one plan year prior to transitioning fully from an FFE to a State Exchange. Operating an SBE-FP for at least one plan year, including its open enrollment period, prior to transitioning to a State Exchange gives States an opportunity to focus on investing time and resources needed to implement key Exchange functions that involve the establishment of critical and necessary relationships with consumers, consumer assisters, partners in the coordination of eligibility functions, issuers, and other interested parties. Operating an SBE-FP for at least one plan year prior to transitioning to a State Exchange also affords States time to implement eligibility and enrollment functions which require information technology platforms, call centers, and coordination with partners, such as State Medicaid agencies. In addition, operating an SBE-FP for at least one plan year prior to transitioning to a State Exchange gives States more time to engage with partners and interested parties to develop various consumer-facing content and

consumer outreach strategies, all while establishing and gaining experience operating a consumer assistance program. Further, when States operate an SBE-FP for at least one plan year before operating a State Exchange, they are more likely to have the time and resources needed to coordinate with the State Department of Insurance to establish policies and procedures associated with carrying out plan management functions, engage with the issuer community, and develop QHP certification requirements and processes. Finally, operating an SBE-FP for at least one plan year before transitioning to a State Exchange allows States time to familiarize consumers, consumer assisters, partners in the coordination of eligibility functions, issuers, and other interested parties with operations of the new State Exchange organization ahead of engaging with that Exchange, and it mitigates the risks and disruption associated with a transition to a State Exchange and simultaneous replacement of *HealthCare.gov* as the eligibility and enrollment pathway for those parties.

We propose to amend § 155.105(b)(4) to require that a State seeking to operate a State Exchange must first operate an SBE-FP for at least one plan year, including its first open enrollment period, for the reasons explained previously in this section.

We seek comment on this proposal, including the duration of time that a State must operate an SBE-FP prior to transitioning to a State Exchange.

2. Election To Operate an Exchange After 2014 (§ 155.106)

We propose changes to the Exchange Blueprint (OMB control number: 0938-1172) requirements for States seeking to operate a State Exchange. At § 155.106(a)(2), we propose to add that, as part of a State's activities for its establishment of a State Exchange, we would require that the State provide supporting documentation demonstrating progress toward meeting State Exchange Blueprint requirements, or documentation that details a State's plans for how it intends to implement and meet the Exchange functional requirements as laid out in the State Exchange Blueprint. This could include a State submitting detailed plans regarding its State Exchange consumer assistance programs and activities, such as information on its direct-to-consumer outreach plans, for HHS to assess comparability to the FFEs' consumer assistance programs and activities while allowing for State flexibility in its approach to best serve the State's

⁷⁹ See 45 CFR 153.620(c)(4). Also see 86 FR at 24192 through 24194.

⁸⁰ If 2020 benefit year audits begin in early 2024, we anticipate the final audit reports would be completed, with findings and observations identified, in late 2024.

consumers. Over the past few years, several States have transitioned off the Federal platform to establish and operate State Exchanges. In our experience providing technical assistance and oversight to States that are establishing State Exchanges, we have observed that requesting additional detail from States on various aspects of their State Exchange implementation plans is imperative to a successful establishment of a State Exchange. Ultimately, we seek to support the establishment of a successful State Exchange, and the ability to request additional detail on a State's State Exchange implementation plans is crucial to identifying areas the State may need to reconsider or further develop.

The current State Exchange Blueprint Application provides that we may require live demonstrations of Exchange functionality on the State Exchange's platform, and/or supporting documentation from a State, as evidence of its progress toward meeting State Exchange Blueprint Application requirements.⁸¹ We propose to codify in our regulations in order to set a clear expectation for a State establishing a State Exchange that, as part of the State's submission of a State Exchange Blueprint Application, we have the authority to request any evidence we determine necessary for the State to detail its implementation of the required State Exchange functionality. This could include HHS requiring a State to submit detailed plans regarding its State Exchange consumer assistance programs and activities, such as information on its direct outreach plans. We would provide guidance and direction to each State regarding requests for evidence, so that each State understands the purpose of our requests as they relate directly to how the State meets the functional requirements for operating a State Exchange. We would request supporting documentation from States with the goal of imposing minimal burden on States' ability to meet its State Exchange Blueprint requirements, while maintaining the objective that our requests would provide us with the ability to sufficiently assess a State's readiness to operate a State Exchange and ensure that a State is sufficiently implementing and scaling policies, procedures, operations, technology, and administrative capacities to meet the needs of the State's consumers. We

would use the information in a State's Exchange Blueprint Application, as well as any supporting documentation and evidence, to make a determination of whether to grant approval for a State's establishment and operation of a State Exchange for its intended first open enrollment period.

We also propose to add new § 155.106(a)(2)(i) and (ii) to require that when a State submits its State Exchange Blueprint application to HHS for approval, the State must provide the public with notice and a copy of its State Exchange Blueprint application. To facilitate such public notice, HHS would post a State Exchange Blueprint application submitted by a State to its public-facing website within 90 calendar days of receipt. Further, we propose to require that at some point following a State's submission of its State Exchange Blueprint application to HHS, a State must conduct at least one public engagement (such as a townhall meeting or public hearing) in a timeline and manner (for instance, considering whether to conduct in-person and/or virtually) considered effective by the State, with concurrence from HHS, at which interested parties can learn about the State's intent to establish a State Exchange and the State's progress toward executing that transition. We also propose to require that while a State is in the process of establishing a State Exchange and until HHS has approved or conditionally approved the State Exchange Blueprint application, a State must conduct periodic public engagements at which interested parties would continue to learn about the State's progress towards establishing a State Exchange, in a timeline and manner considered effective by the State with concurrence from HHS.

As we explained previously, sections 1311(b) and 1321(b) of the ACA allow States to elect to operate their own health insurance Exchanges to provide individuals and employers with health insurance coverage, and section 1321(a)(1)(A) of the ACA directs the Secretary to issue regulations setting standards with respect to the establishment and operation of those Exchanges. The Exchange Blueprint serves as a vehicle for a State to document its progress toward implementing its intended Exchange operational model. Section 155.106(a)(2) requires States to submit an Exchange Blueprint application for HHS approval at least 15 months prior to the date on which the Exchange proposes to begin open enrollment with a State Exchange. The submission and approval of Exchange Blueprints is an iterative process that generally takes place over

the course of 15 months prior to a State's first open enrollment as a State Exchange. HHS' review and approval of the Exchange Blueprint involves providing substantial technical assistance to States as they design, finalize, and implement their Exchange operations. Further, the establishment of a State Exchange involves significant collaboration between HHS and States to develop plans and document readiness for the State to transition from an Exchange that uses the Federal platform to one that operates its own eligibility and enrollment platform. State activities as part of this transition process include completing key milestones, meeting established deadlines, and implementing contingency measures.

Certain parties, such as consumers or advocate groups, who may be interested in a State's establishment of a State Exchange may not know if a State applied to HHS to establish a State Exchange or is in the process of establishing a State Exchange. A mandatory process whereby States notify the public of their plans to establish State Exchanges and provide an opportunity to meet with interested parties to provide updates would help ensure that interested parties are aware these activities are occurring and can provide input on how States can successfully establish State Exchanges. Based on our experience supporting and providing oversight to States in their establishment of State Exchanges, we believe that States would benefit from having a more transparent process to facilitate input from interested parties, especially given the impacts of a State Exchange transition on interested parties, including consumers and issuers. We believe that for a State to maximize consumer gains following its establishment of a State Exchange, its interested parties, including consumers, must have trust in its State Exchange. Providing opportunities for consumers to learn more about a State's planned State Exchange establishment process and plans can build that trust and help support a State's enrollment goals. We believe that all States that have established a State Exchange since PY 2020 conducted public events, such as town halls or hearings, where State Exchange establishment activities were discussed. States planning to establish State Exchanges could use such public events as opportunities to meet the requirements for public engagements being proposed. Our goal of the proposed changes at § 155.106(a)(2)(ii) is to clearly state, for States who are seeking to establish State Exchanges,

⁸¹ CMS. (2021, November 30). *Blueprint For Approval of State-Based Health Insurance Exchanges, Coverage Years Beginning on or After 2019*. CMS. Section I, p. iii. <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/CMS-Blueprint-Application.pdf>.

our expectations of the States engaging with the public regarding their transition to State Exchanges, thus strengthening the transparency requirements of the State Exchange Blueprint review and approval process. Finally, we believe this proposal would help States that establish State Exchanges meet the consultation requirements with interested parties in § 155.130 during the period when the States are establishing State Exchanges, by formalizing a process whereby States and interested parties communicate about the States' establishment of State Exchanges throughout the transition process.

We seek comment on this proposal, including comments related to additional ways States seeking to establish State Exchanges could provide greater transparency to interested parties, including consumers, regarding the process for establishing State Exchanges.

3. Additional Required Benefits (§ 155.170)

We propose to amend § 155.170(a)(2) to provide that benefits covered in a State's EHB-benchmark plan would not be considered in addition to EHB and thus would not be subject to defrayal by the State beginning with PY 2025.

Section 1311(d)(3)(B) of the ACA permits a State to require QHPs offered in the State to cover benefits in addition to EHB, but requires the State to make payments, either to the individual enrollee or to the issuer on behalf of the enrollee, to defray the cost of these additional State-required benefits.

In the EHB final rule (78 FR 12838), we finalized a standard at § 155.170(a)(2) that specifies that State-required benefits enacted on or before December 31, 2011, even if not effective until a later date, are considered EHB and therefore the costs of these benefits are not required to be defrayed by the State. In the 2017 Payment Notice (81 FR 12242 through 12244), we revised § 155.170(a)(2) to make clear that benefits required by State action taking place on or before December 31, 2011, are considered EHB to reflect that this section applies not only when benefits are mandated through State legislative action but also through regulation, guidance, or other State action. We also amended § 155.170(a)(2) to provide that benefits required after December 31, 2011, are in addition to EHB unless enactment is directly attributable to State compliance with Federal requirements.

Under our current policy, benefits mandated after December 31, 2011, other than for compliance with Federal

requirements, are considered in addition to EHB (and thus not EHB) without regard as to whether the mandated benefits are embedded in the State's EHB-benchmark plan. Specifically, under § 155.170, a State mandate is considered "in addition to EHB" if it: is a State action taken after December 31, 2011;⁸² requires coverage of benefits specific to care, treatment, and services;⁸³ requires QHPs to cover the benefits;⁸⁴ and was not enacted to comply with Federal requirements. As a result, States must defray the associated costs of QHP coverage of such benefits, and those costs may not be included in the percentage of premium attributable to coverage of EHB for purpose of calculating APTC. In addition, because the benefits are not EHB, they are not subject to EHB nondiscrimination rules at § 156.125, the annual limitation on cost sharing at § 156.130, and restrictions on annual or lifetime dollar limits at § 147.126.

In the years since we finalized § 155.170, we have received feedback from States and other interested parties that we should reconsider this provision, including in comments submitted to the EHB RFI that we issued in 2022. This feedback indicates that States struggle to understand and operationalize § 155.170, and that States that seek to mandate coverage of benefits are unintentionally removing EHB protections from benefits already included in the State's EHB-benchmark plan.

Therefore, we propose to amend § 155.170(a)(2) to codify that "a covered benefit in the State's EHB-benchmark plan" is considered an EHB. Under this proposal, there would be no obligation for the State to defray the cost of a State mandate enacted after December 31, 2011, that requires coverage of a benefit covered in the State's EHB-benchmark plan. Benefits that are covered in a State's EHB-benchmark plan would not be considered in addition to EHB and would remain subject to the various rules applicable to the EHB, including the prohibition on discrimination in accordance with § 156.125, limitations on cost sharing in accordance with

§ 156.130, and restrictions on annual or lifetime dollar limits in accordance with § 147.126. We believe that this change would promote consumer protections and facilitate compliance with the defrayal requirement by making the identification of benefits in addition to EHB more intuitive.

Under the proposal, if a State mandates coverage of a benefit that is in its EHB-benchmark plan at the time the mandate is enacted, the benefit would continue to be considered EHB and the State would not have to defray the costs of that mandate. However, if at a future date the State updates its EHB-benchmark plan under § 156.111 and removes the mandated benefit from its EHB-benchmark plan, the State may have to defray the costs of the benefit under the factors set forth at § 155.170 as it would no longer be an EHB after its removal from the EHB-benchmark plan. In addition, starting in PY 2025, a State that is defraying the costs of a benefit required by a mandate that is in addition to EHB under § 155.170 would be permitted to cease defraying the costs of that benefit if the benefit is included in its EHB-benchmark plan or upon updating its EHB-benchmark plan in the future to include such benefit coverage.

We acknowledge that there are States that may have been defraying the costs of benefits under the current policy that would be able to stop defraying those costs if this proposal is finalized. We propose this change to be effective starting in PY 2025 to allow for issuers to make necessary modifications to their plan designs and plan filings to reflect any possible changes in designation of benefits as EHB as a result of this proposal, if finalized. For example, if we finalize this proposal and a State ceases defraying the costs of a State-mandated benefit to issuers because it is covered in its EHB-benchmark plan, issuers should update their plan filings accordingly beginning in PY 2025 to reflect that the benefit is covered as an EHB and should be included in the percentage of premium attributable to coverage of EHB for the purpose of calculating APTC. We also note that those States would not be able to recoup the cost of benefits they have already defrayed. In addition, we acknowledge that the start and end dates of State legislative sessions vary greatly by State, and that this change, if finalized, may occur during State legislative sessions that are considering State actions that would be impacted by the change.

We note that this proposal may impact health plans that are not directly subject to the EHB requirements, such as self-insured group health plans and fully-insured group health plans in the

⁸² EHB Rule (78 FR 12838). A State action can be by statute, regulation, guidance, or other State action. 2017 Payment Notice (81 FR 12242).

⁸³ Requirements related to provider types, cost sharing, benefit delivery methods, or reimbursement methods are not specific to care, treatment, and services. EHB Rule (78 FR 12838).

⁸⁴ If a State action applies to the individual and small group markets, it applies to QHPs; if a State allows for the sale of large group plans as QHPs, a State-mandated benefit for the large group market applies to QHPs. EHB Proposed Rule (77 FR 70647 through 70648) (finalized without modification in the EHB Rule (78 FR 12838)).

large group market that are required to comply with the annual limitation on cost sharing and restrictions on annual or lifetime dollar limits in accordance with applicable regulations with respect to such EHBs.⁸⁵ Sponsors of such plans would be affected by this proposal, if finalized, only to the extent a State changes benefits in its EHB-benchmark plan and such plan selects that State's EHB-benchmark plan for purposes of complying with sections 2707 and 2711 of the PHS Act. It may also impact State Basic Health Programs (BHPs) established under section 1331 of the ACA and Medicaid Alternative Benefit Plans (ABPs) implemented pursuant to section 1937 of the Act.

We solicit comment on the proposal.

4. Consumer Assistance Tools and Programs of an Exchange (§ 155.205)

At § 155.205(a), we propose to establish additional minimum standards for Exchange call center operations. Currently, § 155.205(a) requires that Exchanges provide for operation of a consumer-accessible, toll-free call center that addresses the needs of consumers requesting assistance. For a State requesting to establish a State Exchange, we review its plans to implement and meet call center requirements under § 155.205(a) as described in the State Exchange Blueprint Application. Through the Blueprint process, we review and assess a State's call center operational plan for consistency with standards governing its hours of operation, staffing levels, and service level goals (including wait times and abandonment rates), as well as for consistency with best practices utilized by existing Exchanges, including the FFEs' call center. Once a State Exchange has been established and is operating, HHS monitors Exchange call center operations through the annual collection of performance monitoring data, as specified at § 155.1200(b)(3). The data collected includes call center volume, wait times, calls abandoned, and average call center handle time.⁸⁶

We recognize the value in each Exchange being able to tailor customer service level expectations based on their experience in the areas they serve, including setting hours of operation that meet the needs of their consumers. As such, we are not proposing to establish minimum standards for customer service staffing levels. We will continue

to assess and monitor Exchanges' compliance with § 155.205(a) through the Blueprint process and annual collection of compliance reports, as specified at § 155.1200(b)(2). We also intend to utilize, if finalized, the proposed requirement that transitioning States submit documentation through their Blueprint application, which would strengthen our review of Exchange call center plans.

In this proposed rule, we are proposing to require that all Exchanges, other than SBE-FPs and SHOP Exchanges that do not provide for enrollment in SHOP coverage through an online SHOP enrollment platform, meet the following additional requirements: their call center must provide consumers with access to a live call center representative during the Exchanges' published hours of operation; and their live call center representatives must be able to assist consumers with their QHP application, which includes providing consumers information on their APTC and CSR eligibility, helping consumers understand their QHP options, helping consumers select a QHP, and helping consumers submit QHP enrollment applications to the Exchange.

Sections 1311(d)(4)(B) and 1321 of the ACA require that Exchanges provide for the operation of a toll-free telephone hotline to respond to requests for assistance, and section 1413(b)(1)(A)(ii) of the ACA requires that a consumer's application for QHP coverage can be filed by telephone. We believe that our proposal would support the intent of these statutory requirements by codifying the requirement that consumers have access to live representatives with Exchange call centers who can assist consumers with their QHP applications, including helping them submit QHP enrollment applications to the Exchange. Similarly, requiring that Exchange call centers provide consumers with a reliable window for live representative support would support compliance with sections 1311(d)(4)(B) and 1413(b)(1)(A)(ii) of the ACA.

We believe that all State Exchange call centers already meet the minimum standards being proposed, and we know that the call center for the Exchanges on the Federal platform is meeting them. As such, this proposal seeks to standardize and strengthen Exchange consumer assistance capabilities without imposing additional burden on current Exchanges or hindering Exchanges' ability to be innovative in their call center functions. The changes being proposed here would ensure that regardless of where a consumer is in the

United States, the consumer would be able to speak to a live representative who can assist the consumer with the QHP application process during the hours of operation for that State's call center. We also want to ensure that a State does not solely rely on an automated telephone system for QHP application assistance because we believe speaking to a live representative would help troubleshoot consumer QHP application issues, provide in real time an opportunity for a live representative to explain QHP application terminology to a consumer, provide a live representative to ensure the consumer provides the most correct information in the QHP application to alleviate unnecessary follow-up, and provide greater overall consumer satisfaction. We believe that call centers should have a basic level of customer service especially as they relate to hours and operations and staffing levels to limit wait times for QHP application assistance. We also know based on our work with State Exchanges and the Exchanges on the Federal platform that the Exchanges have created and continue to maintain robust call centers.

We seek comment on this proposal.

5. Requirement for Exchanges To Operate a Centralized Eligibility and Enrollment Platform on the Exchange's Website (§§ 155.205(b); 155.302(a)(1))

We propose to amend § 155.205(b)(4) to require that an Exchange operate a centralized eligibility and enrollment platform on the Exchange's website (or, for an SBE-FP, the Federal eligibility and enrollment platform), such that the Exchange allows for the submission of the single, streamlined application for enrollment in a QHP and insurance affordability programs by consumers, in accordance with § 155.405, through the Exchange's website and the Exchange performs eligibility determinations for all consumers based on submissions of the single, streamlined application. Further, we propose to amend § 155.302(a)(1) to clarify that the Exchange, through the centralized eligibility and enrollment platform operated on the Exchange's website (or, for an SBE-FP, the Federal eligibility and enrollment platform), is the entity responsible for making all determinations regarding the eligibility for QHP coverage and insurance affordability programs regardless of whether an individual files an application for enrollment in a QHP on the Exchange's website or on a non-Exchange website operated by an entity described under § 155.220, such as a web-broker defined at § 155.20, or a DE entity or QHP issuer described under

⁸⁵ See parallel requirements to § 147.126 at 26 CFR 54.9815–2711, and 29 CFR 2590.715–2711. Additionally, section 2707(b) of the PHS Act, as added by the ACA, was incorporated by reference into section 9815 of the Code and section 715 of the Employee Retirement Income Security Act (ERISA).

⁸⁶ OMB Control Number: 0938–1119.

§ 155.221. As we believe the eligibility determination function is inherently a function that should only be performed by the Exchange, the proposed amendment to § 155.302(a)(1) would also clarify that only the private vendors or State entities that an Exchange contracts with to operate its centralized eligibility and enrollment platform can perform this function on behalf of an Exchange, and would prohibit an Exchange from solely relying on non-Exchange entities, including a web-broker (defined at § 155.20) or other entities under §§ 155.220 or 155.221, to make such eligibility determinations on behalf of an Exchange.

We also propose to amend § 155.205(b)(5) to require that an Exchange operate a centralized eligibility and enrollment platform on the Exchange's website (or, for an SBE-FP, by relying on the Federal eligibility and enrollment platform) so that the Exchange (or, for an SBE-FP, the Federal eligibility and enrollment platform) meets the requirement under § 155.400(c) to maintain records of all effectuated enrollments in QHPs, including changes in effectuated QHP enrollments.

As background for these proposed amendments, § 155.205(b) states that an Exchange must maintain an up-to-date website that allows consumers to receive eligibility determinations for QHPs and insurance affordability programs and provides standardized comparative information on each available QHP and a calculator to facilitate the comparison of available QHPs after the application of any APTC and any CSRs. Section 1413(c)(1) of the ACA also requires that Exchanges develop a secure electronic interface that allows consumers to apply for health insurance coverage online and electronically receive an eligibility determination and that Exchanges conduct verifications of eligibility through electronic data interfaces. However, currently, there is no explicit regulatory or statutory requirement that Exchanges operate a centralized eligibility and enrollment platform on their website for performing all eligibility determinations for QHPs and insurance affordability programs. Nonetheless, all Exchanges currently provide access to a centralized eligibility and enrollment platform and process for consumers that they serve, and all Exchanges also currently perform all eligibility determinations through the operation of a centralized eligibility and enrollment platform on their websites. In order to codify existing policy and practices and help set clear expectations for existing

Exchanges and States that may seek to operate State Exchanges in the future, we propose these amendments to require that Exchanges may not allow eligibility determinations to be made outside of the Exchanges' own centralized eligibility and enrollment platform by another entity for applications for QHP coverage nor for selections for enrollment in a QHP.

We also propose to amend § 155.302(a) to codify the Exchange's obligation and role as the sole entity responsible for conducting eligibility determinations. For example, if an Exchange permits an eligible web-broker to operate a non-Exchange website that interfaces with an Exchange to assist consumers with DE in QHPs offered through the Exchange as described in §§ 155.220(c)(3) and 155.221, the Exchange must ensure that the Exchange continues to maintain responsibility for conducting all eligibility determinations for applications submitted for QHP coverage and related insurance affordability programs. While HHS has not delegated these functions to DE entities in FFE and SBE-FP States, currently, Exchanges may allow entities described in § 155.220, among others that meet applicable requirements, to be able function as an eligible contracting entity under § 155.110(a) that can carry out determinations regarding QHP coverage eligibility and eligibility for related insurance affordability programs on behalf of the Exchange. This proposed amendment to § 155.302(a) would prohibit Exchanges from delegating the responsibility to conduct eligibility determinations to any non-Exchange entities, besides entities that the Exchanges have elected to contract with to operate the centralized eligibility and enrollment platform. Consistent with these amendments, we propose to maintain the current requirement under § 155.302(a) that SBE-FPs rely on HHS, through the operation of the centralized *HealthCare.gov* eligibility and enrollment platform, to carry out all eligibility determinations for their Exchanges.

This proposal would tie together the disparate, but related, requirements that exist across 45 CFR part 155 that speak to the real-time and tightly integrated nature of the online eligibility functions that Exchanges are required to perform (specifically the tight integration needed between the Exchange-operated website, single streamlined application, and back-end automated eligibility verifications based on information provided by applicants to arrive at an eligibility determination), by clearly

stating the principle that Exchanges are solely responsible for conducting eligibility determinations, and that Exchanges would need to meet the required eligibility functions that exist across 45 CFR part 155 through operating a centralized eligibility and enrollment platform on their website, regardless of whether an application is submitted through the Exchanges' website or through eligible non-Exchange entities that are assisting an individual in enrolling in a QHP.

We believe the lack of a clear statement in the regulations at 45 CFR part 155 affirming the requirement that the Exchange must make all determinations regarding eligibility for QHP coverage and related insurance affordability programs through a centralized eligibility and enrollment platform on the Exchange's website are oversights, as other sections of the regulations implementing the ACA in title 45 of the CFR allude to a requirement or expectation that an Exchange operates in this way already, or the regulations are written in a way such that it would be difficult to fulfill their requirements if an Exchange did not operate as proposed in these amendments.

As an example of an implementing regulation of the ACA that would require an Exchange to operate in this manner, § 155.220 permits qualified individuals to be enrolled in a QHP through the Exchange with the assistance of a web-broker, while § 155.220(c)(3)(ii)(A), and by reference § 155.220(c)(3)(i)(F), require that if the non-Exchange website of a web-broker is used to complete an Exchange eligibility application, that web-broker's website must also provide consumers with the ability to withdraw from the process and use the Exchange's website described in § 155.205(b) instead at any time. If an Exchange did not provide an ability on its website for a consumer to complete an eligibility application, then it would not be possible to fulfill the requirements of §§ 155.220(c)(3)(ii)(A) and (c)(3)(i)(F).

To ensure that the requirements of §§ 155.220(c)(3)(ii)(A) and (c)(3)(i)(F), and 155.205(b) are fulfilled, we believe it is important that Exchanges allow a consumer to continue the application process through the centralized eligibility and enrollment platform operated on the Exchange's own website should the consumer chose to withdraw from the application process that was begun on a web-broker's non-Exchange website; or, if the Exchange is an SBE-FP, allow the consumer to continue the application process through the website of the Federal platform.

As another example, QHP issuers that assist consumers with enrollment in QHPs are currently required under § 156.265(b)(2) to either direct the consumer to the Exchange's website to file an eligibility application or ensure that the consumer's eligibility application is completed through the Exchange website or submitted through Exchange-approved web services in order for the Exchange to conduct an eligibility determination. To align with these requirements, we believe that it is important to amend § 155.302(a)(1) to provide that an Exchange must perform all eligibility determinations through operating a centralized eligibility and enrollment platform on the Exchange's website, and that only those entities that an Exchange chooses to enter into an agreement with to operate its centralized eligibility and enrollment platform, as allowed for under § 155.110(a), can carry out this function on behalf of the Exchange.

In addition to these examples of how current regulations may require an Exchange to operate according to the proposed amendments to §§ 155.205 and 155.302, we believe that consumers may be harmed if these proposals are not adopted. If an entity other than the Exchange conducted eligibility determinations, consumers might receive incorrect or inconsistent eligibility determinations, as entities other than the Exchange may not update their systems with the same eligibility determination rules or logic as the Exchange itself when Federal or State policies or regulations impacting eligibility for QHP coverage and insurance affordability programs come into effect or are updated, including the implementation and maintenance of State-specific eligibility rules and logic for Medicaid and CHIP programs. As a result, a non-centralized eligibility system model would introduce increased program integrity risk as to the accuracy of eligibility determinations, which would introduce increased risk of inaccurate APTC payments to QHP issuers and increased risk to consumers of potential tax liability when filing taxes and reconciling their PTC.

In addition, the websites and eligibility platforms provided by non-Exchange entities may not include the same informational content for consumers that an Exchange provides to consumers through the Exchange's website, such as information related to Medicaid and CHIP programs or the availability of special enrollment periods before or after the open enrollment period. As a result, some consumers might not provide

information in their application in such a manner as to receive a correct eligibility determination and thus, enroll in the wrong coverage or not enroll in any coverage. Lastly, consumers may prefer to enroll directly through the eligibility and enrollment platform hosted and operated on an Exchange's website because they are more comfortable with sharing their personal information through a platform hosted by the Exchange.

In light of these considerations, we propose to amend §§ 155.205(b)(4) and (5) and 155.302(a)(1) to address these gaps. Since all Exchanges currently provide access to a centralized eligibility and enrollment platform and process for consumers that they serve, and all Exchanges also currently perform all eligibility determinations through the operation of a centralized eligibility and enrollment platform on their websites, we believe the impact of these proposals would be minimal.

We seek comment on these proposals.

6. Ability of States To Permit Agents and Brokers and Web-Brokers To Assist Qualified Individuals, Qualified Employers, or Qualified Employees Enrolling in QHPs (§ 155.220(h))

We propose to amend §§ 155.220(h)(2) and (3) by deleting the current references to "the HHS reconsideration entity" and replacing them with "the CMS Administrator" and by specifying that, instead of the HHS reconsideration entity, the CMS Administrator, who is a principal officer,⁸⁷ would be the entity responsible for handling these reconsideration decisions. Agents, brokers, and web-brokers whose Exchange agreement(s) to participate in the FFEs or SBE-FPs have been terminated for cause would continue to have the ability to request a reconsideration of such action in the manner and form established by HHS by requesting a reconsideration within 30 calendar days of the date of the written termination notice from HHS. We propose that the request for reconsideration would be made to the CMS Administrator. This proposal would improve transparency by specifying who would review reconsideration requests under § 155.220(h).

Exchange agreement suspensions and terminations play a critical role in stopping potentially fraudulent enrollments or other fraudulent behavior in the FFEs and SBE-FPs. Currently, § 155.220(g) establishes the framework for suspension and

termination of an agent's, broker's, or web-broker's Exchange agreement(s) for cause in four instances.⁸⁸ First, § 155.220(g)(1) allows HHS to terminate an agent's, broker's, or web-broker's Exchange agreement(s) when there is a specific finding of noncompliance or pattern of noncompliance that is sufficiently severe. Second, § 155.220(g)(3)(ii) enables HHS to terminate an agent's or broker's Exchange agreement(s) when an agent or broker fails to maintain the appropriate license in every State in which the agent or broker actively assists consumers with applying for APTC and CSRs or with enrolling in QHPs through the FFEs and SBE-FPs. Third, HHS will terminate an agent's, broker's, or web-broker's Exchange agreement(s) under § 155.220(g)(5)(ii) when there is a finding or determination by a Federal or State entity that an agent, broker, or web-broker engaged in fraud or abusive conduct that may result in imminent or ongoing consumer harm using personally identifiable information (PII) of Exchange enrollees or applicants or in connection with an Exchange enrollment or application. Fourth, under § 155.220(g)(5)(i)(B), HHS may terminate an agent's, broker's, or web-broker's Exchange agreement(s) following a suspension of the agreement(s) under § 155.220(g)(5)(i)(A) if the agent, broker, or web-broker submitted rebuttal evidence that does not persuade HHS to lift the suspension, or if the agent, broker, or web-broker fails to submit rebuttal evidence during the suspension period.

If an agent's, broker's, or web-broker's Exchange agreement(s) has been terminated for cause, under § 155.220(h)(1), the agent, broker, or web-broker can request reconsideration of such action in the manner and form established by HHS. The agent, broker, or web-broker must submit the reconsideration request to the HHS reconsideration entity within 30 calendar days of the date of the written termination notice from HHS.⁸⁹ Current regulations also require the HHS reconsideration entity to notify the agent, broker, or web-broker of its decision, in writing, within 60 calendar days of the date it receives the request for reconsideration.⁹⁰ Currently,

⁸⁸ Section 155.220(f) establishes the framework for an agent, broker, or web-broker to terminate an agent's, broker's, or web-broker's Exchange agreement(s) with HHS. We are not proposing any changes with respect to the terminations under § 155.220(f). These terminations are not eligible for reconsideration under § 155.220(h) because they are agent, broker, or web-broker initiated actions.

⁸⁹ 45 CFR 155.220(h)(2).

⁹⁰ 45 CFR 155.220(h)(3).

⁸⁷ A principal officer is an individual nominated by the President and confirmed by the Senate.

§ 155.220(h)(3) further provides that this decision constitutes HHS' final determination.

The current framework in § 155.220(h) does not define or identify "the HHS reconsideration entity" responsible for making these decisions. As noted earlier in this rule, we propose revising §§ 155.220(h)(2) and (3) by deleting the existing references to "the HHS reconsideration entity" and replacing them with "the CMS Administrator." This proposal would ensure that authority to review requests for reconsideration of decisions to terminate an agent's, broker's, or web-broker's Exchange agreement(s) for cause are vested in a principal officer. We seek comments on this proposal.

7. Adding and Amending Language To Ensure Web-Brokers Operating in State Exchanges Meet Certain HHS Standards Applicable in the FFEs and SBE-FPs (§ 155.220)

We propose to amend § 155.220 to apply certain existing HHS standards for Exchanges that use the Federal platform that apply to web-brokers⁹¹ assisting the FFEs' and SBE-FPs'⁹² consumers and/or applicants with enrolling in QHPs and assisting consumers with applying for APTC/CSRs in State Exchanges, for both the State Exchange's Individual Exchange and SHOP. Specifically, our proposals would ensure that minimum HHS standards governing web-broker non-Exchange website display of standardized QHP comparative information, disclaimer language, information on eligibility for APTC/CSRs, operational readiness, standards of conduct, and access by web-broker downstream agents and brokers apply to web-brokers across all Exchanges.⁹³ We believe that extending these standards across all Exchanges, to newly apply to

State Exchanges, is important given the increased interest from State Exchanges in using web-brokers to assist consumers with enrollment, as to maximize enrollment opportunities. The ability of consumers and applicants to have consistent, reliable information from web-brokers who, to the extent permitted by the State and the applicable Exchange, assist consumers with enrolling and applying for QHPs offered on the Exchange, with or without APTC and CSRs, in a manner that constitutes enrollment through the Exchange⁹⁴ is an important consumer safeguard, particularly given that web-brokers may operate across Exchange models. These proposals are intended to ensure that certain HHS standards are extended to protect State Exchange consumers as minimum requirements while also providing State Exchanges with continued flexibility and discretion to decide whether and how to utilize web-brokers to assist State Exchange consumers and applicants with enrolling in QHPs and applying for APTC/CSRs. Finally, these proposals align with our other proposals as described later in this proposed rule to extend certain existing HHS standards at § 155.221 that currently apply to DE entities⁹⁵ assisting the FFEs' and SBE-FPs' consumers and applicants with direct enrollment in QHPs and applying for APTC/CSRs to also apply in State Exchanges. These proposals, if finalized, would be effective on the date of publication of the final rule.

Section 1312(e) of the ACA provides that the HHS Secretary shall establish procedures under which a State may allow agents, brokers, and web-brokers to enroll individuals and small employers in QHPs offered through an Exchange and to assist individuals in applying for APTC/CSRs for QHPs sold through an Exchange. The Secretary also has authority under section 1321(a) of the ACA to promulgate regulations with respect to the establishment and operation of Exchanges, the offering of QHPs through such Exchanges, and such other requirements as the Secretary determines appropriate.⁹⁶ HHS previously leveraged these authorities to establish the existing agent, broker, and web-broker standards applicable in FFE

and SBE-FP States codified in § 155.220.⁹⁷

In new proposed paragraph (n), we propose to apply the web-broker standardized QHP comparative information and the accompanying Enrollment Support disclaimer requirements in § 155.220(c)(3)(i)(A) to web-brokers operating in State Exchanges, and consequently to these State Exchanges. Consistent with § 155.220(c)(3)(i)(A)(1) through (6), web-broker non-Exchange websites used to complete the QHP selection must disclose and display the standardized comparative QHP information provided by the Exchange or directly by QHP issuers, consistent with the requirements of § 155.205(c) for all QHPs, including Qualified Dental Plans (QDPs),⁹⁸ offered through the Exchange. The standardized comparative information on each available QHP that must be displayed by the web-broker on its non-Exchange website is the following information provided by the Exchange or directly by QHP issuers: (1) premium and cost-sharing information (total and net premium based on APTC and CSR, if applicable);⁹⁹ (2) the summary of benefits and coverage; (3) identification of whether the QHP is a bronze, silver, gold or platinum level plan, or a catastrophic plan; (4) the results of the enrollee satisfaction survey; (5) quality ratings assigned by HHS; and (6) the provider directory made available to the Exchange. The results of the enrollee satisfaction survey should be displayed in accordance with instructions in the CMS Quality Rating Information Bulletin.¹⁰⁰ As described in the CMS

⁹⁷ See 77 FR 18444, as amended at 78 FR 15533; 78 FR 54134; 79 FR 13837; 81 FR 12338; 81 FR 94176; 84 FR 17563; 85 FR 37248; 86 FR 24288; 87 FR 27388; and 88 FR 25917.

⁹⁸ With some limited exceptions, QDPs are considered a type of QHP. See 77 FR at 18315. Web-brokers participating in the FFEs and SBE-FPs are expected to follow the same requirements for QDPs as for QHPs, including display of all applicable QDPs offered through the Exchange and all available information specific to each QDP on their websites. However, because it is not possible to enroll in QDPs through DE unless also enrolling in medical QHPs, web-brokers are permitted to modify their QDP displays accordingly (for example, display QDPs after medical QHPs to ensure a consumer has first selected a medical QHP). See CMS. (2023, July 12). *Federally-facilitated Exchange (FFE) Enrollment Manual*. CMS. Section 4.3, p.47 and Section 4.4.2, p. 52. <https://www.cms.gov/files/document/ffe-enrollment-manual-2023-5cr-071323.pdf>. Under this proposal, these same standards governing QDPs would also apply to web-brokers in State Exchanges.

⁹⁹ See CMS. (2023, July 12). *Federally-facilitated Exchange (FFE) Enrollment Manual*. CMS. Section 4.4.2, p. 52. <https://www.cms.gov/files/document/ffe-enrollment-manual-2023-5cr-071323.pdf>.

¹⁰⁰ See CMS. (2023, May 2). *Quality Rating Information Bulletin*. CMS. Section III, p. 3. <https://>

⁹¹ Web-broker is defined at 45 CFR 155.20 as "an individual agent or broker, group of agents or brokers, or business entity registered with an Exchange under § 155.220(d)(1) that develops and hosts a non-Exchange website that interfaces with an Exchange to assist consumers with direct enrollment in QHPs offered through the Exchange as described in § 155.220(c)(3) or § 155.221. The term also includes an agent or broker direct enrollment technology provider."

⁹² See § 155.220(l).

⁹³ The amendments to § 155.220 we are proposing would not impact how agents, brokers, or web-brokers may assist consumers and applicants in SBE-FP States. Section 155.220(l) currently provides that an agent, broker or web-broker who enrolls qualified individuals, qualified employers, or qualified employees in coverage in a manner that constitutes enrollment through an SBE-FP or assists individual market consumers with submission of applications for APTC and CSRs through an SBE-FP, must comply with all applicable FFE standards in § 155.220. We are not proposing any changes to this existing framework for agents, brokers, or web-brokers who provide assistance in SBE-FP States.

⁹⁴ See 77 FR 18334 through 18336.

⁹⁵ DE entities permitted to participate in the FFEs and SBE-FPs include, to the extent permitted by applicable State law: (1) QHP issuers that meet the applicable requirements in §§ 155.221 and 156.1230, and (2) web-brokers that meet the applicable requirements in §§ 155.220 and 155.221. 45 CFR 155.221(a).

⁹⁶ Section 1321(a)(1)(A), (B), and (D) of the ACA.

Quality Rating Information Bulletin, State Exchanges already have some flexibility to customize the display of quality ratings assigned by HHS for their respective QHPs.¹⁰¹ For example, State Exchanges can make some State-specific customizations, such as to incorporate additional State or local quality information or to modify the display names of the quality ratings assigned by HHS. Under this proposal, web-brokers in State Exchanges should use the same consumer-facing labels for the quality ratings that HHS displays on *HealthCare.gov* (that is, “Overall Rating,” “Medical Care,” “Member Experience,” and “Plan Administration”) unless the State Exchange modified the display names for these labels. If the State Exchange has modified the display names, web-brokers operating in State Exchanges should use the display names used on the State Exchange website. Web-brokers operating in State Exchanges should also align their display of the quality ratings to reflect any permitted State-specific customizations, such as the addition of State or local quality information. Additionally, consistent with the approach for display of quality ratings by web-brokers in the FFEs and SBE-FPs and by State Exchanges, if a QHP was not eligible to receive a rating or did not receive a rating for other reasons, web-brokers participating in State Exchanges would need to display “New plan—Not Rated” or “Not Rated” in place of the quality ratings.¹⁰² When displaying the quality rating assigned by HHS on their non-Exchange websites, web-brokers operating in State Exchanges would be required to prominently display the disclaimer language specified in the CMS Quality Rating Information Bulletin, which mirrors the language that web-brokers in the FFEs and SBE-FPs must display on their non-Exchange websites.¹⁰³

State Exchanges are also currently required to display the quality ratings assigned by HHS and the results of the enrollee satisfaction survey, in the form and manner specified by the

Secretary.¹⁰⁴ This includes prominently displaying the same disclaimer language on the State Exchange website or a static website when displaying the quality ratings assigned by HHS and the results of the enrollee satisfaction survey.¹⁰⁵ Web-brokers would be able to access QHP quality rating information for a State Exchange they are operating in, including the quality ratings assigned by HHS and enrollee satisfaction survey results,¹⁰⁶ from the State Exchange.

This list of standardized QHP comparative information that web-brokers must disclose and display on their non-Exchange websites used to complete QHP selection in FFE and SBE-FP States mirrors the information that Exchanges are required to disclose and display on their respective websites.¹⁰⁷ This approach ensures consumers have access to the same QHP comparative information whether they elect to enroll through the Exchange’s website or through a web-broker’s non-Exchange website. We propose to extend these same standardized comparative information requirements, as minimum Federal standards, that would need to be met by web-brokers participating in State Exchanges and consequently to these State Exchanges. We similarly propose to extend the Enrollment Support disclaimer referenced in § 155.220(c)(3)(i)(A) beyond FFE and SBE-FP States to also extend to web-brokers participating in State Exchanges and consequently to these State Exchanges. The goal of this disclaimer is to ensure consumers are clearly informed about any enrollment limitations on a web-broker’s non-Exchange website and similarly have clear instructions for accessing the Exchange website if they wish to enroll in those QHPs. In particular, when a website of a web-broker is used in FFE or SBE-FP States to complete the QHP selection, but it does not support

enrollment for a QHP,¹⁰⁸ the web-broker’s website must prominently display the standardized Enrollment Support disclaimer¹⁰⁹ provided by HHS, as follows:

“(Name of Company) does not support enrollment in this Qualified Health Plan at this time. To enroll in this Qualified Health Plan, visit the Health Insurance Marketplace® website at *HealthCare.gov*.”

We propose to require web-brokers assisting consumers in State Exchanges to comply with these same requirements, while also providing these State Exchanges some flexibility regarding the disclaimer language required to be displayed by their web-brokers. First, to prominently display the disclaimer, it must be written in a font size no smaller than the majority of text on the website page and must be noticeable in the context of the website by (for example) using a font color that contrasts with the background of the website page.¹¹⁰ In addition, the Enrollment Support disclaimer must appear on the web-broker’s non-Exchange website in close proximity to where the QHP information is displayed if the web-broker does not support enrollment in any such QHP, so it is noticeable to the consumer.¹¹¹ Web-brokers can also meet this prominent display requirement if a visual cue is displayed where the enrollment button (or another similar mechanism) would otherwise appear for a particular QHP that clearly directs the consumer to the required disclaimer on the same website page or otherwise displays the required disclaimer (for example, in a pop-up bubble that appears while hovering over the visual cue).¹¹²

With respect to State flexibility, under this proposal, the HHS-provided disclaimer language must be used as a minimum starting point, but State Exchanges may add State-specific language to the Enrollment Support

¹⁰⁴ See §§ 155.1400 and 155.1405. Also see § 155.205(b)(1)(iv) and (v). Exchanges can satisfy the requirement to display the enrollee satisfaction survey results by displaying the quality ratings assigned by HHS (which incorporate member experience data from the survey). See 79 FR at 30310 through 30311.

¹⁰⁵ See CMS. (2023, May 2). *Quality Rating Information Bulletin*. CMS. Section III, p. 3. <https://www.cms.gov/files/document/py2024-qrs-display-bulletin.pdf>.

¹⁰⁶ Consistent with the approach for Exchanges, for purposes of compliance with the Federal minimum standards, web-brokers would be able to satisfy the requirement to display the enrollee satisfaction survey results by displaying the quality ratings assigned by HHS (which incorporate member experience data from the survey).

¹⁰⁷ See § 155.205(b)(1). Also see 87 FR at 642 (explaining that “(i)including this [list of] information within § 155.220, instead of through a cross-reference to § 155.205(b)(1), would provide better clarity and ease of reference . . .”).

¹⁰⁸ A web-broker’s non-Exchange website may not support enrollment in a QHP if a web-broker does not have an appointment with a QHP issuer and therefore is not permitted under State law to enroll consumers in coverage offered by that issuer.

¹⁰⁹ CMS. (2023, July 12). *Federally-facilitated Exchange (FFE) Enrollment Manual*. CMS. Section 4.4.2, p. 52. <https://www.cms.gov/files/document/jfe-enrollment-manual-2023-5cr-071323.pdf>.

¹¹⁰ See 78 FR at 27260. Also see CMS. (2023, July 12). *Federally-facilitated Exchange (FFE) Enrollment Manual*. CMS. Section 4.4.1, p. 49–50 and Section 4.4.2, p. 54–55. <https://www.cms.gov/files/document/jfe-enrollment-manual-2023-5cr-071323.pdf>.

¹¹¹ See 78 FR at 27260. Also see CMS. (2023, July 12). *Federally-facilitated Exchange (FFE) Enrollment Manual*. CMS. Section 4.4.2, p. 52. <https://www.cms.gov/files/document/jfe-enrollment-manual-2023-5cr-071323.pdf>.

¹¹² *Id.*

www.cms.gov/files/document/py2024-qrs-display-bulletin.pdf. See Exchange and Insurance Market Standards for 2015 and Beyond; Final Rule, 79 FR 30240 at 30310–30311 (May 27, 2014).

¹⁰¹ §§ 155.1400 and 155.1405. Also see 85 FR at 29214 through 29216.

¹⁰² See CMS. (2023, May 2). *Quality Rating Information Bulletin*. CMS. Section III, p. 3. <https://www.cms.gov/files/document/py2024-qrs-display-bulletin.pdf>.

¹⁰³ See CMS. (2023, May 2). *Quality Rating Information Bulletin*. CMS. Section III, p. 3. <https://www.cms.gov/files/document/py2024-qrs-display-bulletin.pdf>.

disclaimer, provided the additional language does not conflict with the HHS-provided standardized disclaimer. This would permit a State Exchange to replace references and links to the Health Insurance Marketplace® and *HealthCare.gov* in the HHS-provided disclaimer language with the appropriate reference or links to the State Exchange's website for the Enrollment Support disclaimer that web-brokers assisting consumers in the State Exchange would be required to prominently display on their non-Exchange websites. Additionally, State Exchanges may require web-brokers operating in their State to translate the disclaimer text into languages appropriate for the State as this type of additional requirement would not conflict with the HHS-provided disclaimer language or minimum standards. As with all informational materials, standard plain language practice is to write at or near a fourth grade reading level and not to exceed an eighth grade reading level. We expect that any additional State-specific customizations to this disclaimer would be written accordingly. We would be available to provide technical assistance to State Exchanges that want to add State-specific language. We propose to codify this State flexibility in new proposed paragraph (n)(1).

In addition, consistent with § 155.220(c)(3)(i)(G), when used to assist FFE consumers, the web-broker's non-Exchange website must also prominently display a standardized disclaimer¹¹³ provided by HHS, referred to as the General non-FFE disclaimer, that informs consumers and applicants that the web-broker's website is not the Exchange website, notes that the web-broker's non-Exchange website may not support enrollment in all QHPs, and provides a web link to the Exchange's website. This same requirement extends beyond the FFEs and also applies to SBE-FPs today.¹¹⁴ In new paragraph (n), we propose to extend this disclaimer requirement to also apply to web-brokers operating in State Exchanges, and consequently to these State Exchanges, while providing these State Exchanges some flexibility to add State-specific language to this disclaimer, provided the additional language does not conflict with the HHS-provided disclaimer language. We propose to codify this State flexibility in new proposed paragraph (n)(1). Similar

to the adoption of this disclaimer for consumers in an FFE or an SBE-FP,¹¹⁵ we continue to believe this additional standard is in the best interest of consumers, as it would help them distinguish between the Exchange website and web-broker non-Exchange websites. We therefore also identified it as an important baseline consumer protection that should extend to consumers across all Exchanges.

The General non-FFE disclaimer provided by HHS that must be prominently displayed by web-brokers participating in the FFEs and SBE-FPs reads:

“Attention: This website is operated by (Name of Company) and is not the Health Insurance Marketplace® website. In offering this website, (Name of Company) is required to comply with all applicable Federal law, including the standards established under 45 CFR 155.220(c) and (d) and standards established under 45 CFR 155.260 to protect the privacy and security of personally identifiable information. This website may not support enrollment in all Qualified Health Plans (QHPs) being offered in your State through the Health Insurance Marketplace® website. For enrollment support in all available QHP options in your State, go to the Health Insurance Marketplace® website at *HealthCare.gov*.

Also, you should visit the Health Insurance Marketplace® website at *HealthCare.gov* if:

- You want to select a catastrophic health plan. (This only needs to be included if the web-broker does not offer catastrophic plans.)
- You want to enroll members of your household in separate QHPs. (This only needs to be included if the web-broker does not allow multiple enrollment groups for its Classic DE pathway; note that EDE Entities are required to support multiple enrollment groups.)
- You want to enroll members of your household in dental coverage. The plans offered here do not offer pediatric dental coverage and you want to choose a QHP offered by a different issuer that covers pediatric dental services or a separate dental plan with pediatric coverage. (This only needs to be included if the web-broker does not offer assistance with enrollment in adult coverage or pediatric dental coverage.)

(Name of web-broker's website) offers the opportunity to enroll in either QHPs or off-Marketplace coverage. Please visit *HealthCare.gov* for information on the benefits of enrolling in a QHP. Off-Marketplace coverage is not eligible for

the cost savings offered for coverage through the Marketplaces. (This final paragraph must be displayed if the web-broker offers consumers assistance with off-Marketplace coverage options.)”

To prominently display this disclaimer, it must be written in a font size no smaller than the majority of text on the website page and must be noticeable in the context of the website by (for example) using a font color that contrasts with the background of the website page.¹¹⁶ In addition, the disclaimer must be prominently displayed on both the initial user landing page and on the landing page displaying QHP options that appear before the applicant makes a decision to purchase coverage (QHP selection page). In FFE and SBE-FP States, the disclaimer must use the exact language provided by HHS, must include a functioning web link to *HealthCare.gov*, and must be viewable without requiring the user to select or click on an additional link. The disclaimer must also be displayed in the same non-English language as any language(s) the web-broker maintains screens for on its website.¹¹⁷ The web-broker may change the font color, size, or graphic context of the information to ensure that it is noticeable to the user in the context of its website or the other written material.

Consistent with the proposed approach for the extension of the Enrollment Support disclaimer to State Exchanges and their web-brokers, under this proposal, the HHS-provided disclaimer language must be used as a minimum starting point, but State Exchanges may add State-specific language, provided the additional language does not conflict with the HHS-provided standardized disclaimer.

This would permit State Exchanges to replace references and links to the Health Insurance Marketplace® and *HealthCare.gov* in the HHS-provided disclaimer language with the appropriate reference or links to the State Exchange's website for the disclaimer under § 155.220(c)(3)(i)(G) that web-brokers assisting consumers in State Exchanges would be required to prominently display on their non-Exchange websites. Additionally, while web-brokers assisting consumers in State Exchanges must specify in their disclaimer that they are subject to applicable Federal requirements, under this proposal, we anticipate State

¹¹³ CMS. (2023, July 12). *Federally-facilitated Exchange (FFE) Enrollment Manual*. CMS. Section 4.4.2, p. 54. <https://www.cms.gov/files/document/ffe-enrollment-manual-2023-5cr-071323.pdf>.

¹¹⁴ 45 CFR 155.220(l).

¹¹⁵ 78 FR 37046.

¹¹⁶ See 78 FR at 27260. Also see CMS. (2023, July 12). *Federally-facilitated Exchange (FFE) Enrollment Manual*. CMS. Section 4.4.1, p. 49–50 and Section 4.4.2, p. 54–55. <https://www.cms.gov/files/document/ffe-enrollment-manual-2023-5cr-071323.pdf>.

¹¹⁷ See 45 CFR 155.205(c)(2)(iv)(C).

Exchanges would leverage this flexibility to direct their web-brokers to omit citations to Federal requirements included in the HHS-provided language to the extent those provisions do not apply, such as § 155.220(d). State Exchanges would also be permitted under this proposal to modify the disclaimer required under § 155.220(c)(3)(i)(G) to specify applicable provisions of State law. Further, to the extent that web-brokers in State Exchanges may offer off-Exchange coverage options, we would require them to include the HHS-provided disclaimer language that distinguishes between such coverage options and QHPs sold through the Exchange, noting in particular that such off-Exchange coverage options are not eligible for cost savings offered with a QHP sold through the Exchange, and providing a link to the State Exchange website for more information. Similar to the approach adopted for web-brokers participating in FFE and SBE-FP States, bracketed language included in the HHS-provided disclaimer language would not be required for web-brokers assisting consumers in State Exchanges to comply with the Federal minimum standards unless applicable or otherwise required by the State Exchange. State Exchanges may also require web-brokers operating in their State to translate the disclaimer text required under § 155.220(c)(3)(i)(G) into languages appropriate for the State as this type of additional requirement would not conflict with the HHS-provided disclaimer language or minimum standards. As with all informational materials, standard plain language practice is to write at or near a fourth grade reading level and not to exceed an eighth grade reading level. HHS expects that any State-specific additions or customizations to this disclaimer would be written accordingly. We would be available to provide technical assistance to State Exchanges that want to add State-specific language to this disclaimer that a web-broker in a State Exchange would be required to prominently display on its non-Exchange website to distinguish it from the State Exchange website.

In new proposed paragraph (n), we also propose to extend the requirement in § 155.220(c)(3)(i)(I), which requires the prominent display by web-brokers of the information provided by HHS pertaining to a consumer's eligibility for APTC or CSRs on the web-broker's non-Exchange website, to web-brokers operating in State Exchanges and consequently to these State Exchanges. We established this requirement for

web-brokers in FFE and SBE-FP States to increase the likelihood that consumers understand their potential eligibility for APTC and CSRs and potential liability for excess APTC repayment and can factor those determinations into their QHP selection and the amount of APTC they elect to take.¹¹⁸ We identified this as another important consumer protection that should be part of the Federal minimum web-broker standards in § 155.220 that also extends to web-brokers in State Exchanges. Consistent with the proposals described above to extend the requirements at § 155.220(c)(3)(i)(A) and (G), we propose to also extend the display obligations in § 155.220(c)(3)(i)(I) to apply to web-brokers in State Exchanges. As such, to prominently display this information, it must appear in a font size no smaller than the majority of text on the website page and must be noticeable in the context of the website by (for example) using a font color that contrasts with the background of the website page.¹¹⁹ We similarly propose to require web-brokers in State Exchanges to display information provided by, and as specified by, the State Exchange regarding a consumer's eligibility for APTC or CSRs. Additionally, we propose flexibility in how consumer eligibility information for APTC or CSRs is displayed on websites by web-brokers in State Exchanges, at the direction of the State Exchange on the display of that information. This flexibility is intended to provide State Exchanges the ability to define how consumer education information about the State Exchanges, including the consumer eligibility information for APTC or CSRs, is customized and presented on their web-brokers' websites. For example, we recognize that State Exchanges may wish to require their web-brokers include additional consumer educational information or State-specific content to meet the particular needs of their consumers and applicants. We believe allowing the flexibility for State Exchanges and their web-brokers to customize consumer-facing educational information with the HHS minimum standard requiring the prominent display of the consumer eligibility information for APTC or CSRs as provided by the applicable Exchange that must be adopted by web-brokers across all Exchanges would provide a

necessary baseline. Meeting these standards would also provide consistency for all Exchange consumers receiving assistance from web-brokers through their non-Exchange websites and would ensure that all Exchange consumers are provided accurate and sufficient information on potential eligibility for APTC and CSRs and the potential liability for excess APTC repayment. We propose to codify this State flexibility in new proposed paragraph (n)(1).

We also propose to add new § 155.220(c)(4)(iii) to extend certain downstream agent and broker requirements at § 155.220(c)(4)(i) that currently apply to web-brokers in FFE and SBE-FP States and govern the use of the web-broker's non-Exchange website by other agents or brokers assisting Exchange consumers to also apply to web-brokers, and their downstream agents and brokers in States with State Exchanges, and consequently to these State Exchanges. Under the proposed new provision, web-brokers that permit other agents or brokers, through a contract or other arrangement, to use the web-broker's non-Exchange website to help an applicant or enrollee complete a QHP selection or complete the Exchange eligibility application would be required to meet the standards at § 155.220(c)(4)(i)(A), (B), (D), and (F) when assisting consumers in States with a State Exchange. As noted in proposed new § 155.220(c)(4)(iii) and described further below, to extend this framework to also apply in State Exchanges, we propose that all references to "HHS" and "Federally-facilitated Exchange" in § 155.220(c)(4)(i)(A), (B), (D), and (F) would be understood to mean and be replaced with a reference to the applicable State Exchange.

The goal of the downstream agent and broker framework codified in § 155.220(c)(4)(i) is to ensure that agents or brokers who utilize a web-broker's non-Exchange website to help applicants complete a QHP selection or complete the Exchange eligibility application comply with necessary safeguards related to transparency, oversight, and consumer support. It ensures appropriate oversight by the web-broker and allows for closer monitoring by the applicable Exchange. For example, the proposed extension of § 155.220(c)(4)(i)(A) to web-brokers operating in State Exchanges would require these web-brokers to provide the State Exchanges in which it they are operating a list of all agents or brokers utilizing the web-broker website to facilitate enrollment of a consumer. The proposed extension of

¹¹⁸ 81 FR 61499.

¹¹⁹ See 78 FR 27260. Also see CMS. (2023, July 12). *Federally-facilitated Exchange (FFE) Enrollment Manual*. CMS. Section 4.4.1, p. 49–50 and Section 4.4.2, p. 54–55. <https://www.cms.gov/files/document/ffe-enrollment-manual-2023-5cr-071323.pdf>.

§ 155.220(c)(4)(i)(B) would also offer a basic consumer protection that all agents or brokers utilizing a web-broker website to facilitate enrollment of a consumer in a manner that constitutes enrollment through the State Exchange are licensed in the State in which the consumer is selecting the QHP, have completed training and registration, and have signed all required agreements with the State Exchange. Finally, the proposed extension of § 155.220(c)(4)(i)(F) to also apply to web-brokers operating in State Exchanges that make their non-Exchange website available to other agents and brokers would require the web-brokers to obtain approval from the State Exchanges verifying that all applicable requirements are met.

The proposed extension of the § 155.220(c)(4)(i)(A), (B), (D), and (F) framework to State Exchanges and their web-brokers would equip the State Exchanges with information needed to oversee their web-brokers and the use of web-broker non-Exchange websites by other web-brokers. Ultimately, the application of § 155.220(c)(4)(i)(A), (B), (D), and (F) would extend these safeguards to the State Exchange and their consumers when web-brokers participating in the State Exchanges permit downstream agents and brokers to utilize their non-Exchange websites to help applicants or enrollees complete their QHP selection or complete their Exchange eligibility applications in a manner that constitutes enrollment through the State Exchanges. In particular, requiring compliance with the HHS minimum standards at § 155.220(c)(4)(i)(A), (B), (D), and (F) for web-brokers participating in State Exchanges that contract with or enter into arrangements with downstream agents and brokers to provide applicants or enrollees with assistance when selecting QHPs or completing Exchange eligibility applications through their non-Exchange websites would maximize transparency and provide necessary safeguards to applicants or enrollees who rely on those downstream agents and brokers to enroll in coverage. We believe the extension of these HHS minimum standards is especially important since some agents, brokers, and web-brokers operate in multiple States and would benefit from a standardized framework and set of requirements. As part of the State Exchanges' oversight of the use of web-broker non-Exchange websites, we also encourage State Exchanges adopt a temporary suspension framework similar to § 155.220(c)(4)(ii) that applies in FFE and SBE-FP States. This

provision permits HHS to temporarily suspend the ability of a web-broker to make its non-Exchange website available to its downstream agents and brokers to transact information with HHS if HHS discovers a security or privacy incident or breach. The suspension extends for the period in which HHS begins to conduct an investigation and until the incident or breach is remedied to HHS' satisfaction. It is another important feature of HHS' oversight of the use of web-broker non-Exchange websites in FFE and SBE-FP States that protects consumers data and safeguards Exchange operations and systems. State Exchanges that choose to permit web-brokers to host non-Exchange websites to assist consumers with QHP selections and submission of Exchange eligibility applications should consider adoption of similar measures.

In addition, in new paragraph (n)(2), we propose to extend web-broker operational readiness requirements to State Exchanges and their web-brokers. Under this proposal, web-brokers operating in State Exchanges would be required to demonstrate operational readiness to the applicable State Exchange prior to the web-broker's website being used to complete an Exchange eligibility application or a QHP selection. The standards under § 155.220(c)(6) applicable to operational readiness reviews performed by HHS of web-brokers' non-Exchange websites used to assist the FFEs' and SBE-FPs' consumers to apply and enroll in QHP coverage through the Exchange, with or without APTC and CSRs, is a critical part of the oversight framework for HHS' Direct Enrollment (DE) program (including both Classic DE and Enhanced Direct Enrollment (EDE)). DE is a service that allows approved web-brokers to enroll consumers in Exchange coverage, with or without the assistance of an agent/broker, directly from their non-Exchange websites.¹²⁰ In Classic DE, consumers start on a web-broker's website by indicating they are interested in Exchange coverage. The web-broker redirects users to *HealthCare.gov* to complete the eligibility application portion of the process. After completing their eligibility application, *HealthCare.gov* redirects users back to the web-broker website to shop for a plan and enroll in Exchange coverage. EDE is a service that allows approved EDE web-brokers to provide a comprehensive consumer experience including the eligibility application, Exchange enrollment, and post-

enrollment year-round customer service capabilities for consumers and agents/brokers working on behalf of consumers, directly on web-broker websites. Through EDE, approved web-broker EDE entities¹²¹ build and host a version of the *HealthCare.gov* eligibility application directly on their non-Exchange websites that securely integrates with a back-end suite of FFE application programming interfaces (APIs) to support application, enrollment and more.

In the 2018 Payment Notice final rule, we adopted rules to capture operational readiness requirements applicable to web-brokers that host non-Exchange websites to complete QHP selection.¹²² In the 2020 Payment Notice final rule, we finalized amendments that moved the parallel operational readiness requirements for web-brokers and QHP issuers to § 155.221(b)(4), accounting for the fact that DE entities participating in EDE in the FFEs and SBE-FPs host the Eligibility application in addition to QHP selection.¹²³ In the 2022 Payment Notice final rule, we finalized amendments to codify more detail describing the operational readiness reviews applicable to web-brokers participating in FFE and SBE-FP States by adding a new § 155.220(c)(6).¹²⁴ This included codifying requirements for a web-broker to demonstrate operational readiness and compliance with applicable requirements prior to the web-broker's non-Exchange website being used to complete an Exchange eligibility application or a QHP selection, which may include submission or completion, in a form and manner specified by HHS,¹²⁵ of certain information, data, or testing results. As part of these reviews, HHS may request a web-broker submit a number of artifacts or documents or complete certain testing processes to demonstrate the operational readiness of its non-Exchange website. The required documentation may include operational data including licensure information, points of contact, and third-party relationships; security and privacy assessment documentation, including penetration testing results, security and

¹²¹ QHP issuers are also eligible to become approved EDE entities. See 45 CFR 155.221(a)(1).

¹²² 81 FR 94120.

¹²³ 84 FR 17522 through 17525.

¹²⁴ 86 FR 24208 through 24209.

¹²⁵ For additional information, including technical specifications on, the HHS web-broker operational readiness reviews, see CMS. (2023, March 1). *Third-party Auditor Operational Readiness Reviews for the Enhanced Direct Enrollment Pathway and Related Oversight Requirements*. CMS. <https://www.cms.gov/files/document/guidelines-enhanced-direct-enrollment-audits-year-6-final.pdf>.

¹²⁰ QHP issuers are also eligible to become approved DE entities and participate in HHS' DE program. See 45 CFR 155.221(a)(1).

privacy assessment reports, vulnerability scan results, plan of action and milestones, and system security and privacy plans; and an agreement between the web-broker and HHS documenting the requirements for participating in the applicable DE pathway.¹²⁶ The required testing may include enrollment testing, prior to approval or at the time of renewal, and website reviews performed by HHS to evaluate prospective web-brokers' compliance with applicable website display requirements prior to approval.¹²⁷ We identified these operational readiness requirements as necessary safeguards to protect consumer data and the efficient and effective operation of the Exchange while also supporting innovation and the creation of additional approved pathways for FFE and SBE-FP consumers to enroll in QHP coverage in a manner that constitutes enrollment through the Exchange.

As part of the proposal to extend an operational readiness review requirement to State Exchanges and their web-brokers, we propose in new paragraph (n)(2) to require these State Exchanges to establish the form and manner for their web-brokers to demonstrate operational readiness, which may include submission or completion of the same items addressed in § 155.220(c)(6)(i)–(v) to the State Exchanges, in the form and manner specified by the applicable State Exchanges. These standards, which apply in FFE and SBE-FP States, ensure operational readiness and compliance with all applicable requirements prior to the web-broker's non-Exchange website being used to complete Exchange eligibility application or a QHP selection. They make sure consumers and applicants are not able to enroll in Exchange coverage nor submit an Exchange application via a web-broker's non-Exchange website that is not operationally ready. Websites that have not been tested to see if they are operationally ready may not provide consumers and applicants with proper eligibility determinations or may have security flaws that could make a breach involving consumer PII more likely. Mandating that web-brokers participating in State Exchanges meet standards set by the applicable State Exchange to demonstrate operational readiness would help reduce this risk in all Exchanges. We encourage State Exchanges to adopt operational readiness review standards consistent with the requirements captured in

§ 155.220(c)(6)(i)–(v) and also consider leveraging the audits that web-brokers use to demonstrate compliance with the operational readiness review requirements applicable in FFE and SBE-FP States. Such an approach would promote standardization across Exchanges in terms of operational readiness requirements applicable for web-brokers while building in flexibility for State Exchanges. We recognize it is important to provide State Exchanges flexibility to tailor the operational readiness review process to best serve their operational and business needs. For example, State Exchanges may have the need to structure their operational readiness reviews to emphasize or prioritize different web-broker functionalities that meet State-specific needs. Therefore, we are proposing to establish a general requirement that State Exchanges must establish operational readiness requirements for their web-brokers to demonstrate compliance with applicable requirements and technological readiness prior to the web-broker's website being used to complete an Exchange eligibility application or a QHP selection, while providing these State Exchanges with flexibility to define the contours of those requirements. We propose to capture at the end of the new paragraph (n) the accompanying proposed requirement that web-brokers in States with State Exchanges comply with the applicable State Exchanges' operational readiness standards under paragraph (n)(2).

Finally, we propose in new paragraph (n)(1) to extend the current web-broker FFE standard of conduct established at § 155.220(j)(2)(i) to also apply to web-brokers assisting consumers in State Exchanges, and consequently to these State Exchanges. Section 155.220(j)(2)(i) requires agents, brokers, or web-brokers that assist with or facilitate enrollment of qualified individuals, qualified employers, or qualified employees, in coverage in a manner that constitutes enrollment through an FFE, or assist individuals in applying for APTCs and CSRs for QHPs sold through an FFE, must provide consumers with correct information, without omission of material fact, regarding the FFEs, QHPs offered through the FFEs, and insurance affordability programs,¹²⁸ and refrain from marketing or conduct that is misleading (including by having a DE website that HHS determines could mislead a consumer into believing they are visiting *HealthCare.gov*), coercive, or discriminates based on race, color,

national origin, disability, age, or sex. This FFE standard already extends to web-brokers SBE-FP States.¹²⁹ As proposed to be applied in State Exchanges, web-brokers would be required to provide consumers with correct information, without omission of material fact, regarding the applicable State Exchange, QHPs offered through the applicable State Exchange, and insurance affordability programs.¹³⁰ In addition, web-brokers who assist with or facilitate enrollment of qualified individuals, qualified employers, or qualified employees, in coverage in a manner that constitutes enrollment through a State Exchange, or assist individuals in applying for APTCs and CSRs for QHPs sold through a State Exchange, would also be required to refrain from marketing or conduct that is misleading (including by having a website that the State Exchange determines could mislead a consumer into believing they are visiting the State Exchange's website), coercive, or discriminates based on race, color, national origin, disability, age, or sex. As noted in the last sentence of proposed new paragraph (n), to extend this FFE standard of conduct to State Exchanges, we propose that all references to “HHS” and “the Federally-facilitated Exchanges” in § 155.220(j)(2)(i) would be understood to mean and be replaced with a reference to “the applicable State Exchange, applied to web-brokers,” and the reference to “*HealthCare.gov*” in § 155.220(j)(2)(i) would be understood to mean and be replaced with a reference to “the State Exchange website, applied to web-brokers.”

We seek comment on these proposals, especially from States operating, or seeking to operate, State Exchanges. We also seek comment on which of the other current provisions at § 155.220 should or should not apply to State Exchanges and web-brokers that assist consumers in State Exchanges.

8. Establishing Requirements for DE Entities Mandating *HealthCare.gov* Changes Be Reflected on DE Entity Non-Exchange Websites Within a Notice Period Set by HHS (§ 155.221(b))

We propose to revise § 155.221(b) to require that *HealthCare.gov* changes be reflected and prominently displayed on

¹²⁶ See 45 CFR 155.220(c)(6)(i), (iv), and (v).

¹²⁷ See 45 CFR 155.220(c)(6)(ii) and (iii).

¹²⁸ See 42 CFR 435.4 for the definition of insurance affordability programs.

¹²⁹ See 45 CFR 155.220(l). A parallel requirement also applies to QHP issuer DE entities in FFE and SBE-FP States. See 45 CFR 155.221(a)(1) and (i), and 156.1230(b)(2). As discussed below, in this rulemaking, we propose to extend the parallel QHP issuer DE entity requirement to State Exchanges and their QHP issuer DE entities.

¹³⁰ See 42 CFR 435.4 for the definition of insurance affordability programs.

DE entity non-Exchange websites within a specific notice period¹³¹ set by HHS. We conduct various DE entity monitoring programs, including website display reviews, and routinely identify areas where DE entity non-Exchange websites can improve the user experience and more closely align with *HealthCare.gov*. The changes that we propose to require DE Entities to make to their non-Exchange websites include changes that enhance the consumer experience, simplify the plan selection process, and increase consumer understanding of plan benefits, cost-sharing responsibilities, and eligibility for financial assistance. This proposal would codify our existing practice of communicating important changes to the *HealthCare.gov* display to EDE entities to ensure their EDE websites conform to those changes and provide the same vital information to consumers, expand our existing change requests processes to permit entities to request deviations from required display changes, require DE entities that do not participate in EDE to comply with this practice, and require State Exchanges that choose to implement a DE program to require their DE entities to implement and prominently display changes adopted for display on the State Exchanges' websites on their non-Exchange websites for purposes of assisting consumers with DE in QHPs offered through the Exchange in a manner that constitutes enrollment through the Exchange.

Section 1312(e) of the ACA directs the Secretary to establish procedures under which a State may permit agents and brokers to enroll qualified individuals and qualified employers in QHPs through an Exchange and to assist individuals in applying for financial assistance for QHPs sold through an Exchange. In addition, section 1413 of the ACA directs the Secretary to establish, subject to minimum requirements, a streamlined enrollment process for enrollment in QHPs and all insurance affordability programs. At § 155.221(a) and (i), we established that the FFEs and SBE-FPs will permit QHP issuers, which meet the applicable requirements of § 155.221 and § 156.1230, and web-brokers, which meet the applicable requirements of § 155.220 and § 155.221, to assist consumers with DE in QHPs offered through the Exchange in a manner that is considered to be through the Exchange and to the extent permitted by

applicable State law.¹³² Collectively, QHP issuers and web-brokers that meet the applicable requirements to assist Exchange consumers with DE in QHPs are referred to as "DE entities." DE entities may assist consumers with DE in QHPs offered through an Exchange by redirecting consumers from the non-Exchange website to *HealthCare.gov* to complete the eligibility application and obtain an eligibility determination, referred to as "Classic DE." DE entities may also assist consumers with DE in QHPs offered through an Exchange by hosting an eligibility application on their non-Exchange website and allowing consumers to complete the eligibility application and obtain an eligibility determination from the Exchange without being redirected to *HealthCare.gov*, referred to as "Enhanced Direct Enrollment (EDE)." Section 155.221(b) establishes requirements that DE entities must meet to assist consumers in FFE and SBE-FP States.¹³³ Additional requirements that apply to web-brokers and QHP issuers that assist consumers with enrollment in coverage offered through the FFEs and SBE-FPs are captured in §§ 155.220, 156.265, and 156.1230.¹³⁴

The display requirements for DE entity non-Exchange websites are captured in §§ 155.220, 155.221, 156.265, and 156.1230. The website display requirements are often technical in nature and can require subsequent release of guidance to provide technical and operational details to support their implementation. When HHS makes changes to the *HealthCare.gov* display, we notify EDE entities participating in the FFEs and SBE-FPs of these changes and require that they make them to their non-Exchange websites via the HHS-initiated change request process outlined in the Third Party Auditor Operational Readiness Reviews for the Enhanced Direct Enrollment Pathway and Related Oversight Requirements guidance document referred to as the "Third Party Auditor Guidelines."¹³⁵ This process helps ensure consumers

receive vital information they need in a timely fashion.

This proposal would codify and expand this existing, HHS-initiated change request practice for EDE entities' non-Exchange websites and support consistency as to the timing of display changes across enrollment platforms, which would help ensure all Exchange consumers have timely access to accurate, clear information as they navigate the QHP selection and enrollment processes. Most DE partners in FFE and SBE-FP States participate in EDE and therefore are already familiar with and complying with this proposal because it is part of the existing requirements, as outlined in the Third Party Auditor Guidelines. However, the requirements of this proposal would be new for some DE partners, such as those that only participate in Classic DE, because they are not currently subject to these requirements, which currently only apply to DE entities that participate in EDE. It is especially important that changes to the *HealthCare.gov* display are reflected on non-Exchange websites, including websites used for both Classic DE and EDE, as a steadily increasing number of the FFEs' and SBE-FPs' consumers enroll in Exchange plans via these DE pathways. This proposal would help ensure consumers using these DE pathways benefit from the policies we introduce to improve the *HealthCare.gov* website display by enhancing the consumer experience, increasing consumer understanding, and simplifying the plan selection process.

We recognize that the technical details necessary to implement website display changes must be communicated to DE entities with sufficient notice for development prior to implementation. As such, this proposal provides that HHS would provide DE entities with advance notice to give them time to implement the changes on their non-Exchange websites. We intend for the duration of the advance notice period to correspond to the complexity of the change and the urgency with which the change must be reflected on the DE entity's non-Exchange website (that is, we intend to provide a longer advance notice period for implementation of changes requiring more complex website-development work, or for lower-urgency changes). We would categorize display changes as simpler versus more complex based on a combination of factors, including, but not limited to, consideration of the following: number of website pages affected; number of data fields affected; nature of the change (that is, text-based versus data-based); whether the change

¹³¹ "Notice period" refers to the time period that DE entities have to reflect and prominently display *HealthCare.gov* changes communicated to them by HHS pursuant to this proposal.

¹³² 84 FR 17523 through 17524, 86 FR 6176 and 6177.

¹³³ In this rulemaking, we propose to extend certain Federal minimum standards under § 155.221(b) to State Exchanges and their DE entities.

¹³⁴ In this rulemaking, we propose to extend certain Federal minimum standards under §§ 155.220 and 156.1265 to State Exchanges, their web-brokers, and their QHP issuer DE entities.

¹³⁵ CMS. (2023, March 1). *Third-party Auditor Operational Readiness Reviews for the Enhanced Direct Enrollment Pathway and Related Oversight Requirements*. CMS. Section IX.B., pp. 72–74. <https://www.cms.gov/files/document/guidelines-enhanced-direct-enrollment-audits-year-6-final.pdf>.

is static or dynamic based on user input; whether the change updates QHP data provided by us¹³⁶ or involves the display of new data not previously provided by us (that is, new data types would be considered a more complex change due to the web-development work required to integrate a new PUF data field or MAPI data variable); and whether the change may affect backend algorithms for plan sorting, filtering, or recommendations. The complexity of the change would be the primary factor determining the length of the advance notice period. Generally, we would expect to provide approximately 30 calendar days' advance notice of simpler display changes and up to 90 or more calendar days' advance notice for more complex changes. However, in situations where we have determined that it is urgent that *HealthCare.gov* display changes are similarly made to DE entities' non-Exchange websites to communicate necessary information to consumers regarding their plan selection or enrollment, we may provide fewer than 30 days' advance notice, but not less than 5 business days' advance notice. When considering the urgency of a display change, we would consider a number of factors, including, but not limited to, the following: potential to impact the consumers' understanding of plan benefits and cost-sharing responsibilities; potential for consumers to receive an incorrect eligibility determination; potential impact to the consumer's understanding of their eligibility for financial assistance (that is, APTC or CSR); proximity to the Open Enrollment period (with changes becoming more urgent as Open Enrollment nears, as implementing changes prior to Open Enrollment is critical for ensuring the greatest number of consumers are able to benefit from the changes); and whether failure to implement the change may result in a display that is misleading or confusing to consumers.

We propose to amend § 155.221 to add new paragraph (b)(6), which would require DE entities to implement and prominently display website changes in a manner consistent with what is adopted by HHS for display on *HealthCare.gov* by meeting standards

communicated and defined by HHS within a time period set by HHS, unless HHS approves a deviation from those standards. Consistent with § 155.221(i), this new proposed DE entity non-Exchange website display requirement would also apply to DE entities that enroll qualified individuals in coverage in a manner that constitutes enrollment through an SBE-FP or assist individual market consumers with submission of applications for APTC and CSRs through an SBE-FP.

We are cognizant of, and support, DE entity non-Exchange websites' use of innovative decision-support tools and user interface design for consumers to help them shop for and select QHPs that best fit their needs. This proposal is not intended to prohibit or otherwise stand in the way of DE entities' development of such tools and consumer interfaces. Consistent with the existing approach for implementation of HHS-initiated changes described in the Third Party Auditor Guidelines, we would implement this requirement with a focus on requiring DE entities in FFE and SBE-FP States to mirror any display changes made to *HealthCare.gov* that impact a consumer's understanding of plan benefits, cost-sharing responsibilities, and eligibility for financial assistance. For each required change, DE entities in FFE and SBE-FP States would need to implement on their non-Exchange websites conforming changes that meet standards defined by HHS for display in a manner consistent with that adopted by HHS for display on *HealthCare.gov*. We would provide DE entities flexibility in their user interface graphic design, provided that their design complies with the standards defined by HHS in the notification of required change(s). As part of this proposal, we would require that all front-end website changes (that is, website changes that would affect the visual aspects of the website that users see and interact with) be prominently displayed on DE entity non-Exchange websites. "Prominently displayed" means that text must be written in a font size no smaller than the majority of the text on the web page, text must be displayed in the same non-English language as any language(s) the DE entity maintains translations for on its website,¹³⁷ and any display changes must be noticeable in the context of the website (that is, DE entity non-Exchange websites must use a font or graphic color that contrasts with the background of the web page and ensure any graphics and iconography that they are required to display are readable without

requiring the user to increase their magnification percentage greater than 100 percent). The DE entity may change the font color, size, or graphic context of the information to ensure that it is noticeable to the user in the context of its website or other written material.

For example, in a scenario where *HealthCare.gov* is updated to display new help text communicating educational content to consumers that is designed to help a consumer better understand plan benefits, cost-sharing responsibility, or eligibility for financial assistance, we would require the DE entity's non-Exchange website to display that help text or similar text. When notifying DE entities about the required change, we would establish and communicate the standards that must be met for display of the required change, such as the new help text that must be prominently displayed on their websites. If the standards allow the DE entity to display similar text to the language used on *HealthCare.gov* (for example, when information must be communicated but there is a low risk of misinterpretation of the information such that we would not require DE entities to display the exact language used on *HealthCare.gov*), we would provide DE entities with information on how the help text is displayed on *HealthCare.gov*, along with the standards that must be met, while also outlining the flexibility for DE entities to adapt the language to reflect their own entity branding if it generally conveys the same information and meaning as the help text displayed on *HealthCare.gov*. In this example, we would also allow flexibility as to the location of the help text if it adheres to the prominent display requirements discussed earlier in this proposal. In this scenario, DE entities would be able to adjust the language and decide on the location of the help text on the QHP selection page(s) without seeking prior approval from us. However, we would monitor implementation through existing periodic website review monitoring per § 155.220(c)(5) and, as described in the Third Party Auditor Guidelines,¹³⁸ may notify the DE entity if we find that their language does not convey the same meaning as the help text displayed on *HealthCare.gov* or if we find the help text is not prominently displayed. Such notification would occur via a letter that would provide the DE entity with feedback explaining the

¹³⁶ We provide DE entities with the QHP comparative information that must be displayed in accordance with § 155.220(c)(3)(i)(A) and § 156.1230(a)(1)(ii). We provide this data via the Public Use Files (PUF) (<https://www.cms.gov/ccio/resources/data-resources/marketplace-puf>) and through non-Exchange website integration with the Marketplace Application Program Interface (MAPI) (<https://developer.cms.gov/marketplace-api/>). In this context, website integration refers to connecting the non-Exchange website with Exchange data by using the MAPI.

¹³⁷ 45 CFR 155.205(c)(2)(iv).

¹³⁸ CMS. (2023, March 1). *Third-party Auditor Operational Readiness Reviews for the Enhanced Direct Enrollment Pathway and Related Oversight Requirements*. CMS. Section X.F., p. 69. <https://www.cms.gov/files/document/guidelines-enhanced-direct-enrollment-audits-year-6-final.pdf>.

noncompliance and required corrective actions (such letter is referred to as “Technical Assistance”). If Technical Assistance fails, we may potentially take enforcement action to address the identified instances of non-compliance, which could include temporarily suspending the DE entity’s ability to transact information with the Exchange if we discover circumstances that pose unacceptable risk to eligibility determination, Exchange operations, or Exchange systems, if warranted.¹³⁹

Additionally, we recognize that some DE entities may have system constraints that prevent them from precisely mirroring the *HealthCare.gov* display approach, and so we propose that if a DE entity is unable to implement the standards defined by HHS, or the DE entity has an idea for implementation that does not meet the standards but would effectively communicate the same information to consumers, we may permit a deviation. We propose that DE entities that are interested in pursuing a deviation must submit deviation requests to HHS and propose that such requests would be subject to review by HHS in advance of implementation of any alternative display approaches. Deviation requests must include a proposed alternative display and accompanying rationale. The rationale must explain why the DE entity is unable to implement the standards or the DE entity’s idea for implementation that does not meet the standards but would effectively communicate the same information to consumers. Therefore, similar to the differential website display requirements for standardized plans applicable to web-broker and QHP issuer DE entities at §§ 155.220(c)(3)(i)(H) and 156.265(b)(3)(iv) and the HHS-initiated change request process, we propose to allow DE entities to request a deviation from the standards communicated by HHS for required display changes to align with *HealthCare.gov* by submitting a proposed alternative display and accompanying rationale or explanation for why a deviation is necessary. In reviewing deviations, HHS would consider whether the same level of differentiation and clarity is being provided under the deviation requested by the DE entity as is provided on *HealthCare.gov*. Other factors and criteria HHS would consider include, but are not limited to, whether the proposed alternative website display adheres to the standards for prominent display described in this proposal and whether the display provides correct information, without omission of

material fact, that does not have the potential to be misleading to consumers.

Under this proposed approach, the deviation request would have to be submitted and approved by HHS before DE entities would be permitted to implement any alternative website displays. Deviation requests would not toll the advance notice period. This deviation request process described in this paragraph is separate and distinct from the flexibilities in user interface graphic design that we would allow without preapproval as long as the design and display otherwise meets the applicable standards defined and communicated by HHS for the display change. DE entities would only need to request a deviation from the requirements of the standards communicated by HHS if the DE entity seeks to deviate from those standards or specifications when it implements a display change to its Non-Exchange website that is required by HHS pursuant to this proposal.

Pursuant to proposed new § 155.221(j)(3), we also propose to extend this new proposed DE entity non-Exchange website display requirement to require State Exchanges that choose to implement a DE program to require their DE entities to implement and prominently display changes adopted for display on the State Exchanges’ websites on their non-Exchange websites for purposes of assisting consumers with DE in QHPs offered through the Exchange in a manner that constitutes enrollment through the Exchange. We believe it is necessary for consumers utilizing DE entities in State Exchanges to have access to the same vital information pertaining to their plan selection and enrollment process as they would have if they were enrolling via the State Exchanges’ websites. Under this proposal, we would require State Exchanges to establish and communicate standards for required display changes and to set the time period within which display changes must be implemented on DE entities’ non-Exchange websites. State Exchanges would also be required to review deviation requests submitted by DE entities and establish their own deviation request process if the State Exchange wants to permit deviations. We would provide flexibility for State Exchanges to develop their own process for communicating those standards, setting advance notice periods, and establishing a deviation request process as needed to meet the business needs of the State Exchange. We would encourage State Exchanges to consider the same factors described above (that

is, urgency and complexity of the change) when determining the advance notice period. Similarly, we would encourage State Exchanges to provide their DE entities with examples of the State Exchange website display change and technical assistance, including technical implementation guidance, to ease the burden of implementing and prominently displaying required changes. We would require State Exchanges to apply HHS’s standard for “prominently display,” explained earlier in this section of this proposed rule, to help ensure that important enrollment, eligibility, and other information is as noticeable and clear to consumers using DE entities’ websites in State Exchanges as it is to consumers using State Exchange websites or *HealthCare.gov*, which we believe would enhance the user experience, increase understanding, and simplify the plan selection process for all consumers.

As part of this proposal to extend the requirement for DE entities to reflect Exchange website changes on their non-Exchange websites to State Exchanges and their DE entities, we would rely on State Exchanges that choose to implement a DE program to enforce compliance with these requirements and take enforcement action when their DE entities fail to comply and update their non-Exchange websites to mirror changes made to the State Exchange website. We would be available to provide technical assistance to support the State Exchanges’ efforts to take appropriate enforcement action as needed to ensure compliance with applicable requirements. There may exist scenarios where the website display requirements may differ between the FFEs or SBE-FPs versus the State Exchanges (for example, in scenarios where a State Exchange uses the *HealthCare.gov* disclaimer language and adds State-specific information such as replacing a *HealthCare.gov* hyperlink with the State Exchange hyperlink). In such scenarios, DE entities must tailor their non-Exchange website display to the requirements of the State the consumer is seeking assistance in. Based on our experience providing oversight of DE entity website displays, we understand that many DE entities are familiar with and have the capability to tailor website displays based on different scenarios and, as such, we anticipate DE entities would have the capability to tailor website displays to mirror the Exchange website of the State the consumer is shopping for coverage in.

With an increasing number of consumers utilizing the DE pathways to

¹³⁹ 45 CFR 155.221(e).

enroll in coverage through the Exchanges, we believe it is important to codify a requirement to mandate changes adopted by *HealthCare.gov* (or for State Exchanges, the State Exchanges' websites) be implemented on DE entity non-Exchange websites within a timeframe specified by HHS (or, for DE entities participating in State Exchanges, within a timeframe specified by the State Exchange). These proposals would ensure consumers using DE entity non-Exchange websites have a similar user experience, with access to the same information in a similar manner as provided on *HealthCare.gov* and State Exchange websites.

We seek comment on all aspects of this proposal.

9. Adding and Amending Language To Ensure DE Entities Operating in State Exchanges Meet Certain Standards Applicable in the FFEs and SBE-FPs (§ 155.221)

We propose to amend § 155.221 to extend certain existing HHS standards for Exchanges that use the Federal platform that apply to DE entities assisting the FFEs' and SBE-FPs' ¹⁴⁰ consumers and applicants with direct enrollment in QHPs and applying for APTC/CSRs to DE entities operating in State Exchanges, for both the State Exchanges' Individual Exchange and SHOP. These proposals would extend certain Federal DE program standards to DE entities operating in State Exchanges, and consequently to those State Exchanges that, to the extent permitted by applicable State law, permit DE entities to assist their consumers and applicants with direct enrollment in QHPs and applying for APTC/CSRs in a manner that constitutes enrollment through an Exchange. ¹⁴¹ These proposals would also ensure that certain minimum Federal standards—those governing DE entity marketing and display of QHPs and non-QHPs, providing consumer with correct information and refraining from certain conduct, marketing of non-QHPs, website disclaimer language, and operational readiness—would apply to DE entities across all Exchanges. These proposals, if finalized, would be effective on the date of publication of the final rule.

Notably, our regulations do not currently address whether and how DE entities may assist consumers and applicants with DE in QHPs and submission of applications for APTC/CSRs in a manner that constitutes

enrollment in State Exchanges. We believe that current and future State Exchanges may seek to implement DE programs similar to the FFEs and SBE-FPs. As such, we believe that DE entities seeking to assist State Exchange consumers with DE in QHPs and submission of applications for APTC/CSRs in a manner that constitutes enrollment through an Exchange should meet the same or, at a minimum, similar standards as are required in the FFEs and SBE-FPs to protect consumers. These safeguards focus on mitigating the potential for confusion between QHPs and non-QHPs (including the eligibility for APTC and/or CSR as it relates to QHPs versus non-QHPs) and as to which products are available through the Exchange and what products are not, ensuring proper eligibility determinations, protecting against security breaches or incidents through implementation of operational readiness reviews (as websites that have not been tested to see if they are operationally ready may provide improper eligibility determinations or may have security flaws that could make a breach involving consumer PII more likely) and through the other minimum Federal standards in § 155.221 that we propose to extend to State Exchanges and their DE entities. ¹⁴² We recognize that to date, no State Exchanges have implemented DE programs; however, as stated, we anticipate that there may be growing interest in doing so. As such, we recognize a potential burden on State Exchanges that would newly be subject to the standards being proposed, if they choose to implement DE programs. This would include drafting new policies, updating standards, and potentially hiring additional staff to perform functions not currently being performed by the State Exchanges, including providing technical assistance during development and implementation of DE programs in the State Exchanges, creating the framework for and conducting operational readiness reviews, including developing and maintaining documentation needed to complete the operational readiness reviews, as well as conducting ongoing oversight and taking appropriate

¹⁴² The amendments to § 155.221 we are proposing would not impact how DE entities may assist consumers and applicants in SBE-FP States. Section 155.221(i) provides that a DE entity that enrolls qualified individuals in coverage in a manner that constitutes enrollment through an SBE-FP or assists individual market consumers with submission of applications for APTC and CSRs through an SBE-FP, must comply with all applicable FFE standards in § 155.221. We are not proposing any changes to this existing framework for DE entities who assist consumers and applicants in SBE-FP States.

enforcement action for DE entity non-compliance with applicable requirements. It would also include requiring and overseeing web-development and the hosting of non-Exchange websites by DE entities participating in these State Exchanges to ensure compliance with the proposed minimum standards outlined in this rulemaking.

Section 1312(e) of the ACA provides that the HHS Secretary shall establish procedures under which a State may allow agents, brokers, and web-brokers to enroll individuals in QHPs. The Secretary also has authority under section 1321(a) of the ACA to promulgate regulations with respect to the establishment and operation of Exchanges, the offering of QHPs through such Exchanges, and such other requirements as the Secretary determines appropriate. ¹⁴³ As explained earlier, HHS previously leveraged these authorities to establish the existing agent, broker, and web-broker standards applicable in FFE and SBE-FP States, which are currently codified in §§ 155.220 and 155.221. ¹⁴⁴ In addition, section 1413 of the ACA directs the Secretary to establish, subject to minimum requirements, a streamlined enrollment process for enrollment in QHPs and all insurance affordability programs. This authority, along with the Secretary's rulemaking authority under section 1321(a) of the ACA, was previously leveraged to establish the existing QHP issuer DE Entity requirements applicable in FFE and SBE-FP States, which are currently codified in §§ 155.221, 156.265, and 156.1230. ¹⁴⁵

Similar to the agent, broker and web-broker requirements in § 155.220, currently § 155.221 only applies to DE entities assisting consumers and applicants in the FFEs and SBE-FPs. Section 155.221(a) provides that the FFEs will permit the following entities to assist consumers with DE in QHPs offered through the Exchange in a manner that is considered to be through the Exchange, to the extent permitted by applicable State law: (1) QHP issuers that meet the applicable requirements in §§ 155.221 and 156.1230, and (2) web-brokers that meet the applicable requirements in §§ 155.220 and 155.221. These same entities are permitted to

¹⁴³ Section 1321(a)(1)(A), (B) and (D) of the ACA.

¹⁴⁴ See 77 FR 18334–18336; 78 FR 15533; 78 FR 54134; 79 FR 13837; 81 FR 12338; 81 FR 94176; 83 FR 16981–16982; 84 FR 17563; 85 FR 37248; 86 FR 24288; 87 FR 27388; and 88 FR 25917.

¹⁴⁵ See 77 FR 18425–18246; 78 FR 54124–54126; 81 FR 12309–12310; 81 FR 94152; 81 FR 94184; 83 FR 16981–16982, 17030; 84 FR 17521–17525, 17546–17547; and 86 FR 24209–24214.

¹⁴⁰ 45 CFR 155.221(i).

¹⁴¹ See 78 FR at 37065 through 37066 and 78 FR at 54124 through 54126.

assist consumers with DE in QHPs offered through the Exchange in a manner that is considered to be through the Exchange, to the extent permitted by applicable State law, in SBE-FP States.¹⁴⁶ As explained above, DE allows approved entities to enroll consumers in Exchange coverage, with or without the assistance of an agent/broker, directly from their non-Exchange websites. The HHS DE Program includes two DE pathways: Classic DE and EDE. In Classic DE, consumers start on a DE entity's website by indicating they are interested in Exchange coverage. The DE entity's website redirects users to *HealthCare.gov* to complete the eligibility application portion of the process. After completing their eligibility application, *HealthCare.gov* redirects the users back to the DE entity's non-Exchange website to shop for a plan and enroll in Exchange coverage. EDE allows approved EDE entities to provide a comprehensive consumer experience including the eligibility application, Exchange enrollment, and post-enrollment year-round customer service capabilities for consumers and agents/brokers working on behalf of consumers, directly on the DE entities' non-Exchange websites. Through EDE, approved EDE entities build and host a version of the *HealthCare.gov* eligibility application directly on their websites that securely integrates with a back-end suite of FFE application programming interfaces (APIs) to support application, enrollment, and more. References to "Direct Enrollment" or "DE" within § 155.221 include both the Classic DE and EDE pathways. Similarly, the proposal to extend certain existing HHS standards applicable to DE entities participating in FFE and SBE-FP States to State Exchanges and their DE entities would also apply to the operation of Classic DE and/or EDE within these State Exchanges. That is, under this proposal, State Exchanges that choose to implement DE programs in their States would be permitted to adopt the same pathways or tailor their configuration in a manner best suited to their operational and business needs, so long as their DE programs meet the proposed Federal minimum standards in § 155.221 that we propose in this rulemaking to extend to State Exchanges and their DE entities. We would be available to provide extensive technical assistance to State Exchanges that choose to implement DE programs.

As detailed further below, we propose to add a new paragraph (j) to § 155.221 to extend certain Federal minimum DE

entity standards in § 155.221 to DE entities operating in State Exchanges, and consequently, to these State Exchanges that choose to implement DE programs in their States. We seek to ensure that DE entities assisting these State Exchanges' consumers with DE in QHPs and applying for APTC/CSRs in a manner that constitutes enrollment through the Exchange meet Federal minimum standards governing DE entity marketing and display of QHPs, providing consumers with correct information and refraining from certain conduct, marketing of non-QHPs, website disclaimer language, and operational readiness. We also encourage State Exchanges to require DE entities to engage a third-party auditor to perform the operational readiness review audits of their DE entities, consistent with the operational readiness framework adopted by HHS for the FFEs and SBE-FPs. As stated earlier, we recognize that there may be a growing interest from State Exchanges to operate DE programs, and we seek to establish a set of Federal minimum standards to ensure appropriate safeguards are in place, regardless of the Exchange model. Further, the proposed approach to establish a minimum set of Federal standards that would apply to DE entities across all Exchanges would support efficiency in DE entity operations across all Exchanges, including State Exchanges, while also providing flexibility for State Exchanges to tailor their DE program and establish their own standards with respect to operational readiness demonstrations by their DE entities, including whether to require third-party audits of DE entities and to impose additional requirements beyond the proposed Federal minimum standards as they determine may be appropriate based on their operational or business needs. As described above, if they choose to implement DE programs, the State Exchanges would be required to draft policies, update standards, and potentially hire additional staff to perform functions and activities not currently being performed by the State Exchanges in order to comply with these proposals.

We propose to update § 155.221(a), which identifies the entities permitted to be DE entities in FFE and SBE-FP States, to apply across all Exchanges, including State Exchanges. Under this proposal, State Exchanges that choose to implement a DE program may permit QHP issuers and web-brokers that meet applicable requirements to assist consumers with submitting applications for APTC/CSRs and DE in QHPs offered through the Exchange in a manner that

is considered to be through the Exchange. Under the framework proposed in this rulemaking, the applicable requirements that would extend to web-brokers DE entities in States with State Exchanges would include certain subparagraphs of §§ 155.220(c) and (j) and 155.221(a), (b), (c), (d), and (j). We describe above the proposed extension of certain FFE web-broker standards in § 155.220(c) and (j) to State Exchanges and their web-brokers and detail below the FFE web-broker DE entity standards in § 155.221(a), (b), (c), (d), and (j) we propose extending to web-broker DE entities in State Exchanges. As described further below, we propose the applicable requirements that would apply to QHP issuer DE entities in State Exchanges would be certain FFE QHP issuer DE entity standards in §§ 155.221(a), (b), (c), (d), and (j) and 156.1230(b). The proposals to extend certain FFE requirements in § 155.221 to these State Exchanges' web-broker DE entities are intended to align with the proposals described above to extend certain FFE standards and consumer protections in § 155.220 to these State Exchanges' web-brokers.¹⁴⁷ The proposals to extend certain FFE requirements to QHP issuer DE entities are similarly intended to establish a minimum set of standards and consumer protections, with the HHS requirements generally serving as a floor, for State Exchanges that choose to implement DE programs. As detailed further below, as part of these proposals to extend certain FFE requirements to DE entities, we would rely on State Exchanges to enforce compliance with these requirements and take enforcement action as needed when a DE entity fails to comply with applicable requirements. However, we would provide technical assistance to support State Exchange efforts to take appropriate enforcement action as needed to ensure compliance with applicable requirements.

First, consistent with the cross-reference in § 155.221(a)(1), we propose to extend the FFE requirements of § 156.1230(b) governing QHP issuer DE entities to also apply to QHP issuer DE entities assisting consumers with submitting applications for APTC/CSRs and DE in QHPs offered through the Exchange in States with State Exchanges. As reflected in new section § 155.221(a)(1)(i), for purposes of extending the FFE requirements of

¹⁴⁶ 45 CFR 155.221(i).

¹⁴⁷ As previously noted, the FFE requirements for web-brokers in §§ 155.220 and 155.221 also currently extend to web-brokers participating in SBE-FPs. See 45 CFR 155.220(l) and 155.221(i).

§ 156.1230(b) to these States Exchanges and their QHP issuer DE entities, references in § 156.1230(b) to “Federally-facilitated Exchange”, “HHS”, and “HealthCare.gov” would be understood to mean “the applicable State Exchange”, “the applicable State Exchange”, and “the applicable State Exchange website”, respectively. Consistent with §§ 156.1230(b)(1) and (2), to directly enroll consumers in a manner that is considered to be through the Exchange, QHP issuer DE entities are required to comply with the applicable requirements in § 155.221 and provide consumers with correct information, without omission of material fact, regarding the Exchanges, QHPs offered through the Exchanges, and insurance affordability programs,¹⁴⁸ and refrain from marketing or conduct that is misleading (including by having a DE website that HHS determines could mislead a consumer into believing they are visiting *HealthCare.gov*), coercive, or discriminates based on race, color, national origin, disability, age, or sex. This FFE standard already extends to QHP issuer DE entities in SBE–FP States.¹⁴⁹ In this rulemaking, we propose to extend these FFE requirements to also apply them to QHP issuer DE entities in State Exchanges. As proposed to be applied in these State Exchanges, QHP issuer DE entities would similarly be required to provide consumers with correct information, without omission of material fact, regarding the Exchanges, QHPs offered through the Exchanges, and insurance affordability programs.¹⁵⁰ In addition, QHP issuer DE entities in State Exchanges would also be required to refrain from marketing or conduct that is misleading (including by having a DE website that the State Exchange determines could mislead a consumer into believing they are visiting the Exchange’s website), coercive, or discriminates based on race, color, national origin, disability, age, or sex. We solicit comments on whether § 156.1230 should also be amended to affirm its applicability to these State Exchanges and their QHP issuer DE entities.¹⁵¹

In addition, we propose that all Exchanges, including State Exchanges that choose to implement DE programs

must require their DE entities, both web-broker and QHP issuer DE entities, to meet the Federal standards under § 155.221(b)(1) governing plan display and marketing for QHPs and any other products offered on the Exchange. These Federal standards governing plan display and marketing for QHPs and any other products offered on the Exchange currently apply today to approved web-broker and QHP issuer DE entities in FFE and SBE–FP States.¹⁵² As such, in new paragraph (j), we propose to extend § 155.221(b)(1), including the exceptions in § 155.221(c), to DE entities participating in State Exchanges, and consequently to these State Exchanges. Under this proposal, DE entities participating in State Exchanges would be required to display and market QHPs offered through the Exchange, individual health insurance coverage as defined in § 144.103 offered outside the Exchange (including QHPs and non-QHPs other than excepted benefits) and any other products, such as excepted benefits, on at least three separate website pages on its non-Exchange website, except as permitted under § 155.221(c). Pursuant to the exception under § 155.221(c)(1), a DE entity operating in a State Exchange would be permitted to display and market individual health coverage offered outside the Exchange (including QHPs and non-QHPs other than excepted benefits) on the same website pages when assisting individuals who have communicated receipt of an offer of an individual coverage health reimbursement arrangement as described in § 146.123(c), as a standalone benefit, or in addition to an offer of an arrangement under which the individual may pay the portion of the premium for individual health insurance coverage that is not covered by an individual coverage health reimbursement arrangement using a salary arrangement pursuant to a cafeteria plan under section 125 of the Code, but would be required to clearly distinguish between the QHPs offered through the Exchange and individual health insurance coverage offered outside the Exchange (including QHPs and non-QHPs other than excepted benefits), and prominently communicate that APTCs and CSRs are available only for QHPs purchased through the Exchange, that APTCs are not available to individuals who accept an offer of an individual coverage health reimbursement arrangement or who opt out of an individual coverage health reimbursement arrangement that is considered affordable, and that a salary

reduction arrangement under a cafeteria plan may only be used toward the cost of premiums for plans purchased outside the Exchange. Pursuant to the exception in § 155.221(c)(2), DE entities operating in States with State Exchanges would be permitted to display and market Exchange-certified stand-alone dental plans offered outside the Exchange and non-certified stand-alone dental plans on the same website pages.

In new proposed paragraph (j), we also propose to extend the Federal marketing standard at § 155.221(b)(3) to DE entities participating in State Exchanges and consequently to State Exchanges that choose to implement a DE program, such that these DE entities would also be required to limit marketing of non-QHPs during the Exchange eligibility application and QHP selection process in a manner that minimizes the likelihood that consumers would be confused as to which products and plans are available through the Exchange and which products and plans are not, except as permitted under § 155.221(c)(1). Refer to the discussion above regarding the exception in § 155.221(c)(1) pertaining to DE entities assisting individuals who have communicated receipt of an offer of an individual coverage health reimbursement arrangement as described in § 146.123(c), as a standalone benefit, or in addition to an offer of an arrangement under which the individual may pay the portion of the premium for individual health insurance coverage that is not covered by an individual coverage health reimbursement arrangement using a salary arrangement pursuant to a cafeteria plan under section 125 of the Code.

We believe requiring DE entities participating in all Exchanges to meet the plan display and marketing requirements in § 155.221(b)(1) and (3) adopted by HHS for FFE and SBE–FP States would provide necessary safeguards for consumers who may participate in DE programs across all Exchange models, including in State Exchanges. Requiring DE entities across all Exchanges to meet these Federal plan display and marketing requirements would protect consumers by minimizing their confusion regarding which products and plans are available through the Exchange, which products and plans are not, and which products and plans are eligible for APTC and CSRs. Further, the adoption of uniform requirements across Exchanges in this regard can also alleviate burden on DE entities from having to build different programs and comply with disparate requirements for each State Exchange

¹⁴⁸ See 42 CFR 435.4 for the definition of insurance affordability programs.

¹⁴⁹ See 45 CFR 155.221(a)(1) and (i).

¹⁵⁰ Id.

¹⁵¹ If § 156.1230 is amended to affirm its applicability to these State Exchanges and their QHP issuer DE entities, parallel revisions may be made to § 156.1230 in the final rule to also capture and affirm its applicability to SBE–FPs and their QHP issuer DE entities.

¹⁵² 45 CFR 155.221(b)(1) and (i).

that chooses to implement a DE program, as well as burden on a State Exchange from having to develop different requirements than what HHS has already found to be beneficial and effective for FFE and SBE-FP States. We recognize that elsewhere in this rulemaking, we have built in more operational flexibility for State Exchanges to tailor certain aspects of their programs or oversight processes to best suit their operational and business needs (for instance, the operational readiness review requirements for web-brokers and DE entities in States with State Exchanges). In this case, however, we believe that the benefits to consumers of uniformly applying the plan display and marketing requirements in § 155.221(b)(1) and (3) to ensure they apply to all Exchanges as minimum standards outweigh the potential drawbacks of reducing discretion and flexibility to State Exchanges with respect to modifying these baseline requirements. We solicit comments on whether State Exchanges should instead be provided with broader discretion and flexibility to establish their own plan display and marketing requirements tailored to their consumers or local needs.

In new proposed paragraph (j), we also propose to extend the existing standardized disclaimer requirement in § 155.221(b)(2) to apply to DE entities participating in States with State Exchanges and consequently to these State Exchanges. Pursuant to § 155.221(b)(2) and (i), DE entities in FFE and SBE-FP States are required to prominently display a standardized disclaimer in the form and manner provided by HHS.¹⁵³ This disclaimer is separate from the Enrollment Support and General non-FFE standardized disclaimers under § 155.220(c)(3)(i)(A) and (G), respectively, that web-brokers are required to display when their non-Exchange websites are used to complete a QHP selection or complete the Exchange eligibility application.¹⁵⁴ The standardized disclaimer required under § 155.221(b)(2) instead is intended to help consumers understand the difference between QHPs and non-QHPs, and that financial assistance is only available for QHPs. Under this proposal, DE entities in State Exchanges, and DE entities in FFEs and SBE-FPs under existing § 155.221(b)(2), would also be required to prominently display a standardized disclaimer that

similarly informs consumers about the differences between QHPs and non-QHPs, and that financial assistance is only available for QHPs. Its purpose is to assist consumers in distinguishing between DE entity website pages that display QHPs and those that display non-QHPs, and for which products APTC and CSRs are available. Consistent with the current practice for the other standardized disclaimers provided by HHS under §§ 155.220 and 156.1230, we will provide further details on the text and other display details for the standardized disclaimer in technical guidance.

This proposal requires that the disclaimer must be displayed prominently on a DE entity's website in State Exchanges, and in FFEs and SBE-FPs under existing § 155.221(b)(2), when a consumer navigates away from any website page that markets or displays QHPs offered through the Exchange (that is, on-Exchange QHPs) to any website page that markets or displays QHPs offered outside the Exchange (that is, off-Exchange QHPs) or non-QHPs. DE entities would be required to display this disclaimer on its own interstitial website page or on a pop-up window.

We propose in paragraph (j)(1) to provide State Exchanges with flexibility regarding the standardized disclaimer language that would be required to be displayed by their DE entities, provided that the additional language does not conflict with the HHS-provided standardized disclaimer. This proposed flexibility is similar to the proposed flexibility for State Exchanges to modify the web-broker Enrollment Support and General non-FFE standardized disclaimers under § 155.220(c)(3)(i)(A) and (G) described above, such that the HHS-provided language for the standardized disclaimer under § 155.221(b)(2) must be used as a minimum starting point, but State Exchanges may add State-specific information to the disclaimers, provided the additional language does not conflict with the HHS-provided standardized disclaimer. This would permit State Exchanges to replace references to the Exchange or Marketplace with the appropriate reference to the State-specific Exchange name. State Exchanges may also require web-brokers and QHP issuers operating as DE entities in their States to translate the disclaimer text into languages appropriate for the States as this type of additional requirement would not conflict with the HHS-provided disclaimer language or minimum standards. As with all informational materials, standard plain language

practice is to write at or near a fourth grade reading level and not to exceed an eighth grade reading level. We expect that any State-specific additions or customizations to this disclaimer would be written accordingly. We would be available to provide technical assistance to State Exchanges that want to add State-specific language to the standardized disclaimer under § 155.221(b)(2). In using HHS-provided disclaimer language as a minimum starting point, DE entities in State Exchanges would be required to display a disclaimer that provides information to assist consumers in distinguishing between DE entity website pages that display QHPs and those that display non-QHPs and for which products APTC and CSRs are available, all during a single shopping experience for consumers.

We believe establishing the HHS language as a minimum standard for the standardized disclaimer under § 155.221(b)(2) that DE entities must display across all Exchanges would provide a necessary baseline, and meeting these standards would ensure consumers and applicants are receiving sufficient information to help consumers distinguish between DE entity website pages displaying QHPs versus pages displaying non-QHPs and provide general uniformity among the different Exchange models when enrollment or enrollment information is provided outside of the Exchange through a DE entity's non-Exchange website.

Similar to the proposed requirement to extend operational readiness requirements to web-brokers in States with State Exchanges, we also propose to extend operational readiness requirements to DE entities in State Exchanges and consequently to these State Exchanges. DE entities that participate in FFE and SBE-FP States are required, pursuant to § 155.221(b)(4) and (i), to demonstrate to HHS operational readiness and compliance with applicable requirements prior to the DE entity's non-Exchange website being used to complete an Exchange eligibility application or a QHP selection. In new paragraph (j)(2), we propose to extend DE entity operational readiness requirements to State Exchanges. Under this proposal, DE entities participating in State Exchanges would be required to demonstrate operational readiness and compliance with applicable requirements to the State Exchange prior to the DE entity's website being used to complete an Exchange eligibility application or a QHP selection. We also propose in new paragraph (j)(2) to require these State

¹⁵³ See 84 FR 17523.

¹⁵⁴ As detailed above, we propose to extend the Enrollment Support and General non-FFE standardized disclaimers to State Exchanges and web-brokers participating in those State Exchanges.

Exchanges to establish the form and manner for their DE entities to demonstrate operational readiness and compliance with applicable requirements, which may include submission or completion of the same items business audit documentation or security and privacy audit documentation in § 155.221(b)(4)(i) and (ii) to the State Exchange, in the form and manner specified by the applicable State Exchange. Pursuant to § 155.221(b)(4)(i) and (ii), HHS may request a DE entity submit a number of documents to demonstrate compliance with applicable requirements, as well as the operational readiness of its non-Exchange website. The required documentation may include privacy questionnaires, privacy policy statements, and terms of services, business audit reports, interconnection security agreements, security and privacy controls assessment and plans, security and privacy assessment reports, plans of action and milestones, privacy impact assessments, system security and privacy plans, incident response plans, and vulnerability scan results. We propose to codify these documentation standards in new paragraphs (j)(2)(i) and (ii) as illustrative examples of the type of requirements that we encourage State Exchanges that choose to implement a DE program to adopt as part of their operational readiness and compliance reviews of DE entities non-Exchange websites.

This proposal would require DE entities participating in State Exchanges to meet operational readiness requirements established by the State Exchanges, and State Exchanges would have the flexibility to decide which particular operational readiness requirements to implement to support their respective DE programs, potentially leveraging the items in § 155.220(b)(4)(i) and (ii) as the starting point for their operational readiness reviews. Similar to the web-broker operational readiness reviews under § 155.220(c)(6), the standards under § 155.221(b)(4) governing the HHS operational readiness reviews of DE entity non-Exchange websites are also a critical part of the oversight framework for HHS' DE program (including both Classic DE and EDE) available in the FFEs and SBE-FPs. These standards as they apply to DE entities participating in FFE and SBE-FP States help ensure operational readiness and compliance with applicable requirements prior to the DE entity's non-Exchange website being used to complete Exchange eligibility application or a QHP selection and help ensure consumers

would not be able to enroll via a DE entity's website that is not operationally ready. Websites that have not been tested to see if they are operationally ready may not provide consumers with proper eligibility determinations or may have security flaws that could make a breach involving consumer PII more likely. Mandating DE entities that participate in State Exchanges meet minimum standards set by the State Exchanges for operational readiness would help reduce this risk in all Exchanges.

We recognize that some State Exchanges that choose to implement a DE program may seek to utilize DE entities already participating in DE in the FFEs or SBE-FPs. We specifically encourage those State Exchanges to consider adopting the same operational readiness requirements established by HHS, including the third-party auditor framework adopted by HHS pursuant to § 155.221(f) and (g), as well as accept HHS' review of those third-party audits and determinations made as to the DE entities' operational readiness without conducting additional review, unless there are other unique State specific requirements that warrant further targeted review. This approach would permit DE entities to also participate in State Exchanges when HHS determined that those DE entities demonstrated operational readiness and compliance with applicable requirements as they apply to FFE and SBE-FP States would minimize burden of the operational readiness reviews on the State Exchanges and on their DE entities. For example, if the DE entity is using the single streamlined application described in § 155.405 and has already been approved to participate in the FFEs or SBE-FPs, we encourage State Exchanges to accept HHS' review of and determinations made as to the DE entity's audit documentation without conducting further review to confirm compliance with the Federal minimum standards. However, we also recognize that it is important to provide these State Exchanges with flexibility to adopt their own operational readiness requirements in a manner that is tailored to best meet the operational and business needs of the State Exchanges since State Exchanges are best positioned to make that judgement. We therefore encourage, but do not propose to require, these State Exchanges to adopt the same operational readiness requirements and third-party auditor framework that HHS adopted under § 155.221(b)(4), (f) and (g) for DE entities assisting FFE and SBE-FP consumers.

We encourage State Exchanges that choose to implement a DE program to

consider requiring their DE entities to engage a third-party auditor, consistent with standards adopted by HHS at § 155.221(f) and (g) that apply in FFE and SBE-FP States, to perform the operational readiness reviews, for example, to provide an unbiased confirmation that the DE entities are able to appropriately conduct eligibility determinations. However, we do not propose to mandate these State Exchanges require their DE entities to perform such third-party audits as we recognize that State Exchanges may want to adopt their own mechanisms or impose State-specific requirements to confirm DE entity operational readiness and compliance with applicable requirements (which may include additional State-specific standards), and we want to ensure State Exchanges have the flexibility to establish operational readiness review requirements that are tailored to support their respective DE programs. For example, as noted above, if the State Exchange uses an alternative to the single streamlined application described in § 155.405, we would not recommend leveraging HHS' eligibility application audit under § 155.221(b)(4)(iii), as the HHS audit results may not be applicable to the State Exchange's alternative eligibility applications. However, if the State Exchange requires the use of the single streamlined application described in § 155.405, for DE entities that have already been approved to participate in the FFEs or SBE-FPs, we would encourage the State Exchange to use the same third-party auditor framework and requirements that HHS adopted for FFE and SBE-FP States, as well as accept HHS' review of the third-party audits and determinations made as to the DE entity's operational readiness and compliance with applicable requirements without conducting further review, unless there are other unique State specific requirements that warrant further targeted review.

As State Exchanges establish DE programs, it may be in their interest to permit a DE entity to provide consumers with access to DE entity application assisters, as defined at § 155.20, to provide assistance with applying for a determination or redetermination of eligibility for individual market coverage through the Exchange and insurance affordability programs. As such, in new proposed paragraph (j), we propose to also extend § 155.221(d) to State Exchanges and their DE entities to allow DE entity application assisters, when permitted by the applicable State Exchange and only to the extent permitted by applicable State law, to

assist individuals in the individual market with applying for a determination or redetermination of eligibility for coverage through the Exchange and for insurance affordability programs, provided that such DE entities ensure that each of its DE entity application assisters meets the requirements in § 155.415(b). Section 155.415(b) establishes minimum standards for QHP issuer and DE entity application assisters regarding required training on QHP options and insurance affordability programs, eligibility, and benefits rules and regulations at paragraph (b)(1), compliance with the Exchange's privacy and security standards at paragraph (b)(2), and compliance with applicable State laws related to the sale, solicitation and negotiation of insurance products; licensure; confidentiality and conflict of interest at paragraph (b)(3). Although § 155.415(b) is generally applicable to all Exchanges, paragraph (b)(1) establishes required training on QHP options and insurance affordability programs, eligibility, and benefits rules and regulations with respect to providing assistance in the FFEs or SBE-FPs. As proposed to be applied in State Exchanges, DE entities and their application assisters would be required at new paragraph (j) to complete appropriate State-required training and registration in a manner specified by the State Exchange consistent with § 155.415(b)(1), which should similarly include training on QHP options and insurance affordability programs, eligibility, and benefits rules and regulations as training on this content is necessary to ensure consumers are provided with vital information about these topics if DE entities and their application assisters would be permitted to assist consumers with QHP shopping and DE in coverage offered through State Exchanges.

In addition, under this proposal, to meet the requirements of § 155.415(b)(2) and (3), DE entities that participate in a State Exchange and want to use DE entity application assisters would be required to coordinate with the State Exchange and appropriate State agencies to ensure they are meeting the Exchange privacy and security standards at § 155.260 consistent with § 155.415(b)(2), as well as complying with State law related to the sale, solicitation, and negotiations of health insurance products consistent with § 155.415(b)(3).

As part of their establishment of DE programs, we also encourage the State Exchange to adopt an immediate suspension framework, similar to § 155.221(e) that applies in FFE and

SBE-FP States, that provides for the immediate suspension of a DE entity's ability to transact information with the State Exchange if the State Exchange discovers circumstances that pose unacceptable risk to the accuracy of the State Exchange's eligibility determinations, operations, or information-technology systems until the incident or breach is remedied or sufficiently mitigated to the State Exchange's satisfaction. This provision is an important feature of HHS' oversight of the use of DE entity non-Exchange websites in FFE and SBE-FP States that protects consumers data and safeguards Exchange operations and systems. State Exchanges that choose to establish a DE program and permit DE entities to use non-Exchange websites to assist consumers with QHP selections and submission of Exchange eligibility applications should consider adoption of similar measures.

Finally, at new proposed § 155.221(j)(3), we propose to extend the new proposed requirement that would be applicable in FFE and SBE-FP States to mandate *HealthCare.gov* changes be reflected on DE entity websites in a manner consistent with that adopted for display on *HealthCare.gov* within a notice period set by HHS by conforming with display changes defined and communicated as standards by HHS, at new proposed § 155.221(b)(6), to apply to DE entities operating in State Exchanges and consequently to these State Exchanges. As reflected in the last clause of new proposed § 155.221(j)(3), for the purposes of extending this requirement to DE entities operating in the State Exchanges, references to an FFE website would be understood to mean the State Exchange website and references to HHS would be understood to mean the State Exchange. Refer to the discussion in the proposal for new § 155.221(b)(6) for additional details on how State Exchanges would implement the extension of this proposal to their DE entities.

We seek comment on these proposals, especially from States operating, or seeking to operate, State Exchanges. We are particularly interested in comments regarding which of the other current Federal standards at § 155.221 should or should not apply to State Exchanges that choose to implement a DE program.

10. Failure To Reconcile (FTR) Process (§ 155.305(f)(4))

We are proposing in connection with the FTR process described in § 155.305(f)(4), to require all Exchanges, including State Exchanges, to send notices to tax filers for the first year in which they failed to reconcile APTC

starting in PY 2025 as an initial warning to inform and educate tax filers that they need to file and reconcile or risk being determined ineligible for APTC if they fail to file and reconcile for a second consecutive year. As part of the 2024 Payment Notice (88 FR 25814 through 25816), we changed the FTR process such that an Exchange may only determine enrollees ineligible for APTC after a tax filer (or a tax filer's spouse, if married) has failed to file a Federal income tax return and reconcile their past APTC for two consecutive years (specifically, years for which tax data will be utilized for verification of household income and family size). However, in that rule, we did not impose a requirement for Exchanges to notify enrollees during the first year that the applicable tax filer failed to file and reconcile.

We are proposing to require that all Exchanges be required to send informative notices at least annually to tax filers who have failed to file and reconcile. Since Exchanges are prohibited from sending protected Federal tax information (FTI) to an individual who may not be the tax filer, only the FTR Open Enrollment notices sent *directly* to the tax filer may directly state that the IRS data indicates the tax filer failed to file and reconcile, consistent with standards applicable to the protection of FTI. An Exchange may not always be able to send FTR Open Enrollment notices directly to the tax filer because Exchange notices are sent to the household contact or subscriber on the household's Exchange account or insurance policy, and this person is not necessarily the tax filer. Therefore, to comply with the prohibition on sending FTI (including information about failing to file and reconcile) in cases where the household contact is not the tax filer, the Exchange may send notices that contain broad, general language regarding FTR referred to as "combined notices." For example, an Exchange can send the same Exchange Open Enrollment Notice to multiple groups of consumers at risk for APTC discontinuation in the upcoming coverage year such as those flagged as FTR, those for whom the Exchange has received updated income information that suggests the consumers may have income too high to qualify for APTC, and those who did not permit the Exchange to check IRS data. Because the combined notices apply and are sent to some consumers who are currently unaffected by FTR, and not exclusively to individuals who are affected by FTR, these notices are generally not considered FTI under IRS rules may be

sent using the standard notice functionality.

As background, Exchange enrollees whose tax filer fails to comply with current § 155.305(f)(4) are referred to as having failed to “file and reconcile.” These individuals are referred to as having FTR status, and the Exchanges conduct the FTR process to identify such individuals. In the 2024 Payment Notice (88 FR 25814 through 25816), we finalized a new process for Exchanges to conduct FTR to address concerns that the pre-existing FTR process requiring Exchanges to determine an enrollee ineligible for APTC after one year of having an FTR status could be overly punitive. Under the previous policy, enrollees occasionally had their APTC ended due to delayed data processing, in which case their only remedy was to appeal to get their APTC reinstated. Enrollees or their tax filers also may have been confused by or received inadequate education on the requirement to file and reconcile. HHS’ and the State Exchanges’ experiences with running FTR operations showed that Exchange enrollees often do not understand the requirement that their tax filer must file a Federal income tax return and reconcile their APTC or that they must also submit IRS Form 8962 to properly reconcile their APTC, even though both the single, streamlined application used by Exchanges on the Federal platform and the QHP enrollment process require a consumer to attest to understanding the requirement to file and reconcile. Note, the updated policy in the 2024 Payment Notice does not relieve tax filers from their requirement to reconcile each year nor any potential tax liability. By making these changes to the FTR processes in the 2024 Payment Notice and requiring Exchanges to determine an enrollee ineligible for APTC only after having an FTR status for two consecutive years (specifically, years for which tax data will be utilized for verification of household income and family size), Exchanges now have more opportunity to conduct outreach to tax filers for whom data indicate they have failed to file and reconcile and to prevent erroneous terminations of APTC, as well as to provide access to APTC for an additional year even when APTC would have been correctly terminated under the original FTR process.

There are limitations to these notices; notices that are sent directly to the tax filers and explicitly describe their FTR status must be compliant with IRS requirements for disclosing FTI, which can be a complex process and untenable with some Exchanges’ infrastructure.

Alternatively, combined notices, which do not contain FTI, have limitations in that they do not explicitly inform the recipients that they are at risk of losing APTC due to the household tax filer being found to have failed to file and reconcile. However, both types of notices will create an opportunity for State Exchanges to educate enrollees or their tax filers on the requirement to reconcile their PTC. This will address the consumer confusion and knowledge gaps that were identified by both HHS and State Exchanges, which were key considerations in making the changes to the FTR process described in the 2024 Payment Notice, wherein tax filers now must be identified as FTR for two years prior to having their APTC removed. With this additional year for tax filers to correct their FTR status, consumers will be better able to take appropriate action prior to losing their APTC and file and reconcile in response to these notices.

Under this proposal, Exchanges on the Federal platform would continue to send notices to tax filers for the year in which they have failed to reconcile APTC as an initial warning to inform and educate consumers that they need to file and reconcile, or risk being determined ineligible for APTC if they fail to file and reconcile for a second consecutive tax year. Our proposal to codify this practice and require it of all Exchanges, including the State Exchanges, would ensure that tax filers who have been determined to have FTR status for one year are adequately educated on the file and reconcile requirement, and have ample opportunity to address the issue and file and reconcile their APTC before they are determined to have FTR status for two consecutive years. This proposal would support compliance with the filing and reconciling requirement under section 36B(f) of the Code and its implementing regulations at 26 CFR 1.36B–4(a)(1)(i) and (a)(1)(ii)(A), minimize the potential for APTC recipients to incur large tax liabilities over time, and support eligible enrollees’ continuous enrollment in Exchange coverage with APTC by avoiding situations where enrollees become uninsured when their APTC is terminated. Additionally, this proposal would better align State Exchanges’ Failure to Reconcile processes with that of the Exchanges on the Federal platform.

We seek comment on this proposal.

11. Verification Process Related to Eligibility for Enrollment in a QHP Through the Exchange (§ 155.315(e))

We are proposing to amend § 155.315(e) by revising paragraph (e)(1)

to permit all Exchanges to accept an applicant’s attestation of incarceration status and paragraph (e)(2) to allow Exchanges to electronically verify a consumer’s current incarceration status using an HHS-approved verification data source. We are also proposing to amend the reference in paragraph (e)(3) to reflect that if an Exchange verifies an applicant’s attestation of incarceration status using an approved data source and the attestation is not reasonably compatible with the information provided from the said data source or other information provided by the applicant or in the records of the Exchange, then the Exchange must follow the data matching issue (DMI) process set forth in § 155.315(f). If this proposed policy is finalized, Exchanges using the Federal eligibility and enrollment platform, including SBE-FPs, that currently use the incarceration verification data source offered through the Federal Data Services Hub (the “Hub”) would be able to accept consumer attestation of incarceration status without further verification of incarceration status.

As background, section 1312(f)(1)(B) of the ACA states that an individual shall not be treated as a qualified individual for enrollment in a QHP if, at the time of enrollment, the individual is incarcerated, other than incarceration pending the disposition of charges. Sections 155.315(e) and (e)(1) currently state that Exchanges must verify incarceration status with a data source approved by HHS and deemed accurate, current, and offering less administrative complexity than paper verification. When an individual’s incarceration attestation conflicts with information from an approved data source or other information provided by the applicant or in the records of the Exchange, § 155.315(e)(3) requires Exchanges to create a DMI as outlined in § 155.315(f). However, if an approved data source is unavailable, an Exchange may accept attestation of incarceration without further verification under § 155.315(e)(2).

Under proposed paragraphs (e)(1) and (2), an Exchange would be able to accept a consumer’s attestation of incarceration status or propose an electronic data source for incarceration verification to HHS for approval and use that approved source to verify incarceration status. Should a State Exchange choose to propose use of an alternative electronic data source for verifying incarceration status, HHS would review such proposals in accordance with the process under § 155.315(h), through which HHS would make a determination based on the proposed

use of the alternative data source and whether it minimizes administrative costs and burdens on individuals while it maintains accuracy and minimizes delay. Proposed paragraph (e)(3) would provide that if an Exchange verifies an applicant's attestation of incarceration status using an approved data source as provided under proposed paragraph (e)(2), to the extent that the applicant's attestation is not reasonably compatible with information from the approved data source or other information provided by the applicant or in the records of the Exchange, the Exchange would be required to follow the DMI procedures at § 155.315(f).

In the Exchange Establishment Rule (77 FR 18362), we recognized that there may be challenges in the availability of electronic incarceration verification data but believed that so long as an incarceration verification data source existed that has been approved by HHS, it should be used to verify incarceration status. We also recognized that requesting consumer attestation of incarceration status and accepting such attestation without further verification when an accurate data source was unavailable is necessary since incarceration status is a statutory standard for eligibility to enroll in a QHP.

Exchanges using the Federal eligibility and enrollment platform, including SBE-FPs, currently verify whether an applicant is incarcerated through the Hub by using the Social Security Administration's (SSA) Prisoner Update Processing System (PUPS). PUPS is currently maintained by SSA and is the only national database that reflects information from Federal, State, and local correctional records. Our experience administering the Federal eligibility and enrollment platform, along with the experience from the State Exchanges that have used the PUPS data, have demonstrated that verifying incarceration data using PUPS has resulted in a high number of DMIs, few of which identify QHP applicants who are incarcerated. For example, we conducted an internal study and found that out of 110,802 incarceration DMIs generated between PYs 2018 to 2019, 96.5 percent of them were resolved in favor of the applicant. More importantly of those 3,878 applicants whose DMIs were not resolved in their favor (3.5 percent of 110,802), we found that only a total of 2,469 applied for QHP coverage during PYs 2018 and 2019. Of these 2,469 ineligible applicants, 950 applicants were released from either prison or jail within 90 days after the application submission date. Excluding these individuals leaves 1,519 QHP-

ineligible individuals, of which 921 applicants effectuated coverage (that is, made the binder payment), which is allowed while awaiting DMI clearance, thus resulting in an improper APTC payment. An average annual APTC per individual of \$1,569 was estimated for the 921 QHP ineligible applicants with effectuated policies.¹⁵⁵ This yields potential improper payments of approximately \$361,262.25 over 3 months. Because only a very small number of incarcerated individuals apply to enroll in QHPs, verifying incarceration status using PUPS and conducting the DMI process outlined at § 155.315(f) results in Exchanges saving only a fraction of improper overpayment of APTC, and those savings are dwarfed by the administrative costs imposed by using PUPS and conducting the DMI process.

We conducted a cost-benefit assessment and determined that the cost to verify incarceration status electronically far exceeds potential savings. Should the Exchange conduct an electronic incarceration verification check, such as a verification check of a consumer's attestation using PUPS data, it would cost more than \$4 million to operate yearly, along with a one-time implementation startup cost of approximately \$200,000. Furthermore, connecting to an alternative incarceration data source, such as PUPS, and conducting the DMI process outlined at § 155.315(f) can be very costly to Exchanges. In PY 2019, nearly 38,000 out of 78,000 applicants with an incarceration DMI submitted documents to attempt to resolve the incarceration DMI. To process DMIs, the Exchange incurs costs for the eligibility-verification contractor on a fixed-price basis totaling about \$0.57 million per year for verification of incarceration. This figure does not include other costs related to sending notices to consumers, processing appeals, and handling call center transactions. Our 2019 study concluded that those who receive an incarceration DMI are statistically likely to be eligible to enroll in a QHP as the

¹⁵⁵ This per-person per-year estimate was calculated by multiplying the monthly APTC benefit that each ineligible and effectuated applicant was estimated to receive in their FFE application by the maximum number of months the applicant could have been enrolled in a QHP while still incarcerated and pending DMI clearance. For open enrollment applications, an enrollment start date of January 1 was used (45 CFR 155.410). For special enrollment period applicants, the previous coverage effective date rules were used where if the applicant applied between the 1st and 15th of the month, an enrollment start date of the 1st of the following month was used. If the applicant applied after the 16th of the month, an enrollment start date of the 1st of the month 2 months following the application month was used. 45 CFR 155.420.

applicants were released from either prison or jail within 90 days after the application submission date. However, an unresolved incarcerated DMI can result in a complete loss of coverage.

The processes of notifying consumers of their DMIs and resolving them have been burdensome and has negatively impacted the consumer experience. When an incarceration DMI is generated, applicants are required to provide documentation to show that they are no longer incarcerated.¹⁵⁶ This creates a significant enrollment burden for formerly incarcerated individuals, a population comprised of a significant number of people with disabilities.¹⁵⁷ Many documents that can prove incarceration status cannot be obtained without an unexpired proof of identity document, and most cannot be obtained without submitting non-refundable payments. Incarceration may inhibit one's financial savings, and formerly incarcerated individuals are less likely to secure employment.¹⁵⁸

These findings support our beliefs that incarcerated individuals apply for QHP coverage at very low rates, and that their applications are considered to be a very low program integrity risk for Exchanges, which do not warrant always conducting an extensive incarceration verification check. We also believe that previous guidance to conduct incarceration status verification¹⁵⁹ may have contributed to inequity in the Exchange population, as Black adults were imprisoned at five times the rate for White adults¹⁶⁰ and are more likely to face systemic obstacles hindering their ability to secure employment post incarceration.¹⁶¹

Given these concerns, we propose to amend § 155.315(e) by revising

¹⁵⁶ *HealthCare.gov*. (n.d.) How do I resolve a Data Matching Issue. Dept. of Health and Human Services. <https://www.healthcare.gov/help/how-do-i-resolve-an-inconsistency/#incarceration-status>.

¹⁵⁷ Apel, R., and Sweeten, G. (2010, Aug. 1). The Impact of Incarceration on Employment during the Transition to Adulthood. *Social Problems*, 57(3), 448–479. <https://doi.org/10.1525/sp.2010.57.3.448>.

¹⁵⁸ *Id.*

¹⁵⁹ 45 CFR 155.315(e).

¹⁶⁰ Nellis, A. (2021). *The Color of Justice: Racial and Ethnic Disparity in State Prisons*. The Sentencing Project. <https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>; Sabol, W.J., and Johnson, T.L. (2022). *Justice System Disparities: Black-White National Imprisonment Trends, 2000 to 2020*. Council on Criminal Justice. <https://secure.counciloncj.org/np/viewDocument?>

¹⁶¹ Sirios, C., and Western, B. (2017, Feb.). *Racial Inequality in Employment and Earnings after Incarceration*. Harvard University. https://scholar.harvard.edu/files/brucewestern/files/racial_inequality_in_employment_and_earnings_after_incarceration.pdf.

paragraph (e)(1) to permit all Exchanges to accept consumer attestation of incarceration status without further electronic verification. We also propose to revise paragraph (e)(2) to permit Exchanges to verify consumer incarceration status using an HHS-approved verification data source that is current, accurate, and minimizes administrative costs and burdens. We believe these proposed changes would improve the Exchange enrollment process, reduce operational challenges for Exchanges, and reduce burdens on applicants, all while maintaining program integrity and ensuring that the alternative incarceration verification data source that may be used by Exchanges is not unduly burdensome or costly to administer.

We also propose changes to paragraph (e)(3) to reflect that if an Exchange verifies an applicant's attestation of incarceration status using an approved data source, and the attestation is not reasonably compatible with the information from the approved data source or other information provided by the applicant or in the records of the Exchange, the Exchange must then follow the DMI process set forth in § 155.315(f).

We seek comment on this proposal, particularly from State Exchanges and other users of PUPS data through the Hub. We are also particularly interested in comments about whether State Exchanges intend to continue using PUPS data to verify incarceration status. We are also seeking input from any State Medicaid agency that uses PUPS data available through the Hub.

12. Verification Process Related to Eligibility for Insurance Affordability Programs (§ 155.320)

We propose to reinterpret State Exchange and State Medicaid and Children's Health Insurance Program (CHIP) agency use of the Federal Data Services Hub (Hub) to access and use the income data provided by the optional Verify Current Income (VCI) Hub service as a State Exchange or a State Medicaid and CHIP agency function, because these State entities use this optional service to implement eligibility verification requirements applicable to them. While we propose to redesignate use of the VCI Hub service by State Exchanges and State Medicaid and CHIP agencies as a State function, HHS would continue to maintain contracts that make this service available through the Hub for State Exchange and State Medicaid and CHIP agency use as part of its ongoing implementation of sections 1411 and 1413 of the ACA. We propose to amend

§ 155.320(c) to reflect this reinterpretation for the Exchanges. Under this proposal, States would pay annually in advance for the State Exchanges and Medicaid and CHIP agencies' anticipated utilization of the optional VCI Hub service. State Exchanges and Medicaid and CHIP agencies would be required to reconcile with HHS on an annual basis the anticipated utilization of CSI data provided by the VCI Hub service with the actual utilization. In the alternative, HHS would invoice States on a monthly basis for their actual utilization of CSI data provided by the VCI Hub service after that utilization occurs. State Medicaid and CHIP agencies would be eligible for Federal matching for the cost of this service, as described in this section.

To operationalize application and verification processes related to eligibility for health insurance affordability programs and to make eligibility determinations as accurate as possible, in accordance with sections 1411 and 1413 of the ACA, we developed the Hub, which is a secure, electronic interface that facilitates the exchange of information used by Exchanges and State Medicaid and CHIP agencies and provides access to authoritative, trusted data sources for various types of information, including income. The Hub serves as the mechanism described in 45 CFR 155.315 and 155.320 that Exchanges are required to use to perform eligibility verifications by transmitting applicant data to HHS, which then submits the data to specific trusted data sources for verification. For State Medicaid and CHIP agencies, the Hub serves as a mechanism for accessing both required and optional trusted data sources to verify eligibility at application or renewal as described at 42 CFR 435.949 and 42 CFR 457.380(g). These trusted data sources include Federal agencies, such as the IRS for Federal income tax data and the SSA for Social Security benefits.

For example, the ACA requires that Exchanges and State Medicaid and CHIP agencies use data from the SSA to verify applicants' U.S. Citizenship, Social Security number (SSN), and Social Security Disability Insurance (SSDI) income, if any, and data from the Department of Homeland Security to verify applicants' naturalized citizenship or immigration status, both available through the Hub. In addition to mandatory data to verify eligibility, Exchanges and State Medicaid and CHIP agencies may also use optional data available through the Hub, including Medicare enrollment data to verify an

applicant's eligibility for minimum essential coverage, and the VCI Hub service, which provides an access point for Exchanges and State Medicaid and CHIP agencies to request and receive an applicant's current income data from a private company, referred to as Current Sources of Income (CSI) data. Consistent with the requirements at sections 1411 and 1413 of the ACA (related to establishment and participation in a coordinated eligibility and enrollment system for all insurance affordability programs), in order to facilitate Exchange and State Medicaid and CHIP agency access to optional data, HHS will continue to provide free access to States for certain optional data, such as Medicare enrollment data, and will provide access to the CSI data to States that pay for their use of it in advance. However, we propose to re-interpret Exchange and State Medicaid and CHIP agency use of the Hub to access the optional data sources as an Exchange or a State Medicaid and CHIP agency function. We propose to amend § 155.320(c) to reflect this reinterpretation.

As additional background, the ACA requires the use of a single, streamlined application to determine Exchange eligibility and collect information.¹⁶² The application is used to determine eligibility for enrollment in a QHP, and, as applicable, for insurance affordability programs such as APTC, CSR, Medicaid, CHIP, and, if applicable, the BHP. Eligibility for these programs is determined using an income standard based on an applicant's modified adjusted gross income (MAGI) and the process for verifying income depends on the insurance affordability program.¹⁶³ The income verification process that an Exchange uses to verify income depends on whether an applicant is being evaluated for eligibility for APTC and CSRs for a QHP or eligibility for Medicaid, CHIP, or the BHP. For example, Medicaid eligibility is determined using "point-in-time" income, or current monthly income, while eligibility for APTC and CSRs is determined using projected annual income.¹⁶⁴ An Exchange must follow a verification process for household income that includes requesting data

¹⁶² See 42 U.S.C. 18083 and 45 CFR 155.405(a).

¹⁶³ Section 1902(e)(14)(A) of the Act requires that States determine financial eligibility for Medicaid based on MAGI except in the case of individuals identified in section 1902(e)(14)(D) of the Act. For example, States do not determine financial eligibility based on MAGI for individuals who are being evaluated for eligibility on the basis of living with a disability or blindness or being age 65 or older.

¹⁶⁴ See section 1902(e)(14)(H) of the Act, as added by section 2002 of the ACA.

through the Hub to verify income¹⁶⁵ using IRS and SSA income data.¹⁶⁶

For these applications, regulations require that for any individual in the applicant's or enrollee's tax household (and for whom the Exchange has a SSN), the Exchange must request Federal income tax return data regarding income and family size from the IRS as well as data from SSA regarding Social Security Benefits.¹⁶⁷ When the Exchange requests tax return data from the IRS and the data indicates that attested projected annual household income represents an accurate projection of the tax filer's household income for the benefit year for which coverage is requested, the Exchange must determine eligibility for APTC and CSRs based on the IRS income tax data.¹⁶⁸ However, when the Exchange requests income tax return data from the IRS and the IRS returns data reflecting that the attested projected annual household income is not an accurate projection of the tax filer's household income for the benefit year for which coverage is requested, the applicant or enrollee is considered to have experienced a change in circumstances. This change in circumstance allows HHS to establish procedures for determining eligibility for APTC and CSRs on information other than the IRS income tax return data as described in § 155.320(c)(3)(iii)–(vi).¹⁶⁹

In these situations, where government sources of income are unavailable, or the applicant(s)' attested income is significantly different from what the IRS returns, data on current income may be used for eligibility determinations and redeterminations for financial assistance, including the CSI data that HHS makes available to Exchanges and State Medicaid and CHIP agencies via the optional VCI Hub service. HHS holds a contract with a private, commercial company to provide the CSI data through the VCI Hub service. Exchanges and State Medicaid and CHIP agencies have been able to use the VCI Hub service as an optional secondary, trusted data source for income verification but are not required to do so and may use other data sources. The VCI Hub service provides current income data that is sourced from employer-reported income and job status data that is provided and updated for each employer payroll period (that

is, weekly, bi-weekly, monthly, etc.). Under § 155.315(h), State Exchanges may seek HHS approval to use other sources of additional income data for verification of applicant-attested annual household income.

For Medicaid and CHIP, section 2201 of the ACA, codified at section 1943 of the Act, requires State Medicaid and CHIP agencies to participate in and comply with the eligibility and enrollment system requirements under section 1413 of the ACA. This requires State Medicaid and CHIP agencies to use a single streamlined application and rely primarily on electronic data to verify income and other eligibility criteria. The ACA and the Act specify several data sources that State Medicaid and CHIP agencies must use in verifying eligibility. These agencies may also elect to use other optional electronic data sources to improve the efficiency and accuracy of the eligibility determination process. They may use the VCI Hub service for initial applications, redeterminations, changes in circumstance, and periodic data matching for their Medicaid and CHIP populations. State Medicaid agencies are required by 42 CFR 435.948(a) to verify financial eligibility with certain financial data sources. If a State does not accept self-attestation of income in determining eligibility for a separate CHIP, it similarly must verify financial eligibility with certain data sources in accordance with 42 CFR 435.948(a), which is incorporated into the CHIP regulations by cross reference at 42 CFR 457.380. CSI data is not among the data sources which State Medicaid agencies are required to access under this requirement. States also are given latitude to determine the usefulness of these data sources and must only access data sources determined to be useful to them. For initial applications and redeterminations for Medicaid or CHIP eligibility, income data accessed through the VCI Hub service provides real time, current income information for States to determine Medicaid or CHIP financial eligibility. Because other financial data sources, such as State quarterly wage data, provide data that is from a quarter to six months old, some States prefer to use the CSI income data available through the VCI Hub service, which is the only data source in the Hub used to verify and redetermine current and annual income outside of the IRS or SSA data, as their primary source of data to verify income prior to accessing other financial data sources. Some States also utilize the VCI Hub service to verify income information when a

beneficiary reports a change in circumstance for financial eligibility.

Under our proposal, Exchanges and State Medicaid and CHIP agencies may opt to continue to use the VCI Hub service to support their eligibility verification processes for Exchange QHP coverage or Medicaid and CHIP if they pay in advance for the cost of their use of the service. For instance, Exchanges would still be able to use this current income information to verify a tax household's annual income attestation if they are unable to verify income using SSA, IRS income tax data, or a combination of both SSA and IRS data, in determining eligibility for APTC. Because Exchanges and State Medicaid and CHIP agencies are permitted, but not required to use the VCI Hub service to fulfill the mandatory eligibility determination requirements imposed on them, accessing the CSI data via the VCI Hub service would be properly characterized as an Exchange or State Medicaid and CHIP agency function.

Consistent with section 1413 of the ACA, HHS would continue to provide access to optional data sources through the Hub to support the streamlined application processes. However, as these functions would be considered Exchange or State Medicaid and CHIP agency functions, and not HHS functions, HHS would no longer fund Exchange or State Medicaid and CHIP agency use of these sources and would only provide access to States who paid in advance for their use of the service. For all but one of the optional data sources available through the Hub, HHS does not bear a cost for Exchange or State Medicaid and CHIP agency use of the various Hub services that provide these data. However, HHS does bear a cost for Exchange and State Medicaid and CHIP agency use of the CSI data accessed through the VCI Hub service. If finalized as proposed, under this interpretation, State Exchanges and State Medicaid and CHIP agencies would be required to pay for their use of the VCI Hub service in advance of their usage of the service. However, where applicable, State costs for State Medicaid and CHIP agencies may be eligible for Federal matching funds, where HHS will match 75 percent of the cost of a State Medicaid agency's utilization of the VCI Hub service and match CHIP costs at a State's enhanced Federal Medical Assistance Percentage (FMAP).

Since the VCI Hub service was established in 2013 for use by both Exchanges and State Medicaid and CHIP agencies, utilization of the VCI Hub service has grown significantly over time, both in the number of State

¹⁶⁵ See § 155.320(c).

¹⁶⁶ See § 155.320(a)(1) and (c)(3)(ii)(B). Section 155.320(c)(2) outlines the verification process that Exchanges are also required to follow when evaluating eligibility for Medicaid or CHIP.

¹⁶⁷ See § 155.320(c)(i)(A).

¹⁶⁸ See § 155.320(c)(3)(ii)(C).

¹⁶⁹ See section 1412(b)(2) of the ACA.

Exchanges and State Medicaid and CHIP agencies using the service, and the number of applicants and beneficiaries that require income verification as Exchange populations have increased over time. During the first Open Enrollment in 2013, only the Exchanges on the Federal platform, two State Exchanges, and eight State Medicaid agencies used data from the VCI Hub service for eligibility determinations. In that first year, the Exchanges on the Federal platform initiated about 88 percent of all requests, or “pings” to the VCI Hub service for income verification. In the past decade, more State Medicaid agencies and State Exchanges have started using the VCI Hub service; as of June 2023, 34 States, including the District of Columbia and Puerto Rico, use the VCI Hub service for their State Medicaid and CHIP programs, and 10 of those States also use the service to verify QHP eligibility for their State Exchanges. Our analysis shows that as of March 2023, over 70 percent of monthly pings to the VCI Hub service were from State Medicaid applications, including renewals of eligibility for Medicaid or CHIP coverage, and the Exchanges on the Federal platform now account for less than 10 percent of the total volume.

If new State Medicaid agencies or State Exchanges are permitted to request access to the VCI Hub service, we forecast that in the next 5 years, transaction volume to the VCI Hub service would increase by over 17 percent. These trends in utilization have provided us with a clear picture of the primary uses and utilizers of the VCI Hub service. Specifically, we have learned that the queries submitted by States to the VCI Hub service have been for income verification by State Medicaid agencies to determine Medicaid and CHIP eligibility, and by State Exchanges to assess or determine Medicaid and CHIP eligibility and determine APTC eligibility. Accordingly, we now believe this activity that has been categorized as an HHS function would be better categorized as: (1) a State Medicaid and CHIP agency eligibility determination function under title XIX or title XXI of the Act when the determination is initiated by a State Medicaid or CHIP agency; and (2) as an Exchange function when the determination is initiated by an Exchange.

While we believe the utilization of this optional data source is an Exchange or State Medicaid and CHIP agency function, making the optional data sources available through the Hub is consistent with the requirements at sections 1411 and 1413 of the ACA

related to establishment and participation in a coordinated eligibility and enrollment system for all insurance affordability programs. As such, to facilitate Exchanges’ and States Medicaid and CHIP agencies’ access to this optional CSI data that is available through the VCI Hub service, HHS would continue to maintain contracts that make access to these resources available through the Hub for Exchange and State Medicaid and CHIP agency use.

In making this proposal, we note that while use of the VCI Hub service is an integral part of the eligibility determination process in most States, Exchanges and State Medicaid and CHIP agencies may have access to other data sources to verify income. As noted previously, we are aware that many States have access to other comprehensive data sources, such as State quarterly wage data. Generally, as dictated by individual State law, employers are required to report employee information such as payroll and unemployment insurance contribution data to a State department, such as the State Department of Labor or a similar office. In place of the optional VCI Hub service, State Exchanges continue to have flexibility under 45 CFR 155.315(h) and 155.320(c)(3)(iv) to use an alternative verification source, like State wage data, when income is not verified using IRS tax data or SSA title II data. We encourage State Exchanges, State Medicaid and CHIP agencies, and other interested parties, to submit comments regarding any operational burden, policy, or budget challenges regarding access to other State data sources of this proposal change.

As part of our consideration of these proposals in this rulemaking, we considered requiring State Medicaid agencies and State Exchanges to obtain their own contracts to administer their CSI data usage; however, we had concerns that these services cannot be procured reasonably and expeditiously, which would undermine the system we have implemented under section 1413 of the ACA. We also believe that there may be benefits to the State Medicaid agencies and State Exchanges that prefer to use the CSI data accessible through the VCI Hub service in their States. Therefore, we propose to retain optional access to the VCI Hub service on behalf of State Medicaid agencies and State Exchanges that prefer to continue to use this service and are willing to pay for their CSI data usage in advance. Under this proposal, State Medicaid agencies and State Exchanges can choose to

discontinue their use of the CSI data accessible through the VCI Hub service.

Given these considerations, we propose to amend 45 CFR 155.320(c)(1) to add new paragraph (c)(1)(iii) to require that beginning July 1, 2024, State Exchanges would be required to pay for 100 percent of their utilization of the CSI income data provided by the VCI Hub service.¹⁷⁰ To implement this proposal, States would be required to pay for their usage of the CSI data in advance of their use of the service in a timeline and manner established by HHS. HHS would use the State’s pre-payment to pay for the State’s access, with the amount of the pre-payment calculated as being equal to the product of the number of projected purchased transactions to be returned from the VCI Hub service, that is, the “number of pings,” and the price per transaction established under the contract maintained by HHS to provide the VCI Hub service. HHS is currently exploring the best mechanism to project States’ usage for their State Exchange’s use of the VCI Hub service. HHS anticipates leveraging lessons learned from its existing financial management processes.

Similarly, we propose to require that beginning July 1, 2024, States pay for their Medicaid and CHIP utilization of the VCI Hub service prior to obtaining information from data sources which these State entities choose, but are not required, to use in fulfilling Medicaid or CHIP eligibility determination requirements. As noted above, consistent with the requirements at section 1413 of the ACA (related to establishment and participation in a coordinated eligibility and enrollment system for all insurance affordability programs), which is incorporated into the Medicaid and CHIP statutes at sections 1943(b)(3) and 2107(e)(1), respectively, of the Act, in order to facilitate States’ access to this optional CSI data that is available through the VCI Hub service, we would continue to maintain contracts that enable States to efficiently access CSI data through the VCI Hub service. However, under our proposal, States would be required to pay the advance cost incurred by HHS when the State requests CSI data through the VCI service offered by the Hub.

In the alternative, HHS is also considering whether it could invoice States on a monthly basis for their actual utilization of CSI data provided by the VCI hub service after that

¹⁷⁰ The FFEs’ and SBE-FPs’ costs for accessing these services would be covered by the FFEs’ and SBE-FPs’ user fees.

utilization occurs. If appropriate, this alternative proposal could be adopted in the final rule. We are considering these mechanisms for implementing State Exchange and Medicaid and CHIP agency payments for use of the VCI Hub service and solicit comments on whether a different implementation approach would be more efficient or otherwise preferable.

To implement this proposal for the States to pay in advance for CSI data services, we would anticipate working with States to develop an estimate of their annual usage of the CSI data service and collecting those amounts from the States. Under this approach, each State would notify HHS that the State wants to continue to use the CSI data through the VCI Hub service and will pay in advance for its usage of services. In particular, HHS would estimate, based on historical utilization trends taking into consideration other reasonable assumptions about the State's usage, the anticipated annual number of each participating State's purchased transactions to the VCI Hub service returning usable CSI data, that is, the number of pings to the VCI Hub service returning usable CSI data. The estimate for each participating State would be multiplied by the fixed price set by the CSI contract HHS holds with its vendor. HHS would collect that amount from the State, which would be required to reconcile with HHS on an annual basis the anticipated utilization of CSI data provided by the VCI Hub service with the actual utilization.

Under this reconciliation process, HHS would offset payments for the next annual payment cycle for States¹⁷¹ where actual utilization is less than the anticipated utilization for which they were invoiced. The offset amount would be equal to the difference in that State's anticipated number of pings multiplied by the fixed price, and its actual number of pings multiplied by the fixed price. States in which actual utilization is greater than the anticipated utilization for which they were invoiced would be assessed a charge for the difference in that State's actual number of pings multiplied by the fixed price, and the anticipated number of pings multiplied by the fixed price. We seek comment on how HHS should estimate States' future anticipated utilization of CSI data provided by the VCI Hub service. We also seek comment on whether HHS should estimate, collect, and reconcile these payments from States more frequently, such as biannually,

quarterly, or monthly, rather than annually, for their anticipated utilization.

Alternatively, we seek comment on HHS invoicing on a monthly basis for their actual utilization of CSI data provided by the VCI Hub service after that utilization occurs. To implement this alternative approach, we anticipate that each month, States would receive an invoice of the amount that must be paid to HHS for its usage in the prior month. This amount would total each respective State Exchange's and Medicaid and CHIP agencies' utilization in that month, specifically the number of purchased transactions to the VCI Hub service that returned usable CSI data, multiplied by the fixed price set by the CSI contract HHS holds with its vendor. Therefore, we, on behalf of HHS, would collect funds to cover the costs of these services from Medicaid and CHIP agencies after the use of the service and on a regular basis. State Medicaid and CHIP agencies would be eligible for Federal matching for the cost of this service under this alternative proposal we have opted to propose a July 1, 2024 effective, as described in this section. We seek comment on this alternative approach, including whether HHS should invoice States annually, biannually, or quarterly, rather than monthly, if this alternative is adopted in the final rule.

In accordance with section 1903(a)(3)(B) of the Act and 42 CFR 433.116, Federal Financial Participation (FFP) is available at 75 percent of State expenditures for operations of approved State Medicaid Enterprise Systems (MES) costs for data exchange between State systems and the VCI Hub service and including for State costs to access the VCI Hub service, as well as maintenance of associated State system functionality and automation. Additionally, per section 1903(a)(3)(A)(i) of the Act and 42 CFR 433.112, FFP is available at 90 percent of State expenditures for MES design, development, installation, or enhancement, including for such State costs as are necessary to use the VCI Hub service. In CHIP, administrative expenses, including those related to system operations, maintenance, design, development, installation, and enhancement, are matched at the regular CHIP enhanced FMAP. States that use a joint Medicaid and CHIP eligibility system should cost allocate VCI Hub service expenses between the programs. Prior to incurring MES development and operational costs for the VCI Hub service, the State must submit an Advance Planning Document requesting enhanced Federal match to us for

review and approval, in accordance with regulation at 45 CFR part 95, subpart F. We intend to provide States with operational guidance with options for how to comply with any new requirement finalized. We note that the VCI Hub service use is considered to be a State Medicaid and CHIP agency function, and therefore a cost for these agencies only when the eligibility determination is initiated by the State agency. Costs should be allocated to the requesting entity that is making the request to the VCI Hub service, such that States are only liable for the cost of the VCI Hub service responses for pings that originated from the State Medicaid and CHIP agency. For example, if an applicant initiates an application at *HealthCare.gov* or a State Exchange, but is then transferred to a State Medicaid agency, those costs would be the responsibility of HHS or the State Exchange and not the State Medicaid agency.

Finally, we propose that the interpretation characterizing use of the VCI Hub service as a function of State Exchanges and Medicaid and CHIP agencies and not an HHS function be effective on July 1, 2024. We recognize that this implementation date may be difficult for States, especially those with biennial budget cycles. However, given our determination that eligibility verifications using CSI data by State Exchanges and Medicaid and CHIP agencies is most appropriately characterized as a function of these agencies and not an HHS function, we believe it is appropriate to move forward with this change as expeditiously as possible, while giving States some time to plan for the change. For this reason, we have opted to propose a July 1, 2024 effective date for this provision.

We seek comment on these proposed changes, including whether we should make this interpretation effective as of July 1, 2024, or a different date. We are also interested in learning how this change may impact States' use of the VCI Hub service. Will State Exchanges and Medicaid and CHIP agencies seek to cease or restrict their use of the VCI Hub service, possibly using it as a last resort? What impact might these proposed changes have on the amount of time it takes applicants to verify their income or the time it takes for States to make an eligibility determination? We would also be interested in learning the extent to which States may be interested in potential avenues to reduce operational burdens or address budget challenges facing State Exchanges and Medicaid and CHIP agencies. Namely, we are interested in whether States would be

¹⁷¹ Utilization of CSI data through the VCI Hub will be assessed for each relevant State Exchange, State Medicaid Agency, or CHIP agency.

interested in opportunities to pay an additional fee that would allow them to reuse VCI Hub service verification results across multiple Federally-funded and State-administered human service programs (with cost allocation across those programs); whether States have separate, direct access to the same or similar source of VCI Hub services, and the cost of such direct access; and whether States anticipate that reuse of verification data, coupled with cost allocation across program, would reduce operational burdens or address budget challenges facing State Exchanges and Medicaid and CHIP agencies.

13. Eligibility Redetermination During a Benefit Year (§ 155.330(d))

At § 155.330, we propose to redesignate paragraph (d)(3) as paragraph (d)(3)(i) and add paragraph (d)(3)(ii) to require Exchanges to conduct periodic checks for deceased enrollees twice yearly and subsequently end deceased enrollees' QHP coverage beginning with the 2025 calendar year. Additionally, we propose to add § 155.330(d)(3)(iii) to grant the Secretary the authority to temporarily suspend the periodic data-matching (PDM) requirement during certain situations or circumstances that lead to the unavailability of data needed to conduct PDM.

Under § 155.330(d), Exchanges are required to periodically examine available data sources, referred to as PDM, to identify whether enrollees become deceased, and to identify whether enrollees on whose behalf APTC or CSRs are being paid have been found eligible for or are enrolled in Medicare, Medicaid, CHIP, or the BHP, if a BHP is operating in the service area of the Exchange.

Currently, § 155.330(d)(3) defines "periodically" only for PDM activities that identify enrollment in Medicare, Medicaid, CHIP, and, if applicable, BHP, meaning that Exchanges must conduct Medicare PDM, Medicaid or CHIP PDM, and, if applicable, BHP PDM, twice a year. The current regulation does not specify the frequency by which PDM activities to identify deceased enrollees must occur, but the 2019 Program Integrity Rule requires that Death PDM be conducted once annually, and we noted that we intend to update the frequency for Death PDM in future rulemaking. As explained in the 2019 Program Integrity Rule, we did not require Exchanges to perform PDM for death at least twice in a calendar year so that Exchanges could prioritize the implementation of the new requirement to conduct PDM for Medicare, Medicaid, CHIP and, if

applicable, BHP eligibility or enrollment at least twice yearly. In this proposed rule, we are now proposing to add § 155.330(d)(3)(ii) to require Exchanges beginning with the 2025 calendar year to conduct periodic checks for deceased enrollees twice yearly and subsequently end deceased enrollees' QHP coverage after following the procedure specified in § 155.330(e)(2)(i).

Periodic checks for deceased enrollees help ensure Exchange program integrity. This proposal would not only align with current Federal Exchange policy and operations but would also prevent overpayment of QHP premiums and APTC/CSRs, and accurately capture household QHP eligibility based on household size. Additionally, by conducting Death PDMs twice a year, Exchanges can prevent future auto re-enrollments or policy effectuation for deceased enrollees for the next plan year.

Additionally, we propose to add § 155.330(d)(3)(iii) to grant the Secretary the authority to temporarily suspend the PDM requirement during certain situations or circumstances that lead to an unavailability of data needed to conduct PDM. PDMs are conducted as a program integrity measure where the prerequisite for conducting a proper PDM is assurance of data quality. We recognize that during certain circumstances data quality may be incomplete or lagging. During the COVID-19 Public Health Emergency, State and local agencies had to strain their resources to address backlogs due to job losses and other administrative gaps further slowing down response times,¹⁷² thereby, increasing the risk of the Exchanges making inaccurate eligibility determinations due to potential data lags. In such cases, using such data could pose a risk of improper termination of coverage or APTC/CSRs for large numbers of enrollees. These improper terminations may be particularly harmful during situations such as a public health emergency. These potential harms can be even more likely to occur when the additional burdens of DMI resolution are imposed on Medicare and Medicaid beneficiaries, who can be vulnerable and underserved and more likely to encounter gaps in coverage or a complete lack of coverage as a result of failing to resolve the DMIs.¹⁷³ Allowing

the Secretary the flexibility to temporarily suspend the PDM requirement during certain situations may be able to prevent an inadvertent increase in the uninsured population, largely consisting of vulnerable consumers. We would notify Exchanges of such a suspension of PDM activities, and a resumption of PDM activities, through subregulatory guidance.

We anticipate most State Exchanges would be able to meet the proposed requirements for Death PDM based on operations already reported through the State-based Marketplace Annual Reporting Tool (SMART) as well as discussions we have had with the State Exchanges on PDM. We also anticipate that changes, including a suspension of the PDM requirement, would be well received by the Exchanges and issuers, as it is important that consumer information, such as eligibility for APTC or QHP coverage, be accurate to avoid expending administrative resources on complex processes to correct errors. Eleven State Exchanges reported in their 2022 SMART submissions that they curtailed PDM checks only due to the exigency resulting from the COVID-19 Public Health Emergency, which expired in May of 2023. Furthermore, we do not anticipate the new periodicity requirement for the Death PDM to result in a significant administrative burden for State Exchanges because States previously conducted PDM checks for deceased enrollees.

Under section 1313(a)(4) of the ACA, if HHS determines that an Exchange has engaged in serious misconduct with respect to compliance with Exchange requirements, it has the option to rescind up to 1 percent of payments due to a State under any program administered by HHS until such misconduct is resolved. These existing authorities would apply to the proposed PDM requirements in § 155.330(d). If HHS were to determine that it is necessary to apply this authority due to non-compliance by an Exchange with § 155.330(d), HHS would also determine the HHS-administered program from which it would rescind payments that are due to that State. However, if State Exchanges do not comply with the proposed PDM requirements, we would generally first direct a State Exchange to take corrective action. We utilize specific oversight tools (for example, the SMART, independent external programmatic & financial audits) to ensure compliance and that State Exchanges take appropriate corrective action. HHS also provides technical

¹⁷² McDermott, D., Cox, C., Rudowitz, R., and Garfield, R. (2020, Dec. 9). *How Has the Pandemic Affected Health Coverage in the U.S.?* KFF. <https://www.kff.org/policy-watch/how-has-the-pandemic-affected-health-coverage-in-the-u-s/>.

¹⁷³ Hirsch, M. (1994). Health Care of Vulnerable Populations Covered by Medicare and Medicaid.

Health Care Finance Rev., 15(4):1-5. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4193433/>.

assistance and ongoing monitoring to track those actions until the State Exchange remediates the issue fully.

We seek comment on this proposal.

14. Incorporation of Catastrophic Coverage Into the Auto Re-Enrollment Hierarchy (§ 155.335(j))

We propose to amend § 155.335(j)(1) and (2) to require Exchanges to re-enroll individuals who are enrolled in catastrophic coverage as defined in section 1302(e) of the ACA into a new QHP for the coming plan year. We believe that some Exchanges already re-enroll these enrollees, including Exchanges on the Federal platform when issuers include plan crosswalk information for catastrophic plans when they submit the information as part of the annual QHP certification process. However, explicitly incorporating catastrophic plan enrollees into the rules at § 155.335(j) would help ensure continuity of coverage in cases where the issuer does not offer the catastrophic plan for the subsequent plan year, and individuals enrolled in catastrophic coverage do not actively select a different QHP. We also propose to add new § 155.335(j)(5) to establish that an Exchange may not newly auto re-enroll into catastrophic coverage an enrollee who is currently enrolled in coverage of a metal level as defined in section 1302(d) of the ACA. This is consistent with the practice of the Exchanges on the Federal platform, and we believe that State Exchanges likely also adhere to this practice, but that all interested parties would benefit from clear regulation on this aspect of the re-enrollment process.

If this proposal is finalized, we would also update the Federally-facilitated Exchange (FFE) Enrollment Manual to incorporate catastrophic coverage into the re-enrollment hierarchy for alternate enrollments, which we use to implement the regulation to crosswalk enrollees whose current issuer no longer offer plans available to them through the Exchanges on the Federal platform under § 155.335(j)(3).¹⁷⁴

In the 2013 Patient Protection and Affordable Care Act; Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation Final Rule (78 FR 12833), we set forth Exchange and issuer standards related to coverage of essential health benefits and actuarial value to reflect section 1302 of the ACA, which specifies levels of coverage or “actuarial values” that health plans in

the individual and small group markets, both inside and outside of an Exchange, must meet as part of the requirement to cover an EHB package beginning in 2014. Specifically, the final rule codified section 1302(d)(1) of the ACA, which specifies that actuarial values must be 60 percent for a bronze plan, 70 percent for a silver plan, 80 percent for a gold plan, and 90 percent for a platinum plan.

In the 2013 Patient Protection and Affordable Care Act; Health Insurance Market Rules; Rate Review Final Rule (78 FR 13405), we established standards for catastrophic plans offered in the individual market, consistent with section 1302(e) of the ACA, and codified the statutory criteria identified in section 1302(e)(2) of the ACA listing the two categories of individuals eligible to enroll in a catastrophic plan. The first category includes individuals who are younger than age 30 before the beginning of the plan year. The second category includes individuals who have been certified as exempt from the individual responsibility payment because they cannot afford minimum essential coverage or because they are eligible for a hardship exemption. Section 1302(e) of the ACA does not specify an actuarial value requirement for a catastrophic plan, but states that a health plan not providing a bronze, silver, gold, or platinum level of coverage shall be treated as meeting the requirements of subsection (d) for any plan year if it meets the requirements at section 1302(e)(1) of the ACA, providing an option for basic protections for young adults and people who cannot otherwise afford health insurance or have a hardship. However, section 36B(c)(3)(A) of the Code provides that PTC is not allowed for individuals who enroll in catastrophic coverage described in section 1302(e) of the ACA. Consequently, those individuals are not eligible for APTC.

In the 2014 Patient Protection and Affordable Care Act; Annual Eligibility Redeterminations for Exchange Participation and Insurance Affordability Programs; Health Insurance Issuer Standards Under the ACA, Including Standards Related to Exchanges (79 FR 52994, 52998 through 53001), we established the Exchange re-enrollment hierarchy at § 155.335(j) to help ensure continuous coverage for consumers who opt not to make an active plan selection for the upcoming year.¹⁷⁵ This final rule provided

standards that Exchanges must follow to place current enrollees whose current year plan is no longer available, and who do not terminate coverage or select a different QHP, into a new plan for the coming year based on their current product, and their current year plan’s metal level and plan network type. For example, an Exchange must place an enrollee whose current QHP is not available through the Exchange, in a QHP within the same product as their current year plan, and at the same metal level as the enrollee’s current QHP. The final rule also specified requirements at § 155.335(j)(2) for cases in which an enrollee’s current product is no longer available. For example, an Exchange must place an enrollee whose current product is no longer available in a QHP at the same metal level as the enrollee’s current QHP, in the product offered by the same issuer that is the most similar to the enrollee’s current product.¹⁷⁶

In the 2017 Payment Notice (81 FR 12203), we amended § 155.335(j) to provide for automatic re-enrollment in a QHP offered by another issuer through the Exchange for enrollees whose current QHP issuer no longer offered a QHP through the Exchange in the enrollee’s service area. This policy helped ensure that enrollees could maintain coverage with APTC and income-based CSRs, as opposed to losing coverage or re-enrolling in a plan outside the Exchange in cases where their current issuer offered off-Exchange coverage. This rule at § 155.335(j)(3) provides that the Exchange may direct these re-enrollments, to the extent permitted by applicable State law, into a QHP from a different issuer as directed by the applicable State regulatory authority, or, if the applicable State regulatory authority declines to direct this activity, directed by the Exchange.

In the 2023 Payment Notice (87 FR 27273), we solicited comments on incorporating certain cost factors into the re-enrollment hierarchy, including net premium, maximum out-of-pocket amount (MOOP), deductible, and total

provides “no benefits” for any plan year (except for providing coverage for at least three primary care visits and preventive health services in accordance with section 2713 of the PHS Act) until the individual has incurred cost-sharing expenses in an amount equal to the annual limitation on cost sharing in effect under section 1302(c)(1) of the ACA.

¹⁷⁶ “Product” means a discrete package of health insurance coverage benefits that are offered using a particular product network type (such as health maintenance organization, preferred provider organization, exclusive provider organization, point of service, or indemnity) within a service area. 45 CFR 144.103.

¹⁷⁴ For the 2023 plan year, see CMS. (2023, July 12). *Federally-facilitated Exchange (FFE) Enrollment Manual*. CMS. Section 3.2.4, pp 29–30. <https://www.cms.gov/files/document/ffe-enrollment-manual-2023-5cr-071323.pdf>.

¹⁷⁵ This final rule also made a technical correction to catastrophic coverage regulation at § 156.155 to incorporate language in section 1302(e) of the ACA indicating that a catastrophic plan

out-of-pocket cost.¹⁷⁷ We also solicited comments on additional ways we could ensure that the Exchange hierarchy for re-enrollment aligns with plan generosity and consumer needs, such as re-enrolling a current bronze QHP enrollee into a silver QHP with a lower net premium and higher plan generosity offered by the same QHP issuer.

In the 2024 Payment Notice (87 FR 25740, 25821 through 25822), we added § 155.335(j)(4) to allow Exchanges to modify their re-enrollment hierarchies such that enrollees who are eligible for CSRs in accordance with § 155.305(g) and who would otherwise be automatically re-enrolled in a bronze-level QHP without CSRs, would instead be automatically re-enrolled in a silver-level QHP (with income-based CSRs) in the same product provided that certain conditions are met.¹⁷⁸ We also required Exchanges to ensure that enrollees whose QHPs are no longer available to them and enrollees who would be re-enrolled into a silver-level QHP to receive income-based CSRs are re-enrolled into plans with the most similar network to the plan they had in the previous year.

We propose to amend the regulations at § 155.335(j)(1) and (2) to require Exchanges to re-enroll individuals enrolled in catastrophic coverage as defined in section 1302(e) of the ACA into QHP coverage for the coming plan year. Section 155.335(j) currently specifies re-enrollment requirements for enrollees in coverage of a specific metal level as defined by section 1302(d) of the ACA, but does not address auto re-enrollment for catastrophic coverage enrollees nor does it address a scenario in which a catastrophic coverage enrollee would lose eligibility for catastrophic coverage in the coming plan year either because they exceed the 30-year age limit or lose eligibility for the exemption that allowed them to enroll in a catastrophic plan in spite of exceeding the age limit.¹⁷⁹

To make this change, we propose to add new § 155.335(j)(1)(v) and (j)(2)(iv).

We propose paragraph (j)(1)(v) to specify that if the enrollee's current QHP is a catastrophic plan as described in section 1302(e) of the ACA, and the enrollee would no longer meet the criteria for enrollment in a catastrophic plan as described in section 1302(e)(2) of the ACA, the Exchange would re-enroll the enrollee into a bronze metal level QHP in the same product as the enrollee's current QHP that has the most similar network compared to the enrollee's current QHP; or if no bronze plan is available through this product, the Exchange would re-enroll the enrollee in the QHP with the lowest coverage level offered under the product in which the enrollee's current QHP is offered in which the enrollee is eligible to enroll and that has the most similar network compared to the enrollee's current QHP.

We propose paragraph (j)(2)(iv) to specify that if the enrollee's current QHP is a catastrophic plan as described in section 1302(e) of the ACA, and the enrollee would no longer meet the criteria for enrollment in a catastrophic plan as described in section 1302(e)(2) of the ACA, and if no bronze QHP is available in the same product as the enrollee's current QHP, the Exchange would re-enroll the enrollee into a bronze plan offered by the same issuer through the Exchange that has the most similar network compared to the enrollee's current QHP, in the product offered that is the most similar to the enrollee's current product.

We also propose to amend § 155.335(j)(1)(ii) to (iv) and (j)(2)(i) to (iii) to use the term "coverage level" instead of "metal level" so that the rules in this section are inclusive of catastrophic coverage enrollees to whom proposed paragraphs (j)(1)(v) and (j)(2)(iv) would not apply. For example, this change would ensure that paragraph (j)(1)(ii) requires an Exchange, if possible, to re-enroll a catastrophic coverage enrollee who would remain eligible for catastrophic coverage in the coming plan year into another catastrophic plan within the same product as their current QHP that has the most similar network compared to their current QHP.

In practice, we permit and encourage issuers as part of the annual QHP Certification process to submit a crosswalk option for enrollees in catastrophic coverage and for enrollees who would otherwise lose eligibility for their catastrophic plan. While most issuers submit this information, it is currently not required under the existing regulation. For PY 2023, one issuer on *HealthCare.gov* did not submit a crosswalk option for enrollees losing

catastrophic coverage eligibility, which resulted in the Exchanges not auto re-enrolling 37 people. By including catastrophic coverage and loss of eligibility for catastrophic coverage in regulation at § 155.335(j)(1) and (2), Exchanges would require issuers to submit crosswalk plans for the scenarios described in § 155.335(j) and ensure auto re-enrollment for all Exchange enrollees. It also improves transparency by incorporating the current practice of auto re-enrolling catastrophic enrollees in future year coverage to all issuers.

Finally, we propose adding a new § 155.335(j)(5) to establish that, for purposes of this section, catastrophic coverage is not a coverage level that is considered higher or lower than metal level coverage when moving an enrollee to a plan that is a metal level higher or lower than their current plan, and an Exchange may not re-enroll an enrollee that has coverage under section 1302(d) into catastrophic coverage. For example, when applying paragraphs (j)(1)(iii)(B), or (2)(ii), an Exchange may enroll bronze enrollees into silver level coverage but not catastrophic level coverage. When applying paragraphs (j)(1)(iv) or (2)(iii), an Exchange may enroll enrollees into a QHP other than catastrophic. This rule reflects our re-enrollment process for Exchanges on the Federal platform, and we believe it appropriately reflects enrollees' decision to enroll in coverage with benefits beyond those that catastrophic coverage provides, and the operational processes to determine catastrophic coverage eligibility for a coming plan year.

We solicit comment on these proposals, including from State Exchanges regarding whether the proposals reflect their current auto re-enrollment practices. If either or both of the policies proposed in paragraphs (j)(1)(v) and (j)(2)(iv) do not reflect current practices and would impose an implementation burden for State Exchanges or for other interested parties, we solicit comment on whether to provide flexibility on making this provision effective for plan years beginning on or after January 1, 2025. We solicit comment on strategies for helping enrollees who transition from catastrophic coverage into coverage through a metal level QHP on how to understand and apply APTC to their monthly premiums if they are eligible and wish to do so.

We also solicit comment on whether we should consider proposing changes to the auto re-enrollment hierarchy to prioritize re-enrollment in catastrophic coverage for enrollees who remain eligible for catastrophic coverage in a

¹⁷⁷ MOOP refers to the limit on cost sharing an enrollee must pay for covered services in a plan year. After the enrollee spends this amount on cost sharing for in-network essential health benefits, the health plan pays 100 percent of the costs of covered essential health benefits. For purposes of this section of preamble, the term total out-of-pocket costs refers to net premium and out-of-pocket costs attributable to cost sharing and excludes any costs attributable to balance billing.

¹⁷⁸ Additional conditions at § 155.335(j)(4) include that the silver plan must have the same provider network, and a lower or equivalent premium after the application of APTC, as the bronze level QHP into which the Exchange would otherwise re-enroll the enrollee under paragraph (j)(1) or (2) of this section.

¹⁷⁹ See § 155.305(h).

way that is similar to current prioritization of silver level coverage. That is, § 155.335(j)(1)(ii) specifies that if an enrollee's current QHP is a silver plan that will not be available for the coming plan year, and the enrollee's current product will no longer include a silver level QHP, then the Exchange will re-enroll the enrollee in a silver level QHP under a different product offered by the same QHP issuer that is most similar to the enrollee's current product. We seek comment on whether it would be appropriate to prioritize continuity of catastrophic coverage in a similar way. Finally, we solicit comment on additional strategies to help ensure continuity of coverage for enrollees in catastrophic QHPs, including those who lose eligibility for catastrophic coverage.

15. Premium Payment Deadline Extensions (§ 155.400(e)(2))

We propose to amend § 155.400(e)(2) to codify that the flexibility for issuers experiencing billing or enrollment problems due to high volume or technical errors, or issuers directed to do so by applicable State or Federal authorities, is not limited to extensions of the binder payment.

Section 155.400(e) specifies that Exchanges may require, and the FFEs and SBE-FPs will require, enrollees to make a binder payment to effectuate enrollment, and paragraph (e)(1) specifies the range of dates within which an issuer may establish a deadline to pay binder, depending on whether coverage is being effectuated under regular, prospective, or retroactive effective dates. In the 2018 Payment Notice (81 FR 94058), we added paragraph (e)(2) to address situations in which an issuer is unable to timely process binder payments submitted by enrollees, which may impact an enrollee's ability to effectuate coverage. Specifically, we noted that based on our experience during several Open Enrollment Periods, issuers occasionally experience technical errors, or a processing backlog caused by an unusually high volume of enrollments. As a result, enrollees may be temporarily unable to submit premium payments, or the issuer may be unable to process payments in a timely manner. We thus established an option for issuers to implement a reasonable extension of binder payment deadlines,¹⁸⁰ which ensures that enrollees do not have coverage cancelled due to non-payment when the

enrollee did not have adequate time to pay the binder payment.

Although we only addressed extensions to the binder payment deadlines in § 155.400(e)(1), we did not intend to exclude other premium payment scenarios in which Exchanges could, and the Exchanges on the Federal platform would, provide similar flexibility. In published guidance, such as the 2023 *Federally-facilitated Exchange (FFE) Enrollment Manual*,¹⁸¹ we stated that we will exercise enforcement discretion with regard to regulatory requirements such as the binder payment and the deadline for payment of premiums under grace periods if an issuer is complying with a State regulatory authority's request to extend premium payment deadlines and delay termination of coverage due to a natural disaster or other emergency within the State.

For example, in connection with the COVID-19 Public Health Emergency declared by the Secretary, HHS exercised enforcement discretion¹⁸² regarding issuers extending premium payment deadlines and delaying cancellations or terminations of coverage with the permission of the applicable State regulatory authority. We propose to codify that Exchanges may, and Exchanges on the Federal platform would, provide flexibility in such circumstances, including circumstances in which an issuer is directed to do so by applicable State or Federal authorities.

Because current paragraph (e)(2) may be read to limit the flexibility Exchanges could provide issuers regarding payments other than the binder payment, we also propose to add the phrase "and other premium payment deadlines." Doing so would clarify for interested parties, particularly issuers, that Exchanges may, and Exchanges on the Federal platform would, provide flexibility regarding premium payment requirements other than the binder payment, such as the requirement to trigger a grace period to enrollees receiving APTC under § 156.270(d) if enrollees fail to pay premiums timely.

We request comments on this proposal.

¹⁸¹ CMS. (2023, July 12). *2023 Federally-facilitated Exchange (FFE) Enrollment Manual*. CMS. Section 6.1.3, p. 89, and Section 6.10, p. 110. <https://www.cms.gov/files/document/ffe-enrollment-manual-2023-5cr-071323.pdf>.

¹⁸² Pate, R. (2020, March 24). *Payment and Grace Period Flexibilities Associated with the COVID-19 National Emergency*. CMS. <https://www.cms.gov/files/document/faqs-payment-and-grace-period-covid-19.pdf>.

16. Initial and Annual Open Enrollment Periods (§ 155.410)

At § 155.410, we propose to amend paragraph (e)(4)(ii) to revise parameters around the adoption of an alternative open enrollment period by a State Exchange. We propose to require that for benefit years beginning on or after January 1, 2025, State Exchanges must adopt an open enrollment period that begins on November 1 of the calendar year preceding the benefit year and ends no earlier than January 15 of the applicable benefit year, with the option to extend the open enrollment period beyond January 15 of the applicable benefit year.

In part 3 of the 2022 Payment Notice final rule (86 FR 53429 through 53432), where we extended the open enrollment period for the Exchanges on the Federal platform to January 15, we noted several observations regarding a 6-week open enrollment period ending on December 15. However, we also noted that for an open enrollment period ending in December, certain consumers may be subjected to unexpected plan cost increases that they may not be notified about until January, after open enrollment concludes. We also observed that extending the open enrollment period for the Exchanges on the Federal platform to January 15 would ensure ample time for Navigators, assisters, certified application counselors, agents, and brokers to fully assist all interested consumers. We further noted that ending open enrollment on January 15 would give consumers additional time to react to updated plan cost information and more time to seek enrollment assistance, which could improve access to health coverage, particularly for those in underserved communities who face additional barriers to accessing health coverage.

We believe these observations hold true as to State Exchanges and warrant requiring that their open enrollment periods also end no earlier than January 15. Since we extended the open enrollment period for Exchanges on the Federal platform in part 3 of the 2022 Payment Notice final rule, four States have transitioned to the State Exchange model, and we anticipate that there will be additional State Exchanges in future benefit years, which increases the potential for differing open enrollment periods. While most of the State Exchanges already hold an open enrollment period that ends on or after January 15 of the benefit year, we believe that the risk of shorter open enrollment periods in the future requires ensuring a minimum open enrollment period across all Exchanges,

¹⁸⁰ We also stated that we do not anticipate extensions to be greater than 45 calendar days.

including State Exchanges. Notably, this proposal would impose a minimal burden on most of the State Exchanges.

Additionally, we believe that ensuring State Exchanges' open enrollment periods begin on November 1 of the calendar year and continue through at least January 15 of the benefit year—thereby ensuring substantial overlap between all Exchange open enrollment periods—would reduce consumer confusion in States with State Exchanges that currently hold open enrollment periods that are shorter than the open enrollment period for the Exchanges on the Federal platform, or that begin before November 1 and end earlier than January 15. Consumers in these States would benefit from a longer open enrollment period by having an increased opportunity to enroll in coverage or reducing missed opportunities to enroll due to confusion about when open enrollment begins and ends. The combined benefits of this proposal in terms of reducing consumer confusion, building in additional time for consumers to enroll, and aligning open enrollment periods with Medicare and most employer open enrollment periods, could further increase Exchange enrollment and potentially have downstream impacts like improving the uninsured rate in States.

We seek comment on this proposal.

17. Special Enrollment Periods

a. Effective Dates of Coverage (§ 155.420(b))

We propose amending § 155.420(b)(1) and (b)(3)(i) to align the effective dates of coverage after selecting a plan during certain special enrollment periods across all Exchanges, including State Exchanges. In order to consolidate and integrate the requirements in § 155.420(b)(3), without affecting any rights or obligations, we also propose to include the requirements currently in paragraph (b)(3)(ii) into proposed paragraph (b)(3)(i) and to delete paragraph (b)(3)(ii). For ease of consumer experience and to prevent coverage gaps, particularly for consumers transitioning between different Exchanges or from other insurance coverage, we propose amending § 155.420(b)(1) and (b)(3)(i) so that qualifying individuals or enrollees who select and enroll in a QHP during certain special enrollment periods receive coverage beginning the first day of the month after the consumer selects a QHP.

In accordance with § 155.420(b)(3)(i), in the FFEs, SBE-FPs, as well as several State Exchanges, during a special enrollment period, consumers who

select a QHP through the Exchange to which regular effective dates specified in § 155.420(b) apply have the plan's coverage begin on the first day of the month after the consumer's selection. For example, if a consumer selects a QHP on March 31, their QHP coverage would start April 1.

However, in some State Exchanges, a consumer's coverage is only made effective on the first day of the month after the consumer has selected a plan during a special enrollment period to which regular effective dates specified in § 155.420(b) apply if the consumer selects their plan between the 1st day and the 15th day of the previous month, per § 155.420(b)(1). In these State Exchanges, if a consumer selects a plan between the 16th day and the last day of the month, coverage will not become effective until the first day of the second month after plan selection. For example, for these State Exchanges, if a consumer selects a plan on March 1, Exchange QHP coverage would start April 1, but if that consumer selected a plan on March 16, their Exchange QHP coverage would start on May 1. This may result in a coverage gap of more than a month for these consumers.

As consumers typically qualify for special enrollment periods due to a life event that may disrupt their previous coverage (such as a move to a new State, or a change in household size due to birth or divorce, or a loss of other health insurance, such as a loss of Medicaid), these consumers are less likely to have health insurance coverage while they wait for their selected QHP coverage to begin.

In addition, when transitioning between Exchanges, such as from an Exchange in a State that operates on the Federal platform to a State Exchange that does not offer first-of-the-following-month coverage, consumers may expect that their coverage becomes effective on the first day of the month after selecting a QHP. These consumers might not be aware that the effective dates of coverage may differ between Exchanges, and they might not take appropriate steps to maintain or access alternate coverage while waiting for their QHP to become effective. As a result, these consumers may be at risk of coverage gaps due to the existing policies governing effective dates of coverage.

To address this, we propose amending § 155.420(b)(1) and (b)(3)(i) to align effective dates of coverage across all Exchanges under these special enrollment periods. The proposal would require all State Exchanges, beginning on January 1, 2025, or an earlier date at the option of the Exchange to provide coverage that is effective on the first day

of the month following plan selection, if a consumer enrolls in a QHP during a Special Enrollment Period to which regular effective dates specified in § 155.420(b) apply.

We seek comment on this proposal.

b. Monthly Special Enrollment Period for APTC-Eligible Qualified Individuals With a Household Income *At or Below* 150 Percent of the Federal Poverty Level

At § 155.420, we propose to amend paragraph (d)(16) to revise the parameters around the availability of a special enrollment period (SEP) for APTC-eligible qualified individuals with a projected household income at or below 150 percent of the Federal Poverty Level (FPL) hereinafter referred to as the "150 percent FPL SEP." We are proposing to amend the current text from "no greater than" to "at or below" for improved readability and understanding. Specifically, we are proposing to remove the limitation that this SEP be only available during periods of time when APTC is available such that the applicable taxpayers' applicable percentage is set to zero.

As background, in part 3 of the 2022 Notice of Benefit and Payment Parameters (86 FR 53429 through 53432), we finalized, at the option of an Exchange, a monthly SEP for APTC-eligible qualified individuals with a projected household income at or below 150 percent of the FPL. We also finalized a provision stating that this SEP is available only during periods of time during which APTC is available such that the applicable taxpayers' applicable percentage is set at zero, such as during tax years 2021 through 2025, as provided by section 9661 of the American Rescue Plan (ARP) and extended by the Inflation Reduction Act (IRA).¹⁸³ We also amended § 147.104(b)(2)(i) to specify that issuers are not required to provide the SEP in the individual market with respect to coverage offered outside of an Exchange.

As a result of the enhanced financial assistance established by the ARP and extended by the IRA until December 31, 2025, many consumers with lower household incomes with a projected household income at or below 150 percent of the FPL, have the opportunity to enroll in a much wider range of affordable coverage. Specifically, as a result of the legislative changes passed by Congress in the ARP and IRA, more consumers have access to Exchange and QHP coverage with zero-dollar premiums after financial subsidies, including more opportunities to enroll in zero-dollar silver-level plans with

¹⁸³ Public Law 117–169.

significant levels of CSRs. To provide these consumers—many of whom might have had difficulty enrolling during standard SEP timelines due to lack of awareness or other logistical difficulties—with the chance to access this generous Exchange coverage, we finalized the 150 percent FPL SEP.

We remain committed to ensuring that affordable Exchange coverage is available for individuals with lower household incomes and who are uninsured, and we believe that the availability of the 150 percent FPL SEP has made significant strides in ensuring that this population has real opportunities to enroll in free or extremely low cost Exchange coverage.

Executive Order (E.O.) 14070, signed on April 5, 2022 (which expanded upon E.O. 15009 signed on January 28, 2021), directs Federal agencies to identify ways to continue to expand the availability of affordable health coverage, to improve the quality of coverage, to strengthen benefits, and to help more Americans enroll in quality health coverage. To that end, this proposed change may further ensure continued improved access to affordable coverage for this population.

Continuing to make this SEP available also may continue to help consumers who lose other MEC coverage, especially those disenrolling from Medicaid or CHIP coverage to regain health care coverage. We are aware of the challenges many consumers disenrolling from Medicaid or CHIP coverage have faced due to the end of the Medicaid continuous enrollment condition as of March 31, 2023. During this time period, we have observed, and expect to continue to observe, a higher than usual volume of individuals with lower household incomes transitioning from Medicaid or CHIP coverage to coverage through Exchanges due to the end of the Medicaid continuous enrollment condition. As discussed in our guidance released on January 27, 2023, consumers disenrolling from Medicaid or CHIP because of the Medicaid continuous enrollment condition are especially vulnerable and may face challenges with transitioning from Medicaid or CHIP into other forms of coverage, such as Exchange coverage.¹⁸⁴ These challenges may include consumers' confusion as to why their Medicaid coverage is ending due

to irregular or untimely communications from State Medicaid agencies about the termination of coverage or coverage options for individuals with lower household incomes. Due to these factors, consumers may be unable to make an informed decision about their coverage options within the 60-day window provided by the SEPs at § 155.420(c)(1) and (d)(1) or within the 90-day window provided at the option of the Exchange at § 155.420(c)(6) beginning on January 1, 2024. Given our observations of these challenges, we believe that the existence of the 150 percent FPL SEP provides an additional safety-net, particularly for consumers impacted by the Medicaid continuous enrollment condition, but also generally for those who have historically faced challenges transitioning from Medicaid or CHIP into other coverage, like Exchange coverage.

Finally, our experience with the 150 percent FPL SEP strongly suggests that the policy has been successful. Based on our analysis, between October 2022 and August 2023, about 1.3 million consumers who reside in States with Exchanges on the Federal platform were APTC-eligible, and had projected household incomes at or below 150 percent of the FPL, enrolled in Exchange coverage under the 150 percent FPL SEP. In 2022, 41.8 percent of enrollees on Exchanges on the Federal platform had a projected household income of less than 150 percent of the FPL, compared to 46.9 percent of Exchange enrollees in 2023, after the implementation of the 150 percent FPL SEP. We believe the current 150 percent FPL SEP is one factor that significantly contributed to the increase in the enrollees on the Federal platform with a projected household income at or below 150 percent of the FPL.

In previous rulemaking, we expressed concern about offering the 150 percent FPL SEP when APTC does not always reduce the applicable percentage of a taxpayer with projected annual household income at or below 150 percent FPL to zero. We were also receptive to concerns raised by issuers that this SEP would impact the Exchange risk pool, lead to higher premiums, and impact the population with household incomes above 400 percent FPL with higher premium contributions as the APTC phases out. The possible increasing premiums also present a risk of financial hardship for consumers who purchase insurance off Exchange including those who are not eligible for APTC due to immigration status, or any other consumers who would purchase unsubsidized plans, or

only receive small subsidies. At the time, we believed that the risk for adverse selection was mitigated because consumers would not have an incentive to drop their Exchange plans when healthy and resume coverage when sick using the 150 FPL SEP since they would be enrolled in zero-dollar premium plans due to the enhanced financial subsidies provided by the ARP and IRA. Previously, we estimated that the adverse selection risk may result in issuers increasing premiums by approximately 0.5 to 2 percent, and a corresponding increase in APTC outlays and decrease in income tax revenues of approximately \$250 million to \$1 billion annually, when the enhanced APTC provisions of the ARP (and later extended by the IRA) are in effect. While it is challenging to predict the future nature of the Exchanges in 2026, we estimate that some adverse selection, though unknowable at this time, may occur once enhanced subsidies sunset on December 31, 2025, and may result in issuers increasing premiums. We acknowledge that there is a wide range of predictions for an increase to premiums due to the adverse selection risk associated with this proposed change and discuss this further in the regulatory impact analysis section of this rule.

However, an analysis of the plans available to consumers in 2020, just before implementation of the enhanced subsidies, suggests that the risk of adverse selection we acknowledged may be lower than expected, and therefore downstream impacts of that risk may be mitigated. When consumers with household incomes at or below 150 percent of the FPL are no longer eligible for enhanced subsidies, these consumers may still be eligible for low-cost silver or bronze plans with zero-dollar premiums after regular subsidies. In 2020, before the ARP provided enhanced financial assistance in the form of enhanced subsidies, about 900,000 consumers were enrolled in bronze plans, which were fully subsidized by APTC and where the consumer portion of premium was zero dollars. Additionally, in 2020, 77 percent of the consumer population at or below 150 percent FPL had access to a zero-dollar bronze plan with 16 percent of the same population having access to a zero-dollar silver plan in addition to the zero-dollar bronze plan. We believe that if the majority of consumers with income at or below 150 percent FPL would be eligible for a zero-dollar premium plan absent the enhanced subsidies provided under the ARP and IRA, then such consumers

¹⁸⁴ CMS. (2023, Jan. 27). *Temporary Special Enrollment Period (SEP) for Consumers Losing Medicaid or the Children's Health Insurance Program (CHIP) Coverage Due to Unwinding of the Medicaid Continuous Enrollment Condition—Frequently Asked Questions (FAQ)*. CMS. <https://www.cms.gov/technical-assistance-resources/temp-sep-unwinding-faq.pdf>.

would be unlikely to use the proposed 150 FPL SEP in a way that caused adverse selection. In other words, we believe that the availability of these zero-dollar bronze plans for consumers at or below 150 percent FPL mitigates the risk pool impact this proposed change might cause in addition to mitigating downstream hardships for consumers who purchase insurance without subsidies or with only small subsidies. Therefore, we are proposing to make the 150 percent FPL SEP, at the option of an Exchange, permanent by amending § 155.420(d)(16) to remove the requirement that the SEP only be available during periods of time when the applicable taxpayer's applicable percentage for purposes of calculating the premium assistance amount, as defined in section 36B(b)(3)(A) of the Code, is set at zero.

We seek comment on this proposal.

18. Termination of Exchange Enrollment or Coverage (§ 155.430)

We propose to add § 155.430(b)(1)(iv)(D) to permit enrollees on Exchanges using the Federal platform to retroactively terminate their enrollment in a QHP through the Exchange¹⁸⁵ when the enrollee enrolls in Medicare Parts A or B retroactively effective to the day before the date Medicare coverage begins. We also propose making implementation of this proposal optional for State Exchanges and request comment on whether it should instead be mandatory.

In the 2017 Payment Notice (81 FR 12203), we implemented regulations at § 155.430(b)(1)(iv) to permit Exchange enrollees to retroactively terminate coverage in the following circumstances: (1) the enrollee demonstrates to the Exchange that the enrollee attempted to terminate the enrollee's coverage or enrollment in a QHP and experienced a technical error that did not allow the enrollee to terminate the enrollee's coverage or enrollment through the Exchange; (2) the enrollee demonstrates to the Exchange that the enrollee's enrollment in a QHP through the Exchange was unintentional, inadvertent, or erroneous and was the result of the error or misconduct of an officer, employee, or agent of the Exchange or HHS, its instrumentalities, or a non-Exchange entity providing enrollment assistance or conducting enrollment activities; and (3) the enrollee demonstrates to the Exchange that the enrollee was enrolled

in a QHP without the enrollee's knowledge or consent by any third party, including third parties who have no connection with the Exchange. Additionally, § 155.430(d)(2)(v) authorizes Exchanges to retroactively terminate QHP coverage effective the day before Medicaid, CHIP, or BHP eligibility begins, though the Exchanges on the Federal platform do not permit retroactive terminations in this scenario. While SBE-FPs generally are required to follow the Exchanges on the Federal platform in matters of enrollment and disenrollment policy and operations, because this regulation relates to Medicaid, CHIP, or BHP programs, with which States are more closely involved than we are, we have provided SBE-FPs the option to implement retroactive terminations in these circumstances, despite the Federal platform not doing so.

Currently, we do not permit enrollees in Exchanges on the Federal platform to retroactively terminate QHP coverage due to retroactive enrollment in other coverage, including Medicare. When coverage is retroactively terminated, claims submitted during the period of terminated coverage will be reversed by the QHP issuer and become the responsibility of the enrollee, who must ensure claims are submitted by the provider to the new insurance provider, if coverage is effective retroactively.¹⁸⁶ State law would generally require that QHP issuers refund the enrollee any premiums paid during the months in which coverage is retroactively terminated.

In the 2017 Payment Notice (81 FR 12203), we stated that retroactive terminations would be limited to situations in which an enrollee was prevented from terminating coverage due to error or misconduct, and was not intended for enrollees who did not understand the rules of their enrollment and wished to avoid tax liability for APTC for which they were ineligible, nor for enrollees who seek retroactive termination of coverage at the end of the plan year because they did not use the coverage. We continue to believe that it is important to limit the scenarios in

which enrollees can seek retroactive termination of coverage, in part to address concerns raised by issuers of adverse selection if healthy enrollees are able to retroactively terminate coverage they did not use. However, we regularly receive requests from Exchange enrollees through the Marketplace Call Center to retroactively terminate QHP coverage because they enrolled retroactively in Medicare, and these requests are denied because they are not currently authorized by regulation. Unlike enrollees who enroll in Medicare prospectively when they turn 65, individuals who enroll in Medicare retroactively did not have the opportunity to prospectively terminate Exchange coverage, and thus, did not merely fail to understand the terms of their QHP enrollment.

Generally, consumers who become eligible for Medicare once they turn 65 can enroll prospectively, and those who are enrolled in Exchange coverage can normally terminate coverage prospectively so that there is no overlap between the two. In accordance with § 155.430(d)(2)(iii), Exchange enrollees may request same-day or prospective termination of coverage,¹⁸⁷ and Exchange communications instruct enrollees to terminate coverage once they learn they will be enrolled in other coverage to avoid an overlap. Exchange enrollees approaching their 65th birthday also receive communications from the Exchange advising them that they will be ineligible for APTC if they enroll in Medicare and instructing them to terminate Exchange coverage if they do not wish to have an overlap between the two. However, there are scenarios in which a consumer may retroactively enroll in Medicare Parts A or B coverage. For example, consumers can become eligible for retroactive Medicare Parts A and B due to retroactive eligibility for SSDI benefits, in which case the consumer is entitled to Medicare Parts A and B beginning with the 25th month of SSDI entitlement (that is, receipt of the SSDI benefit). If the SSA determines the consumer to be eligible more than 25 months back, the consumer will receive Medicare Part A automatically beginning with the 25th month of SSDI entitlement and will have the option of enrolling in Part B Medicare retroactive to the 25th month of SSDI entitlement (though they also have the choice to enroll in Part B

¹⁸⁵ When an enrollee retroactively terminates QHP coverage, State law generally requires that the premiums paid in the months for which coverage is retroactively terminated be refunded by the QHP issuer.

¹⁸⁶ Providers are generally required to submit claims to Medicare no later than 12 months after the date of service. However, in situations where Medicare Part A or B entitlement did not exist at the time service was furnished, or the beneficiary receives notice of Medicare Part A or B entitlement after the date of service, the 12-month limit may be extended for 6 months following the month in which the beneficiary receives notice of Medicare Part A or Part B entitlement. CMS. (rev. 2023, Jan. 19). *Medicare Claims Processing Manual*, 100-04, Chapter 1, Section 70.7.2 "Retroactive Medicare Entitlement." <https://www.cms.gov/regulations-and-guidance/manuals/downloads/clm104c01.pdf>.

¹⁸⁷ Although this regulation permits QHP enrollees to request prospective terminations, limitations in operations in the Exchanges on the Federal platform prevent one enrollee in an enrollment group from ending coverage prospectively when the other enrollees in the group intend to remain enrolled.

prospectively). In addition, when a consumer has not been automatically enrolled in Medicare Part A and applies for Medicare Part A after their 65th birthday, their entitlement to Part A begins (that is, when coverage starts) up to six months prior to the date of the application but no sooner than the consumer's 65th birthday.

Because consumers who enroll retroactively in Medicare Parts A or B may not be able to avoid an overlap in coverage by prospectively terminating their Exchange coverage, we believe it is appropriate to allow them to retroactively terminate Exchange coverage back to the day before Medicare coverage begins. Allowing consumers to request retroactive terminations in these scenarios ensures they can avoid an overlap between Exchange and Medicare coverage and avoid paying premium unnecessarily (if the consumer owes premium after the application of APTC). However, we note that consumers would not be required to request a retroactive termination and could maintain both Exchange and Medicare coverage if they wish. Consumers who enroll in Medicare retroactively are not categorically excluded from PTC eligibility for the period of retroactive coverage, and thus may not be required to repay APTC for the months of overlap when they file their taxes, in accordance with 26 CFR 1.36B–2(c)(2)(iv); however, a QHP enrollee receiving APTC who is voluntarily requesting and is granted a retroactive QHP termination relieves the government of subsidizing two forms of coverage, as the APTC is recouped for the terminated QHP coverage months.

Although it is also possible for consumers to become retroactively eligible for Medicaid, and have an unavoidable overlap with Exchange coverage, we believe it is appropriate to limit the applicability of this provision in the Exchanges on the Federal platform to Medicare. We previously allowed retroactive terminations of Exchange coverage due to enrollment in Medicaid, CHIP, and the BHP, but removed this option for the FFEs in the 2019 Payment Notice (83 FR 16930). This option was retained for State Exchanges and SBE-FPs, which as previously mentioned are more closely integrated into their State-administered Medicaid programs. In response to commenters who opposed this change, we noted that although consumers in these cases may wish to recoup premiums paid during the period of overlapping coverage, there is significant risk that providers who participate in the consumer's Exchange coverage do not participate in Medicaid,

CHIP, or BHP, which would leave the consumer with unexpected out-of-pocket costs. However, because Medicare is accepted by many, if not most, providers, it is less likely that a retroactive QHP disenrollment would leave consumers responsible for claims made during the period of retroactive Medicare enrollment.

We note that in the FFEs and SBE-FPs, Marketplace Call Center workers and caseworkers have system-based evidence of both QHP and Medicare eligibility dates and would be able to verify that an enrollee requesting retroactive termination is enrolled in Medicare and approve retroactive requests. This would ensure that enrollees cannot retroactively terminate their QHP coverage for other, unauthorized reasons such as low utilization of coverage, which could create an adverse selection risk. We also note that, similar to retroactive Medicare enrollment, consumers who retroactively enroll in Medicaid coverage are not required to repay APTC for the months in which they retroactively enrolled when they file their taxes, consistent with 26 CFR 1.36B–2(c)(2)(iv).

Finally, in recognition of the challenges associated with retroactively adjusting coverage for preceding years, we propose to require that enrollees must request retroactive termination of coverage within 60 days of the date they retroactively enroll in Medicare (the date the enrollment occurs, not the Medicare coverage effective date). In the 2017 Payment Notice (81 FR 12203), we requested comment on and finalized a similar requirement for the other retroactive enrollment scenarios permitted under § 155.430(b)(1)(iv). We believe implementing this requirement would be appropriate here as well. Permitting retroactive enrollments too far in the past can be operationally burdensome for Exchanges, and for issuers that must reverse claims and refund premiums for the months of terminated coverage. We believe that a window of 60 days provides an appropriate amount of time for an enrollee who retroactively enrolls in Medicare coverage to request retroactive termination of Exchange coverage and is consistent with the limitation placed on requests for the other permissible retroactive termination scenarios at § 155.430(b)(1)(iv).

We request comments on this proposal. Specifically, we request comment on whether the public benefits of this proposal to honor an enrollee's choice, recoup APTC for duplicative coverage, and protect the individual market risk pool outweighs the risk that

an enrollee would be left with uncovered claims for the overlapping period. We also request comment on the best way to ensure that enrollees have the necessary information to make an informed decision about whether to retroactively terminate coverage. If this proposal is finalized, we intend to monitor the impact to minimize harm to consumers. We also seek comment on whether this provision should be mandatory for State Exchanges, rather than optional, and if so, how State Exchanges would verify retroactive Medicare enrollment dates.

19. Establishment of Exchange Network Adequacy Standards (§ 155.1050)

We propose to require that State Exchanges and SBE-FPs establish and impose quantitative time and distance QHP network adequacy standards that are at least as stringent as the FFEs' time and distance standards established for QHPs under § 156.230. We also propose that State Exchanges and SBE-FPs be required to conduct quantitative network adequacy reviews prior to certifying any plan as a QHP, consistent with the reviews conducted by the FFEs under § 156.230. We further propose to require State Exchanges and SBE-FPs to permit issuers that are unable to meet the specified network adequacy standards to participate in a justification process after submitting their initial network adequacy data to account for variances and potentially earn QHP certification. Finally, we propose to mandate that State Exchanges and SBE-FPs require all issuers seeking QHP certification to submit information to the State Exchange or SBE-FP about whether network providers offer telehealth services.

Understanding that some State Exchanges or SBE-FPs may need to promulgate regulations to comply with the proposed provisions requiring State Exchanges and SBE-FPs to impose quantitative network adequacy standards and conduct quantitative network adequacy reviews, as well as the requirement related to QHP issuer submission of telehealth information, we propose that these provisions would be effective for plan years beginning on or after January 1, 2025, to accommodate the time it may take for a State Exchange or SBE-FP to come into compliance. We are of the view that strong network adequacy time and distance standards across all Exchanges would enhance consumer access to quality, affordable care through the Exchanges.

a. Federal Network Adequacy Policy Under the Affordable Care Act

Section 1311(c)(1)(B) of the ACA directs the Secretary of HHS to establish by regulation certification criteria for QHPs, including criteria that require QHPs to ensure a sufficient choice of providers (in a manner consistent with applicable provisions under section 2702(c) of the PHS Act) and provide information to current and prospective enrollees on the availability of in-network and out-of-network providers. Federal network adequacy standards were first detailed in the Exchange Establishment Rule (77 FR 18418) and codified at § 156.230.

In the Exchange Establishment Rule (77 FR 18418), we established the minimum network adequacy criteria that plans must meet to be certified as QHPs at § 156.230. The Exchange Establishment Rule (77 FR 18409 through 18420) provided that an issuer of a QHP that uses a provider network must maintain a network that is sufficient in number and types of providers, including providers that specialize in mental health and substance use disorder services, to ensure that all services will be accessible to enrollees without unreasonable delay. In the 2016 Payment Notice (80 FR 10830 through 10833), we modified § 156.230(a) in part to specify that network adequacy requirements only apply to QHPs that use a provider network, and that a provider network includes only providers that are contracted as in-network. For PYs 2015 through 2017, the FFEs conducted network adequacy reviews of time and distance standards for QHP issuers.

The 2017 Market Stabilization final rule (82 FR 18371 through 18372) deferred reviews of network adequacy for QHPs to States that we determined to have a sufficient network adequacy review process, an approach that was expanded on in the 2019 Payment Notice (83 FR 17024 through 17026). In the 2019 Payment Notice (83 FR 17024 through 17026), we deferred reviews of network adequacy for QHPs to States that possessed sufficient legal authority to enforce standards that were at least equal to the reasonable access standard defined in § 156.230 and that had the means to assess the adequacy of plans' provider networks. In States without the legal authority or means to assess and ensure network adequacy, we relied on an issuer's accreditation (commercial or Medicaid) from an HHS-recognized accreditation body to determine compliance with network adequacy requirements. For PYs 2018 through

2022, we determined that all States had sufficient legal authority and means to assess the adequacy of QHP provider networks.

In part 1 of the 2022 Payment Notice (86 FR 6154 through 6155), we provided a clarification to the network adequacy rules to reflect that § 156.230 does not apply to plans seeking QHP certification that do not differentiate benefits based on whether or not enrollees receive covered services from providers that are members of the plan's provider network.

The network adequacy review policy finalized in the 2019 Payment Notice was challenged in *City of Columbus, et al. v. Cochran*, 523 F. Supp. 3d 731 (D. Md. 2021). Specifically, on March 4, 2021, the United States District Court for the District of Maryland vacated the 2019 Payment Notice's policy that deferred to States the Federal government's reviews of the network adequacy of QHPs and plans seeking QHP certification to be offered through the FFEs. With the FFE QHP certification cycle for PY 2022 beginning on April 22, 2021, we were not able to fully implement the aspects of the court's decision regarding network adequacy in time for issuers to design plans and for us to be prepared to consider whether to certify such plans as QHPs for PY 2022. However, we noted in part 2 of the 2022 Payment Notice (86 FR 24264 through 24265) that we planned to propose specific steps to address implementation of this aspect of the court's decision in future rulemaking.

In the 2023 Payment Notice (87 FR 27322), we finalized network adequacy standards for issuers in the FFEs that would apply for PYs 2023 and later. Specifically, in that rule (87 FR 27323 through 27328), we finalized that we would evaluate plans seeking certification as QHPs in all States served by an FFE, including conducting network adequacy reviews based on time and distance standards. In PY 2023,¹⁸⁸ we assessed time and distance standards at the county level and classified counties into five county type designations: Large Metro, Metro, Micro, Rural, and Counties with Extreme Access Considerations (CEAC). We used a county type designation method that is based upon the population size and density parameters of individual counties. To assess whether QHPs complied with these standards, we reviewed provider data for in network providers that QHP issuers submitted to

us via our ECP/NA template.¹⁸⁹ For each specialty and time and distance standard, we reviewed the issuer-submitted data to ensure that the plan provided access within specified times and distances to at least one provider in each of the provider type categories for at least 90 percent of enrollees. If a QHP did not meet one or more of the time and distance standards, the issuer could (1) add more contracted providers to the network to come into alignment with the standards and re-submit their updated ECP/NA template to us, and/or (2) submit a completed Network Adequacy Justification Form.¹⁹⁰ This justification process required issuers that did not yet meet the time and distance standards to detail: (1) the reasons that one or more time and distance standards were not met; (2) the mitigating measures the issuer is taking to ensure enrollee access to respective provider specialty types; (3) information regarding enrollee complaints regarding network adequacy; and (4) the issuer's efforts to recruit additional providers. We used the provider's data submitted on the ECP/NA template and the completed Network Adequacy Justification Form submitted as part of the certification process to assess whether the issuer met the regulatory requirement, prior to making the certification decision.

In the 2023 Payment Notice (87 FR 27328), we also finalized that, starting in PY 2025, we would also evaluate QHPs for compliance with appointment wait time standards. In the 2023 Payment Notice (87 FR 27323), we finalized that CMS would not evaluate network adequacy in States performing plan management functions that elect to perform their own reviews of plans seeking QHP certification in their State, provided that the State applies and enforces quantitative network adequacy standards that are at least as stringent as the federal network adequacy standards established for QHPs under 45 CFR 156.230, and that reviews are conducted prior to plan confirmation to support timely QHP certification.

In response to the network adequacy proposals proposed in the 2023 Payment Notice proposed rule, many commenters also requested that we extend Federal network adequacy standards to State Exchanges in future rulemaking (87 FR 27334). Several commenters suggested that State alignment with Federal standards would be ideal, and that Federal standards

¹⁸⁸ 2023 Final Letter to Issuers in the Federally-facilitated Exchanges. <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/final-2023-letter-to-issuers.pdf>.

¹⁸⁹ Essential Community Providers and Network Adequacy. <https://www.qhpcertification.cms.gov/s/ECP%20and%20Network%20Adequacy>.

¹⁹⁰ Id.

should offer minimum standards, or a “strong floor,” that all States must meet.

In the 2024 Payment Notice (87 FR 78285 through 78287), we finalized that all individual market QHPs, including individual market stand-alone dental plans (SADPs), and all SHOP QHPs across all Exchanges must use a network of providers that complies with the standards described in §§ 156.230 and 156.235 (with a limited exception for certain SADP issuers as specified under § 156.230(a)(4)). We also further deferred the imposition of appointment wait time standards to PY 2025.

b. Network Adequacy Standards and Reviews Across Exchanges

Network adequacy is a key factor affecting consumers’ access to care. While the FFEs impose uniform network adequacy standards across the States they serve that require QHP issuers to meet quantitative metrics, a similarly uniform network adequacy standard does not exist for States served by State Exchanges and SBE-FPs. Indeed, these circumstances prompted the National Association of Insurance Commissioners to develop the NAIC Health Benefit Plan Network Access and Adequacy Model Act (Model Act).¹⁹¹ The Model Act includes recommendations for qualitative network adequacy standards to which States could hold their issuers accountable and that require submission of access plans. The Model Act, however, does not specify what constitutes network adequacy, and, currently, only a few State Exchanges and SBE-FPs have adopted the full Model Act, resulting in the lack of a strong floor for network adequacy standards among State Exchanges and SBE-FPs.

State Exchanges and SBE-FPs currently have a mix of network adequacy policies in place, and approximately 25 percent of those fail to impose any quantitative standard. Quantitative network adequacy standards can be monitored relatively easily and applied objectively and may include standards that measure provider-to-enrollee ratios, time and distance, or appointment wait times.¹⁹² On the other hand, a qualitative approach to network adequacy typically articulates a broad, general standard of

adequacy and typically grants regulators or insurers discretion to determine how to measure compliance.¹⁹³ State regulators using this approach may require issuers to simply articulate how they determine and measure adequacy in their networks.¹⁹⁴ Once regulators approve an issuer’s network adequacy plan using this approach, they then typically let issuers self-monitor their own compliance.¹⁹⁵ As opposed to conducting routine audits or requiring periodic reports of compliance, State regulators usually rely on consumer complaints to highlight situations that might require investigation.¹⁹⁶

Based on our experience conducting network adequacy reviews and regulating QHPs, as well as feedback from interested parties, including the many commenters who requested in the 2023 Payment Notice (87 FR 27334) that HHS extend Federal network adequacy standards to State Exchanges in future rulemaking, we are now of the view that no matter the State in which a QHP is offered, some quantitative analysis is necessary for an Exchange to objectively monitor network adequacy and determine whether a QHP provides enrollees in that State with access to an adequate network of providers.

Moreover, the proliferation in recent years of QHP issuers with narrower provider networks raises several consumer protection concerns. QHPs with narrower networks may lack access to specific provider specialties in-network, resulting in significant out-of-pocket expenses for consumers who must seek care out-of-network or resulting in consumers forgoing care to avoid these expenses. We have also been made aware, through communications with interested parties, of issues faced by consumers where in-network emergency physicians and mental health providers are in limited supply or, in the case of in-network emergency physicians, not available at in-network hospitals. Additionally, the proliferation of narrower networks risks consumers being enrolled in plans whose networks do not have sufficient capacity to serve them or whose providers are too geographically dispersed to be reasonably accessible.

Therefore, we propose to establish a national floor of quantitative network adequacy standards and network adequacy reviews. Although a number of State Exchanges and SBE-FPs have taken meaningful steps towards ensuring the adequacy of QHP

networks, we are of the view that every Exchange should apply quantitative network adequacy standards and conduct a thorough review and analysis of issuer compliance with these standards to effectively evaluate the adequacy of QHP networks in order to ensure that all consumers, regardless of which State they live in, have timely access to providers to manage their health care needs.

c. Proposals Related to State Exchange and SBE-FP Network Adequacy Standards and Reviews

We propose that for PY 2025 and future plan years, State Exchanges and SBE-FPs must (1) establish and impose quantitative time and distance network adequacy standards for QHPs that are at least as stringent as standards for QHPs participating on the FFEs under § 156.230; and (2) conduct reviews of a plan’s compliance with those quantitative network adequacy standards prior to certifying any plan as a QHP, consistent with the manner in which the FFEs review the network adequacy of plans under § 156.230.

i. Quantitative Network Adequacy Time and Distance Standards

For plans years beginning on or after January 1, 2025, we propose that State Exchanges and SBE-FPs establish and impose quantitative time and distance network adequacy standards that are at least as stringent as the FFEs’ time and distance standards established for QHPs under § 156.230.

For purposes of this proposal, “at least as stringent as” means time and distance standards that use a specialty list that includes at least the same specialties as our provider specialty lists and time and distance parameters that are at least as short as our parameters. States would be permitted to implement network adequacy standards that are more stringent than those performed by the FFEs under § 156.230. In other words, States could use a specialty list that is broader than our specialty lists, but it must include all the provider specialties included in our lists. Similarly, the time and distance parameters could also be narrower than our parameters, meaning they could require shorter time and/or distances, but they cannot be less demanding than our time and distance parameters.

Quantitative time and distance standards help strengthen QHP enrollees’ timely access to a variety of providers to meet their health care needs, which in turn helps ensure that enrollees can receive health care services without unreasonable delay. Additionally, quantitative time and

¹⁹¹ Health Benefit Plan Network Access and Adequacy Model Act. (2015, 4th Quarter). https://www.naic.org/insurance/legal/documents/naic_model_act_network_adequacy.pdf.

¹⁹² Hall, Ginsburg. (2017, Sep.). A Better Approach to Regulating Provider Network Adequacy. <https://www.brookings.edu/wp-content/uploads/2017/09/regulatory-options-for-provider-network-adequacy.pdf>.

¹⁹³ Id.

¹⁹⁴ Id.

¹⁹⁵ Id.

¹⁹⁶ Id.

distance standards, when varied by county type, provide a useful assessment of whether QHPs provide reasonable access to care and a more comprehensive evaluation of the adequacy of QHPs' networks.

In the 2023 Payment Notice (87 FR 27322), we adopted time and distance standards that the FFEs would use to assess whether plans to be certified as QHPs in the FFEs meet network adequacy standards. The proposed provider specialty lists for time and distance standards for PY 2023 were informed by prior HHS network adequacy requirements, consultation with interested parties, and other Federal and State health care programs, such as Medicare Advantage and Medicaid. The provider specialty lists that were finalized for PY 2023 covered more provider types than previously evaluated under FFE standards so that

QHP networks would be robust, comprehensive, and responsive to QHP enrollees' needs. We believe that these provider specialty lists promote access to a variety of provider types and as a result strengthen consumer access to health care services without unreasonable delay. To establish a national floor for quantitative network adequacy standards, we propose that the provider specialty list that State Exchanges and SBE-FPs use must include, at a minimum, the providers in the provider specialty lists for the FFEs that were applicable to PY 2023. Those lists are included in this preamble, as well.

Consistent with the standards for the FFEs and to strengthen QHP enrollees' timely access to a variety of providers to meet their health care needs, we propose that State Exchanges and SBE-FPs' time and distance standards would

be calculated at the county level and vary by county designation. State Exchanges and SBE-FPs would be required to use a county type designation method that is based on the population size and density parameters of individual counties. Under our proposal, the time and distance standards State Exchanges and SBE-FPs would establish and impose would apply to the provider specialty lists contained in Tables 10 and 11. To count towards meeting the time and distance standards, individual and facility providers listed on Tables 10 and 11 would have to be appropriately licensed, accredited, or certified to provide services in their State, as applicable, and would need to have in-person services available.

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TABLE 10: Individual Provider Specialty List for Time and Distance Standards

Individual Specialty Types
Allergy and Immunology
Cardiology
Cardiothoracic Surgery
Chiropractor
Dental
Dermatology
Emergency Medicine
Endocrinology
ENT/Otolaryngology
Gastroenterology
General Surgery
Gynecology, OB/GYN
Infectious Diseases
Nephrology
Neurology
Neurosurgery
Occupational Therapy
Oncology – Medical, Surgical
Oncology – Radiation
Ophthalmology
Orthopedic Surgery
Outpatient Clinical Behavioral Health (Licensed, accredited, or certified professionals)
Physical Medicine and Rehabilitation
Physical Therapy
Plastic Surgery
Podiatry
Primary Care – Adult
Primary Care – Pediatric
Psychiatry
Pulmonology
Rheumatology
Speech Therapy
Urology
Vascular Surgery

TABLE 11: Facility Specialty List for Time and Distance Standards

Facility Specialty Types
Acute Inpatient Hospitals (Must have Emergency services available 24/7)
Cardiac Catheterization Services
Cardiac Surgery Program
Critical Care Services – Intensive Care Units (ICU)
Diagnostic Radiology (Free-standing; hospital outpatient; ambulatory health facilities with Diagnostic Radiology)
Inpatient or Residential Behavioral Health Facility Services
Mammography
Outpatient Infusion/Chemotherapy
Skilled Nursing Facilities
Surgical Services (Outpatient or ASC)
Urgent Care

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The county-specific time and distance parameters that QHPs would be

required to meet would be detailed in future guidance, in the annual CMS

Letter to Issuers in the Federally-facilitated Exchanges. We would

consider industry standards in developing these standards.

ii. Quantitative Network Adequacy Reviews

For plans years beginning on or after January 1, 2025, we propose that State Exchanges and SBE-FPs be required to conduct quantitative network adequacy reviews prior to QHP certification, and that they conduct them consistent with network adequacy reviews conducted by the FFEs under § 156.230. Specifically, when we refer to the review being consistent with the network adequacy reviews conducted by the FFEs under § 156.230, we propose that State Exchanges and SBE-FPs would be required to conduct, prior to QHP certification, quantitative network adequacy reviews to evaluate compliance with requirements under § 156.230(a)(1)(ii) and (iii), and (a)(2)(i)(A), while providing QHP certification applicants the flexibilities described under § 156.230(a)(2)(ii) and (a)(3) and (4). Under this proposal, State Exchanges and SBE-FPs would be prohibited from accepting an issuer's attestation as the only means for plan compliance with network adequacy standards. We further propose that State Exchanges and SBE-FPs would make available to SADP applicants the limited exception available to SADPs under § 156.230(a)(4), pursuant to which SADPs may not be required to meet FFE network adequacy standards under § 156.230(a)(4), for the same reasons we made this exception available in the FFEs in the 2024 Payment Notice (88 FR 25878 through 25879). This exception is not available to medical QHP issuers.

iii. Quantitative Network Adequacy Review Justification Process

We acknowledge that State-specific challenges may necessitate exceptions, and so we propose to require State Exchanges and SBE-FPs to permit issuers that are unable to meet the specified standards to participate in a justification process after submitting their initial data to account for variances, consistent with the processes specified under § 156.230(a)(2)(ii) and (a)(3) and (4). State-specific challenges could include barriers beyond an issuer's control, such as provider supply shortages or topographic barriers.

The issuer would include this justification as part of its QHP application and describe how the plan's provider network provides an adequate level of service for enrollees and how the plan's provider network will be strengthened and brought closer to compliance with the network adequacy standards prior to the start of the plan

year. The issuer would be required to provide information as requested by the State Exchange or SBE-FP to support this justification. State Exchanges and SBE-FPs would be required to review the issuer's justification to determine whether making such health plan available through the Exchange is in the interests of qualified individuals in the State or States in which such Exchange operates as specified under § 156.230(a)(3). In making this determination, the factors State Exchanges and SBE-FPs could consider include whether the exception is reasonable based on circumstances such as the local availability of providers and variables reflected in local patterns of care. If the State Exchange or SBE-FP determines that making such health plan available through its Exchange is in the interests of qualified individuals in the State or States in which such Exchange operates, it could then certify the plan as a QHP.

iv. Exception Process for State Exchanges and SBE-FPs

We are aware that some States Exchanges employ robust, quantitative network adequacy standards that differ from those used by the FFEs, but still ensure that QHPs provide consumers with reasonable, timely access to practitioners and facilities to manage their health care needs, consistent with the ultimate aim of these proposals. In light of this, we propose a framework for granting exceptions to the requirements that State Exchanges and SBE-FPs are required to establish and impose network adequacy time and distance standards for QHPs that are at least as stringent as the standards applicable to QHPs in FFEs and conduct quantitative network adequacy reviews that are consistent with those carried out by the FFEs under § 156.230. We propose that HHS could grant State Exchanges and SBE-FPs an exception if it determines that the Exchange applies and enforces quantitative network adequacy standards that are different from the FFEs' but ensure reasonable access as defined under § 156.230. The exception would be available only to State Exchanges and SBE-FPs that conduct quantitative reviews of network adequacy prior to certifying plans as QHPs. Exchanges seeking to employ alternative network adequacy standards would be required to submit an exception request, in a form and manner specified by HHS, and to support their exception request with evidence-based data demonstrating that such standards ensure access as defined under § 156.230.

For example, if a State were to provide quantitative evidence that their network adequacy time and distance standards that measure access by service types provide consumers with equal access to providers as the Federal network adequacy standards under § 156.230 that measure access by provider types, we may grant the respective State's request for an exception from measuring access by provider types. Additionally, if a State were to use different county type designations than the five county type designations that we use to assess QHP time and distance standards at the county level (that is, Large Metro, Metro, Micro, Rural, CEAC), we would consider the respective State's request for an exemption from using the same five county type designations only if the State were to provide evidence that their alternative county type designations provide consumers with equal access to providers as the Federal network adequacy standards under § 156.230. Alternative quantitative network adequacy standards that we would review for potentially qualifying for the exemption must be supported by evidence-based data, demonstrating that such standards provide enrollees with a level of access to providers that is equal to or greater than that ensured by the FFE network adequacy standards under § 156.230.

Although we propose to establish minimum standards related to network adequacy in this proposed rule, we solicit comment on how States may be able to develop a combination of data-driven quantitative and qualitative standards, developed with input from interested parties, to assess network adequacy. In the 2020 Medicaid Program; Medicaid and Children's Health Insurance Program (CHIP) Managed Care final rule (85 FR 72754, 72802), we provided States the flexibility to develop quantitative network adequacy standards for determining network adequacy. In that rule, we noted that in some situations, time and distance may not be the most effective type of standard for determining network adequacy and that some States have found that the time and distance analysis produces results that may not accurately reflect provider availability. For example, a State that has a heavy reliance on telehealth in certain areas of the State may find that a health care provider-to-enrollee ratio is more useful in measuring meaningful access to all services without unreasonable delay, as the time it would take the enrollee, and the distance the enrollee would have to travel, to access

the provider in-person could be well beyond applicable time and distance standards, but the enrollee may still be able to easily and quickly access many different providers on a virtual basis. (85 FR 72802) We seek comment on how we should administer the process for Exchanges to apply for these exceptions, including the appropriate timelines, and the data that would be required to be submitted as part of this request. We also seek comment on how we should evaluate the provider access offered by QHP issuers in a State that requests an exception to establish and impose quantitative network adequacy standards that are different from the FFEs', whether and how to measure the access provided by those different standards over time, and how long an approved exemption should last.

To ensure compliance with these proposed quantitative time and distance QHP network adequacy standards and review requirements, we would coordinate with State Exchanges and SBE-FPs to provide technical assistance to support their compliance with the requirements of this proposal and work with them should it be necessary to remedy any gaps in compliance. However, if a State Exchange or SBE-FP fails to comply with these standards, HHS could seek to take remedial action under its authorities related to Exchange program integrity.

d. Proposal Related to QHP Reporting on Telehealth Services

We propose to require State Exchanges and SBE-FPs to require that all issuers seeking certification of plans to be offered as QHPs submit information to the respective State Exchanges or SBE-FPs about whether network providers offer telehealth services. We propose that this requirement would be applicable beginning with the QHP certification cycle for PY 2025. This data would be for informational purposes; it would be intended to help inform the future development of telehealth standards and would not be displayed to consumers. We believe this information could be relevant to State Exchange and SBE-FP analysis of whether a QHP meets network adequacy standards. We note that this proposal is not intended to suggest that telehealth services would be counted in place of in-person service access for the purpose of meeting network adequacy standards for PY 2025. While we acknowledge the growing importance of telehealth, we want to ensure that telehealth services do not reduce the availability of in-person care.

For this purpose, telehealth encompasses professional consultations, office visits, and office psychiatry services delivered through technology-based methods, including virtual check-ins, remote evaluation of pre-recorded patient data, and inter-professional internet consultations. Currently, for issuers in FFEs to comply with telehealth reporting standards, issuers must indicate whether each provider offers telehealth with the options "Yes," "No," or "Requested information from the provider, awaiting their response." We are proposing that State Exchanges and SBE-FPs also impose this same standard.

We seek comment on this proposal, including comments on how we might incorporate telehealth availability into network adequacy standards in future plan years.

f. Additional Network Adequacy Standards

To reduce burden on State Exchanges and SBE-FPs that are not yet conducting quantitative network adequacy reviews, we are not proposing at this time that State Exchanges and SBE-FPs enforce appointment wait time standards or that State Exchanges and SBE-FPs ensure that the provider network of each QHP meets applicable standards specified in § 156.230(b) through (e). However, we seek comment to inform any potential future enforcement of appointment wait time standards as well as the standards specified in § 156.230(b) through (e), and look forward to capturing a wide range of perspectives on these topics from various interested parties. We are especially interested in comments about how State Exchanges and SBE-FPs may enforce quantitative network adequacy standards for appointment wait times, as well as the impact enforcing these standards may have on issuers and consumers.

We also seek comment on our proposal for State Exchanges and SBE-FPs to establish and impose quantitative time and distance QHP network adequacy standards that are at least as stringent as the FFEs' time and distance standards established for QHPs under § 156.230 and to conduct quantitative network adequacy reviews, prior to QHP certification, that are consistent with the reviews conducted by the FFEs under § 156.230, including comment on whether we should amend § 156.230 in addition to § 155.1050 to directly apply the same standards applicable to issuers on FFEs to issuers in State Exchanges and SBE-FPs for plan years beginning on or after January 1, 2025.

E. 45 CFR Part 156—Health Insurance Issuer Standards Under the Affordable Care Act, Including Standards Related to Exchanges

1. FFE and SBE-FP User Fee Rates for the 2025 Benefit Year (§ 156.50)

For the 2025 benefit year, we propose to retain the 2024 benefit year FFE user fee rate of 2.2 percent of total monthly premiums and an SBE-FP user fee rate of 1.8 percent of the total monthly premiums.

Section 1311(d)(5)(A) of the ACA permits an Exchange to charge assessments or user fees on participating health insurance issuers as a means of generating funding to support its operations. If a State does not elect to operate an Exchange or does not have an approved Exchange, section 1321(c)(1) of the ACA directs HHS to operate an Exchange within the State. Accordingly, in § 156.50(c), we state that a participating issuer offering a plan through an FFE or SBE-FP must remit a user fee to HHS each month that is equal to the product of the annual user fee rate specified in the annual HHS notice of benefit and payment parameters for FFEs and SBE-FPs for the applicable benefit year and the monthly premium charged by the issuer for each policy where enrollment is through an FFE or SBE-FP. OMB Circular A-25 established Federal policy regarding user fees and what the fees can be used for.¹⁹⁷ OMB Circular A-25 provides that a user fee charge will be assessed against each identifiable recipient of special benefits derived from Federal activities beyond those received by the general public.

a. FFE User Fee Rates for the 2025 Benefit Year

Based on estimated costs, enrollment (including anticipated establishment of SBE-FPs or shifts to State Exchanges in certain States in which FFEs or SBE-FPs currently are operating), and premiums for the 2025 benefit year, we propose a 2025 user fee rate for all participating FFE issuers of 2.2 percent of total monthly premiums.

Section 156.50(c)(1) provides that, to support the functions of FFEs, an issuer offering a plan through an FFE must remit a user fee to HHS, in the timeframe and manner established by HHS, equal to the product of the monthly user fee rate specified in the annual HHS notice of benefit and payment parameters for the applicable benefit year and the monthly premium

¹⁹⁷ See Circular No. A-25 Revised. <https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-025.pdf>.

charged by the issuer for each policy where enrollment is through an FFE. As in benefit years 2014 through 2024, issuers seeking to participate in an FFE in the 2025 benefit year will receive two special benefits not available to issuers offering plans in State Exchanges: (1) the certification of their plans as QHPs; and (2) the ability to sell health insurance coverage through an FFE to individuals determined eligible for enrollment in a QHP. For the 2025 benefit year, issuers participating in an FFE will receive special benefits from the following Federal activities:

- Provision of consumer assistance tools;
- Consumer outreach and education;
- Management of a Navigator program;
- Regulation of agents and brokers;
- Eligibility determinations;
- Enrollment processes; and
- Certification processes for QHPs (including ongoing compliance verification, recertification, and decertification).

Activities performed by the Federal government that do not provide issuers participating in an FFE with a special benefit are not covered by the FFE user fee.

The proposed user fee rate reflects our estimates for the 2025 benefit year of costs for operating the FFEs, premiums, enrollment, and transitions in Exchange models from the FFE and SBE-FP models to either the SBE-FP or State Exchange models. The total enrollment in Exchanges in States anticipated to transition from operating an SBE-FP to a State Exchange model represents premiums for which we will no longer collect user fees, and the total enrollment in Exchanges in States anticipated to transition from an FFE to an SBE-FP model represents premiums for which we will assess user fees at the lower SBE-FP rate. Thus, these anticipated transitions impact our total projected collections and may affect the FFE and SBE-FP rates and are considered as part of our calculation of our proposed user fee amounts.

To develop the proposed 2025 benefit year FFE user fee rates, we considered a range of costs, premiums, and enrollment projections.¹⁹⁸ For the proposed 2025 benefit year user fee rates, we estimated a reduction in contract costs partially or fully funded out of FFE and SBE-FP user fees from the 2024 benefit year due to the HHS

funding for Exchange outreach activities related to Medicaid unwinding ending in 2024. We took several factors into consideration in choosing which premium and enrollment projections would inform the proposed 2025 FFE user fee rates. The enhanced PTC subsidies in section 9661 of the ARP were extended in section 12001 of the IRA through the 2025 benefit year. The extension of enhanced PTC subsidies significantly influenced our development of the 2025 enrollment and premium projections. We expect this provision of the IRA to sustain the higher enrollment levels observed in the 2021 and 2022 benefit years after the ARP was established and, as a result, we expect the projected total premiums where the user fee applies to increase, thereby increasing the amount of user fees that will be collected. Our 2025 enrollment estimates also account for the projected transitions of States from FFEs or SBE-FPs to State Exchanges, the enrollment impacts of section 1332 waivers, and transitioning Medicaid Expansion States.¹⁹⁹ We project that 2025 benefit year premiums will generally increase at the rate of medical inflation. After considering the range of costs, premiums, and enrollment projections, we propose a 2025 user fee rate that will ensure adequate funding for Federal Exchange operations.

We note that if any events significantly change our estimates around costs, premiums, or enrollment projections between this proposed rule and the final rule, we may modify the FFE and SBE-FP user fee rates that are proposed in this rule. For example, if enrollment during the open enrollment period for the 2024 plan year is significantly larger or smaller than anticipated, we would revise our enrollment projections, which could result in a modification of the FFE and SBE-FP proposed rates. The proposed FFE user fee rate for 2025 is 2.2 percent of total monthly premiums and is the same user fee rate as for the 2024 benefit year. After accounting for the impact of the proposed user fee rate, we estimate that we would have sufficient funding available to fully fund user-fee-eligible FFE activities.

We seek comment on the proposed 2025 FFE user fee rate.

b. SBE-FP User Fee Rates for the 2025 Benefit Year

We propose to charge issuers offering QHPs through an SBE-FP a user fee rate of 1.8 percent of the monthly premium charged by the issuer for each policy under plans offered through an SBE-FP for the 2025 benefit year.

In § 156.50(c)(2), we specify that an issuer offering a plan through an SBE-FP must remit a user fee to HHS, in the timeframe and manner established by HHS, equal to the product of the monthly user fee rate specified in the annual HHS notice of benefit and payment parameters for the applicable benefit year and the monthly premium charged by the issuer for each policy where enrollment is through an SBE-FP. SBE-FPs enter into a Federal platform agreement with HHS to leverage the systems established for the FFEs to perform certain Exchange functions and enhance efficiency and coordination between State and Federal programs. The benefits provided to issuers in SBE-FPs by the Federal government include use of the FFE information technology and call center infrastructure used in connection with eligibility determinations for enrollment in QHPs and other applicable State health subsidy programs, as defined at section 1413(e) of the ACA, and QHP enrollment functions under 45 CFR part 155, subpart E. The user fee rate for SBE-FPs is calculated based on the proportion of total FFE costs associated with Federal activities that provide SBE-FP issuers with special benefits, including costs that are associated with the FFE information technology infrastructure, the consumer call center infrastructure, and eligibility and enrollment services.

To calculate the proposed SBE-FP rates for the 2025 benefit year, we used the same assumptions related to contract costs, enrollment, and premiums as we used for the proposed FFE user fee rates. As we explained previously in this section, the user fee rate for SBE-FPs is calculated based on the proportion of the total FFE costs associated with Federal activities that provide SBE-FP issuers with special benefits, which we estimate to be approximately 80 percent of total FFE costs. These FFE costs associated with Federal activities that provide SBE-FP issuers with special benefits include the costs associated with the FFE information technology infrastructure, the consumer call center infrastructure, and eligibility and enrollment services. Based on this methodology, the proposed 2025 SBE-FP user fee rate is the same user fee rate of 1.8 percent of

¹⁹⁸ We considered the most recent projections from the Congressional Budget Office (<https://www.cbo.gov/system/files/2023-05/51298-2023-05-healthinsurance.pdf>) and, as we have in prior rulemakings, our own internal data. See, for example, 88 FR 25845.

¹⁹⁹ In 2023, South Dakota implemented the Medicaid expansion provision of the ACA, extending Medicaid eligibility to adults in that State under the age of 65 with incomes up to 138 percent of the Federal poverty level. North Carolina is expected to implement Medicaid expansion in 2024.

premiums that we established for the 2024 benefit year. The proposed user fee rate for SBE–FP issuers for the 2025 benefit year also includes assumptions about States transitioning from either the FFE model to an SBE–FP, or from an SBE–FP to a State Exchange for the 2025 benefit year, which impacts the SBE–FP enrollment projections. As mentioned above, we also note that if any events significantly change our estimates around costs, premiums, or enrollment projections between this proposed rule and the final rule, we may modify the FFE and SBE–FP rates that are proposed in this rule.

We seek comment on the proposed 2025 SBE–FP user fee rate.

2. State Selection of EHB-Benchmark Plans for Plan Years Beginning on or After January 1, 2027 (§ 156.111)

For benefit years beginning on or after January 1, 2027, we propose to revise the standards for the State selection of EHB-benchmark plans at § 156.111 to: consolidate the options for States to change EHB-benchmark plans at § 156.111(a); revise the scope of benefit requirements at § 156.111(b)(2); and amend § 156.111(e)(3) to require States to submit a formulary drug list as part of its application to change EHB-benchmark plans only if the State is seeking to change its prescription drug EHB.

Section 1302 of the ACA provides for the establishment of an EHB package that includes coverage of EHBs (as defined by the Secretary of HHS), cost-sharing limits, and AV requirements. Among other requirements, the law directs that the EHBs be equal in scope to the benefits provided under a typical employer plan, and that they include at least the following 10 general categories and the items and services covered within the categories: ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; and pediatric services, including oral and vision care.

We established requirements relating to the coverage of EHBs in the EHB Rule (78 FR 12834). In the 2019 Payment Notice (83 FR 17009), we added § 156.111 to provide States with additional options from which to select an EHB-benchmark plan for plan years beginning on or after January 1, 2020. In the 2023 Payment Notice (87 FR 27290), we revised § 156.111 to require States to

notify HHS of the selection of a new EHB-benchmark plan by the first Wednesday in May of the year that is 2 years before the effective date of the new EHB-benchmark plan, and stated that if a State did not provide such notification to HHS, the State's EHB-benchmark plan for the applicable plan year would be that State's EHB-benchmark plan applicable for the prior year. In the EHB RFI (87 FR 74097), we solicited public comment on a variety of topics related to the scope of benefits in health plans subject to the EHB requirements of the ACA, including the description of the EHB, the scope of benefits covered in typical employer plans, the review of EHB, coverage of prescription drugs, and substitution of EHB.

Section 156.111(a) describes three options for States to change their EHB-benchmark plan. States may: (1) select the EHB-benchmark plan that another State used for the 2017 plan year under §§ 156.100 and 156.110; (2) replace one or more categories of EHBs established at § 156.110(a) in the State's EHB-benchmark plan used for the 2017 plan year with the same category or categories of EHB from the EHB-benchmark plan that another State used for the 2017 plan year under §§ 156.100 and 156.110; or (3) otherwise select a set of benefits that would become the State's EHB-benchmark plan.

Among other requirements, a State changing its EHB-benchmark plan must comply with two scope of benefit requirements at § 156.111(b)(2)(i) and (ii). The first scope of benefit requirement at § 156.111(b)(2)(i), also known as the typicality standard, requires the State's proposed EHB-benchmark plan to provide a scope of benefits equal to the scope of benefits provided under a typical employer plan,²⁰⁰ in accordance with section 1302(b)(2) of the ACA. As defined at § 156.111(b)(2)(i)(A) and (B), a typical employer plan is either: one of the selecting State's 10 base-benchmark plan options established at § 156.100 and available for the selecting State's selection for the 2017 plan year or the largest health insurance plan by enrollment within one of the five largest large group health insurance products by enrollment in the State.²⁰¹ The

second scope of benefit requirement at § 156.111(b)(2)(ii), also known as the generosity standard, requires the State's proposed EHB-benchmark plan to provide a scope of benefits that does not exceed the generosity of the most generous among a set of comparison plans, including: the State's EHB-benchmark plan used for the 2017 plan year, and any of the State's base-benchmark plan options for the 2017 plan year described in § 156.100(a)(1), supplemented as necessary under § 156.110.

Under § 156.111(e)(3), if a State is selecting its EHB-benchmark plan by selecting a set of benefits that would become the State's EHB-benchmark plan under § 156.111(a)(3), the State must submit a formulary drug list in a format and manner specified by HHS.

Nine States have changed their EHB-benchmark plans since 2018 by complying with the requirements at § 156.111.²⁰² Based on interactions with these States and feedback received in response to the EHB RFI,²⁰³ we understand that certain aspects of the process to change EHB-benchmark plans may impose unanticipated difficulty on and create confusion for States. We understand there are concerns that the typicality standard, as implemented, is a burdensome way to ensure a State's EHB-benchmark plan selection is equal in scope to a typical employer plan. In addition, in limiting EHB-benchmark plan selections, we understand that the generosity standard may also impede the ability of States to select an EHB-benchmark that is equal in scope to the benefits provided under a typical employer plan in the State, which we understand States often find have become more generous over time. We also understand that requiring States to submit a formulary drug list to HHS as part of the documentation required under § 156.111(e) can be particularly onerous when a State is not seeking to change its prescription drug EHBs.

As a result of that feedback, we are now proposing changes to § 156.111 to reduce State burden to change EHB-benchmark plans. For benefit years beginning on or after January 1, 2027, we propose three revisions to the

²⁰⁰ § 156.145; the benefits are not excepted benefits, as established under § 146.145(b) and § 148.220; and the benefits in the plan are from a plan year beginning after December 31, 2013.

²⁰² For more information on the changes States have made to their EHB-benchmark plans, see <https://www.cms.gov/CCIIO/Resources/Data-Resources/ehb>.

²⁰³ For example, see <https://www.regulations.gov/comment/CMS-2022-0186-0270>; <https://www.regulations.gov/comment/CMS-2022-0186-0412>; and <https://www.regulations.gov/comment/CMS-2022-0186-0559>.

²⁰⁰ The scope of benefits of the State's new EHB-benchmark plan may exceed the scope of benefits of the typical employer-sponsored or other job-based plans only to the extent any supplementation is required to provide coverage within each EHB category at § 156.110(a).

²⁰¹ Provided that the product has at least 10 percent of the total enrollment of the five largest large group health insurance products in the State; the plan provides minimum value, as defined under

standards for State selection of EHB-benchmark plans at § 156.111. First, we propose to consolidate the options for States to change EHB-benchmark plans at § 156.111(a) to reduce the burden on States to decide between three functionally identical choices. Second, we propose to revise the typicality standard at § 156.111(b)(2) so that, in demonstrating that a State's new EHB-benchmark plan provides a scope of benefits that is equal to the scope of benefits of a typical employer plan in the State, the scope of benefits of a typical employer plan in the State would be defined as any scope of benefits that is as or more generous than the scope of benefits in the State's least generous typical employer plan (supplemented by the State as necessary to provide coverage within each EHB category at § 156.110(a)), and as or less generous than the scope of benefits in the State's most generous typical employer plan (supplemented by the State as necessary to provide coverage within each EHB category at § 156.110(a)), among the typical employer plans currently defined at § 156.111(b)(2)(i)(A) and (B). We also propose to remove the generosity standard at § 156.111(b)(2)(ii) and to make a technical revision to the language regarding supplementation at § 156.111(b)(2)(i). Third, we propose to revise § 156.111(e)(3) to require States to submit a formulary drug list as part of their documentation to change EHB-benchmark plans only if the State is seeking to change its prescription drug EHB.

a. Consolidating the State EHB-Benchmark Plan Options

First, we propose to consolidate the choices for States to change their EHB-benchmark plan by revising § 156.111(a) to add a new paragraph (a)(2) which would simply state that, subject to paragraphs (b), (c), (d), and (e) of § 156.111, for plan years beginning on or after January 1, 2027, a State may change its EHB-benchmark plan by selecting a set of benefits that would become the State's EHB-benchmark plan. The language at current § 156.111(a) would be redesignated as § 156.111(a)(1) and would be revised to provide that this paragraph applies to plan years beginning on or after January 1, 2020, through December 31, 2026. Further, the language currently at § 156.111(a)(1) through (3) would be redesignated as § 156.111(a)(1)(i) through (iii).

This proposal would not substantively change the options for States to change their EHB-benchmark plans, as current § 156.111(a)(3) already

allows States to select a set of benefits that would become the State's EHB-benchmark plan and this option functionally encompasses the options at current § 156.111(a)(1) and (a)(2), which allow States to select the EHB-benchmark plan that another State used for the 2017 plan year under §§ 156.100 and 156.110, in whole or in part. Under this proposal, a State selecting a set of benefits to become the State's EHB-benchmark plan that wants to use an EHB-benchmark plan from another State, either in whole or in part, could still do so. The flexibility that current § 156.111(a)(3) offers is why all nine States that have changed their EHB-benchmark plans since 2018 relied on § 156.111(a)(3) to do so, though they often made that decision after spending time and resources to deliberate on the differences between the three options. Therefore, we propose to revise § 156.111(a) to reduce this burden on States without substantively changing their options to select an EHB-benchmark plan.

Under 42 CFR 440.347, Medicaid ABPs authorized under section 1937 of the Act are required to meet EHB standards. Similarly, under 42 CFR 600.405, in States that elect to operate a BHP, the standard health plans must meet EHB standards. The changes to State EHB-benchmark plan options would also be applicable to States when choosing a benchmark plan used to define EHBs in a Medicaid ABP or BHP standard health plan.

We seek comment on the proposal to consolidate State EHB-benchmark plan options under § 156.111(a).

b. Scope of Benefit Requirements

Second, we propose to revise the scope of benefit requirements at § 156.111(b)(2) for plan years beginning on or after January 1, 2027, with corresponding proposed revisions to the actuarial requirements at § 156.111(e)(2). Specifically, we propose that a State's new EHB-benchmark plan would be required to provide a scope of benefits that is equal to the scope of benefits of a typical employer plan in the State, and that the scope of benefits of a typical employer plan in the State would be defined as any scope of benefits that is as or more generous than the scope of benefits in the State's least generous typical employer plan (supplemented by the State as necessary to provide coverage within each EHB category at § 156.110(a)), and as or less generous than the scope of benefits in the most generous typical employer plan in the State (supplemented by the State as necessary to provide coverage within each EHB category at

§ 156.110(a)), among the typical employer plans currently defined at § 156.111(b)(2)(i)(A) and (B). We also propose to remove the generosity standard at § 156.111(b)(2)(ii) and to make a technical revision to the language regarding supplementation at § 156.111(b)(2)(i).

Since the effective date of the 2019 Payment Notice, States have been required to perform detailed actuarial analyses to demonstrate that their EHB-benchmark plans offer a scope of benefits equal to, or greater than, to the extent any supplementation is required to provide coverage within each EHB category at § 156.110(a), the scope of benefits provided under a typical employer plan from among the typical employer plans identified in the regulation. To demonstrate this, a State must first assess the value of the current EHB-benchmark plan. Next, the State must determine how that valuation increases or decreases depending on their proposed plan modifications. Finally, the State must assess the value of each typical employer plan option to identify an exact match for the expected value offered by the proposed plan. To find such a match, the State may need to assess the value of many typical employer plan options, and determine whether supplementation is necessary, which requires both additional time and potentially additional costs for actuarial services. Additionally, the typical employer plan options available to the State may not yield an exact match to the benefit changes the State wishes to make, requiring the State to then modify its proposed benefit changes to be exactly equal in value to one of the available typical employer plan options. In this way, the existing typicality standard can inhibit the ability of States to innovate benefits in the State's EHB-benchmark plan by generally requiring an exact actuarial match. In contrast, under the proposed approach to typicality, each State would need to assess only two typical employer plan options (the most and least generous available) to establish a range of scopes of benefits that would be considered typical employer plans within which the State EHB-benchmark plan values could then match. We believe that requiring States to actuarially assess only two typical employer plan options would reduce both the time and cost to States of seeking to update their EHB-benchmark plans and support a wider range of possible benefit changes, thereby enabling States to more easily propose such updates if and when they deem it appropriate to do so.

As an example, a State seeks to add benefits to an existing EHB-benchmark

plan that currently provides a scope of benefits equivalent to the State's least generous typical employer plan. The benefits that the State seeks to add to the existing EHB-benchmark plan would make it no longer equivalent to the State's least generous typical employer plan. The additional benefits would also result in an EHB-benchmark plan that is still less generous than the State's most generous typical employer plan. Under the current rules, the State could not add these benefits to their existing EHB-benchmark unless there is another typical employer plan listed in the regulation that provides an equivalent scope of benefits that accounts for the State's proposed additions. This could mean that the State's proposed EHB-benchmark plan would be out of compliance with the typicality standard simply because it does not provide a scope of benefits equivalent to one of the remaining State's typical employer plans, even though the scope of benefits in the State's proposed EHB-benchmark plan is more generous than the State's least generous typical employer plan and less generous than the State's most generous typical employer plan. States have expressed frustration that this approach to the typicality standard is unnecessarily restrictive.

We agree with States that this approach to the typicality standard can lead to unnecessary burden for States to ensure compliance with section 1302(b)(2) of the ACA. Accordingly, we propose to revise the scope of benefits requirements at § 156.111(b)(2) to redesignate § 156.111(b)(2)(i) and (ii) as § 156.111(b)(2)(i)(A) and (B) and to specify at redesignated § 156.111(b)(2)(i) that these provisions would apply for plan years beginning on or after January 1, 2020, through December 31, 2026. We further propose to add new § 156.111(b)(2)(ii) to provide that, for plan years beginning on or after January 1, 2027, States may select an EHB-benchmark plan that provides a scope of benefits equal to that of a typical employer plan in the State, where the scope of benefits of a typical employer plan is any scope of benefits within a continuous range of the scope of benefits that is as or more generous than that provided by State's least generous typical employer plan (supplemented by the State as necessary to provide coverage within each EHB category at § 156.110(a)) and as or less generous than that provided by the State's most generous typical employer plan (supplemented by the State as necessary to provide coverage within each EHB category at § 156.110(a)), among the plans described at the proposed

§ 156.111(b)(2)(ii)(A) and (B). Under this proposal, at proposed § 156.111(b)(2)(ii)(A) and (B), a State would identify the least and most generous typical employer plans among the same typical employer plans currently defined at § 156.111(b)(2)(i)(A) and (B) to determine the permissible continuous range of the scope of benefits for a State's EHB-benchmark plan selection. We believe that this approach would significantly reduce State burden in changing EHB-benchmark plans while still ensuring that they provide a scope of benefits in accordance with section 1302(b)(2) of the ACA.

As noted above, we are not proposing to change the list of typical employer plans in this proposed rule. Under current § 156.111(b)(2)(i)(B) and proposed § 156.111(b)(2)(ii)(B), for purposes of complying with the proposed typicality standard, a State may use the largest health insurance plan by enrollment within one of the five largest large group health insurance products by enrollment in the State, provided that the benefits in the plan are from a plan year beginning after December 31, 2013.²⁰⁴ Nonetheless, if the scope of benefits in these large group employer plans changes over time and such plans are among a State's most generous typical employer plans, the upper bound of that State's available scope of benefits could change accordingly.²⁰⁵ We have received feedback from States that indicates that the scope of benefits in some of these large group plans has increased since 2017, so we believe it is appropriate to allow States to select an EHB-benchmark plan with a scope of benefit requirement that tracks with such changes to employer plans in the States, to the extent they exist.

We continue to believe that this list of plans appropriately represents the scope of benefits provided under typical employer plans. Based on our research on how the scope of benefits in employer-sponsored or other job-based coverage has changed since 2014, which

includes our review of the comments submitted in response to the EHB RFI, we believe that the scope of benefits in employer-sponsored or other job-based coverage has either remained the same or increased incrementally overall since 2014. To the extent it has increased in certain States or certain regions, we believe that the scope of benefits in employer-sponsored or other job-based coverage increasingly tends to provide coverage for telehealth services, gender-affirming care, bariatric surgery, hearing aids, infertility treatment, routine non-pediatric dental services, and travel-related benefits for certain conditions.²⁰⁶

When we finalized the addition of § 156.111 in the 2019 Payment Notice (83 FR 17009), we also included the generosity standard at § 156.111(b)(2)(ii) among the scope of benefit requirements for State EHB-benchmark plans. As described at § 156.111(b)(2)(ii), the generosity standard requires that the scope of benefits in a State's proposed new EHB-benchmark plan not exceed the generosity of the most generous among a set of comparison plans, including: the State's EHB-benchmark plan used for the 2017 plan year, and any of the State's base-benchmark plan options for the 2017 plan year described in § 156.100(a)(1), supplemented as necessary under § 156.110. In the 2019 Payment Notice (83 FR 17011), we supported the addition of the generosity standard by stating that it would appropriately limit the range of benefits that can be considered EHB. Ever since, we have received significant feedback from States and interested parties that the generosity standard "hinders the ability of States to add innovative benefits to their EHB-benchmark plans."²⁰⁷ States have also shared that the generosity standard is not necessary to ensure the State EHB-benchmark plan selections are not unbounded given that the typicality standard can function as both a ceiling and floor to limit a State's EHB selections. Specifically, the typicality standard alone limits the

²⁰⁴ In addition, the product must have at least 10 percent of the total enrollment of the five largest large group health insurance products in the State; the plan must provide minimum value, as defined under § 156.145; and the benefits must not be excepted benefits, as established under §§ 146.145(b) and 148.220. See § 156.111(b)(2)(i)(B)(1) through (3).

²⁰⁵ It is our expectation that the changes to the scope of benefits in these large group plans would only impact the upper bound of EHB-benchmark plans' scope of benefits. We expect the small group typical employer-sponsored or other job-based plans at § 156.100(a)(1), which are only from PY 2017, to consistently be among the least generous typical employer-sponsored or other job-based plans.

²⁰⁶ We emphasize that, under current § 156.111, States that change their EHB-benchmark plan are generally permitted to select a set of benefits as their EHB-benchmark plan without regard to the specific benefits that the State's selected typical employer-sponsored or other job-based plan covers. As implemented under § 156.111(b)(2)(i) and (e)(2)(i), the State is only required to provide an actuarial certification and an associated actuarial report from an actuary, who is a member of the American Academy of Actuaries, in accordance with generally accepted actuarial principles and methodologies, that affirms that the State's EHB-benchmark plan is actuarially equal to the scope of benefits under a typical employer-sponsored or other job-based plan.

²⁰⁷ See, for example, <https://www.regulations.gov/comment/CMS-2022-0186-0412>.

potential generosity of a State's EHB-benchmark plan to be no greater than the generosity provided by the most generous typical employer plan, because a State would be unable to demonstrate that a more generous plan was equal in scope to any of the typical employer plans defined at § 156.111(b)(2)(i).

Based on this feedback and our experience working with the nine States that have changed their EHB-benchmark plans under § 156.111, we propose to remove the generosity standard from the scope of benefit requirements at § 156.111(b)(2), for plan years beginning on or after January 1, 2027. Under this proposal, the scope of benefits in the State's new EHB-benchmark plan would no longer be restricted by the generosity of the set of prescribed comparison plans at § 156.111(b)(2)(ii)(A) and (B), which should provide States with significant flexibility to more easily select a new EHB-benchmark plan and remove a burdensome step of the actuarial analysis that States are required to complete under the existing generosity standard when selecting a new EHB-benchmark plan. However, we still believe that it is appropriate to limit the range of benefits that can be considered EHB to ensure the affordability of the EHB, and believe that the proposal to revise the typicality standard so that States may select an EHB-benchmark plan that provides a scope of benefits along a continuous range of the scope of benefits provided by a State's least and most generous typical employer plans is a more appropriate way to limit State EHB-benchmark plan selections in accordance with section 1302(b)(2) of the ACA. The proposed revisions to the typicality standard and the proposed removal of the generosity standard would also establish an upper bound for State EHB-benchmark plan selections that better tracks with the scope of benefits in typical employer plans as they change over time.

When we finalized the addition of § 156.111 in the 2019 Payment Notice, we also published an acceptable methodology for States to comply with the scope of benefits requirements.²⁰⁸ If the proposals contained in this proposed rule are finalized, this methodology would no longer be applicable after the May 1, 2024 deadline for States to notify us of a new EHB-benchmark plan selection for plans

effective beginning on or after January 1, 2027. Given that the proposed revisions to the scope of benefit requirements are designed to reduce State burden, we do not believe it is necessary to issue a new standalone methodology at this time. We believe States could more easily comply with these proposed requirements, if finalized, by identifying the least and most generous typical employer plans at § 156.111(b)(2) (supplemented by the State as necessary to provide coverage within each EHB category at § 156.110(a)) and assessing their scope of benefits in some quantitative manner in accordance with generally accepted actuarial principles and methodologies. The State would then assess the scope of benefits in its selected EHB-benchmark plan in the same manner. The State would be in compliance with the proposed scope of benefit requirement if the assessed scope of benefits in its proposed EHB-benchmark plan is as or more generous than the least generous typical employer plan in the State (supplemented by the State as necessary to provide coverage within each EHB category at § 156.110(a)) and as or less generous than the most generous typical employer plan in the State (supplemented by the State as necessary to provide coverage within each EHB category at § 156.110(a)). For a State adding benefits to its existing EHB-benchmark plan, an acceptable analysis under the proposed revisions to § 156.111 could involve the State calculating the expected premium for covering all the benefits in the State's proposed EHB-benchmark plan and in the State's least and most generous typical employer plans at § 156.111(b)(2) at 100 percent actuarial value, in accordance with generally accepted actuarial principles and methodologies. This analysis would allow the State to confirm, on an estimated premium basis, that the scope of benefits in the proposed EHB-benchmark plan is as or more generous than the scope of benefits in the least generous typical employer plan and as or less generous than the scope of benefits in the most generous typical employer plan in the State (supplemented by the State as necessary to provide coverage within each EHB category at § 156.110(a)). We anticipate that we would continue working closely with States to provide technical assistance to comply with the scope of benefit requirements at proposed § 156.111(b)(2).

In addition, we propose corresponding edits to § 156.111(e)(2) to require States to submit an actuarial

certification and an associated actuarial report from an actuary, who is a member of the American Academy of Actuaries, in accordance with generally accepted actuarial principles and methodologies, that affirms that the State's EHB-benchmark plan complies with the scope of benefits requirements at proposed § 156.111(b)(2).

We also propose a technical clarification to the language regarding supplementation at § 156.111(b)(2)(i), which currently states that a State's new EHB-benchmark plan must "provide a scope of benefits equal to, or greater than, to the extent any supplementation is required to provide coverage within each EHB category at § 156.110(a), the scope of benefits provided under a typical employer plan" (emphasis added). We have found that the language regarding supplementation is consistently misunderstood as allowing a State's EHB-benchmark plan to be greater than the scope of benefits under a typical employer plan for any reason. A State's EHB-benchmark plan may only exceed the scope of benefits in a typical employer plan when supplementation is required to provide coverage in the typical employer plan within each category at § 156.110(a). To address the confusion created by this provision, we propose to make a technical clarification at § 156.111(b)(2)(i) (which would apply to State selections of EHB-benchmark plans through plan year 2026) to state that a State's EHB-benchmark plan must provide a scope of benefits equal to the scope of benefits provided under a typical employer plan (supplemented by the State as necessary to provide coverage within each EHB category at § 156.110(a)). This proposed technical clarification would not substantively change the existing requirement regarding supplementation at § 156.111(b)(2)(i).

Under 42 CFR 440.347, Medicaid ABPs authorized under section 1937 of the Act are required to meet EHB standards. Under 42 CFR 600.405, in States that elect to operate a BHP, the standard health plans are required to meet EHB standards. The changes to State EHB-benchmark plan requirements would also be applicable to States when choosing a benchmark plan used to define EHBs in a Medicaid ABP or a BHP standard health plan.

We seek comment on the proposals to revise the typicality standard at § 156.111(b)(2)(i), remove the generosity standard at § 156.111(b)(2)(ii), make corresponding edits to § 156.111(e)(2), and make a technical revision to the language regarding supplementation at § 156.111(b)(2)(i).

²⁰⁸ "Example of an Acceptable Methodology for Comparing Benefits of a State's EHB-benchmark Plan Selection in Accordance with 45 CFR 156.111(b)(2)(i) and (ii)". <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/final-example-acceptable-methodology-for-comparing-benefits.pdf>.

c. Drug Formularies

We propose to revise § 156.111(e)(3) to require States to submit a formulary drug list as part of their documentation provided to change EHB-benchmark plans only if the State is seeking to change its prescription drug EHB. Currently, we require States to submit a formulary drug list if the State is selecting its EHB-benchmark plan using the option at current § 156.111(a)(3), even if the State is not seeking to change its prescription drug EHB. We understand that creation and submission of this formulary drug list creates a significant amount of burden for the State. Since we can carry over the State's existing prescription drug EHB, as defined under § 156.122, without substantial input from the State if the State is not seeking to change its prescription drug EHB, we propose to revise § 156.111(e)(3) as specified to reduce the burden on States.

We seek comment on this proposal.

3. Provision of EHB (§ 156.115)

We propose to remove the regulatory prohibition at § 156.115(d) on issuers from including routine non-pediatric dental services as an EHB.

In the EHB Rule, we finalized at § 156.115(d) that issuers of a plan offering EHB may not include, among other services and benefits, routine non-pediatric dental services as an EHB, even if the State's current EHB-benchmark plan includes such services as covered benefits. Section 1302(b)(2) of the ACA directs the Secretary, in defining the EHB, to ensure that they are equal in scope to the benefits provided under a typical employer plan. In the proposed EHB Rule (77 FR 70644), in support of the prohibition at § 156.115(d), we stated that routine non-pediatric dental services are not typically included in the medical plans offered by employers and are often provided as excepted benefits by the employer. We now believe a more natural reading of this provision is one that considers all the benefits typically covered by employers, regardless of whether such benefit is historically considered a "health benefit" or whether such benefit is "typically covered" by an employer's major medical plan or, for example, by a limited scope excepted benefits plan. Given that oral health has a significant impact on overall health and quality of life,²⁰⁹ and several commenters on the

EHB RFI²¹⁰ advocated for adult dental EHB coverage, we propose specifically to remove the regulatory prohibition on issuers including routine non-pediatric dental services as an EHB. We seek comment on whether similar changes should be proposed with regard to routine non-pediatric eye exam services and long-term/custodial nursing home care benefits as well.

In 2020, approximately 110 million Americans had private dental coverage.²¹¹ Of the Americans that have private dental coverage, about 91 percent get their dental benefits through their employer or through affiliation with an entity such as the American Association of Retired Persons (AARP).²¹² According to National Financial Partners (NFP)'s 2023 US Benefits Trend Report, approximately two out of every three employers offer at least one dental plan, with 46 percent offering one plan, 18 percent offering two plans, and 3 percent offering three or more plans.²¹³ Furthermore, according to KFF,²¹⁴ among firms offering health benefits in 2019 included in the report, 59 percent of small firms (3–199 workers) and 92 percent of large firms (200 or more workers) offered a dental insurance program to their workers separate from the health plan(s).²¹⁵ Therefore, it appears that routine non-pediatric dental services are commonly covered as an employer-sponsored or other job-based benefit to a degree that warrants removing the prohibition on their provision as an EHB. We solicit comment on this understanding of the inclusion of routine non-pediatric dental services in employer-sponsored or other job-based benefits.²¹⁶

²¹⁰ For example, see <https://www.regulations.gov/comment/CMS-2022-0186-0567>; <https://www.regulations.gov/comment/CMS-2022-0186-0586>; and <https://www.regulations.gov/comment/CMS-2022-0186-0626>.

²¹¹ National Association of Dental Plans (2023). *Understanding Dental Benefits*. <https://www.nadp.org/about-dental-plans-care/understanding-dental-benefits/>.

²¹² See *supra* note 15. Also note that another 8.8 percent buy individual dental coverage, while less than 1 percent obtain dental benefits as part of a medical plan.

²¹³ National Financial Partners. (2023). *US Benefits Trend Report 2023*. <https://www.nfp.com/Portals/25/2023USBenefitsTrendReport.pdf?ver=H3zZlbZ5N2KDLhC0UjYiYA%3D%3D>.

²¹⁴ Formerly the Kaiser Family Foundation. See KFF "About Us." <https://www.kff.org/about-us/>.

²¹⁵ KFF (2019, September 25). *2019 Employer Health Benefits Survey*. <https://www.kff.org/report-section/ehbs-2019-section-2-health-benefits-offer-rates/#figure217>.

²¹⁶ Section 156.115(d) also currently prohibits routine non-pediatric eye exam services, long-term/custodial nursing home care benefits, and non-medically necessary orthodontia as EHB. We are not proposing to remove the prohibition on such services as EHB in this proposed rule; however, we

Additionally, we believe that prohibiting the inclusion of routine non-pediatric dental services as an EHB on the basis that they are not often covered by typical employer plans is a more restrictive reading of section 1302(b)(2) of the ACA than is warranted by a plain reading of the statute. Section 1302(b)(2) of the ACA states that, in defining the EHB, the Secretary shall ensure that the scope of the EHB is equal to the scope of benefits provided under a typical employer plan, as determined by the Secretary and as informed by a survey by the Secretary of Labor of employer-sponsored or other job-based coverage to determine the benefits typically covered by employers. In considering the benefits typically covered by employers, this statutory section does not require the Secretary to consider only those benefits provided in major medical plans. It also does not require the Secretary to consider only those benefits that are strictly "health benefits," if such a term excludes coverage of routine non-pediatric dental services. Therefore, we no longer believe that the prohibition on non-pediatric dental services as an EHB is warranted. Accordingly, we propose to remove the regulatory prohibition on including routine non-pediatric dental services as an EHB at § 156.115(d).

Removing the prohibition on issuers from including routine non-pediatric dental services as an EHB would remove regulatory and coverage barriers to expanding access to routine non-pediatric dental benefits for those plans that must cover EHB. This would allow States to work to improve adult oral health and overall health outcomes, which are disproportionately low among marginalized communities such as people of color and people with low incomes.²¹⁷ Lack of dental insurance remains one of the primary barriers to accessing dental care,²¹⁸ and this proposed policy would help mitigate this barrier. Oral health and overall health are inextricably linked; untreated oral health conditions can increase risk for and complicate the management of

solicit comment on the extent to which employer-sponsored or other job-based benefits provide coverage for these services.

²¹⁷ Northridge, M.E., Kumar, A., & Kaur, R. (2020). Disparities in Access to Oral Health Care. *Annual review of public health*, 41, 513–535. <https://doi.org/10.1146/annurev-publhealth-040119-094318>.

²¹⁸ Agency for Healthcare Research and Quality. (2022). *2022 National Healthcare Quality and Disparities Report*. <https://www.ahrq.gov/sites/default/files/wysiwyg/research/findings/nhrdr/2022qdr.pdf>.

²⁰⁹ Spanemberg, J.C., Cardoso, J.A., Slob, E.M.G.B., & López-López, J. (2019). Quality of life related to oral health and its impact in adults. *Journal of Stomatology, Oral and Maxillofacial Surgery*, 120(3), 234–239. <https://doi.org/10.1016/j.jormas.2019.02.004>.

other chronic conditions.²¹⁹ For example, studies have shown that periodontal disease and tooth loss are strongly associated with heart health, and oral health care can reduce the risk for cardiovascular disease,²²⁰ atrial fibrillation, and heart failure.²²¹ Additionally, research indicates that oral health care has implications for substance use disorder (SUD) treatment. Individuals who receive comprehensive oral health care during SUD treatment have been shown to remain in treatment longer and have improved treatment outcomes at discharge, including an increase in employment and drug abstinence, as well as a reduction in homelessness.²²² Furthermore, access to oral health care impacts employment prospects. Approximately 30 percent of low-income adults in the U.S. and nearly 60 percent of Medicaid beneficiaries without access to dental coverage report that the appearance of their mouth and teeth limits their ability to interview for a job.²²³

This proposed policy would also align with CMS' Oral Health Cross Cutting Initiative, which aims to implement policy changes and consider opportunities through existing authorities to expand access to oral health coverage.²²⁴ Additionally, it

would align with the request of several commenters on the EHB RFI (87 FR 74097) for us to remove regulatory and coverage barriers to expanding access to routine non-pediatric dental care.

We emphasize that the removal of this prohibition would not, by itself, mean that routine non-pediatric dental services would be an EHB, even in States with an EHB-benchmark plan that currently describes routine non-pediatric dental services as a non-EHB covered benefit. We stress that this proposal would not require any State to add such services as an EHB, nor would we consider any existing language regarding routine non-pediatric dental services in any State's current EHB-benchmark plan to have the effect of adding such services as an EHB. Under this proposal, a State seeking to provide any routine non-pediatric dental services as an EHB would be required to update its EHB-benchmark plan to include such services as an EHB pursuant to § 156.111. If a State does not update its EHB-benchmark plan to add coverage of routine non-pediatric dental services as an EHB, then such services would not be an EHB, even if the current benchmark plan document includes routine non-pediatric dental services. However, we believe this proposal would incentivize States to add routine non-pediatric dental services as an EHB by updating their EHB-benchmark plans pursuant to § 156.111.

Under this proposal, we would expect States, in determining whether it is appropriate to update their EHB-benchmark plan to add routine non-pediatric dental services as an EHB, to weigh the advantages of expanded dental services against the challenges of providing such services. States should consider the ability of plans to add such services as an EHB, which, as with pediatric oral care, may require plans to establish new networks of dental providers. Alternatively, issuers could comply with this policy by contracting with issuers of SADPs to administer these services, as long as it is seamless to the enrollee. This contracting arrangement would not be required, but it could be permitted as an option. In addition, States should consider that some health plans may not currently have infrastructure or experience working with Current Dental Terminology (CDT) codes that report dental procedures to dental payers.

We note that while section 1302(b)(4)(F) of the ACA permits a medical QHP sold on the Exchange to omit coverage of pediatric dental EHB services if a SADP is offered through an

Exchange,²²⁵ there is no statutory basis to extend this exception to routine non-pediatric dental services. Thus, plans subject to an EHB-benchmark plan that includes routine non-pediatric dental services as an EHB may not omit such coverage on the basis that a SADP already provides such coverage through an Exchange.

This proposal, if finalized, may impact plans that are not directly subject to the EHB requirements, such as self-insured group health plans and fully-insured group health plans in the large group market, that are required to comply with the annual limitation on cost sharing and restrictions on annual or lifetime dollar limits in accordance with applicable regulations with respect to such EHBs.²²⁶ If a State updates its EHB-benchmark plan to add coverage of routine non-pediatric dental services as an EHB and the sponsor of a self-insured group health plan or fully-insured group health plan in the large group market selects that EHB-benchmark plan, any routine non-pediatric dental services covered by such a group health plan would generally be subject to the limitation on cost sharing and restrictions on annual or lifetime dollar limits. However, if the sponsors of such plans offer coverage of routine non-pediatric dental services through an excepted benefit under 26 CFR 54.9831-1(c)(3), 29 CFR 2590.732(c)(3), and 45 CFR 146.145(b)(3), including a limited-scope dental plan, that benefit is generally excepted from complying with the group market reforms, including the limitation on cost sharing and restrictions on annual or lifetime dollar limits.

Additionally, under 42 CFR 440.347, Medicaid ABPs authorized under section 1937 of the Act are required to meet EHB standards. Under 42 CFR 600.405, in States that elect to operate a BHP, the standard health plans are required to meet EHB standards. Under this proposal, States would be permitted to include routine non-pediatric dental services as EHB for purposes of their ABPs or BHP standard health plans.

We seek comment on the proposal to revise § 156.115(d) to remove the regulatory prohibition on issuers from including routine non-pediatric dental services as an EHB, including the impact this proposal would have, if

²²⁵ See section 1311(d)(2)(B)(ii) of the ACA for more information on offering SADP benefits.

²²⁶ See parallel requirements to § 147.126 at 26 CFR 54.9815-2711, and 29 CFR 2590.715-2711. Additionally, section 2707(b) of the PHS Act, as added by the ACA, was incorporated by reference into section 9815 of the Code and section 715 of ERISA.

²¹⁹ Kapila Y.L. (2021). Oral health's inextricable connection to systemic health: Special populations bring to bear multimodal relationships and factors connecting periodontal disease to systemic diseases and conditions. *Periodontology* 2000, 87(1), 11–16. <https://doi.org/10.1111/prd.12398>. Periodontal disease has been associated with diabetes, metabolic syndrome, obesity, eating disorders, liver disease, cardiovascular disease, Alzheimer disease, rheumatoid arthritis, adverse pregnancy outcomes, and cancer.

²²⁰ Dietrich, T., Webb, I., Stenhouse, L., Pattni, A., Ready, D., Wanyonyi, K.L., White, S., & Gallagher, J.E. (2017). Evidence summary: the relationship between oral and cardiovascular disease. *British dental journal*, 222(5), 381–385. <https://doi.org/10.1038/sj.bdj.2017.224>.

²²¹ Chang, Y., Woo, H.G., Park, J., Lee, J.S., & Song, T.J. (2020). Improved oral hygiene care is associated with decreased risk of occurrence for atrial fibrillation and heart failure: A nationwide population-based cohort study. *European journal of preventive cardiology*, 27(17), 1835–1845. <https://doi.org/10.1177/2047487319886018>.

²²² Hanson, G.R., McMillan, S., Mower, K., Bruett, C.T., Duarte, L., Koduri, S., Pinzon, L., Warthen, M., Smith, K., Meeks, H., & Trump, B. (2019). Comprehensive oral care improves treatment outcomes in male and female patients with high-severity and chronic substance use disorders. *Journal of the American Dental Association* (1939), 150(7), 591–601. <https://doi.org/10.1016/j.adaj.2019.02.016>.

²²³ Families USA in partnership with the American Dental Association (ADA), Health Policy Institute (HPI), and Community Catalyst. (2021, July). *Making the Case for Dental Coverage for Adults in All State Medicaid Programs*. https://familiesusa.org/wp-content/uploads/2021/07/HPI-CC-FUSA-WhitePaper_0721.pdf.

²²⁴ CMS. (n.d.) *Strategic Plan Cross-Cutting Initiatives*. <https://www.cms.gov/files/document/strategic-plan-overview-fact-sheet.pdf>.

finalized, on health insurance coverage in the individual, small group, and large group markets, as well as self-insured plans.

4. Prescription Drug Benefits (§ 156.122)

We propose revisions to certain EHB prescription drug benefit requirements at § 156.122, including proposals to revise the minimum membership standards for pharmacy & therapeutics (P&T) committees and to codify EHB policy related to prescription drugs in excess of the benchmark. We seek comment on these proposals as well as a possible future policy proposal to replace the United States Pharmacopeia (USP) Medicare Model Guidelines (MMG) with the USP Drug Classification system (DC) to classify the prescription drugs required to be covered as EHB under § 156.122(a)(1).

a. Classifying the Prescription Drug EHB

We seek public comment to confirm or further expand our understanding of the risks and benefits associated with replacing the reference to the USP MMG with a reference to the USP DC as a means of classifying the drugs required to be covered as EHB under § 156.122(a)(1). As finalized in the EHB Rule (78 FR 12845 through 12846), to provide EHB, a plan must comply with § 156.122(a)(1) and cover at least the same number of prescription drugs in every USP category and class as covered by the State's EHB-benchmark plan, or one drug in every category and class, whichever is greater. We stated in the EHB Rule (78 FR 12845 through 12846) that plans could exceed the minimum number of drugs required to be covered and that additional drugs would still be considered EHB. In that final rule, we chose to use USP MMG Version 5.0 (USP Guidelines) to classify the drugs required to be covered as EHB under § 156.122(a)(1). In so doing, we noted in the EHB Rule (78 FR 12845 through 12846) that “[w]hile there was concern among commenters on the use of USP as the system, there was no universal system identified as a potential alternative. We chose the current version of USP Medicare Model Guidelines (version 5) because it is publicly available, and many pharmacy benefit managers are familiar with it. We believe the USP model best fits the needs for the years 2014 and 2015 during the transitional EHB policy.”

In the 2016 Payment Notice (80 FR 10814), we solicited comments on whether to replace the USP Guidelines with a standard based on the American Hospital Formulary Service (AHFS) or another drug classification system. We ultimately decided in the 2016 Payment

Notice (80 FR 10815) to retain the USP Guidelines classification system because “[i]ssuers have already developed 2 years of formularies based on it, States have already developed systems to review those formularies, and interested parties are familiar with the system. Thus, while AHFS had the benefit of being updated more frequently and incorporating a broader set of classes and subclasses, commenters did not uniformly support its use because of several issues, including a lack of transparency, the need to supplement certain classes when compared with USP, and the complexity of the AHFS system.” In 2017, the USP developed a second drug classification system, the USP DC, an independent drug classification system “developed in response to input from interested parties that it would be helpful to have a classification system beyond the MMG to assist with formulary support outside of Medicare Part D.”²²⁷

In the EHB RFI (87 FR 74097 through 74102), we sought input from the public regarding a variety of topics related to the scope of benefits in health plans subject to the EHB requirements of the ACA, including whether we should consider using an alternative prescription drug classification standard for defining the EHB prescription drug category, such as the USP DC or others. Most commenters supported the transition from the USP MMG, as currently used for EHB purposes and for Medicare Part D, to USP DC as the standard for defining the EHB prescription drug category. Commenters noted that USP DC is more inclusive of drug classes relevant to the private insurance patient base and is updated annually, while USP MMG is only updated once every three years. In particular, advocacy groups and provider groups stated that USP DC was developed to support formularies outside of the Medicare Part D population, which is another advantage over the current classification system designed specifically with Medicare beneficiaries in mind. They noted that USP MMG inappropriately limits access to FDA-approved therapies such as anti-obesity medications (AOMs), resulting in fewer treatment options. A few commenters encouraged us to consider implementing an annual review and update process that includes input from consumers and other interested parties, to ensure USP DC continues to remain current with the prescription drug landscape. Some commenters

recommended that we retain the USP MMG drug classification system. These same commenters expressed concern regarding the potential administrative burden with changing drug classification systems, explained that both government and commercial plans have broad experience with USP MMG, and stated that issuers would need to undertake potentially significant information technology work and expense to remap their data warehouses to include the new drug categories. A few commenters also noted that changing to a new classification standard could have negative consequences for patients as issuers could be required to cover high-cost drugs with low clinical value, increasing the total cost of care and potentially increasing premiums for members.

Additionally, some commenters stated that new and expanded categories and classes under USP DC include anti-obesity agents, infertility agents, and several new classes of combination products, the latter of which often are comprised of brand name drugs paired with other drugs or devices and are more expensive coverage options than the individual generic products. Some commenters recommended that we retain the USP MMG drug classification system but noted that we should consider adoption of a new classification system, while a few commenters urged us to develop our own prescription drug classification standards rather than relying on those developed by private entities stating that our continued reliance on the USP does not address substantial gaps in coverage of medically necessary drugs. Lastly, a few commenters noted that replacement of USP MMG with the AHFS or USP DC would not address certain prescription drug access issues and instead recommended that the protected classes policy utilized in the Medicare Part D prescription drug program be incorporated into the prescription drug benefit.

After reviewing these comments, we agree that using the USP DC to categorize the drugs provided as EHB would assist in strengthening the drug benefit due to its inclusion of additional drug categories and classes relevant to enrollees within the private insurance market. The USP MMG was created for use by prescription drug plans for the Medicare Part D population (eligibility for Medicare enrollment is 65) and not designed with the health needs of the population covered by plans subject to the requirement to cover EHB, which includes those receiving coverage through the Exchanges, such as women

²²⁷ USP Drug Classification. <https://www.usp.org/health-quality-safety/usp-drug-classification-system>.

of reproductive age and children whose health needs are significantly different than those of Medicare Part D beneficiaries, in mind. In addition, the USP MMG includes notable gaps in coverage related to the treatment of chronic conditions such as obesity, infertility agents, and sexual disorder agents. We also note that inclusion of additional categories and classes of drugs used to manage chronic conditions would assist in mitigating future risks and complications associated with a lack of access to these therapies, particularly for vulnerable populations.

In addition, USP DC is updated annually instead of every three years, allowing for a more rapid incorporation of new prescription drugs, drugs that are newly or no longer used for a particular indication, or discontinued drugs. While we are aware that the USP DC system has many features that may be beneficial to consumers and meet evolving public health challenges, we recognize the concerns as noted by commenters to the EHB RFI regarding the potential challenges of switching drug classification systems from USP MMG to USP DC for defining EHB, including the administrative burdens to issuers and negative premium impacts to patients. We seek public comment to confirm or further expand our understanding of the risks and benefits associated with potentially replacing USP MMG with USP DC.

Further, we seek comment regarding concerns noted by interested parties in response to the EHB RFI related to the challenges that issuers may experience transitioning from USP MMG to USP DC to include administrative burdens, particularly relating to disruptive impacts to issuer operations and systems to incorporate new drug categories and classes into their formulary review process. Lastly, we seek comment on a reasonable timeline for impacted entities to potentially migrate from USP MMG to USP DC.

CMS and the USP developed the USP Guidelines in 2004 to implement the Medicare Part D Prescription Drug Program,²²⁸ and as such, the system was designed for the Medicare population. Section 1860D–2(e) of the Act defines a “covered part D drug” for purposes of the Medicare Part D program, and the statutory definition excludes drugs used for anorexia, weight loss, weight gain, fertility, cosmetic purposes or hair growth, symptomatic relief of cough and colds, smoking cessation, prescription

vitamins and mineral products, nonprescription drugs, certain covered outpatient drugs, barbiturates, benzodiazepines, and drugs for the treatment of sexual or erectile dysfunction.²²⁹ Consequently, the USP Guidelines do not include categories and classes to classify these excluded drugs, and as a result, these drugs are not required to be covered as EHB under § 156.122(a)(1), though there may be coverage requirements for a limited subset of these drugs based on other requirements such as the requirement to cover preventive services under section 2713 of the PHS Act. However, certain types of AOMs may still be covered as EHB but under a different drug category (for example, AOMs classified and covered under the category for central nervous system drugs). Additionally, nothing prevents issuers from voluntarily covering these drugs as EHB. However, the variation in classification for these drugs leads to potential coverage gaps for consumers.

We recognize that there could be formulary challenges if we were to change drug classification systems, particularly as it relates to issuers’ coverage and issuers’ affordability of AOMs through the formulary benefit design. Specifically, although issuers would not necessarily be required to cover one of the more expensive AOMs looking solely at the policy at § 156.122(a)(1), under § 156.122(a)(3)(iii)(H)(2), P&T committees are required to ensure that issuer formulary drug lists provide appropriate access to drugs that are included in broadly accepted treatment guidelines and that are indicative of general best practices at the time. We have included a review of current guidelines on pharmacological interventions for adults with obesity to highlight some of the issues that issuers and P&T committees would need to consider should we move from USP MMG to USP DC. We solicit comment on the data summarized as well on additional clinical data that we should review as we continue to consider possible future policy proposals related to the EHB prescription drug benefit requirements.

Two guidelines, one by the American College of Cardiology/American Heart

Association/The Obesity Society, and the other by the American Association of Clinical Endocrinologists/American College of Endocrinology are considered the standard of care in the management of overweight and obesity in adults.²³¹ In November 2022, the American Gastroenterological Association (AGA) issued a new clinical practice guideline on pharmacological interventions for adults with obesity.²³² This guideline advances those evidence-based recommendations from the American College of Cardiology/American Heart Association/The Obesity Society, the American Association of Clinical Endocrinologists/American College of Endocrinology, and the Endocrine Society. These guidelines note that AOMs used with lifestyle modifications produce greater and more sustained weight loss when compared with lifestyle modifications alone. Further, the authors of the AGA guideline reiterate that AOM selection should be based on each patient’s needs and highlight that AOMs are generally used chronically to treat the chronic disease of obesity. In addition, the AGA guidelines note that Wegovy, Saxenda, Qsymia, and Contrave, which are classified in USP DC 2023 as anti-obesity agents had a balance of weight loss over harm that favored their use. The guidelines further state, “given the magnitude of net benefit, Wegovy may be prioritized over other approved [anti-obesity medications] for the long-term treatment of obesity for most patients.”²³³ Additionally, the guidelines recommend against the use of Xenical. Four drugs are currently available in the United States for short-term weight loss: phentermine, benzphetamine, diethylpropion, and phendimetrazine. Although the American Association of Clinical Endocrinologists/American College of Endocrinology guidelines recommend against use of these treatments, the Endocrine Society guideline endorses the use of long-term treatment with phentermine that is contingent upon several conditions being met. The AGA guideline also provides a qualified endorsement of long-term use of phentermine, noting a low quality of evidence for this recommendation.

²³¹ Cornier, M. (2002). A Review of Current Guidelines for the Treatment of Obesity. *Am J Manag Care*, 28(15), S288–S296. doi:10.37765/ajmc.2022.89292.

²³² Grunwald, E., Shah, R., Hernaez, R., Chandar, A.K., Pickett-Blakely, O., Teigen, L.M., Harindhanavudhi, T., Sultan, S., Singh, S., Davitkov, P. (2022). AGA Clinical Practice Guideline on Pharmacological Interventions for Adults With Obesity. *Gastroenterology*, 163(5), 1198–1225. doi:10.1053/j.gastro.2022.08.045.

²³³ [Id.]

²²⁸ USP Medicare Model Guidelines. <https://www.usp.org/health-quality-safety/usp-medicare-model-guidelines>.

²²⁹ See section 1860D–2(e)(2) of the Act.

²³⁰ See section 1927(d)(2) of the Act. The list of drugs subject to restriction include drugs used for anorexia, weight loss, weight gain, fertility, cosmetic purposes or hair growth, symptomatic relief of cough and colds, smoking cessation, prescription vitamins and mineral products, nonprescription drugs, certain covered outpatient drugs, barbiturates, benzodiazepines, and drugs for the treatment of sexual or erectile dysfunction.

Phentermine is not FDA-approved for long-term treatment of obesity.

Although some issuers may cover AOMs, we are aware that demand for effective AOMs is high and expected to increase.²³⁴ We seek comment on the potential financial effects of covering AOMs by issuers should we adopt the USP DC classification system to define EHB; in particular, we are interested in understanding estimated enrollee medication uptake within plans, associated total spending cost, overall impact to the medical and prescription drug benefit as well as premium impact to patients. Further, we seek comment on the estimated premium impact to patients if issuers were required to cover drugs in additional categories/classes of the USP DC such as infertility drugs, sexual disorder agents and combination drugs as part of the transition from USP MMG. Additionally, we seek comment on how issuers would try to balance prescription benefit costs of these newly added categories and classes within the USP DC with providing members access to affordable, clinically proven medications. For example, if an issuer were to employ utilization management strategies (for example, step therapy, prior authorization, and quantity limits) to ensure that the appropriate patient populations receive and benefit from these treatments, we are interested in understanding how issuers determine which of these newly added medications would require the implementation of utilization management strategies and what would be included in the clinical coverage criteria developed for prior authorization or step therapy as well as quantity limit guidelines.

b. Coverage of Prescription Drugs as EHB

We propose to amend § 156.122 to codify that prescription drugs in excess of those covered by a State's EHB-benchmark plan are considered EHB. As a result, they would be subject to requirements including the annual limitation on cost sharing and the restriction on annual and lifetime dollar limits, consistent with § 156.130, unless the coverage of the drug is mandated by State action and is in addition to EHB pursuant to § 155.170, in which case the drug would not be considered EHB.

In the EHB Rule (78 FR 12845), in response to commenter concerns regarding how plans must address new prescription drugs that come onto the

market during the course of a plan year pursuant to § 156.122, we stated that while plans must offer at least the greater of one drug for each USP category and class or the number of drugs in the EHB-benchmark plan, plans are permitted to go beyond the number of drugs offered by the benchmark plan without exceeding EHB. Therefore, if the plan is covering drugs beyond the number of drugs covered by the benchmark, all drugs in excess of the drug count standard at § 156.122(a) are considered EHB, such that they are subject to EHB protections and must count towards the annual limitation on cost sharing. Additionally, we noted this policy in the preamble of the 2016 Payment Notice (80 FR 10749) during a discussion of requirements related to § 156.122(c).

We believed that this policy as noted in both the EHB Rule and preamble of the 2016 Payment Notice was clearly understood by issuers until we received comments in response to the EHB RFI that included a significant number of requests from interested parties to clarify this policy in rulemaking. In addition, a small number of commenters noted concerns regarding some plans in the individual, small group, and large group markets that have stated that some drugs in excess of the drug count standard at § 156.122(a) are not EHB and have developed programs to provide some drugs as “non-EHB,” outside of the terms of the rest of the coverage. We seek comment regarding how widespread these practices are.

To resolve these concerns, we propose to amend § 156.122 to add paragraph (f), which would explicitly state that drugs in excess of the benchmark are considered EHB. To the extent that a health plan covers drugs, in any circumstance, in excess of the benchmark, these drugs would be considered an EHB and would be required to count towards the annual limitation on cost sharing. This policy would apply unless the coverage of the drug is mandated by State action and is in addition to EHB pursuant to § 155.170, in which case the drug would not be considered EHB.

We have been made aware of a few plans within the individual and small group markets that have either developed or are offering programs that provide some drugs as “non-EHB.” As we have only recently begun receiving comments from interested parties regarding this issue, we do not believe that there are a large number of plans that offer these types of programs; however, we seek comment regarding how widespread these programs are.

We seek comment on this proposal.

c. Pharmacy and Therapeutics Committee Standards

For plan years beginning on or after January 1, 2026, we propose to amend § 156.122 to provide that the P&T committee must include a consumer representative.

In the 2016 Payment Notice (80 FR 10749), we required plans providing EHB to establish P&T committees to review and update plan formularies in conjunction with the USP MMG. At § 156.122(a)(3)(i), we require P&T committees to: (a) have members that represent a sufficient number of clinical specialties to adequately meet the needs of enrollees; (b) consist of a majority of individuals who are practicing physicians, practicing pharmacists, and other practicing healthcare professionals who are licensed to prescribe drugs; (c) prohibit any member with a conflict of interest with respect to the issuer or a pharmaceutical manufacturer from voting on any matters for which the conflict exists; and (d) require at least 20 percent of its membership to have no conflict of interest with respect to the issuer and any pharmaceutical manufacturer.

Many of the P&T committee requirements are also found in the Principles of a Sound Drug Formulary System, which was first developed in September 1999 by a coalition of national organizations representing healthcare professionals, government, and business leaders and later adopted in 2000 by the Academy of Managed Care Pharmacy (AMCP), Alliance of Community Health Plans, American Medical Association, American Society of Health-Systems Pharmacists, Department of Veterans Affairs, Pharmacy Benefits Management Strategic Healthcare Group, National Business Coalition on Health, and U.S. Pharmacopeia.²³⁵ Since that time, best practices for P&T committees have matured throughout the healthcare system. In 2019, AMCP convened a group of thought leaders, clinicians, academics, patient advocacy organizations, payer organizations, and members of the pharmaceutical industry to consider P&T committee best practices in today's evolving healthcare system.²³⁶ Specifically, the group

²³⁵ Hawkins, B., ed. (2011). Principles of a sound drug formulary system. Best Practices for Hospital and Health System Pharmacy: Positions and Guidance Documents of ASHP. American Society of Health-System Pharmacists. <https://www.ashp.org/-/media/assets/policy-guidelines/docs/endorsed-documents/endorsed-documents-principles-sound-drug-formulary-system.pdf>.

²³⁶ AMCP Partnership Forum: Principles for Sound Pharmacy and Therapeutics (P&T)

²³⁴ Duncan, I., Kerr, D., Aggarwal R., & Huynh, N. New Drugs for Obesity, Is the Excitement Affordable? *Population Health Management*. Oct 2023. 356–357. <http://doi.org/10.1089/pop.2023.0086>.

provided perspectives on: (a) P&T committee composition and relevant interested parties, (b) evaluation of emerging evidence for formulary decisions and recommendations around training of P&T committee members, and (c) characteristics and best practices of successful committees.

While a P&T committee is usually composed of actively practicing physicians, pharmacists, and other healthcare professionals, forum participants stated that a well-structured committee should also include patient representation since it provides additional insight into the patient perspective regarding the practical use of therapies and effect on quality-of-life outcomes which can be a helpful component of the formulary evaluation process. Additionally, participants noted that the patient perspective should be considered a key voice in formulary decisions as they are directly affected by P&T committee decisions and can assist the committee in better understanding the value of different treatments and medications for patients.

While we are aware that the inclusion of consumers in the P&T committee process is not common, it has been observed in different healthcare systems. One example of this practice includes the Uniform Formulary Beneficiary Advisory Panel (UFBAP), which provides independent advice and recommendation on the development of the TRICARE Uniform formulary.²³⁷ Members of the UFBAP include nongovernmental organizations and associations that represent the views and interests of a large number of eligible covered beneficiaries, contractors responsible for the TRICARE retail pharmacy program, contractors responsible for the national mail-order pharmacy program, and TRICARE network providers. Additional examples of States that include clinicians such as physicians, pharmacists, and other specialists along with consumer or patient representatives as members within their respective P&T committees

include Pennsylvania,²³⁸ Connecticut,²³⁹ and New York.²⁴⁰

P&T committee decisions have the power to impact a consumer's overall quality of life and encompass important elements of care and cost for the consumer. Therefore, we propose to add paragraph (a)(3)(i)(E) to § 156.122 to update P&T membership standards to require the P&T committee to include a consumer representative as part of its membership for plan years beginning on or after January 1, 2026. In addition, we propose to specify at § 156.122(a)(3)(E)(1) through (4) membership standards for consumer representatives. Specifically, the consumer representative would be required to represent the consumer perspective as a member of the P&T committee and would be required to have an affiliation with and/or demonstrate active participation in consumer or community-based organizations. Some examples of these types of organizations include those that are representative of a community or significant segments of a community that provide educational or related direct services to individuals in the community as well as organizations that protect consumer rights via advocacy, research, or outreach efforts. As a P&T committee member, the consumer representative would assume responsibility for highlighting and addressing any potential risks and benefits observed that could have a direct impact on consumers as a result of issues and actions before the P&T committee. In addition, an affiliation with and/or active participation in a consumer or community-based organization would provide the consumer representative with the necessary background to represent consumers' perspectives. If this rule is finalized as proposed, issuers would also be required to select a consumer representative who has experience in the analysis and interpretation of complex data and is able to understand its public health significance, bearing in mind that one of the duties as a member of a P&T committee includes thoughtful

consideration of clinical criteria, such as drug safety and efficacy data, when making a recommendation regarding products under review. This individual would also be required to have no fiduciary obligation to a health facility or other health agency and have no material financial interest in the rendering of health care services. This conflict-of-interest standard is intended to ensure that, as a member of the P&T committee, the consumer representative is free from financial interests or other relationships that could compromise the objectivity of the members of the committee as they perform their duties. Nothing in this proposal would prevent the P&T committee from defining additional membership standards pertaining to the position of consumer representative.

We believe that proposed § 156.122(a)(3)(i)(E) would ensure that the consumer experience with a disease or condition is considered in the design of formulary benefits. Consumer representatives would be able to offer insight into real consumer experiences that P&T committees may be unaware of that would help the committee better understand consumer challenges related to medication use as well as assist them in exploring solutions to these challenges during the formulary development process. We also note that broader inclusion of perspectives on the P&T committee would align with other groups, including the AMCP.

We seek comment on these proposals. The consumer representative, as a member of the P&T committee, would be subject to the conflict-of-interest standards as specified in § 156.122(a)(3); however, we are interested in comments regarding whether we should further define additional membership standards for the consumer representative. In particular, we seek comments on the qualifications necessary to serve as a consumer representative on a P&T committee, to include if the representative should have a clinical background, have served as a representative of organizations with a regional or Statewide constituency, or have been involved in activities related to health care consumer advocacy, including issues affecting individual and small group market enrollees. We also seek comment on whether the current conflict-of-interest provision is sufficient as applied to this proposed role, or whether the consumer representative role should be subject to additional conflict-of-interest standards. We seek comment on whether a consumer representative should have a background for more than one condition or disease to sufficiently represent the

Committee Practices: What's Next? (2020). *J Manag Care Spec Pharm*, 26(1), 48–53. <https://doi.org/10.18553/jmcp.2020.26.1.48>.

²³⁷ Charter: Uniform Formulary Beneficiary Advisory Panel. <https://health.mil/Military-Health-Topics/Access-Cost-Quality-and-Safety/Pharmacy-Operations/BAP>.

²³⁸ The Pennsylvania Department of Human Services Pharmacy and Therapeutics Committee. See: <https://www.dhs.pa.gov/about/DHS-Information/Pages/Stakeholders/Pharmacy-Committee.aspx>.

²³⁹ The Connecticut Medical Assistance Program Pharmaceutical and Therapeutics Committee. See: https://www.cga.ct.gov/current/pub/chap_319v.htm#sec_17b-274d and https://www.ctdssmap.com/CTPortal/Portals/0/StaticContent/Publications/CT_PT_COMMITTEE_BYLAWS_v2.pdf.

²⁴⁰ New York State Department of Health Drug Utilization Review (DUR). See: https://www.health.ny.gov/health_care/medicaid/program/dur/docs/board_membership.pdf.

concerns of a diverse population. Additionally, we seek comment on the number of consumer representatives who should be included on a committee and if that number should be directly proportional to the size of the committee. We also recognize that a requirement to develop additional P&T committee standards, solicit for applicants for this new position, and provide any necessary training to new members would require lead time for States, issuers, and pharmacy benefit managers to implement and we seek comment on the proposed timing for implementation.

5. Publication of the 2025 Premium Adjustment Percentage, Maximum Annual Limitation on Cost Sharing, Reduced Maximum Annual Limitation on Cost Sharing, and Required Contribution Percentage in Guidance (§ 156.130)

As established in part 2 of the 2022 Payment Notice (86 FR 24238), we will publish the premium adjustment percentage, the required contribution percentage, and maximum annual limitations on cost sharing and reduced maximum annual limitation on cost sharing, in guidance annually starting with the 2023 benefit year. We note that these parameters are not included in this rulemaking, as we do not propose changing the methodology for these parameters for the 2025 benefit year. Therefore, we will publish these parameters in guidance no later than January 2024.

6. Standardized Plan Options (§ 156.201)

HHS proposes to exercise its authority under sections 1311(c)(1) and 1321(a)(1)(B) of the ACA to make minor updates to the standardized plan options for PY 2025. Specifically, we propose to make minor updates to the plan designs for PY 2025 to ensure these plans have AVs within the permissible *de minimis* range for each metal level, and we propose to maintain a high degree of continuity with the approach to standardized plan options finalized in the 2023 and 2024 Payment Notices. We do not propose to amend § 156.201.

Section 1311(c)(1) of the ACA directs the Secretary to establish criteria for the certification of health plans as QHPs. Section 1321(a)(1)(B) of the ACA directs the Secretary to issue regulations that set standards for meeting the requirements of title I of the ACA for, among other things, the offering of QHPs through such Exchanges.

In the 2024 Payment Notice (88 FR 25847 through 25855), we maintained a large degree of continuity with the

approach to standardized plan options finalized in the 2023 Payment Notice, aside from several minor changes to the plan designs. Specifically, in contrast to the policy finalized in the 2023 Payment Notice, we finalized, for PY 2024 and subsequent plan years, to no longer include a standardized plan option for the non-expanded bronze metal level, primarily due to severe AV constraints. Thus, for PY 2024 and subsequent PYs, we finalized standardized plan options for the following metal levels: one bronze plan that meets the requirement to have an AV up to five points above the 60 percent standard, as specified in § 156.140(c)(2) (known as an expanded bronze plan), one standard silver plan, one version of each of the three income-based silver CSR plan variations, one gold plan, and one platinum plan.

Consistent with our approach in the 2023 Payment Notice, in the 2024 Payment Notice (88 FR 25847 through 25848), we did not finalize standardized plan options for the AI/AN CSR plan variations as provided for at § 156.420(b), given that the cost-sharing parameters for these plan variations are already largely specified. However, we continued requiring issuers to offer these plan variations for all standardized plan options offered, and we removed the regulation text language that stated that standardized plan options for these plan variations were not required to be offered. In the 2024 Payment Notice (88 FR 25847 through 25848), we further clarified that while issuers must continue to offer AI/AN CSR plan variations based on standardized plan options under § 156.420(b), those plan variations will themselves not be standardized plan options based on designs specified in that rulemaking.²⁴¹ Instead, similar to how all the cost sharing values for income-based silver CSR plan variations are automatically imputed based on the corresponding standard silver plan when an issuer enters required data into the Plans and Benefits Template as part of QHP certification, all the cost sharing values for standardized plan option AI/AN CSR plan variations will be automatically imputed based on the corresponding standardized plan option standard silver plan.

Similar to the approach taken in the 2023 Payment Notice, in the 2024 Payment Notice (88 FR 25848), we finalized standardized plan options that once again resembled the most popular QHP offerings that millions were

already enrolled in by taking the following steps: selecting the most popular cost-sharing type for each benefit category; selecting enrollee-weighted median values for each of these benefit categories based on refreshed PY 2023 cost sharing and enrollment data; modifying these plans to ensure they comply with State cost-sharing laws; and decreasing the AVs for these plan designs to be at the floor of each AV *de minimis* range, primarily by increasing deductibles.

Furthermore, in the 2024 Payment Notice (88 FR 25848), we finalized two sets of standardized plan options at the aforementioned metal levels, with the same sets of designs applying to issuers in the same sets of States as in the 2023 Payment Notice. Specifically, the first set of standardized plan options continued applying to FFE and SBE-FP issuers in all FFE and SBE-FP States, excluding those in Delaware, Louisiana, and Oregon, and the second set of standardized plan options continued applying to Exchange issuers in Delaware and Louisiana.

Also consistent with our approach in PY 2023, in the 2024 Payment Notice (88 FR 25848), we continued requiring issuers in the individual market Exchanges on the Federal platform to offer the standardized plan options specified in the 2023 Payment Notice, but we did not apply this requirement to issuers in the small group market SHOPS. We also continued exempting issuers offering QHPs through FFEs and SBE-FPs that were already required to offer standardized plan options under State action taking place on or before January 1, 2020, such as issuers in the State of Oregon,²⁴² from the requirement to offer the standardized plan options included in the 2024 Payment Notice. We also continued not requiring State Exchange issuers to offer the standardized plan options included in the 2024 Payment Notice.

Furthermore, consistent with the policy finalized in the 2023 Payment Notice, in the 2024 Payment Notice (88 FR 25848), we stated that we would continue differentially displaying standardized plan options on *HealthCare.gov* pursuant to § 155.205(b)(1), including those standardized plan options required under State action taking place on or before January 1, 2020. We also stated that we would continue enforcing the standardized plan options display requirements for approved web-brokers and QHP issuers using a direct

²⁴¹ See also QHP Certification Standardized Plan Options FAQs, <https://www.qhpcertification.cms.gov/s/Standardized%20Plan%20Options%20FAQs>.

²⁴² See Or. Admin. R. 836–053–0009, <https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=3778>.

enrollment pathway to facilitate enrollment through an FFE or SBE-FP—including both the Classic DE and EDE Pathways—at §§ 155.220(c)(3)(i)(H) and 156.265(b)(3)(iv), respectively.

As such, web-brokers and QHP issuers were required to differentially display the PY 2024 standardized plan options in accordance with the requirements under § 155.205(b)(1) in a manner consistent with how standardized plan options are displayed on *HealthCare.gov*, unless we approved a deviation, beginning with the 2024 benefit year open enrollment period. Consistent with the PY 2023 policy, the 2024 Payment Notice (88 FR 25848) provided that any requests from web-brokers and QHP issuers seeking approval for an alternate differentiation format will continue to be reviewed based on whether the same or similar level of differentiation and clarity would be provided under the requested deviation as is provided on *HealthCare.gov*.

Consistent with the approach to plan designs in the 2023 Payment Notice, in the 2024 Payment Notice (88 FR 25848), we continued using the following four tiers of prescription drug cost sharing in the standardized plan options: generic drugs, preferred brand drugs, non-preferred brand drugs, and specialty drugs. We explained that we believed that continued use of four tiers of prescription drug cost sharing in standardized plan options would result in more predictable and understandable drug coverage. We also explained that we believed that continuing to use four tiers of prescription drug cost sharing would play an important role in helping consumers make informed QHP selections by allowing consumers to more easily compare formularies between plans and make year-to-year comparisons with their current plan. We also explained that the continued use of four tiers would minimize issuer burden since, for PY 2023, issuers had already created standardized plan options with formularies that included only four tiers of prescription drug cost sharing.

We refer readers to the preambles to the 2023 and 2024 Payment Notices discussing § 156.201 (87 FR 27310 through 27322 and 88 FR 25847 through 25855, respectively) for more detailed discussion regarding approaches to standardized plan options in PY 2024 and previous PYs.

For PY 2025, we propose to follow the approach finalized in the 2024 Payment Notice concerning standardized plan option metal levels, and to otherwise maintain continuity with our approach to standardized plan options finalized in the 2023 and 2024 Payment Notices.

We propose to make only minor updates to the plan designs for PY 2025 to ensure these plans have AVs within the permissible *de minimis* range for each metal level. Our proposed updates to plan designs for PY 2025 are detailed in Tables 12 and 13, later in this section. We propose to maintain a high degree of continuity with the approach to standardized plan options finalized in the 2023 and 2024 Payment Notices for several reasons.

We are continuing to require FFE and SBE-FP issuers to offer standardized plan options in large part due to continued plan proliferation, which has only increased since the standardized plan option requirements were finalized in the 2023 Payment Notice. In light of this continued plan proliferation, it is increasingly important to continue to attempt to streamline and simplify the plan selection process for consumers on the Exchanges. We believe these standardized plan options continue to play a meaningful role in that simplification by reducing the number of variables that consumers must consider when selecting a plan option, making it easier for consumers to compare available plan options.

More specifically, with these standardized plan options, consumers continue to be able to more quickly and more easily consider meaningful factors, such as networks, formularies, and premiums, when selecting a plan. We further believe these standardized plan options include several distinctive features, such as enhanced pre-deductible coverage for several benefit categories and copayments instead of coinsurance rates for a greater number of benefit categories, that will continue to play an important role in reducing barriers to access, combatting discriminatory benefit designs, and advancing health equity. Including enhanced pre-deductible coverage for these benefit categories (specifically, primary care visits, specialist visits, speech therapy, occupational and physical therapy, and generic drugs at all metal levels, with an increasing number of benefit categories exempt at higher metal levels) ensures consumers are more easily able to access these services without first meeting their deductibles. Furthermore, using copayments instead of coinsurance rates for a greater number of benefit categories reduces the risk of unexpected financial expenses sometimes associated with coinsurance rates.

Additionally, we propose to maintain a high degree of continuity with many of the standardized plan option policies previously finalized in the 2024

Payment Notice in order to reduce the risk of disruption for all involved interested parties, including issuers, agents, brokers, States, and enrollees. We believe making major departures from the methodology used to create the standardized plan options finalized in the 2023 and 2024 Payment Notices could result in drastic changes in these plan designs that may create undue burden for interested parties. For example, if the standardized plan options that we create vary significantly from year to year, those enrolled in these plans could experience unexpected financial harm if the cost sharing for services they rely upon differs substantially from the previous year. Ultimately, we believe consistency in standardized plan options is important to allow issuers and enrollees to become accustomed to these plan designs.

We seek comment on our proposed approach to standardized plan options for PY 2025. Additionally, we seek comment on requiring issuers offering QHPs in individual market State Exchanges to offer, in a future plan year, some version of standardized plan options, while not necessarily subjecting them to the full scope of standardized plan option requirements applicable to issuers on the FFEs or SBE-FPs under § 156.201. In particular, we seek comment on requiring issuers offering QHPs in individual market State Exchanges that are not already required to offer standardized plan options under State requirements to offer some version of standardized plan options, even if these plan designs differ from the requirements of those included in the applicable Payment Notice for that plan year. We also seek comment on requiring States that intend to transition their Exchange model type from an FFE or SBE-FP to a State Exchange to require their issuers to offer standardized plan options as one condition of this transition. As such, we are particularly interested in comments from individual market State Exchanges that do not currently require QHP issuers to offer standardized plan options, States with an FFE or SBE-FP Exchange model type that intend to transition their Exchange model type to a State Exchanges, and issuers offering QHPs through State Exchanges.

While we recognize that State Exchanges are best positioned to set requirements that serve the nuances of their respective individual markets, we underscore the benefits of offering at least some version of standardized plan options, which we discussed in greater detail in the preamble discussion of § 156.201 in the 2023 Payment Notice

(87 FR 27316). We also believe that the fact that over half of State Exchanges currently require issuers to offer

standardized plan options in one form

or another suggests that they, too, see value in standardized plan options.

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TABLE 12: 2025 Proposed Standardized Options Set One (For All FFE and SBE-FP Issuers, Excluding Issuers in Delaware, Louisiana, and Oregon)

	Expanded Bronze	Standard Silver	Silver 73 CSR	Silver 87 CSR	Silver 94 CSR	Gold	Platinum
Actuarial Value	63.81%	70.01%	73.09%	87.33%	94.14%	78.06%	88.04%
Deductible	\$7,500	\$5,000	\$3,000	\$500	\$0	\$1,500	\$0
Annual Limitation on Cost Sharing	\$9,200	\$8,000	\$6,400	\$3,000	\$2,000	\$7,800	\$4,300
Emergency Room Services	50%	40%	40%	30%	25%*	25%	\$100*
Inpatient Hospital Services (Including Mental Health & Substance Use Disorder)	50%	40%	40%	30%	25%*	25%	\$350*
Primary Care Visit	\$50*	\$40*	\$40*	\$20*	\$0*	\$30*	\$10*
Urgent Care	\$75*	\$60*	\$60*	\$30*	\$5*	\$45*	\$15*
Specialist Visit	\$100*	\$80*	\$80*	\$40*	\$10*	\$60*	\$20*
Mental Health & Substance Use Disorder Outpatient Office Visit	\$50*	\$40*	\$40*	\$20*	\$0*	\$30*	\$10*
Imaging (CT/PET Scans, MRIs)	50%	40%	40%	30%	25%*	25%	\$100*
Speech Therapy	\$50*	\$40*	\$40*	\$20*	\$0*	\$30*	\$10*
Occupational, Physical Therapy	\$50*	\$40*	\$40*	\$20*	\$0*	\$30*	\$10*
Laboratory Services	50%	40%	40%	30%	25%*	25%	\$30*
X-rays/Diagnostic Imaging	50%	40%	40%	30%	25%*	25%	\$30*
Skilled Nursing Facility	50%	40%	40%	30%	25%*	25%	\$150*
Outpatient Facility Fee (Ambulatory Surgery Center)	50%	40%	40%	30%	25%*	25%	\$150*
Outpatient Surgery Physician & Services	50%	40%	40%	30%	25%*	25%	\$150*
Generic Drugs	\$25*	\$20*	\$20*	\$10*	\$0*	\$15*	\$5*
Preferred Brand Drugs	\$50	\$40*	\$40*	\$20*	\$15*	\$30*	\$10*
Non-Preferred Brand Drugs	\$100	\$80	\$80	\$60	\$50*	\$60*	\$50*
Specialty Drugs	\$500	\$350	\$350	\$250	\$150*	\$250*	\$150*

*Benefit category not subject to the deductible.

TABLE 13: 2025 Proposed Standardized Options Set Two (For Issuers in Delaware and Louisiana)

	Expanded Bronze	Standard Silver	Silver 73 CSR	Silver 87 CSR	Silver 94 CSR	Gold	Platinum
Actuarial Value	63.81%	70.01%	73.10%	87.36%	94.37%	78.10%	88.07%
Deductible	\$7,500	\$5,000	\$3,000	\$500	\$0	\$1,500	\$0
Annual Limitation on Cost Sharing	\$9,200	\$8,000	\$6,400	\$3,000	\$2,000	\$7,800	\$4,300
Emergency Room Services	50%	40%	40%	30%	25%*	25%	\$100*
Inpatient Hospital Services (Including Mental Health & Substance Use Disorder)	50%	40%	40%	30%	25%*	25%	\$350*
Primary Care Visit	\$50*	\$40*	\$40*	\$20*	\$0*	\$30*	\$10*
Urgent Care	\$75*	\$60*	\$60*	\$30*	\$5*	\$45*	\$15*
Specialist Visit	\$100*	\$80*	\$80*	\$40*	\$10*	\$60*	\$20*
Mental Health & Substance Use Disorder Outpatient Office Visit	\$50*	\$40*	\$40*	\$20*	\$0*	\$30*	\$10*
Imaging (CT/PET Scans, MRIs)	50%	40%	40%	30%	25%*	25%	\$100*
Speech Therapy	\$50*	\$40*	\$40*	\$20*	\$0*	\$30*	\$10*
Occupational, Physical Therapy	\$50*	\$40*	\$40*	\$20*	\$0*	\$30*	\$10*
Laboratory Services	50%	40%	40%	30%	25%*	25%	\$30*
X-rays/Diagnostic Imaging	50%	40%	40%	30%	25%*	25%	\$30*
Skilled Nursing Facility	50%	40%	40%	30%	25%*	25%	\$150*
Outpatient Facility Fee (Ambulatory Surgery Center)	50%	40%	40%	30%	25%*	25%	\$150*
Outpatient Surgery Physician & Services	50%	40%	40%	30%	25%*	25%	\$150*
Generic Drugs	\$25*	\$20*	\$20*	\$10*	\$0*	\$15*	\$5*
Preferred Brand Drugs	\$50	\$40*	\$40*	\$20*	\$5*	\$30*	\$10*
Non-Preferred Brand Drugs	\$100	\$80	\$80	\$60	\$10*	\$60*	\$50*
Specialty Drugs	\$150	\$125	\$125	\$100	\$20*	\$100*	\$75*

*Benefit category not subject to the deductible.

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7. Non-Standardized Plan Option Limits (§ 156.202)

HHS proposes to exercise its authority under sections 1311(c)(1) and 1321(a)(1)(B) of the ACA to amend § 156.202 by adding paragraphs (d) and (e) to introduce an exceptions process that would allow issuers to offer additional non-standardized plan options (in excess of the limit of two) per product network type, metal level, inclusion of dental and/or vision benefit coverage, and service area for PY 2025 and subsequent plan years, if issuers demonstrate that these additional non-standardized plans have specific design features that would substantially benefit consumers with chronic and high-cost conditions. Under this proposal, issuers

would not be limited in the number of exceptions permitted per product network type, metal level, inclusion of dental and/or vision benefit coverage, and service area, so long as they meet specified criteria. Section 1311(c)(1) of the ACA directs the Secretary to establish criteria for the certification of health plans as QHPs. Section 1321(a)(1)(B) of the ACA directs the Secretary to issue regulations that set standards for meeting the requirements of title I of the ACA for, among other things, the offering of QHPs through such Exchanges.

In the 2024 Payment Notice (88 FR 25855 through 25865), we finalized requirements limiting the number of non-standardized plan options that issuers of QHPs can offer through Exchanges on the Federal platform

(including SBE-FPs) to four non-standardized plan options per product network type (as described in the definition of “product” at § 144.103), metal level (excluding catastrophic plans), inclusion of dental and/or vision benefit coverage, and service area for PY 2024, and two for PY 2025 and subsequent plan years.

We explained that we phased in this limit over 2 plan years (instead of adopting the limit of two in PY 2024) primarily to decrease the risk of disruption for both issuers and enrollees, and to provide increased flexibility to issuers. Many commenters supported adopting a more gradual approach in which the number of non-standardized plan options that issuers can offer is incrementally decreased over a span of 2 plan years, instead of

adopting a limit of two for PY 2024. Additionally, regarding the modification to factor the inclusion of dental and vision benefits into this limit, issuers have frequently offered these specific benefit categories as additional benefits in otherwise identical plan options, accounting for the vast majority of product ID-based variations (approximately 84 percent of such variation) offered by issuers within a given metal level, network type, and service area in PY 2022. We refer readers to the preamble of the 2024 Payment Notice discussing § 156.202 (88 FR 25855 through 25865) for more detailed discussion of our approach to non-standardized plan option limits for PY 2024 and related background.

As a result of the limit on the number of non-standardized plan options that issuers can offer through the Exchanges being reduced from four in PY 2024 to two in PY 2025, we estimate (based on current PY 2024 plan offering data) that the weighted average number of non-standardized plan options available to each consumer will be reduced from 67.3 in PY 2024 to approximately 41.7 in PY 2025. Furthermore, we estimate that the weighted average total number of plans, including standardized and non-standardized plan options, available to each consumer will be reduced from 91.8 in PY 2024 to approximately 66.2 in PY 2025.²⁴³

Furthermore, based on current QHP submission data for PY 2024, we estimate that approximately 28,275 of the total 109,229 non-standardized plan option plan-county combinations²⁴⁴ (25.9 percent) will be discontinued as a result of this limit in PY 2025. Relatedly, based on trended enrollment data from PY 2023 (which we rely on for purposes of this estimate because PY 2024 enrollment data is currently unavailable), we estimate that approximately 1.78 million of the 14.94 million enrollees on the FFEs and SBE-FPs (11.9 percent) will be affected by these discontinuations in PY 2025.

In the 2024 Payment Notice (88 FR 25858 through 25859), we also

announced our intent to propose an exceptions process in the 2025 Payment Notice proposed rule that would allow issuers to offer non-standardized plan options in excess of the limit of two per product network type, metal level, inclusion of dental and/or vision benefit coverage, and service area for PY 2025 and subsequent plan years.

As such, in this proposed rule, we propose an exceptions process at new § 156.202(d) and (e) that would permit FFE and SBE-FP issuers to offer more than two non-standardized plan options per product network type, metal level, inclusion of dental and/or vision benefit coverage, and service area for PY 2025 and subsequent plan years, if issuers demonstrate that these additional non-standardized plans beyond the limit at § 156.202(b) have specific design features that would substantially benefit consumers with chronic and high-cost conditions. Issuers would not be limited in the number of exceptions permitted per product network type, metal level, inclusion of dental and/or vision benefit coverage, and service area, so long as they meet specified criteria.

Specifically, pursuant to proposed § 156.202(d), issuers would be permitted to offer more than two non-standardized plan options if these additional plans' cost sharing for benefits pertaining to the treatment of chronic and high-cost conditions (including benefits in the form of prescription drugs, if pertaining to the treatment of the condition(s)) is at least 25 percent lower, as applied without restriction in scope throughout the plan year, than the cost sharing for the same corresponding benefits in an issuer's other non-standardized plan option offerings in the same product network type, metal level, and service area. The reduction could not be limited to a part of the year, or an otherwise limited scope of benefits. Instead, issuers would be required to apply the reduced cost sharing for these benefits any time the covered item or service is furnished. For example, an issuer could not reduce cost sharing for the first three office visits or drug fills and then increase it for remaining visits or drug fills. Furthermore, issuers would be prohibited from conditioning reduced cost sharing for these benefits on a particular diagnosis. That is, although the benefit design would have reduced cost sharing to address one or more articulated conditions, the reduced cost sharing must be available to all enrolled in the plan who receive the service(s) covered by the benefit.

Under this proposal, no other plan design features (such as the inclusion of additional benefit coverage, different provider networks, different

formularies, or reduced cost sharing for benefits provided through the telehealth modality) would be evaluated under this exceptions process, meaning no other differences in plan design features would allow issuers to be excepted from the limit to the number of non-standardized plan options offered per product network type, metal level, inclusion of dental and/or vision benefit coverage, and service area.

Additionally, as part of this exceptions process, at proposed § 156.202(e), issuers would be required to submit a written justification in a form and manner and at a time prescribed by HHS that provides additional details and explains how the particular plan design the issuer desires to offer above the non-standardized plan option limit of two satisfies the proposed standards for receiving an exception to this limit—namely, how the particular plan would substantially benefit consumers with chronic and high-cost conditions. We would provide issuers with a justification form upon publication of the final rule and when the QHP templates for the applicable plan year are released.

This justification form would ask the issuer to (1) identify the specific condition(s) for which cost sharing is reduced, (2) explain which benefits would have reduced annual enrollee cost sharing (as opposed to reduced cost sharing for a limited number of visits) for the treatment of the specified condition(s) by 25 percent or more relative to the cost sharing for the same corresponding benefits in an issuer's other non-standardized plan offerings in the same product network type, metal level, and service area, and (3) explain how the reduced cost sharing for these services pertains to clinically indicated guidelines for treatment of the specified chronic and high-cost condition(s). Additionally, to allow the Exchange adequate time to review these justification forms, issuers would need to submit their QHP application in a form and manner and at a time specified by us. We anticipate requesting that issuers submit QHP applications for non-standardized plan options that exceed the two-plan limit by the QHP certification Early Bird deadline.

We propose for PY 2025 to allow exceptions only for plans that meet the previously described requirements for benefits pertaining to the treatment of conditions that are chronic and high-cost in nature. We clarify that, for purposes of this standard, chronic conditions are those that have an average duration of one year or more and require ongoing medical attention or limit activities of daily living, or

²⁴³ The weighted average total number of plans available to each consumer was 107.8 in PY 2022, prior to the introduction of standardized plan option requirements, and 113.6 in PY 2023, the first year that standardized plan option requirements were introduced.

²⁴⁴ Plan-county combinations are the count of unique plan ID and FIPS code combinations. This measure was used because a single plan may be available in multiple counties, and specific limits on non-standardized plan options or specific dollar deductible difference thresholds may have different impacts on one county where there are four plans of the same product network type and metal level versus another county where there are only two plans of the same product network type and metal level, for example.

both.²⁴⁵ We also clarify that, for purposes of this standard, high-cost conditions are those that account for a disproportionately high portion of total Federal health expenditures. We note that the four chronic and high-cost conditions included in the prescription drug adverse tiering for PY 2025 (specifically, hepatitis C virus, HIV, multiple sclerosis, and rheumatoid arthritis) are examples of conditions that we would consider to be chronic and high-cost in nature for purposes of this standard. However, for purposes of this standard, we clarify that we would also consider additional conditions to be chronic and high-cost in nature. Additional representative examples of conditions that we would consider to be chronic and high-cost in nature for purposes of this proposal include Alzheimer's disease, kidney disease, osteoporosis, heart disease, diabetes, and all kinds of cancer. Examples of conditions that we would not consider chronic and high-cost in nature would be those that are generally acute in nature, including bronchitis, the flu, pneumonia, strep throat, and respiratory infections.

We propose this approach for several reasons. Considering that chronic and high-cost conditions (including the examples previously discussed) affect a comparatively low number of consumers, we anticipate that a significant portion of the non-standardized plan options that may be discontinued due to having comparatively lower rates of enrollment among each issuer's portfolio of offerings could potentially be those that have plan design features that benefit consumers with these chronic and high-cost conditions (such as plans with some combination of enhanced pre-deductible coverage for relevant services, reduced cost sharing for relevant services, lower MOOPs, lower deductibles, more comprehensive provider networks with more specialized providers, more generous formularies with more specialized medications, higher AVs, and higher premiums).

Even with comparatively lower rates of enrollment, we believe that these non-standardized plan options can still fulfill an important role in addressing chronic and high-cost conditions, which are responsible for a disproportionate amount of health care expenditures.²⁴⁶

Thus, we believe this proposed exceptions process could play an important role in enhancing the quality of life for those affected by these conditions, combatting health disparities, advancing health equity, and reducing health care expenditures. We further believe that introducing such an exceptions process while also reducing the non-standardized plan option limit to two for PY 2025 would balance the dual aims of reducing the risk of plan choice overload while simultaneously ensuring that truly innovative plan designs that may benefit consumers with chronic and high-cost conditions can continue to be offered.

We further believe that not limiting the number of permitted exceptions per issuer, product network type, metal level, inclusion of dental and/or vision benefit coverage, and service area (instead of allowing exceptions for only two such plans, for example) would ensure that issuers are not restricted in the number of innovative plans they can offer. This would in turn help ensure that a greater portion of consumers with chronic and high-cost conditions have access to plans that reduce barriers to access to care for services critical to the treatment of their conditions.

Although issuers would not be limited in the number of exceptions they may be granted under this proposal, we anticipate that most issuers would determine that the burden of creating and certifying additional non-standardized plans intended to benefit a comparatively small population of consumers would outweigh the benefit of doing so. We also previously solicited comments on innovative plan designs, such as in the 2024 Payment Notice proposed rule. In response to this comment solicitation, we received only two examples of plan designs that commenters considered to be innovative in nature: plan designs that have reduced cost sharing for benefits provided through telehealth, and plan designs that have reduced cost sharing for services and medications related to the treatment of diabetes (such as in the form of insulin). We clarify that the former example (reduced cost sharing for benefits provided through the telehealth) would not qualify for this exceptions process, while the latter example (reduced cost sharing for benefits related to the treatment of diabetes) could potentially qualify for this exceptions process, if the specified criteria are met.

Regardless, given that we only received two examples of plan designs

that particular issuers considered to be innovative in nature, we do not anticipate that issuers will seek to have a substantial number of non-standardized plan options excepted from the non-standardized plan option limit. As a result, we do not anticipate this proposal would result in an increased risk of plan choice overload for consumers interested in plans with better benefits for qualifying conditions.

We further believe that permitting exceptions solely based on whether a non-standardized plan option has reduced cost sharing of 25 percent or more for benefits pertaining to the treatment of chronic and high-cost conditions, as opposed to considering other factors (such as specialized networks, specialized formularies, or specialized benefit packages), is appropriate since the current standardized plan option requirements do not limit issuers in the number of standardized plan options they can offer per product network type, metal level, or service area. Standardized plan option requirements do not permit issuers to deviate from the specified cost sharing parameters for standardized plan options—meaning issuers would not be able to offer standardized plan options with reduced cost sharing of 25 percent or more for the treatment of specific conditions if the benefit category's cost sharing does not comply with the specified standards.

As a result, issuers already have the flexibility to offer specialized networks, formularies, and benefit packages (including those that decrease barriers to access for the treatment of chronic and high-cost conditions—such as by including additional specialized providers, prescription drugs, or benefits) as standardized plan options. We further believe that the cost sharing difference threshold of 25 percent or more is appropriate since we have observed that cost sharing differences below this threshold represent normal variation within a particular metal level, while differences at or above this threshold are more often associated with cost sharing differences between different metal levels. Altogether, we do not believe that a difference in a cost sharing amount that is of the same magnitude as normal variation within a particular metal level (specifically, less than 25 percent) would warrant being excepted from the non-standardized plan option limit.

We note that under this proposed exceptions process, if additional plans were permitted to be offered in excess of the limit of two non-standardized plan options, in accordance with the guaranteed availability requirements at

²⁴⁵ National Center for Chronic Disease Prevention and Health Promotion. *About Chronic Diseases*, July 21, 2022, <https://www.cdc.gov/chronicdisease/about/index.htm>.

²⁴⁶ Waters, H, & Graf, M. (2018). *The Cost of Chronic Disease in the U.S.* Milken Institute.

<https://milkeninstitute.org/sites/default/files/reports-pdf/ChronicDiseases-HighRes-FINAL2.pdf>.

§ 147.104(a), these plans would also be required to be made available on the same basis to consumers without these chronic and high-cost conditions. Further, we emphasize that these plans would be prohibited from discriminating in accordance with the nondiscrimination requirements at §§ 147.104(e), 156.125, and 156.200(e).²⁴⁷ To meet these non-discrimination requirements, these plans would be required to apply preferential cost sharing to all enrolled in the plan, without regard to diagnosis. Furthermore, although we acknowledge that non-standardized plan options excepted under this proposal would primarily benefit consumers with chronic and high-cost conditions, we believe that a sufficiently satisfactory range of both non-standardized and standardized plan options currently exist that are primarily intended for consumers without chronic and high-cost conditions. As a result, we are not concerned that any risk of discrimination created by this exceptions process would negatively impact consumers, including but not limited to consumers with chronic and high-cost conditions.

We seek comment on this proposed approach. Specifically, we seek comment on the proposed exceptions process, and whether there should be any exceptions at all to the limit on the number of non-standardized plan options that issuers can offer through the Exchanges. In addition, we are particularly interested in comments on the following topics: whether exceptions should be permitted only for a specific set of chronic and high-cost conditions as opposed to any chronic and high-cost condition; whether there are other plan attributes we should consider outside of sufficiently differentiated cost sharing, such as the inclusion of alternative payment models or sufficiently differentiated benefits, networks, or formularies; the specific difference threshold for these cost-sharing amounts, including whether a threshold higher or lower than 25 percent would be more appropriate; the specific components of the justification form that issuers would be required to submit; the deadline for issuers to submit the materials necessary for us to consider whether non-standardized plan

options should be excepted from the limit; and whether we should require that non-standardized plan options excepted from the limit be visually differentiated from other non-standardized plan options not excepted from the limit—such as by differentially displaying these excepted plans on *HealthCare.gov*, or by requiring these excepted plans to adopt a particular plan marketing name that accurately conveys how these plans would substantially benefit consumers with chronic and high-cost conditions (for example, by requiring that an excepted plan that reduces cost sharing for the treatment of diabetes have a corresponding plan marketing name related to diabetes).

We also seek comment on other ways to balance the dual aims of reducing the risk of plan choice overload while simultaneously ensuring that truly innovative plan designs that may benefit consumers with chronic and high-cost conditions can continue to be offered. Specifically, we seek comment on whether we should limit the number of exceptions available such that issuers are only permitted to offer one or several additional plans pursuant to the proposed exceptions process above the limit of two non-standardized plans—as opposed to not limiting the number of exceptions permitted per product network type, metal level, inclusion of dental and/or vision benefit coverage, and service area.

8. CO-OP Loan Terms (§ 156.520)

We propose to amend § 156.520(f) to enable CMS to approve requests by CO-OP borrowers to voluntarily terminate their loan agreement with CMS, and thereby cease to constitute a qualified non-profit health insurance issuer (QNHII),²⁴⁸ for the purpose of permitting the loan recipient to pursue innovative business plans that are not otherwise consistent with the governance requirements and business standards applicable to a CO-OP borrower, provided certain conditions are met as described in this section.

Section 1322 of the ACA requires a CO-OP loan recipient, or QNHII, to be, among other things, an entity “substantially all of the activities of which consist of the issuance of qualified health plans in the individual and small group markets in each State in which it is licensed to issue such plans.”²⁴⁹ This requirement is set forth in regulations which require that at least two-thirds of the policies or contracts

for health insurance coverage issued by a CO-OP in each State in which it is licensed be qualified health plans offered in the individual and small group markets.²⁵⁰

The ACA also mandates that a QNHII be subject to governance by “a majority vote of its members.”²⁵¹ Accordingly, § 156.515(b) imposes governance requirements for each CO-OP that include a requirement that the entity remain under member control, such that a majority of its directors are elected by a majority vote of the CO-OP’s members. A CO-OP “member” is an individual covered by a health insurance policy issued by a CO-OP.²⁵² A CO-OP’s voting members consist of all persons covered by health insurance policies issued by the CO-OP who are 18 years of age or older.²⁵³

Section 1322 of the ACA mandates that the Secretary require an entity receiving a CO-OP loan to enter into a loan agreement with the Secretary. The required loan agreement must obligate the borrower to “meet, and to continue to meet” the requirements of a QNHII, and “any other requirements contained in the agreement.”²⁵⁴ No more is specified concerning the required contents of the loan agreement.²⁵⁵ The requirement that a CO-OP be subject to a majority vote of its members is, accordingly, imposed by regulation, at § 156.515(b), as well as the CO-OP loan agreement. Specifically, Section 18.2 of the CO-OP loan agreement prohibits any “[o]rganizational [c]hange . . . that would result in . . . implementing a governance structure that does not meet the governance standards codified at 45 CFR 156.515(b).”

As a result of these requirements, a CO-OP cannot pursue new business arrangements that would impose a governance structure under which it is possible for a majority of directors to be elected by a majority vote of persons who are not covered by health insurance policies issued by the CO-OP. A CO-OP also cannot enter into new business arrangements under which voting members need not be individuals covered by policies issued by the CO-OP. It is also not possible for a CO-OP to enter into a business plan under which less than two-thirds (“substantially all”) of the company’s

²⁴⁷ The nondiscrimination requirements at § 147.104(e) apply to health insurance issuers offering non-grandfathered group or individual health insurance coverage, and their officials, employees, agents, and representatives. The nondiscrimination requirements at § 156.200(e) apply to QHPs in the individual and small-group markets, and the nondiscrimination requirements at § 156.125(b) apply to issuers providing EHB.

²⁴⁸ Section 1322(c)(1)(B) of the ACA and 42 U.S.C. 18042(c)(1)(B) define a QNHII.

²⁴⁹ 42 U.S.C. 18042(c)(1)(B).

²⁵⁰ See § 156.515(c)(1).

²⁵¹ ACA section 1322(c)(3)(A); 42 U.S.C. 18042(c)(3)(A).

²⁵² See § 156.505.

²⁵³ See § 156.515(b)(1).

²⁵⁴ 42 U.S.C. 18042(b)(2)(C).

²⁵⁵ 42 U.S.C. 18042(b)(2)(C)(iii) contains specific prohibitions, and concomitant penalty, that are not relevant here.

activities potentially may not consist of issuing qualified health plans.

The loan agreements currently in force only permit a CO-OP to initiate voluntary termination of its loan agreement on grounds that the loan recipient believes that it cannot create a viable and sustainable CO-OP.²⁵⁶ The inability to create a viable or sustainable CO-OP would consist of a failure to become or remain licensed as a health insurance company, a failure to qualify as a QHP issuer, or a failure to become or remain financially solvent. There is no avenue currently for a CO-OP to request to terminate its loan agreement for the purpose of pursuing new business ventures that involve a governance structure or business model inconsistent with CO-OP governance or operational standards.

Informed by 8 years of experience with business operations for the CO-OP program, we have become aware of opportunities that may be available to CO-OPs to terminate their loan agreement, cease to constitute a QNHII, and thus become able pursue new opportunities that appear well-calculated to expand operations from regional areas within a State to Statewide operations, and also improve consumer access to other health insurance products, while remaining a non-profit, member-focused entity.

We therefore propose to amend § 156.520(f) to add § 156.520(f)(2) which would enable CMS, in its sole discretion, to approve requests by CO-OP borrowers to voluntarily terminate their loan agreement with CMS, and thereby cease to constitute a QNHII, for the purpose of permitting the loan recipient to pursue innovative business plans that are not otherwise consistent with the governance requirements and business standards of a CO-OP borrower, provided that (1) all outstanding CO-OP loans issued to the loan recipient are repaid in full prior to termination of the loan agreement, and (2) we believe granting the request would meaningfully enhance consumer access to quality, affordable, member-focused, non-profit health care options in affected markets. We propose to move the current regulation text at § 156.520(f) to new § 156.520(f)(1).

As a general matter, we anticipate that plans could be deemed innovative and likely to enhance consumer access to quality, affordable, member-focused health care if they appear to be well-calculated to lead directly to marketing non-profit, member-focused health plans in new regions of a State, or to offer health plans on a Statewide basis

for the first time, or to expand operations into new States, or to enhance consumer access to new non-profit products that are not qualified health plans. These examples of innovative business plans are illustrative, and not exclusive.

9. Conforming Amendment to Netting Regulation To Include Federal IDR Administrative Fees (§ 156.1215)

We propose conforming amendments to the payment and collections process set forth at § 156.1215 to align with the policies and regulations proposed in the Federal Independent Dispute Resolution Operations proposed rules (88 FR 75744). If finalized, these amendments would provide that the administrative fees for utilizing the No Surprises Act²⁵⁷ Federal IDR process for health insurance issuers that participate in financial programs under the Patient Protection and Affordable Care Act would be subject to netting as part of HHS' integrated monthly payment and collections cycle.²⁵⁸

To implement this policy, we propose to amend § 156.1215(b) to allow HHS to net payments owed to issuers and their affiliates²⁵⁹ operating under the same tax identification number (TIN) against amounts due to the Federal Government from the issuers and their affiliates operating under the same TIN for APTC, advance payments of and reconciliation of CSRs, payment of FFE user fees, payment of SBE-FP user fees, HHS risk adjustment, reinsurance, and risk corridors payments and charges, and administrative fees from these issuers and their affiliates for utilizing the Federal IDR process in accordance with § 149.510(d)(2). Additionally, we propose to amend § 156.1215(c) to provide that any amount owed to the Federal Government by an issuer and its

²⁵⁷ The Consolidated Appropriations Act, 2021 (CAA) was enacted on December 27, 2020. Title I, also known as the No Surprises Act, and title II (Transparency) of Division BB of the CAA amended chapter 100 of the Code, Part 7 of ERISA, and title XXVII of the PHS Act. Administrative fees are charged in accordance with 45 CFR 149.510(d)(2), 26 CFR 54.9816-8T(d)(2), and 29 CFR 2590.716-8(d)(2).

²⁵⁸ 88 FR 75798. The effective date of any finalized proposal related to netting of amounts owed to the Federal government from health insurance issuers for administrative fees for utilizing the No Surprises Act Federal IDR process would be no earlier than a time at which both the proposals related to netting proposed in the Federal Independent Dispute Resolution Operations proposed rule and the proposed amendments to § 156.1215 in this proposed rule are finalized.

²⁵⁹ "Affiliate" refers to any affiliated issuer that operates under the same taxpayer identification number as an issuer, such as when there are multiple Health Insurance Oversight System (HIOS) identifiers operating under the same taxpayer identification number. See the 2015 Payment Notice proposed rule (78 FR 72371).

affiliates for unpaid administrative fees due to the Federal Government from these issuers and their affiliates for utilizing the Federal IDR process in accordance with § 149.510(d)(2), after HHS nets amounts owed by the Federal Government under these programs, would be the basis for calculating a debt owed to the Federal Government.

We seek comment on the proposed amendments to § 156.1215(b) and (c).

IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-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. 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 the 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 are soliciting public comment on each of these issues for the following sections of this document that contain information collection requirements (ICRs).

A. Wage Estimates

To derive wage estimates, we generally use data from the Bureau of Labor Statistics to derive average labor costs (including a 100 percent increase for the cost of fringe benefits and overhead) for estimating the burden associated with the ICRs.²⁶⁰ Table 14 presents the median hourly wage, the cost of fringe benefits and overhead, and the adjusted hourly wage.

As indicated, employee hourly wage estimates have been adjusted by a factor of 100 percent. This is necessarily a rough adjustment, both because fringe benefits and overhead costs vary significantly across employers, and because methods of estimating these costs vary widely across studies. Nonetheless, there is no practical alternative, and we believe that

²⁶⁰ See May 2022 Bureau of Labor Statistics, Occupational Employment Statistics, National Occupational Employment and Wage Estimates. https://www.bls.gov/oes/current/oes_stru.htm.

²⁵⁶ CO-OP loan agreement, section 16.1.1(a).

doubling the hourly wage to estimate

total cost is a reasonably accurate estimation method.

TABLE 14: Adjusted Hourly Wages Used in Burden Estimates

Occupation Title	Occupational Code	Median Hourly Wage (\$/hr.)	Fringe Benefits and Overhead (\$/hr.)	Adjusted Hourly Wage (\$/hr.)
Business Operations Specialist	13-1000	\$36.56	\$36.56	\$73.12
Web and Digital Interface Designer	15-1255	\$40.02	\$40.02	\$80.04
Web Developer	15-1254	\$37.78	\$37.78	\$75.56
Compliance Officer	13-1041	\$34.47	\$34.47	\$68.94
Accountant and Auditor	13-2011	\$37.50	\$37.50	\$75.00
Management Analyst	13-1111	\$45.81	\$45.81	\$91.62
Chief Executive	11-1011	\$91.12	\$91.12	\$182.24
Computer Systems Analyst	15-1211	\$49.15	\$49.15	\$98.30
Financial Examiners (State Government, excluding schools and hospitals)	13-2061	\$39.52	\$39.52	\$79.04
Actuary (Member of American Academy of Actuaries)	15-2011	\$54.80	\$54.80	\$109.60
General and Operations Manager	11-1021	\$47.16	\$47.16	\$94.32
General Internal Medicine Physician	29-1216	\$103.11	\$10.113	\$206.22
Computer Programmers	15-1251	\$47.02	\$47.02	\$94.04

B. ICRs Regarding Proposed Amendments to Normal Public Notice Requirements (31 CFR 33.112, 31 CFR 33.120 and 45 CFR Part 155.1312, and 45 CFR 155.1320)

The Departments propose amendments to the section 1332 waiver implementing regulations to set forth flexibilities related to State public notice requirements and post-award public participation requirements. Current regulations at 31 CFR 33.112 and 45 CFR 155.1312 specify State public notice and comment period and participation requirements for proposed section 1332 waiver requests, and 31 CFR 33.116(b) and 45 CFR 155.1316(b) specify the public notice and comment period and approval requirements under the accompanying Federal process.

However, this proposed rule does not propose to alter any of the requirements related to section 1332 waiver applications, compliance and

monitoring, or evaluation in a way that would impose any additional costs or burdens for States seeking waiver approval or those States with approved waiver plans that have not already been captured in prior burden estimates. The Departments anticipate that implementing these provisions, if finalized, would not significantly change or decrease the associated burden currently approved under OMB control number: 0938–1389, expiration date: February 29, 2024.

C. ICRs Regarding Basic Health Program Regulations (42 CFR 600.320)

We propose at 42 CFR 600.320(c)(1) through (3) that a State operating a BHP must establish a uniform method of determining the effective date of eligibility for enrollment in a standard health plan which follows: (1) the Exchange effective date standards at 45 CFR 155.420(b)(1); (2) the Medicaid effective date standards at 42 CFR

435.915 exclusive of § 435.915(a); or (3) an effective date of eligibility of the first day of the month following the month in which BHP eligibility is determined. We note that only 42 CFR 600.320(c)(3) is a new proposal. The options under 42 CFR 600.320(c)(1) and (2) exist.

We estimate that the proposal under 42 CFR 600.320(c)(3) would have no impact on the information collection burden. We note that any cost would be incurred 100 percent by the State, as Federal BHP funds cannot be used for program administration. We seek comment on these assumptions.

D. ICRs Regarding Election To Operate an Exchange After 2014 (45 CFR 155.106)

We propose amending § 155.106(a)(2) to add new paragraphs (a)(2)(i) and (ii) to require that, as part of a State's activities for its establishment of a State Exchange, the State provide supporting documentation demonstrating progress

toward meeting State Exchange Blueprint requirements, or documentation that details a State's plans for how it intends to implement and meet the Exchange functional requirements as laid out in the State Exchange Blueprint. This could include a State submitting detailed plans regarding its State Exchange consumer assistance programs and activities, such as information on its direct-to-consumer outreach plans, for HHS to assess comparability to the FFEs' consumer assistance programs and activities while allowing for State flexibility in its approach to best serve the State's consumers. Additionally, we are proposing to require that when a State submits its State Exchange Blueprint application to HHS for approval, the State must provide the public with notice and a copy of its State Exchange Blueprint application. Further, at some point following a State's submission of its State Exchange Blueprint application to HHS, a State must conduct at least one public engagement (such as a townhall meeting or public hearing), in a timeline and manner considered effective by the State, with concurrence from HHS, at which interested parties can learn about the State's intent to establish a State Exchange and the State's progress toward executing that transition. We also propose to require that while a State is in the process of establishing a State Exchange and until HHS has approved or conditionally approved the State Exchange Blueprint application, a State conduct periodic public engagements at which interested parties can continue to learn about the State's progress towards establishing a State Exchange, in a timeline and manner considered effective by the State, with concurrence from HHS. These proposals, if finalized, would impact States that are considering, or are in the process of, establishing a State Exchange for PY 2025 and subsequent years. However, if finalized, we anticipate minimal burden on these States, as we believe they would have sufficient time to plan for such public-facing State Exchange engagements and activities if not already in their plans.

E. ICRs Regarding Adding and Amending Language To Ensure Web-Brokers Operating in State Exchanges Meet Certain Requirements Applicable in the FFEs and SBE-FPs (45 CFR 155.220)

The following proposed changes will be submitted to OMB for review under OMB control number 0938–New (CMS–#####). We seek comment on these burden estimates.

We propose to amend § 155.220 to apply to web-brokers operating in State Exchanges, and consequently in State Exchanges, for both the State Exchange's Individual Exchange and SHOP, certain existing Federal standards governing web-brokers use of non-Exchange website to assist consumers with enrolling in QHPs and applying for APTC/CSRs in a manner that constitutes enrollment through the Exchange. The burden associated with these proposed changes includes costs for web-brokers participating in States with State Exchanges to meet the requirements described in new proposed § 155.220(n) and for State Exchanges related to the development and oversight of web-broker programs within their State. We anticipate that the same number of web-brokers operating in the Exchanges on the Federal platform (20) would also operate in the 5 State Exchanges and would be required to incur this burden for each of the 5 State Exchanges they may operate in. We estimate the relevant costs based on current Federal costs. These estimates are described below.

These proposals would impose burdens on web-brokers participating in State Exchanges for costs related to web-development to meet the website display requirements proposed to be extended to web-brokers operating in these State Exchanges and costs associated with creating and submitting audit documentation for the applicable Exchange's review. Although we have allowed States certain flexibility for State Exchanges with regards to establishing procedures and requirements for website displays and demonstration of operational readiness, we expect the costs can be reasonably estimated based on the Federal costs as follows. We also solicit feedback from State Exchanges regarding these burden estimates and the number of web-brokers expected to participate in State Exchanges pursuant to this proposal.

We estimate it would take 15 hours for a Business Operations Specialist at an hourly rate of \$73.12 to implement the standardized disclaimers required under § 155.220(c)(3)(i)(A) and (G), along with 45 hours at an hourly rate of \$80.04 for a Web and Digital Interface Designer to modify the website to implement the standardized disclaimers across 5 State Exchanges. Therefore, for the standardized disclaimers under § 155.220(c)(3)(i)(A) and (G), we estimate each web-broker operating in State Exchanges that operate their own eligibility and enrollment platform would incur a cost of \$4,698.60 (15 hours × \$73.12 per hour + 45 hours × \$80.04 per hour). We estimate a

cumulative burden of \$93,972 for the anticipated 20 web-brokers operating across the State Exchanges (\$4,698.60 × 20 web-brokers). Additionally, proposed new paragraph § 155.220(n)(1) allows State Exchanges the flexibility to add State-specific information to the standardized disclaimers that does not conflict with the HHS-provided language. We solicit feedback from State Exchanges regarding how these flexibilities would impact these burden estimates.

Additionally, we anticipate it would take up to 100 hours at an hourly rate of \$80.04 for a Web and Digital Interface Designer to modify the website to implement and display the standardized QHP comparative information required under § 155.220(c)(3)(i)(A) (including the quality ratings assigned by HHS and enrollee satisfaction survey) across 5 State Exchanges. Therefore, for the display of the QHP comparative information on web-broker non-Exchange websites, we estimate each web-broker operating in State Exchanges would incur a cost of \$8,004 (100 hours × \$80.04 per hour). We estimate a cumulative burden of \$160,080 for the anticipated 20 web-brokers operating across the State Exchanges (\$8,004 × 20 web-brokers).

We anticipate it would take 50 hours for a Web and Digital Interface Designer at an hourly rate of \$80.04 to modify the website to display the APTC and CSR eligibility information required under § 155.220(c)(3)(i)(I) across 5 State Exchanges. Therefore, for changes related to implementation of the Federal minimum web-broker standards related to display of consumer APTC and CSR eligibility information, we estimate each web-broker operating in States with State Exchanges would incur a cost of \$4,002 (50 hours × \$80.04). We therefore estimate a cumulative burden of \$80,040 for the anticipated 20 web-brokers operating across the 5 State Exchanges (\$4,002 × 20 web-brokers). Additionally, proposed new paragraph § 155.220(n)(1) allows State Exchanges the flexibility to add State-specific information to the standardized disclaimers that does not conflict with the HHS-provided language and to define and review how consumer education information about the State Exchange is customized and presented on web-brokers websites. We solicit feedback from State Exchanges regarding how these flexibilities would impact these burden estimates.

New proposed paragraph (c)(4)(iii) would extend certain downstream agent and broker requirements at § 155.220(c)(4)(i) that currently apply to web-brokers in FFE and SBE-FP States and govern the use of the web-broker's

non-Exchange website by other agents or brokers assisting Exchange consumers to also apply to web-brokers, and their downstream agents and brokers in State Exchanges. Under the proposed new provision, web-brokers that permit other agents or brokers, through a contract or other arrangement, to use the web-broker's non-Exchange website to help and applicant or enrollee complete a QHP selection or complete the Exchange eligibility application would be required to meet the standards at § 155.220(c)(4)(i)(A), (B), (D), and (F) when assisting consumers in States with State Exchanges. This includes extension of requirements for web-brokers to verify that any agent or broker accessing or using the website is licensed in the State in which the consumer is selecting the QHP and has completed training and registration and has signed all required agreements with the applicable State Exchange. It would also require web-brokers to terminate the agent or broker's access to its website if the applicable State Exchange determines the agent or broker is in violation of the provisions described in this section and/or if the applicable State Exchange terminates any required agreement with the agent or broker. In addition, it would also extend a requirement for web-brokers to provide State Exchanges with a list of agents and brokers who enter into such a contract or other arrangement to use the web-broker's non-Exchange website, in a form and manner to be specified by the State Exchanges similar to the requirement in § 155.220(c)(4)(i)(A) for web-brokers in FFE and SBE-FP States to report the same information to HHS. We understand that web-brokers who work with and allow other agents and brokers to use the web-brokers' non-Exchange websites to assist Exchange consumers typically obtain and manage information on each of their downstream agents or brokers as part of an onboarding process. As a result, we expect web-brokers would already have the necessary data to provide a list to the applicable State Exchange of each of the other agents or brokers that allows to use the web-brokers' non-Exchange websites to assist Exchange consumers. We estimate that it would take up to 240 hours at an hourly cost of \$94.04 for a computer programmer to perform the necessary programming to comply with these requirements in § 155.220(c)(4)(i)(A), (B), and (D), and 20 hours at an hourly cost of \$118.30 for a senior manager to develop a listing of affiliated third-party agents and brokers across all 5 State Exchanges. Therefore,

for changes related to implementation of these Federal minimum web-broker standards related to downstream agents or brokers, we estimate each web-broker operating in State Exchanges would incur a cost of \$24,935.60 per web-broker ($(\$94.04 \times 240 \text{ hours}) + (\$118.30 \times 20 \text{ hours})$). We estimate a cumulative burden of \$598,454.40 for an anticipated 24 web-brokers operating across the State Exchanges ($\$24,935.60 \times 24 \text{ web-brokers}$).

We estimate it would take 95 hours for a Business Operations Specialist at an hourly rate of \$73.12 to oversee and monitor compliance with the operational readiness requirements established by State Exchange, as required by new § 155.220(n)(2) across 5 State Exchanges. Therefore, for compliance requirements, we estimate each web-broker operating in States with State Exchanges would incur a cost of \$6,946.40 (95 hours $\times$ \$73.12) for the proposed operational readiness requirements. We estimate a cumulative burden of \$138,928 for the anticipated 20 web-brokers operating across the 5 State Exchanges ($\$6,946.40 \times 20 \text{ web-brokers}$). These burden estimates are provided based on the estimates of the cost for DE entities to comply with the operational readiness requirements established by HHS. Proposed new paragraph § 155.220(n)(2) would allow State Exchanges to define and establish the form and manner for their web-brokers to establish operational readiness. Although we anticipate State Exchanges would establish requirements similar to the requirements for demonstrating operational readiness to operate in the FFE or SBE-FPs, we solicit feedback from State Exchanges regarding how well these burden estimates reflect their anticipated requirements.

Therefore, we estimate each web-broker operating in all 5 State Exchanges would incur a one-time burden in PY 2025 of 565 hours at a cost of \$48,586.60. We estimate a cumulative burden of 11,300 hours at an estimated cost of \$1,071,474.40 for all 20 web-brokers operating across the 5 State Exchanges. We seek comment on the number of State Exchanges that would be interested in establishing a web-broker program to allow web-brokers to host non-Exchange websites to assist Exchange consumers in their State and on the number of web-brokers interested in operating in those State Exchanges.

New proposed paragraph 155.220(n) requires State Exchanges to comply with the Federally-facilitated Exchange standards described above and in the preamble. Proposed paragraph 155.220(n)(1) allows State Exchanges

the flexibility to add State-specific information to the standardized disclaimers that does not conflict with the HHS-provided language and provides flexibility for the State Exchanges to define how consumer educational information is displayed on websites by web-brokers in State Exchanges. Proposed paragraph (2) under this new section also requires State Exchanges to establish the form and manner for their web-brokers to demonstrate operational readiness and compliance with applicable requirements, in the form and manner specified by the Exchange. The burden associated with these proposed changes includes costs for existing and future State Exchanges related to drafting new policy, updating standards, and potentially hiring additional staff to perform functions not currently being performed by the State Exchange, such as for drafting web-broker disclaimer language, drafting consumer-facing educational content, and engaging web-brokers in operational readiness, that would now incur new costs related to establishment of a web-broker program and ongoing monitoring of web-brokers to enforce the minimum Federal standards and any additional State-specific requirements.

We estimate the relevant costs based on current Federal costs as follows. We estimate that 5 States will opt to host a web-broker program for their State Exchanges. We anticipate the total burden associated with the State Exchanges developing the associated policies and procedures, including providing web-brokers with examples and technical assistance (including technical implementation guidance such as providing the quality ratings assigned and enrollee satisfaction survey data) to be up to 528 hours per State. This assumes 480 hours for a GS-13, Step 5 employee at an hourly rate of \$121.66 (the hourly wage rate for a GS-13, Step 5 employee in the Washington, DC area,²⁶¹ doubled to account for fringe benefits and overhead) and 48 hours for a GS-15, Step 5 employee at an hourly rate of \$169.10 (the hourly wage rate for a GS-15, Step 5 employee in the Washington, DC area,²⁶² doubled to account for fringe benefits and overhead). In total, for the 5 State Exchanges anticipated to participate, we estimate a burden of 2,640 hours (5

²⁶¹ OPM. (2023, January). *Salary Table 2023–DCB Incorporating the 4.1% General Schedule Increase and a Locality Payment of 32.49% For the Locality Pay Area of Washington-Baltimore-Arlington, DC-MD-VA-WV-PA Total Increase: 4.86%*. https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/DCB_h.pdf.

²⁶² *Id.*

State Exchanges $\times$ 528 hours per State Exchange) at a cost of \$332,568 (2,400 hours $\times$ \$121.66 + 240 $\times$ \$169.10).

We estimate it would take 40 hours each for the State Exchange equivalent of 2 GS–13, Step 5 employees at an hourly rate of \$121.66 (the hourly wage rate for a GS–13, Step 5 employee in the Washington, DC area,²⁶³ doubled to account for fringe benefits and overhead) to complete initial documentation review related to all web-broker requirements pursuant to this proposal, for a total cost to State governments of \$9,732.8 (2 $\times$ 40 hours $\times$ \$121.66) per State Exchange. We estimate it would take 8 hours for the equivalent of 1 GS–15, Step 5 employee at an hourly rate of \$169.10 (the hourly wage rate for a GS–15, Step 5 employee in the Washington, DC area,²⁶⁴ doubled to account for fringe benefits and overhead) to provide managerial review and oversight, for a total cost to State governments of \$1,352.8 (1 $\times$ 8 hours $\times$ \$169.10) per State Exchange. *Additionally, we estimate* the total burden for each State government for State contract and contractors ongoing reviews for oversight would include 1,087 hours at GS–12, Step 5 with an hourly rate of \$102.30 (the hourly wage rate for a GS–12, Step 5 employee in the Washington, DC area,²⁶⁵ doubled to account for fringe benefits and overhead) and 2,305 hours at GS–13, Step 5 with an hourly rate of \$121.66 (the hourly wage rate for a GS–13, Step 5 employee in the Washington, DC area,²⁶⁶ doubled to account for fringe benefits and overhead), and the total burden across all 5 States to be 16,960 hours. Therefore, we estimate a cost to each State governments of \$469,225.60, with a total estimated cost to State governments of \$2,346,128 (5 States $\times$ \$469,225.60). We seek comment from State Exchanges on these burden estimates.

We recognize that some State Exchanges may utilize web-brokers already participating in the FFEs and SBE–FPs, and encourage State Exchanges to leverage web-broker operational readiness demonstrated to participate in the FFEs or SBE–FPs when possible, as to minimize both burden on the State Exchanges and their web-brokers.

F. ICRs Regarding Establishing Requirements for DE Entities Mandating HealthCare.gov Changes To Be Reflected on DE Entity Non-Exchange Websites Within a Notice Period Set by HHS (45 CFR 155.221(b))

The following proposed changes will be submitted to OMB for review under OMB control number 0938–New (CMS–#####). We seek comment on these burden estimates.

As discussed in the preamble of this proposed rule, we propose to add language to § 155.221 requiring that display changes adopted by *HealthCare.gov* be reflected on DE entity non-Exchange websites within a time period specified by HHS, unless HHS approves a deviation.

Based on our experience with operating the DE program on the FFEs and SBE–FPs over the past several years, we estimate that approximately three or fewer display changes would be required annually. We estimate that a total of 100 web-brokers and QHP issuers participating in DE in FFE and SBE–FP States would be required to comply with these requirements. These display changes may range from changes such as, but not limited to, relatively simple text-based updates to more complex display changes involving the website's backend display methodology or algorithms. We estimate approximately two simpler and one more complex display change annually. We estimate that it would take a Web and Digital Interface Designer 30 hours annually, at a cost of \$80.04 per hour, to implement these changes, at a total annual cost of approximately \$2,401.20 (\$80.04 $\times$ 30 hours) per web-broker or QHP issuer. We therefore estimate a total annual burden of 3,000 hours (30 $\times$ 100) at a cost of \$240,120 (3,000 hours $\times$ \$80.04 per hour) for all applicable web-brokers and QHP issuers.

We recognize that system constraints may prevent DE entity websites from conforming to the minimum standards defined by HHS for certain *HealthCare.gov* display changes, and that DE entities may have an idea for implementation that does not meet the standards but would effectively communicate the same information to consumers. We propose DE entities participating in FFE and SBE–FPs that intend to deviate from the standards defined by HHS would be required to submit a deviation request. Those requests would be subject to review by HHS in advance of implementation of any alternative website displays.

Based on internal data, we estimate that 25 web-brokers and QHP issuers participating in FFE or SBE–FP States

would submit a request to deviate from the standards defined by HHS annually. We estimate it would take a compliance officer approximately 3 hours annually, at a rate of \$68.94 per hour, to prepare and submit the request to deviate from the communicated standards, including preparing the rationale explaining for the request. We therefore estimate the total annual burden for all web-brokers and issuers in completing and submitting a request to deviate to be approximately \$5,170.50 annually.

We do not expect this proposal to impose a new burden on EDE entities, if finalized, as EDE entities are already following the process outlined in this proposal through the change request processes described in the Third Party Auditor Guidelines.

If the proposal to add and amend language to ensure DE entities participating in Exchanges, at proposed new § 155.221(j), is finalized, we estimate that DE entities may incur burden related to the website development needed to implement changes made to State Exchange websites per the standards defined by the State Exchange. We anticipate that the web-development costs cited above would apply for each DE entity assisting consumers in State Exchanges. As described in the preamble, there may be burden associated with maintaining DE environments tailored to each States' display requirements. However, based on our experience conducting oversight of DE entity websites, it is our understanding that DE entities are familiar with and capable of tailoring website displays based on specific criteria and, as such, we anticipate entities are capable of tailoring website displays to the requirements of the State the consumer is seeking assistance in. We anticipate a total annual burden of \$1,226,452.50 for DE entities participating in States with State Exchanges associated with implementing display changes and submitting requests to deviate from the standards defined by the State Exchange across 5 State Exchanges (\$245,290.50 $\times$ 5 State Exchanges). Deviation requests would be subject to review by the State Exchange in advance of implementation of any alternative website displays. We seek comment on the burden of this proposal on DE entities planning to operate in State Exchanges.

G. ICRs Regarding Adding and Amending Language To Ensure DE Entities Operating in State Exchanges Meet Certain Standards Applicable in the FFEs and SBE–FPs (45 CFR 155.221)

The following proposed changes will be submitted to OMB for review under

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

OMB control number 0938–New (CMS–#####). We seek comment on these burden estimates.

We propose to amend § 155.221 to apply to DE entities operating in State Exchanges, and consequently State Exchanges that choose to implement a DE program, certain existing Federal standards regarding DE entities assisting consumers with enrolling in QHPs and applying for APTC/CSRs, both for the State Exchange's Individual Exchange and SHOP program. We anticipate that the same number of DE entities operating in the Exchanges on the Federal platform (100) would also operate in the 5 State Exchanges and would be required to incur this burden for each of the 5 State Exchanges they may operate in. The burden associated with these proposed changes includes costs for DE entities participating in State Exchanges to meet the requirements described in new proposed § 155.221(j) and for State Exchanges related to the development and oversight of DE programs within their State. We estimate relevant costs based on current Federal costs. These estimates are described below.

The burden associated with operating a DE program includes costs for DE entities related to web-development to meet the website display requirements being applied to DE entities operating in States with State Exchanges and costs for creating, storing, and submitting operational readiness documentation for Exchange review. Although these proposals allow States certain flexibility for State Exchanges with regards to establishing procedures and requirements for website displays and demonstration of operational readiness, we expect the costs to reasonably be estimated based on the Federal costs as follows.

We estimate it would take 15 hours for a DE entity's Business Operations Specialist at an hourly rate of \$73.12 to implement the standardized disclaimer required under § 155.221(b)(2), along with 20 hours at an hourly rate of \$80.04 for a Web and Digital Interface Designer to modify the DE entity non-Exchange website to implement the standardized disclaimer across 5 State Exchanges. Therefore, for the standardized disclaimer under § 155.221(b)(2), we estimate each DE entity operating in State Exchanges that operate their own eligibility and enrollment platform would incur a burden of 35 hours at an estimated cost of \$2,697.60 (15 hours × \$73.12 per hour + 20 hours × \$80.04 per hour). We estimate the anticipated 100 DE entities would incur a cumulative burden 3500

hours at an estimated cost of \$269,760 (\$2,697.60 × 100 DE entities).

Costs related to demonstrating operational readiness at new proposed § 155.221(j) would depend on the DE entity's desired enrollment pathway and the options made available by the State Exchange. Although we are allowing States the flexibility to establish operational readiness requirements, including the form and manner for their DE entities to demonstrate operational readiness, we encourage State Exchanges to leverage the existing items in § 155.220(b)(4)(i) and (ii) as the starting point for their operationally readiness reviews. If State Exchanges leverage these items, we anticipate the burden associated with DE entity demonstration of operational readiness can be estimated based on the Federal costs as follows. We estimate it would take up to 360 hours for an Auditor at an hourly rate of \$75.00 to submit business audit documentation across 5 State Exchanges, and we estimate 4 DE entities would participate in a manner that would trigger this information collection, resulting in an estimated cost of \$27,000 per DE entity (360 hours × \$75.00). We estimate it would take up to 610 hours for an Auditor at an hourly rate of \$75.00 to submit a security and privacy audit documentation across 5 State Exchanges, and we estimate 14 DE entities would participate in a manner that would trigger this information collection, resulting in an estimated cost of \$45,750 per DE entity (610 hours × \$75.00). We estimate it would take 45 hours for a Business Operations Specialist to complete and submit a typical Enhanced Direct Enrollment (EDE) documentation package and related information across 5 State Exchanges at an hourly rate of \$73.12, and 77 DE entities would participate in a manner that would trigger this information collection, resulting in an estimated cost of \$3,290.40 per DE entity (45 hours × \$73.12). Therefore, for a DE entity to demonstrate operational readiness and compliance with applicable requirements to State Exchanges, we estimate each DE entity would incur a burden of up to 1,015 hours at an estimated cost of up to \$76,040.40 (360 hours × \$75.00 per hour + 610 hours × \$75.00 per hour + 45 hours × \$73.12), but many DE entities would incur a lower burden and cost due to not participating in a manner that would trigger some of these information collection costs. We estimate a cumulative burden of 13,445 hours at an estimated cost of \$1,001,860.80 for all applicable DE entities operating across the 5 State Exchanges (\$27,000 × 4 DE

entities + \$45,750 × 14 DE entities + \$3,290.40 × 77 entities). We solicit feedback from State Exchanges with regards to how the form and manner of documentation they would require DE entities to submit to demonstrate operational readiness, along with the estimated burden associated with those submissions.

We estimate it would take 100 hours for a Web and Digital Interface Designer at a rate of \$80.04 per hour to modify the DE entity's non-Exchange website to comply with the requirements to display and market QHPs offered through the Exchange, individual health insurance coverage, and any other products on at least three separate websites pages in accordance with §§ 155.221(b)(1) and (3) and (c) across 5 State Exchanges. Therefore, for these website display requirements, we estimate each DE entity operating in State Exchanges would incur an estimated cost of \$8,004 (100 hours × \$80.04 per hour). We estimate 40 DE entities would trigger this information collection with a cumulative burden of 4,000 hours at an estimated cost of \$320,160 across the State Exchanges (\$8,004 × 40 DE entities).

The burden associated with this change also includes costs for DE entities operating in State Exchanges with oversight of direct enrollment entity application assisters, as described in § 155.221(d) (citing § 155.415(b)), for those DE entities that opt to use these application assisters. As described in the preamble, the requirements at 155.415(b)(2) and (b)(3) are already applicable to DE entities operating in all Exchanges and therefore do not represent a new burden for DE entities. The extension of § 155.221(d) to DE entities operating in State Exchanges would require DE entities' application assisters to complete appropriate State-required training and registration in a manner specified by the State Exchange consistent with § 155.415(b)(1). We estimate that up to 1,000 application assisters will operate in each State that opts to implement a DE program and allows DE entity application assisters to assist Exchange consumers. Accordingly, we anticipate that 5,000 application assisters across an estimated 5 States will participate. We estimate the burden for 100 DE entities to comply with this requirement at 3 hours per assister for a total annual burden of 15,000 hours for a Compliance Officer at an hourly wage of \$68.94 for a total cost of \$51,705 per entity. We estimate a cumulative burden of 75,000 hours at an estimated cost of \$5,170,500 for 100 DE entities operating across the 5 State Exchanges (\$51,705 × 100 entities).

Proposed new paragraph § 155.221(j)(3) extends requirements for DE entities operating in State Exchanges to implement and prominently display changes adopted for display on the State Exchanges' websites and with standards defined by State Exchange, unless the State Exchange approves a deviation. The costs associated with DE entities implementing this proposal in State Exchanges is discussed in the ICR section related to new proposed paragraph § 155.221(b)(6).

Regarding new proposed paragraph § 155.221(a) extending requirements under § 156.1230(a) to DE QHP issuers operating in State Exchanges, we do not anticipate additional burden for QHP issuers, beyond the estimated burdens for the website display requirements described above, to provide consumers with correct information, without omission of material fact, regarding the Exchanges, QHPs offered through the Exchanges, and insurance affordability programs, or to refrain from marketing or conduct that is misleading, coercive, or discrimination based on race, color, national origin, disability, age, or sex.

Therefore, we estimate each DE entity operating in State Exchanges would incur a one-time burden in PY 2025 of up to 1,900 hours at a cost of up to \$138,447 for an overall total for all DE entities operating across the State Exchanges of up to 95,945 hours at an estimated cost of \$6,762,280.80 to comply with these proposed requirements. We seek comment on the burden of this proposal on DE entities planning to participate in State Exchanges. For the purposes of better determining burden estimates, we also seek comment on the number of State Exchanges that operate their own eligibility and enrollment platforms and would be interested in implementing a DE program in their State and on the number of DE entities interested in operating in those State Exchanges.

New proposed paragraph § 155.221(j) requires State Exchanges to comply with the Federally-facilitated Exchange standards described above and in the preamble. § 155.221(j)(1) allows State Exchanges the flexibility to add State-specific information to the standardized disclaimer that does not conflict with the HHS-provided language. Proposed paragraph (2) under this new section also requires State Exchanges to establish the form and manner for their DE entities to demonstrate operational readiness and compliance with applicable requirements, in the form and manner specified by the Exchange. Proposed paragraph (3) requires State Exchanges establish requirements for their DE entities to implement and

prominently display changes adopted for display on the State Exchanges' website at the direction of the State Exchange. The burden associated with these proposed changes includes costs for State Exchanges related to drafting new policy, updating standards, and potentially hiring additional staff to perform functions not currently being performed by the State Exchange, such as for drafting DE entity program requirements and guidelines, including establishment of DE entity operational readiness programs, establishment of procedures related to defining and communicating standards for required display changes, establishment of any State-specific disclaimer text, and ongoing monitoring of DE entity compliance with applicable Federal standards and any additional State-specific requirements. DE entities operating in States transitioning off of the Federal Platform to a State Exchange would likely have fewer costs as they should already be meeting the Federal minimum requirements. No State Exchange has implemented DE to date, so we are not able to provide precise costs estimates of the burden associated with these proposed changes for State Exchanges. However, we anticipate that operational costs related to establishing policies and adding staff in order to operate a compliant DE program under § 155.221 may be estimated based on Federal platform costs and would be added to the costs and burdens of transitioning to State Exchange.

We estimate that 5 States will opt to host a DE program for their State Exchanges. We anticipate the total burden associated with the State Exchanges developing the associated policies and procedures to be up to 528 hours per State. This assumes 480 hours for a GS-13, Step 5 employee at an hourly rate of \$121.66 (the hourly wage rate for a GS-13, Step 5 employee in the Washington, DC area,²⁶⁷ doubled to account for fringe benefits and overhead) and 48 hours for a GS-15, Step 5 employee at an hourly rate of \$169.10 (the hourly wage rate for a GS-15, Step 5 employee in the Washington, DC area,²⁶⁸ doubled to account for fringe benefits and overhead). In total, for the 5 State Exchanges anticipated to participate, we estimate a burden of 2,640 hours (5 State Exchanges × 528 hours per State Exchange) at a cost of

\$332,568 (2,400 hours × \$121.66 per hour + 240 hours × \$169.10 per hour).

Based on the Federal platform costs, we estimate it would take 60 hours each for the State Exchange equivalent of 2 GS-13, Step 5 employees at an hourly rate of \$121.66 (the hourly wage rate for a GS-13, Step 5 employee in the Washington, DC area,²⁶⁹ doubled to account for fringe benefits and overhead) to complete initial documentation review related to all DE entity requirements pursuant to this proposal, for a total cost to State governments of \$14,599.20 (2 employees × 60 hours per employee × \$121.66 per hour) per State Exchange. We estimate it would take 12 hours for the equivalent of 1 GS-15, Step 5 employee at an hourly rate of \$169.10 (the hourly wage rate for a GS-15, Step 5 employee in the Washington, DC area,²⁷⁰ doubled to account for fringe benefits and overhead) to provide managerial review and oversight, for a total cost to State governments of \$2,029.20 (12 hours × \$169.10 per hour) per State Exchange. *Additionally, we estimate the total burden for each State government for State contract and contractors ongoing reviews for oversight would include 1,631 hours for a GS-12, Step 5 employee with an hourly rate of \$102.30 (the hourly wage rate for a GS-12, Step 5 employee in the Washington, DC area,²⁷¹ doubled to account for fringe benefits and overhead) and 3,458 hours for a GS-13, Step 5 employee with an hourly rate of \$121.66 (the hourly wage rate for a GS-13, Step 5 employee in the Washington, DC area,²⁷² doubled to account for fringe benefits and overhead). We estimate a burden to each State government of 5,089 hours at an estimated cost of \$587,551.58 for State contracts and contractors ongoing reviews for oversight. Therefore, each State would incur a burden of 5,749 hours at an estimated cost of \$670,693.58 (\$66,513.60 + \$14,599.20 + \$2,029.20 + \$587,551.58) in total for these proposals, and all 5 States would incur a total burden of 28,745 hours at an estimated cost of \$3,353,468 (5 States × \$670,693.58). We seek comment from State Exchanges on these burden estimates.*

We recognize that some State Exchanges may decide to utilize DE entities already participating in the FFEs and SBE-FPs and encourage State Exchanges to leverage DE operational readiness demonstrated to participate in the FFEs or SBE-FPs when possible, so

²⁶⁷ OPM. (2023, January). *Salary Table 2023-DCB Incorporating the 4.1 % General Schedule Increase and a Locality Payment of 32.49% For the Locality Pay Area of Washington-Baltimore-Arlington, DC-MD-VA-WV-PA Total Increase: 4.86%*. https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/DCB_h.pdf.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

as to minimize burden on both the State Exchanges that operate their own eligibility and enrollment platform and their DE entities.

H. ICRs Regarding Failure To File and Reconcile Process (45 CFR 155.305(f)(4))

We propose amending § 155.305(f)(4) to provide that State Exchanges must notify a tax filer that has been identified as having FTR status for one-year of the requirement to file and reconcile their APTC, or risk losing their eligibility for APTC if they remain FTR for the subsequent tax-year. This proposed requirement would ensure that State Exchanges provide notifications, similar to how Exchanges on the Federal platform do, and that tax filers on State Exchanges are adequately educated on the requirement to file and reconcile. The proposed rule, if finalized, would impact State Exchange FTR noticing processes for PY 2025 and subsequent years. For State Exchanges, FTR would be conducted in the same manner it had previously been conducted with respect to collection of information, with minimal changes to the language of the Exchange application questions necessary to obtain relevant information; as such, we anticipate that the proposed amendment, if finalized, would not impact the existing information collection requirements (OMB control number: 0938–1191) or burden for consumers.

Under previous FTR policy, State Exchanges were already required to notify tax filers identified as FTR at a minimum of once per year. As such, we do not anticipate this requirement increasing State Exchanges' burden of noticing beyond their existing FTR processes. We seek comment on these assumptions.

I. ICRs Regarding Verification Process Related to Eligibility for Enrollment in a QHP Through the Exchange (45 CFR 155.315(e))

The following proposed changes will be submitted to OMB for review under OMB control number 0938–1312 (CMS–10593). We seek comment on these burden estimates.

We propose several revisions to § 155.315(e) that, if finalized, would allow Exchanges to accept consumer attestation of incarceration status without further verification or, alternatively, to propose an alternative data source for incarceration verification for HHS approval. Exchanges that elect to verify incarceration status would continue to be required to use the DMI process if the data source provides a mismatch against the consumer attestation of incarceration status or

other information provided by the applicant or in the records of the Exchange. Should a State Exchange choose to propose using an alternative electronic data source for verifying incarceration status, HHS would review such proposals for consistency with the proposed standard in § 155.315(e)(2).

Of the 18 State Exchanges (operating in 12 States and the District of Columbia) that have incarceration verification processes, 8 conduct incarceration verifications similar to the one used to date by Exchanges on the Federal platform, and 5 have connected to an individual State or local incarceration facility for verifications and have received approval to do so from HHS. Additionally, 3 States are currently in process of transitioning to State Exchanges for PY 2024 or beyond and may choose to connect to an alternative incarceration verification data source with HHS approval. Subtracting the 5 Exchanges with preexisting approvals, we anticipate 11 State Exchanges could connect to an alternative incarceration verification data source, should they assess that an alternative data source exists and want to continue verification of consumer incarceration status using it.

For the purposes of assessing whether an alternative data source should be used, we estimate that a Management Analyst would spend 20 hours, at an hourly rate of \$91.62, to synthesize a cost-benefit analysis regarding whether the Exchange should continue to verify incarceration status using an approved data source instead of accepting a consumer's attestation that they are not incarcerated. If the Exchange finds a viable alternative data source and determines that it should be used, we anticipate that a Business Operations Specialist would take about 2 hours, at an hourly rate of \$73.12, to submit a request for HHS approval. We also anticipate that it would take a Chief Executive equivalent for the Exchange 1 hour, at an hourly rate of \$182.24, to approve the paperwork for submission to request HHS approval of the alternative incarceration data source. In total, the assessment of whether the Exchange should continue to verify incarceration status using an alternative data source instead of accepting consumer attestation would take 20 hours at a cost of \$1,832.40, and the process of approving and submitting a request for HHS approval would take 3 hours at a cost of \$328.48. Therefore, the total one-time burden for each Exchange that elects to verify incarceration status using an HHS-approved data source in 2025 would be 23 hours at a cost of approximately \$2,161, and the total

burden across all 11 State Exchanges would be 253 hours at a cost of approximately \$23,770.

J. ICRs Regarding Eligibility Redetermination During a Benefit Year (45 CFR 155.330(d))

The following proposed changes will be submitted to OMB for review under OMB control number 0938–1207 (CMS–10468). We seek comment on these burden estimates.

We propose amending § 155.330(d) to require that Exchanges periodically examine available data sources described in §§ 155.315(b)(1) and 155.320(b) to identify changes related to death of an applicant on whose behalf advance payments of the premium tax credit or cost-sharing reductions are being provided. The Exchanges have developed electronic data exchanges to support obtaining this information to determine the applicant's eligibility at the point of application and could reuse those data exchanges here. Consequently, we estimate costs associated with this requirement to be minimal.

However, State Exchanges not already conducting death PDM with the required frequency or not deemed in compliance with the newly proposed PDM requirements would be required to engage in IT system development activity to communicate with these programs and act on enrollment data either in a new way, or in the same way more frequently. Thus, there may be additional associated administrative cost for these State Exchanges to implement the proposed PDM requirement.

Based on experience with other PDMs, for each State Exchange not already conducting death PDM at least twice a year, we estimate that it would take 40 hours by a Computer Systems Analyst at an hourly rate of \$98.30 to implement this proposed provision, for a cost of \$3,932 per State Exchange. Therefore, for all 11 State Exchanges not currently meeting the proposed requirement, we estimate a total burden of 440 hours at a cost of \$43,252. We assume that this burden would be incurred primarily in 2025.

K. ICRs Regarding Establishment of Exchange Network Adequacy Standards (45 CFR 155.1050)

The burden associated with subjecting QHP issuers in State Exchanges and SBE-FPs to time and distance standards as proposed at § 155.1050 is covered by the information collection currently approved under OMB control number 0938–1312 (CMS–10593). We note that we are also revising the information

collection currently approved under OMB control number 0938–1415 (CMS–10803) regarding appointment wait time standards encompassed in previously finalized regulations at 45 CFR 156.230(a)(2)(B). We seek comment on these burden estimates.

Effective for plan years beginning on or after January 1, 2025, we propose to amend § 155.1050 to require that State Exchanges and SBE–FPs establish and impose quantitative time and distance QHP network adequacy standards that are at least as stringent as the FFEs' time and distance standards established for QHPs under § 156.230. We also propose that State Exchanges and SBE–FPs be required to conduct quantitative network adequacy reviews prior to certifying any plan as a QHP, consistent with the reviews conducted by the FFEs under § 156.230. Specifically, when we refer to the review being consistent with the network adequacy reviews conducted by the FFEs under § 156.230, we propose that State Exchanges and SBE–FPs would be required to conduct, prior to QHP certification, quantitative network adequacy reviews to evaluate compliance with requirements under § 156.230(a)(1)(ii) and (iii), and (a)(2)(i)(A), while providing QHP certification applicants the flexibilities described under § 156.230(a)(2)(ii) and (a)(3) and (4). Under this proposal, State Exchanges and SBE–FPs would be prohibited from accepting an issuer's attestation as the only means for plan compliance with network adequacy standards. We further propose to require State Exchanges and SBE–FPs to permit issuers that are unable to meet the specified network adequacy standards to participate in a justification process after submitting their initial network adequacy data, consistent with the processes specified under § 156.230(a)(2)(ii) and (a)(3) and (4), to account for variances and potentially earn QHP certification. In addition, for States Exchanges that employ robust, quantitative network adequacy standards that differ from those used by the FFEs, but still ensure that QHPs provide consumers with reasonable, timely access to practitioners and facilities to manage their health care needs, we propose a framework for granting exceptions to the requirements that State Exchanges and SBE–FPs are required to establish and impose network adequacy time and distance standards for QHPs that are at least as stringent as the standards applicable to QHPs in FFEs and conduct quantitative network adequacy reviews that are consistent with those carried out by the FFEs under § 156.230. Finally, we

propose to mandate that State Exchanges and SBE–FPs require all issuers seeking QHP certification to submit information to the State Exchange or SBE–FP about whether network providers offer telehealth services.

We estimate that the total annual burden associated with State Exchanges and SBE–FPs establishing and imposing the proposed network adequacy standards, conducting the network adequacy reviews as proposed, collecting telehealth information from issuers seeking QHP certification, and submitting any exception to be up to 900 hours. Assuming the compliance officer average hourly rate of \$68.94 per hour, we estimate the cost of the data collection, operations, and maintenance pertaining to these proposed requirements on each State Exchange and SBE–FP to be \$62,046 per year (900 hours × \$68.94 per hour). In total, for the 19 State Exchanges and 3 SBE–FPs anticipated to be operational in 2025, we estimate a burden of 19,800 hours (22 State Exchanges and SBE–FPs × 900 hours per Exchange) at a cost of \$1,365,012 (22 State Exchanges and SBE–FPs × 900 hours per Exchange × \$68.94 per hour).

We estimate that the burden for QHP issuers in State Exchanges and SBE–FPs to gather and submit the time and distance data, including any justification, to the respective State Exchanges or SBE–FPs would be 10 hours in total for each medical QHP issuer (a QHP issuer that is not an SADP issuer) and 2 hours in total for each SADP issuer submitted by a compliance officer at a rate of \$68.94 per hour. The 10-hour estimate includes the burden associated with the requirement that all issuers seeking QHP certification submit information to the State Exchange or SBE–FP about whether network providers offer telehealth services.

Approximately half of the parent companies of issuers on the State Exchanges also offer Medicare Advantage plans. Since Medicare Advantage offers a telehealth credit for network adequacy, we expect those issuers would already have telehealth information available for their providers. We further believe that those QHP issuers that do not currently collect this information may do so using the same means and methods by which they already collect information from their network providers relevant to time and distance standards and provider directory information. For these reasons, we estimate that any additional burden relative to the requirement that all issuers seeking QHP certification submit information to the State Exchange or

SBE–FP about whether network providers offer telehealth services would lead to a minimal increase in burden for many issuers.

The requirement that all issuers seeking QHP certification submit information to the State Exchange or SBE–FP about whether network providers offer telehealth services would account for 3 of the total 10 hours we estimate for gathering and submitting the time and distance data to the respective State Exchange or SBE–FP for medical QHP issuers and 30 minutes of the total 2 hours we estimate for SADP issuers. We believe the cost estimates of 3 hours for medical QHP issuers and 30 minutes for SADP issuers to be a maximum and that the burden could be less to issuers that are already collecting telehealth data for other purposes.

We estimate that the total annual burden associated with QHP issuers in State Exchanges and SBE–FPs to gather and submit the time and distance and telehealth data to the respective State Exchanges or SBE–FPs for up to 149 medical QHP issuers in State Exchanges and SBE–FPs would be up to 1,490 hours (10 hours × 149 medical QHP issuers). Assuming the compliance officer average hourly rate of \$68.94 per hour, we estimate that the cost of gathering and submitting this network adequacy data for an individual medical QHP issuer could be up to \$689.40 (10 hours × \$68.94 per hour), and for all 149 medical QHP issuers in State Exchanges and SBE–FPs, up to \$102,720.60 (149 medical QHP issuers × 10 hours per issuer × \$68.94 per hour). We estimate that the total annual burden associated with this requirement for 89 SADP issuers in State Exchanges and SBE–FPs would be up to 178 hours (2 hours × 89 SADP issuers). Assuming the compliance officer average hourly rate of \$68.94 per hour, we estimate that the cost of gathering and submitting the network adequacy data for an individual SADP could be up to \$137.88 (2 hours × \$68.94 per hour), and for all 89 SADP issuers in State Exchanges and SBE–FPs, up to \$12,271.32 (89 SADP issuers × 2 hours per issuer × \$68.94 per hour). We estimate the total annual burden associated with this proposed requirement across both medical QHP and SADP issuers in State Exchanges and SBE–FPs beginning in 2025 would be approximately \$114,992.

L. ICRs Regarding the State Selection of EHB-Benchmark Plans for Plan Years Beginning on or After January 1, 2027 (45 CFR 156.111)

The existing OMB approval (0938–1174) PRA package, for which we are

seeking a renewal for use beginning in March 2024, would remain in effect until the proposed changes to § 156.111 would come into effect, if finalized, for the State selection of EHB-benchmark plans in 2025, impacting plans that are effective beginning on January 1, 2027. We seek comment on these burden estimates.

We propose several revisions to § 156.111 that, if finalized as proposed, would reduce the burden associated with State selection of EHB-benchmark plans. For plan years beginning on or after January 1, 2027, we propose to revise the standards for State selection of EHB-benchmark plans at § 156.111 to consolidate the options for States to change EHB-benchmark plans at § 156.111(a); revise the scope of benefit requirements at § 156.111(b)(2); and revise § 156.111(e)(3) to require States to submit a formulary drug list as part of their application to change EHB-benchmark plans only if the State is seeking to change their prescription drug EHB. We also propose revisions to the actuarial certification requirements at § 156.111 to reflect the proposed scope of benefit changes. If the proposed changes to § 156.111 are finalized as proposed, they would not be effective until 2025, and the anticipated reduction in burden to States would not be realized until that time.

If the proposed changes to § 156.111 are finalized as proposed, we anticipate an overall reduction in burden on States to change their EHB-benchmark plans in accordance with the revisions to § 156.111. If finalized as proposed in this rule, the revisions to § 156.111 would remove the requirement that States report which option under § 156.111(a) they are using as a basis to change their EHB-benchmark plans, their methodology for confirming compliance with the generosity standard at current § 156.111(b)(2)(ii), and the submission of a formulary drug list under § 156.111(e)(3) unless the State is seeking to make changes to their prescription drug EHB. We would also change the information States submit to HHS to confirm compliance with the scope of benefit requirements at § 156.111(b)(2), for which we estimate an overall reduction in burden.

These proposals would not change the number of documents States would be required to submit to change their EHB-benchmark plans under § 156.111(e)(3), unless the State is not seeking to make changes to its prescription drug EHB, in which case, the State would not be required to submit a formulary drug list as specified in § 156.111(e)(3). In addition, a response would not be required from all States under current

§ 156.111 and its proposed revisions, if finalized as proposed in this rule. Only States choosing to modify the State's EHB-benchmark plan would need to submit this information to HHS.

Since finalizing the addition of § 156.111 in the 2019 Payment Notice, between one and three States have changed their EHB-benchmark plan each year between 2019 and 2023. While we anticipate that the proposed revisions to § 156.111 would reduce overall burden on States and incentivize more frequent changes to EHB-benchmark plans, we anticipate that at most 5 States would choose to make a change to their EHB-benchmark plans in any given year (15 States over 3 years within the authorization of this ICR).

To change an EHB-benchmark plan, a State currently provides confirmation that the State's EHB-benchmark plan selection complies with certain requirements, including those under § 156.111(a), (b), and (c). This information collection would be revised under the proposals in this rule, if finalized. To comply with the proposed requirement, we estimate that a financial examiner would require 4 hours (at a rate of \$79.04 per hour) to fill out, review, and transmit a complete and accurate document. We estimate that it would cost each State approximately \$316.16 to meet the proposed reporting requirement, with a total annual burden for all 5 States of 20 hours and an associated total cost of \$1,580.80.

Section 156.111(e)(2) currently requires States to submit an actuarial certification and associated actuarial report of the methods and assumptions when selecting options under § 156.111(a). Presently, before compiling this report, States must consider which of the options provided at current § 156.111(a) best facilitate their intended EHB-benchmark changes. This deliberation often involves both research and discussion within the State and between the State and HHS. The proposed consolidation of the options currently available at § 156.111(a) into one overarching approach for EHB-benchmark plan updates would eliminate the need for, and time spent by, States contemplating the merits of one option or another. This actuarial certification and associated actuarial report must also demonstrate compliance with section § 156.111(b)(2)(i), which requires a State's EHB-benchmark plan to provide a scope of benefits that is equal in scope to the scope of benefits under one of the typical employer plans at § 156.111(b)(2)(i)(A) and (B). While the proposed revisions to § 156.111(b)(2)(i)

would still require a State's EHB-benchmark plan to provide benefits that are equal in scope to the scope of benefits under a typical employer plan, they would also allow a State to select any scope of benefits that is as or more generous than the scope of benefits in the least generous plan (supplemented by the State as necessary to provide coverage within each EHB category at § 156.110(a)), and as or less generous than the scope of benefits in the most generous plan in the State (supplemented by the State as necessary to provide coverage within each EHB category at § 156.110(a)), among the plans currently defined at § 156.111(b)(2)(i)(A) and (B). We anticipate that these proposed revisions would substantially reduce the burden on States to perform the required actuarial analyses. Under this proposed revision, we anticipate that a State would typically only need to perform three actuarial analyses to determine the scope of benefits in the least and most generous plans among the plans currently defined at § 156.111(b)(2)(i)(A) and (B), and the scope of benefits in the State's new EHB-benchmark plan. Under current regulation, a State may need to perform an indeterminate number of actuarial analyses of the plans defined at § 156.111(b)(2)(i)(A) and (B) until the State identifies a plan with a scope of benefits equal to the State's EHB-benchmark plan. This proposed revision would significantly reduce the likelihood that a State would need to perform as many actuarial analyses. Accordingly, we would anticipate a reduction in the estimated burden on States to perform the actuarial analysis to confirm compliance with § 156.111(b)(2)(i).

This actuarial certification and associated actuarial report must also demonstrate compliance with § 156.111(b)(2)(ii), which currently requires a State's EHB-benchmark plan to not exceed the generosity of the most generous among a set of comparison plans. For benefit years beginning on or after January 1, 2027, we are proposing to remove this requirement and would revise this estimate to reflect a reduced burden on States that would no longer need perform the actuarial analyses required to confirm compliance with § 156.111(b)(2)(ii).

The actuarial certification that would be collected under this ICR would be required to include an actuarial report that complies with generally accepted actuarial principles and methodologies. This estimate includes complying with all applicable actuarial standards of practice (ASOPs) (including ASOP 41 on actuarial communications). For

example, ASOP 41 on actuarial communications includes disclosure requirements, including those that apply to the disclosure of information on the methods and assumptions being used for the actuarial certification and report. The actuarial certification for this requirement currently includes an attestation that the standard actuarial practices have been followed or that exceptions have been noted. The signing actuary is required to be a Member of the American Academy of Actuaries. These requirements would continue to apply if this policy is finalized as proposed.

We estimate that an actuary, who is a member of the American Academy of Actuaries, would be required to complete 12 hours of work (at a rate of \$109.60 per hour) on average for § 156.111(e)(2). This would include the certification and associated actuarial report from an actuary to affirm, in accordance with generally accepted actuarial principles and methodologies that the State's EHB-benchmark plan must provide a scope of benefits that is equal to the scope of benefits provided under a typical employer plan. For these calculations, the actuary would need to conduct the appropriate calculations to create and review an actuarial certification and associated actuarial report, including minimal time required for recordkeeping. The precise level of effort for the actuarial certification and associated actuarial report under § 156.111(e)(2) would likely vary depending on the State's approach to its EHB-benchmark plan and this certification requirement, but we are estimating 12 hours of work for the actuary to complete the actuarial certification and associated report in this proposed rule in recognition that the definition of typical employer plan may require the actuary to determine whether the typical employer plan meets minimum value requirements. We estimate that it would cost each State approximately \$1,315.20 to meet this reporting requirement, with a total annual burden for all 5 States of 60 hours and an associated total cost of \$6,576.

We estimate that a financial examiner would require 1 hour (at a rate of \$79.04 per hour) to review, combine, and electronically transmit these documents to HHS, as part of a State's EHB-benchmark plan submission. We estimate that each State would incur a burden of 1 hour with an associated cost of \$79.04 with a total annual burden for 5 States of 5 hours at associated total cost of \$395.20.

We require at § 156.111(e)(3) that each State submit its new EHB-benchmark

plan documents. The level of effort associated with this requirement could depend on the State's selection of the EHB-benchmark plan options under the regulation at § 156.111(a). However, for the purposes of this estimate, we estimate that it would require a financial examiner (at a rate of \$79.04 per hour) 12 hours on average to create, review, and electronically transmit the State's EHB-benchmark plan document that accurately reflects the benefits and limitations, resulting in a burden of 12 hours and an associated cost of \$948.48, with a total annual burden for all 5 States of 60 hours and an associated cost of \$4,742.40. This estimate of 12 hours would also include the burden necessary for a State to submit a formulary drug list for the State's EHB-benchmark plan in a format and manner specified by HHS, in accordance with § 156.111(e)(3). However, we propose to revise § 156.111(e)(3) in this proposed rule to require a State to submit this formulary drug list only if the State is changing the prescription drug EHB. We do not anticipate that all States would change prescription drug EHB, so we anticipate this burden would be lower for some States. To collect the formulary drug list, the State would be required to use the template provided by HHS and must submit the formulary drug list as a list of RxNorm Concept Unique Identifiers (RxCUIs).

Section 156.111(e)(4) requires a State to submit the documentation necessary to operationalize the State's EHB-benchmark plan. This reporting requirement includes the EHB summary file that is currently posted on CCIIO's website and is used as part of the QHP certification process and is integrated into HHS' IT Build systems that feeds into the data that is displayed on *HealthCare.gov*.²⁷³ We estimate that it requires a financial examiner 12 hours, on average, (at a rate of \$79.04 per hour) to create, review, and electronically submit a complete and accurate document to HHS resulting in a burden of 12 hours and an associated cost of \$948.48, with a total annual burden for all 5 States of 60 hours and an associated cost of \$4,742.40.

We estimate that the total number of respondent States would be 5 per year, for a total yearly burden of 205 hours²⁷⁴ and an associated cost of approximately

\$18,036²⁷⁵ to meet these reporting requirements.

M. ICRs Regarding Non-Standardized Plan Option Limits (45 CFR 156.202)

The following proposed changes will be submitted to OMB for review under OMB control number 0938–New (CMS–#####). We seek comment on these burden estimates.

As was previously discussed in the preamble to this proposed rule, we propose to permit issuers to offer non-standardized plan options in excess of the limit of two per product network type, metal level, inclusion of dental and/or vision benefit coverage, and service area for PY 2025 and subsequent years, if issuers demonstrate that these additional non-standardized plans beyond the limit at § 156.202(b) have specific design features that would substantially benefit consumers with chronic and high-cost conditions.

Specifically, issuers would be permitted to offer more than two non-standardized plan options if these additional plans' cost sharing for benefits pertaining to the treatment of chronic and high-cost conditions (including benefits in the form of prescription drugs, if pertaining to the treatment of the condition(s)) is at least 25 percent lower, as applied without restriction in scope throughout the plan year, than the cost sharing for the same corresponding benefits in an issuer's other non-standardized plan option offerings in the same product network type, metal level, and service area. The reduction could not be limited to a part of the year, or an otherwise limited scope of benefits. Instead, issuers would be required to apply the reduced cost sharing for these benefits any time the covered item or service is furnished. For example, an issuer could not reduce cost sharing for the first three office visits or drug fills and then increase it for remaining visits or drug fills. Furthermore, issuers would be prohibited from conditioning reduced cost sharing for these benefits on a particular diagnosis. That is, although the benefit design would have reduced cost sharing to address one or more articulated conditions, the reduced cost sharing must be available to all enrolled in the plan who receive the service(s) covered by the benefit.

Under this proposal, no other plan design features (such as the inclusion of additional benefit coverage, different provider networks, different formularies, or reduced cost sharing for

²⁷³ Information on Essential Health Benefits (EHB) Benchmark Plans. Accessed at <https://www.cms.gov/CCIIO/Resources/Data-Resources/ehb.html>.

²⁷⁴ This is calculated as follows: (29 hours for the financial examiner + 12 hours for the actuary) × 5 States = 205 hours.

²⁷⁵ This is calculated as follows: (\$11,460.80 for the financial examiner + \$6,576.00 for the actuary) × 5 States = \$18,036.80.

benefits provided through the telehealth modality) would be evaluated under this exceptions process, meaning no other differences in plan design features would allow issuers to be excepted from the limit to the number of non-standardized plan options offered per product network type, metal level, inclusion of dental and/or vision benefit coverage, and service area.

Additionally, as part of this exceptions process, issuers would be required to submit a written justification in a form and manner and at a time prescribed by HHS that provides additional details and explains how the particular plan design the issuer desires to offer above the non-standardized plan option limit of two satisfies the proposed standards for receiving an exception to this limit—namely, how the particular plan would substantially benefit consumers with chronic and high-cost conditions. We would provide issuers with a justification template upon publication of the final rule and when the QHP templates for the applicable plan year are released. We anticipate requesting that issuers submit QHP applications for non-standardized plan options that exceed the two-plan limit by the QHP certification Early Bird deadline.

This justification form would ask the issuer to: (1) identify the specific condition(s) for which cost sharing is reduced, (2) explain which benefits would have reduced annual enrollee cost sharing (as opposed to reduced cost

sharing for a limited number of visits) for the treatment of the specified condition(s) by 25 percent or more relative to the cost sharing for the same corresponding benefits in an issuer's other non-standardized plan offerings in the same product network type, metal level, and service area, and (3) explain how the reduced cost sharing for these services pertains to clinically indicated guidelines for treatment of the specified chronic and high-cost condition(s).

In order for an issuer to complete the necessary documentation to submit a request to be excepted from the non-standardized plan option limit at § 156.202(b) in accordance with the proposed requirements at § 156.202(d), we estimate that it would take an actuary (OES occupational code 15–2011) 5 hours annually at a median hourly cost of \$109.60 per hour (amounting to \$548 annually) to create a new plan design with sufficiently differentiated cost sharing and to set the premium rate for this plan; a general internal medicine physician (OES occupational code 29–1216) 2 hours annually at a median hourly cost of \$206.22 (amounting to \$412.44 annually) to complete the justification form for this exceptions process; and a general and operations manager (OES occupational code 11–1021) 10 hours annually at a median hourly cost of \$94.32 per hour (amounting to \$943.20 annually) to review and submit the justification form, including all required

data, as part of an issuer's portfolio of plan offerings that it seeks certification of during QHP certification.

Altogether, we estimate a total burden of 17 hours at a cost of \$1,903.64 per issuer annually to submit a request for each additional non-standardized plan option to be excepted from the non-standardized plan option limit. Although issuers would not be limited in the number of potential exceptions they may be granted under this proposal, we do not anticipate that issuers would seek to have more than one additional non-standardized plan options excepted from the limit. We further estimate that approximately 50 FFE and SBE–FP issuers (of the 228 issuers based on current PY 2024 plan offering data, amounting to approximately 22 percent) would request to be excepted from the non-standardized plan option limit in order to offer these additional plans annually, at a total burden of 850 hours and associated cost of \$95,182 for all issuers annually. We estimate that only 50 issuers would submit a request to be excepted from the non-standardized plan option limit since we anticipate that most issuers would believe that the burden of creating and certifying additional plans intended to benefit a comparatively small population of consumers would outweigh the benefit of doing so.

N. Summary of Annual Burden Estimates for Proposed Requirements

TABLE 15: Proposed Annual Recordkeeping and Reporting Requirements

Regulation Section(s)	OMB Control Number	Number of Respondents	Number of Responses	Burden per Response (hours)	Total Annual Burden (hours)	Labor Cost of Reporting (\$)	Total Cost (\$)
45 CFR 155.1050	0938-XXXX	22	22	900	19,800	1,365,012	1,365,012
45 CFR 155.220	0938-XXXX	20	20	565	11,300	1,071,474	1,071,474
45 CFR 155.220	0938-XXXX	5	5	4,008	20,040	2,346,128	2,346,128
45 CFR 155.221	0938-XXXX	100	100	1,900	95,945	6,762,280	6,762,280
45 CFR 155.221	0938-XXXX	5	5	5,749	28,745	3,353,468	3,353,468
45 CFR 155.221(b)(6)	0938-XXXX	100	100	33	3,300	1,226,453	1,226,453
45 CFR 155.315	0938-XXXX	11	11	23	253	23,770	23,770
45 CFR 155.330(d)	0938-XXXX	11	11	40	440	43,252	43,252
45 CFR 156.111	0938-1174	5	5	41	205	18,036	18,036
45 CFR 156.202	0938-XXXX	50	50	17	850	95,182	95,182
TOTAL		329	329		180,878	15,078,602	15,078,602

O. Submission of PRA-Related Comments

We have submitted a copy of this proposed rule to OMB for its review of the rule's information collection and recordkeeping requirements. These requirements are not effective until they have been approved by the OMB.

To obtain copies of the supporting statement and any related forms for the proposed collections discussed above, please visit our website at www.cms.hhs.gov/PaperworkReductionActof1995, or call the Reports Clearance Office at 410-786-1326.

We invite public comments on these potential information collection requirements. If you wish to comment, please submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule and identify the rule (CMS-9895-P), the ICR's CFR citation, CMS ID number, and OMB control number.

ICR-related comments are due January 16, 2024.

V. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and when we proceed

with a subsequent document, we will respond to the comments in the preamble to that document.

VI. Regulatory Impact Analysis

A. Statement of Need

This rule proposes to make several HHS risk adjustment updates, such as to use the 2019, 2020, and 2021 data for recalibration of the HHS risk adjustment models for benefit year 2025; to update and retain the AI/AN CSR adjustment factors for benefit year 2025 and beyond, unless changed through notice-and-comment rulemaking; to establish the risk adjustment user fee for benefit year 2025; and to give HHS the authority to require corrective action plans for certain observations identified as a result of high-cost risk pool audits. The rule further proposes State Exchange and agent, broker, web-broker, and DE entity standards; requiring State Exchanges and State Medicaid and CHIP agencies to pay to access and use optional CSI data from the Hub for income verification; eligibility and auto re-enrollment standards; open enrollment period and special enrollment period standards; and permitting enrollees to retroactively terminate their enrollment in a QHP through the Exchange when the enrollee enrolls in Parts A or B Medicare retroactively effective to the date

Medicare coverage begins. Additionally, the rule proposes the FFE and SBE-PP user fee rates for the 2025 benefit year, as well as EHB-benchmark plan selection updates, other EHB updates, minor updates to the standardized plan options for PY 2025, an exceptions process for issuers to offer additional non-standardized plan options in excess of the limit of two for PY 2025, Consumer Operated and Oriented Plan (CO-OP) loan term revisions, and modifications to section 1332 waiver implementing regulations governing public hearing procedures.

B. Overall Impact

We have examined the impacts of this 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), Executive Order 14094 entitled "Modernizing Regulatory Review" (April 6, 2023), 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), and Executive Order 13132 on Federalism (August 4, 1999).

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). The April 6, 2023 Executive Order on Modernizing Regulatory Review²⁷⁶ amends Section 3(f) of Executive Order 12866 to define a “significant regulatory action” as an action that is likely to result in a rule that may: (1) have an annual effect on the economy of \$200 million or more (adjusted every 3 years by the Administrator of OMB’s 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) create a serious inconsistency or otherwise

interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President’s priorities or the principles set forth in the Executive Order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

A regulatory impact analysis (RIA) must be prepared for significant rules. OMB’s OIRA has determined that this rulemaking is ‘significant’ as measured by the \$200 million threshold under section 3(f)(1). We have prepared an RIA that to the best of our ability presents the costs and benefits of the rulemaking. OMB has reviewed these proposed regulations, and the Departments have provided the following assessment of their impact.

C. Impact Estimates of the Payment Notice Provisions and Accounting Table

As required by OMB Circular A–4 (available at [https://](https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf)

www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf), we have prepared an accounting statement in Table 16 showing the classification of the impact associated with the provisions of this proposed rule.

This proposed rule implements standards for programs that will have numerous effects, including providing consumers with access to affordable health insurance coverage, reducing the impact of adverse selection, and stabilizing premiums in the individual and small group (including merged) health insurance markets and in Exchanges. We are unable to quantify all the benefits and costs of this proposed rule. The effects in Table 16 reflect qualitative assessment of impacts and estimated direct monetary costs and transfers resulting from the provisions of this proposed rule for health insurance issuers and consumers. The annual monetized transfers described in Table 16 include changes to costs associated with the risk adjustment user fee paid to HHS by issuers.

²⁷⁶ Executive Order 14094. <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/04/06/executive-order-on-modernizing-regulatory-review/>.

TABLE 16: Accounting Table

Benefits:	Estimate	Year Dollar	Discount Rate	Period Covered
Annualized Monetized (\$/year)	\$25.79 million	2023	7 percent	2024-2028
	\$26.32 million	2023	3 percent	2024-2028
Quantitative: • Annual cost savings to State Exchanges of approximately \$20,317,000 beginning in 2025 associated with the proposal to permit Exchanges to accept consumer incarceration attestations without further verification. • Annual cost savings to the Federal Government of approximately \$570,000 beginning in 2025 due to the proposal to stop generating incarceration DMIs and thereby stop paying the PUPS annual maintenance and transaction fees for the purposes of verification incarceration status for QHP eligibility. • Annual cost savings to the Federal Government of approximately \$12.5 million associated with the proposal to conduct an additional death PDM check annually beginning in 2025.				
Qualitative: • Increased State flexibility with respect to determining the effective date of eligibility for enrollment in a standard health plan for purposes of a BHP. • Improved transparency as a result of the proposal to require States seeking to transition to a State Exchange to provide the public with a notice and copy of its State Exchange Blueprint application at the time of submission to HHS for approval, and conduct periodic public engagements whereby interested parties can learn about the State's intent to transition, as well as a State's progress toward transitioning. Although, historically, States that have transitioned to State Exchanges conducted some level of public engagements that would meet what is being proposed, they have done so voluntarily, so this proposal would set a clear expectation moving forward for all States that intend to establish and operate a State Exchange. • Improved consumer experience associated with the proposal to require that Exchange call centers must provide consumers with access to a live call center representative during the Exchanges' published hours of operations who must be able to assist consumers with submitting their application for QHP coverage. • Improved consumer experience and access to accurate insurance information associated with the proposal to require all Exchanges to have a centralized eligibility and enrollment platform on its website. Although all current Exchanges meet this requirement, there may be States transitioning to State Exchanges in the future that would not consider operating a centralized eligibility and enrollment platform in the absence of this proposed amendment. This proposal would set a clear expectation moving forward for all States that intend to establish and operate a State Exchange. • Increased transparency for agents, brokers, and web-brokers by specifying who will be reviewing their reconsideration request. • Improved consumer experience on non-Exchange websites by requiring DE entities to implement <i>HealthCare.gov</i> and State Exchange website display changes that enhance the consumer experience, simplify the plan selection process, and increase consumer understanding of plan benefits, cost-sharing responsibilities and eligibility for financial assistance. • Reduced burdens and barriers to care for applicants as a result of the proposal to permit Exchanges to accept incarceration attestations without further verification. • Improved continuity of coverage for enrollees due to the proposal to require Exchanges to automatically re-enroll enrollees in catastrophic coverage into QHP coverage for the coming plan year. • Reduced consumer confusion and increased consumer access to assisters as a result of the proposal to require State Exchanges to adopt an open enrollment period that begins on November 1 of the calendar year preceding the benefit year and ends no earlier than January 15 of the applicable benefit year, with the option to extend the open enrollment period beyond January 15. • Reduced consumer confusion and coverage gaps due to the proposal to align the effective dates of coverage after selecting a plan during certain special enrollment periods across all Exchanges. • Reduced overlaps in coverage and premium payments for Exchange enrollees who retroactively enroll in Medicare Part A or B as a result of the proposal to permit Exchange enrollees to retroactively terminate Exchange coverage back to the date in which they retroactively enroll in Medicare Part A or B. • Reduced costs for States to perform actuarial analyses to confirm compliance of EHB-benchmark plans with scope of benefit requirements at § 156.111(b)(2).				

- Reduced coverage barriers to expanding access to adult dental benefits, improved State flexibility to add benefits to improve adult oral health, and promotion of health equity associated with the proposal to remove the prohibition on including routine non-pediatric dental services as an EHB.
- Increased issuer flexibility in plan design as a result of the proposed exceptions process to allow issuers to offer additional non-standardized plan options in excess of the limit of two per product network type, metal level, including of dental and/or vision benefit coverage, and service area, if particular requirements are met.
- Streamlined payments and collections processes and limited administrative burden for operating HHS programs due to the proposal to align netting regulations at § 156.1215 with the policies proposed in the Federal Independent Dispute Resolution (IDR) Process Administrative Fee and Certified IDR Entity Fee Ranges proposed rule.

Costs:	Estimate	Year Dollar	Discount Rate	Period Covered
Annualized Monetized (\$/year)	\$11.41 million	2023	7 percent	2024-2028
	\$11.37 million	2023	3 percent	2024-2028

Quantitative:

- Cost to issuers being audited for high-cost risk pool payments of approximately \$25,078 to complete, submit to HHS, and implement corrective action plans for certain high-cost risk pool audit observations for each benefit year being audited, if required by HHS.
- One-time cost in PY 2025 to web-brokers operating in State Exchanges of approximately \$1,071,474 due to the proposal to ensure agents, brokers, and web-brokers operating in these State Exchanges are meeting certain requirements applicable in the FFE and SBE-FPs.
- Costs to States of \$2,346,128 associated with the policy that agents, brokers, and web-brokers operating in State Exchanges meet certain requirements applicable in the FFEs and SBE-FPs.
- Costs to DE entities operating in FFE and SBE-FP States of approximately \$240,120 annually beginning in 2025 as a result of the proposal to require that changes adopted by *HealthCare.gov* be reflected on DE entity websites within a notice period set by HHS, unless HHS approves a deviation in advance.
- Costs to DE entities participating in State Exchanges of approximately \$1,226,452.50 annually beginning in 2025 associated with implementing display changes and submitting requests to deviate from the standards defined by the State Exchange.
- Costs to DE entities operating in FFE and SBE-FP States of approximately \$5,171 to submit a request to deviate from the display approach adopted by *HealthCare.gov* standards defined by HHS annually beginning in 2025.
- Costs to States of \$3,353,468 associated with the policy that DE entities operating in State Exchanges meet certain requirements applicable in the FFEs and SBE-FPs, including the costs for States associated with policy surrounding DE entities operating in State Exchanges regarding implementing display changes and reviewing associated deviation requests.
- One-time cost in PY 2025 to DE entities in State Exchanges of approximately \$6,762,281 to comply with the proposal to add language to ensure DE entities operating in these State Exchanges are meeting certain requirements applicable in the FFE and SBE-FPs.
- One-time cost in PY 2025 to State Exchanges of \$23,770 to conduct an analysis of whether to accept consumer attestation of incarceration status or identify an alternative data source to verify incarceration status and to make changes to their eligibility systems and processes to either accept consumer attestation or use an alternative data source to verify incarceration status.
- One-time cost to HHS of \$2.3 million in 2024 to build the structure and set up operations for the purposes of distinguishing costs of accessing CSI data through the VCI Hub service between the State Exchange and State Medicaid agency and annual costs of \$1 million starting in 2024 to administer this process.
- One-time cost to 1 to 3 States with State Exchanges, who currently have one Hub connection shared between the State Exchange and Medicaid, of approximately \$3 to 6 million in 2024 (averaged to approximately \$4.5 million for purposes of this proposed rule) if they elect to build a second, separate Hub connection for the purposes of distinguishing costs of accessing CSI data through the VCI Hub service between the State Exchange and State Medicaid agency. Should any of these States elect to build a second Hub connection, the State would determine if the State Exchange or Medicaid agency would finance the implementation and operational costs associated with the second Hub connection.
- One-time cost in 2025 of approximately \$43,252 to 11 State Exchanges that are not currently meeting the proposed requirement to conduct death PDM at least twice a year.
- Costs to 5 States per year of approximately \$18,036 to comply with the proposal regarding the State selection of EHB-benchmark plans.
- Costs to 50 issuers of approximately \$95,182 annually to complete the proposed exceptions process in order to offer one additional non-standardized plan option in excess of the non-standardized option plan limit of two for PY 2025 and

subsequent years.

- Costs to QHP issuers in State Exchanges and SBE-FPs of approximately \$114,992 annually beginning in 2025 associated with the network adequacy proposals in this proposed rule.
- Costs to State Exchanges and SBE-FPs of approximately \$1,365,012 annually beginning in 2025 associated with the network adequacy proposals in this proposed rule.
- Costs to interested parties of approximately \$136,937 in 2024 to review and interpret this rule.
- Costs to HHS per year of approximately \$58,923 to conduct an additional check for deceased enrollees associated with the proposal to require Exchanges to conduct periodic checks for deceased enrollees twice yearly and subsequently end deceased enrollees' QHP coverage beginning with the 2025 calendar year.
- One-time cost in 2025 of \$1,540,000 to HHS to modify the Federal platform's current incarceration verification processes for the purposes of verifying eligibility for QHP, and to update the Federal platform's system logic for HHS to stop sending incarceration verification requests to PUPS.

Qualitative:

- Increased premium amounts and PTC, to the extent that the proposals to address State-mandated benefits and the process to change EHB-benchmark plans incentivize States to update and modernize the EHB with additional benefits, including routine non-pediatric dental services.
- Increased administrative burden to States and issuers to develop criteria used to select a consumer representative for the P&T committee, to create or revise standard operating procedures for the committee, as well as for any additional training.

Transfers:	Estimate	Year Dollar	Discount Rate	Period Covered
Annualized Monetized (\$/year)	\$1.86 billion	2023	7 percent	2024-2028
	\$1.92 billion	2023	3 percent	2024-2028

Quantitative:

- Estimated average transfers of costs from the Federal government to Medicaid beneficiaries of approximately \$0 million to \$538 million per year beginning in 2025 (averaged to \$269 million for the purposes of this proposed rule) for additional health care benefits paid by the Medicaid program to new beneficiaries covered under States using the proposed eligibility flexibilities.
- Estimated average transfers of costs from States to beneficiaries of approximately \$0 million to \$392 million per year beginning in 2025 (averaged to \$196 million for the purposes of this proposed rule) for additional health care benefits paid by the Medicaid program to new beneficiaries covered under States using the proposed eligibility flexibilities.
- Estimated transfers of costs from the Federal government to States of approximately \$78 million to \$122 million per year beginning in 2024 (averaged to \$100 million for purposes of this proposed rule) by requiring State Exchanges and State Medicaid agencies to pay for their use of the optional CSI income data accessed through the VCI Hub service.
- Reduction in risk adjustment user fee transfers from issuers to the Federal government of approximately \$3.5 million for benefit year 2025 compared to the prior benefit year.
- Estimated increased PTC outlays from the Federal government to issuers of \$2 billion to \$3 billion (averaged to \$2.5 billion for purposes of this proposed rule) annually beginning in 2026 associated with the proposal to remove the limitation that the 150 percent FPL SEP be available only when the applicable taxpayer's applicable tax percentage is set to zero.

Qualitative:

- Provide States additional flexibilities to cover more Medicaid beneficiaries and improve health care for those individuals as a result of the Medicaid proposal in this proposed rule.
- Increase in the overall absolute value of risk adjustment State transfers calculated under the State payment transfer formula of approximately 8 percent in Oklahoma, 2.5 percent in Alaska, 2 percent in Montana, and less than 0.5 percent in South Dakota and North Dakota as a result of the proposal to recalibrate the CSR adjustment factors for AI/AN plan variant enrollees.

TABLE 17: Estimated Federal Government Outlays and Receipts for the HHS Risk Adjustment and Reinsurance Programs from Fiscal Year 2025-2029, in billions of dollars²⁷⁷

Year	2025	2026	2027	2028	2029	2025-2029
HHS Risk Adjustment and Reinsurance Program Payments	8	9	10	10	10	47
HHS Risk Adjustment and Reinsurance Program Collections	9	10	10	10	10	49

Note: HHS risk adjustment program payments and receipts lag by one quarter. Receipt will fully offset payments over time. Source: Congressional Budget Office. Federal Subsidies for Health Insurance Coverage for People Under Age 65: CBO and JCT's May 2023 Baseline Projections. Table 2. May 2023. <https://www.cbo.gov/system/files/2023-05/1298-2023-05-healthinsurance.pdf>.

1. Proposed Amendments to Normal Public Notice Requirements (31 CFR 33.112, 31 CFR 33.120, 45 CFR 155.1312, and 45 CFR 155.1320)

In this proposed rule, the Departments propose modifications to the section 1332 waiver implementing regulations to set forth flexibilities in the public notice requirements and post-award public participation requirements for section 1332 waivers. However, this proposed rule does not propose to alter any of the requirements related to section 1332 waiver applications, compliance and monitoring, or evaluation in a way that would create any additional costs or burdens for States submitting proposed waiver applications or those States with approved waiver plans that have not already been captured in prior burden estimates. The Departments are of the view that both States with approved section 1332 waivers and States that apply for section 1332 waivers would be minimally impacted or would benefit from reduced burden by these proposed changes in policy, if finalized. The Departments anticipate that implementing these provisions would not significantly change the associated burden currently approved under OMB control number: 0938-1389, Expiration date: February 29, 2024. The Departments are of the view that section 1332 waivers help increase State innovation, which in turn could lead to more affordable health coverage for individuals and families in States that consider implementing a section 1332 waiver program.

The Departments seek comment on these impacts and assumptions.

2. Increase State Flexibility in the Use of Income and Resource Disregards for Non-MAGI Populations (42 CFR 435.601)

Current 42 CFR 435.601(d) authorizes States to apply less restrictive methodologies than those that would otherwise be required to be considered in the individual's eligibility determination. Paragraph (d)(4) requires that the application of less restrictive methodologies by State Medicaid agencies be comparable for all persons within each Medicaid eligibility group. For example, if a State wants to apply an income disregard to an eligibility group serving individuals who are 65 years old or older, it must either agree to apply the income disregard to all members of the eligibility group who are 65 years old or older or forego application of the disregard.

In this proposed rule, we propose to remove the requirement that less restrictive methodologies be comparable for all members of an eligibility group. This would allow States that want to expand their Medicaid eligibility rules through the use of less restrictive methodologies to have more flexibility in managing the extent to which their programs are expanded.

This proposed rule, however, would not create an entirely new State option, but, instead, would permit States to exercise an existing option in a more limited manner. Additionally, the proposed rule, if finalized, would not require new State plan material or impose any new administrative tasks for States in their development and submission of State plan amendments. We therefore do not anticipate that implementing this provision would create any new information collection burden for States.

Estimating the impact on Medicaid enrollment and expenditures is difficult. Notably, it is not known how many States would use this new authority, and the extent to which they would use

this. Some States may be interested in using this flexibility to make a significant expansion to coverage, and in turn, spending on Medicaid services. Other States may not use these options at all or may use them to a limited degree. Moreover, how States use this authority—which populations would be affected, the number of people in these groups, and the underlying healthcare needs of these individuals—is also unknown. Therefore, we have estimated a range of potential impacts as part of the regulatory impact analysis.

At the low end of the range, we have assumed that the impact on enrollment and Medicaid expenditures would be 0 (or negligible). In this scenario, we assume that States do not make any substantial changes under this new authority, and as a result there is no measurable increase in enrollment or spending. Historically, States have had many options in expanding coverage, including but not limited to other authorities to use income and resource disregards and section 1115 waivers. Recent State plan amendments to expand the use of income disregards (either broadly or targeted to certain groups) have been modest, ranging from estimated impacts of \$0 million to \$49 million per year. Thus, it may be possible that the use of these flexibilities is limited and the impacts relatively small.

On the other hand, it is possible that States may be more active in using these proposed options. To estimate the high end of the range, we made the following assumptions. First, we assumed that 10 States would take up these options. Second, we assumed that States would apply these options to non-MAGI populations (mainly enrollees age 65 and over, and enrollees qualifying on the basis of a disability) and have an average increase of 1 percent in enrollment among these groups. We assumed the average total, Federal, and State Medicaid costs for these enrollees

²⁷⁷ Reinsurance collections ended in FY 2018 and outlays in subsequent years reflect remaining payments, refunds, and allowable activities.

would be equal to the national average for these groups.

Under these assumptions, we project that enrollment would increase by 36,000 to 38,000 across 10 States (or

3,600 to 3,800 per State) and Medicaid expenditures would increase by about \$4,660 million over the first 5 years (\$2,700 million Federal, \$1,960 million

State share). (The estimates rely on projections of enrollment and spending from the Mid-Session Review of the President's FY 2024 Budget.)

TABLE 18: Projected Impacts on Medicaid Enrollment and Expenditures

Low scenario	2025	2026	2027	2028	2029	2025-2029
Enrollment	0	0	0	0	0	
Expenditures (millions)						
Total	\$0	\$0	\$0	\$0	\$0	\$0
Federal	\$0	\$0	\$0	\$0	\$0	\$0
State	\$0	\$0	\$0	\$0	\$0	\$0
High scenario	2025	2026	2027	2028	2029	2025-2029
Enrollment	36,000	36,000	37,000	38,000	38,000	
Expenditures (millions)						
Total	\$890	\$910	\$930	\$950	\$980	\$4,660
Federal	\$510	\$530	\$540	\$550	\$570	\$2,700
State	\$380	\$380	\$390	\$400	\$410	\$1,960

It is important to note that there is a wide range of outcomes due to the flexibility afforded in the proposed rule. We expect actual costs and enrollment impacts to fall within the range shown here, but the effects are highly dependent on which States would take up these options and how extensively such options are used.

We seek comment on these impacts and assumptions.

3. Changes to the Basic Health Program Regulations (42 CFR 600.320)

Section 1331 of the ACA (42 U.S.C. 18051) requires the Secretary to establish a BHP, and section 1331(c)(4) specifically provides that a State shall coordinate the administration of, and provision of benefits under the BHP with other State programs. These proposed regulations build from previous BHP regulations to provide for options for BHP implementation and operations beginning with program year 2024.

In this proposed rule, we propose to add an option for a State establishing a uniform method of determining the

effective date of eligibility for enrollment in a standard health plan. We believe this proposal would provide additional flexibility for States when implementing their BHP. If the State chooses to follow this new effective date of eligibility option, we believe this proposal would also benefit enrollees by providing coverage sooner than if the State were to follow the Exchange effective date of eligibility option. We do not anticipate any costs to States because of this proposal, as we are only proposing to provide another option by which a State could determine the effective date of eligibility for purposes of its BHP. We seek comment on these impacts and assumptions.

4. HHS Risk Adjustment (45 CFR 153.320)

We propose to recalibrate the HHS risk adjustment models for the 2025 benefit year using the 2019, 2020, and 2021 enrollee-level EDGE data. We believe that continuing to maintain the approach of blending (or averaging) 3 years of separately solved coefficients provides stability within the HHS-

operated risk adjustment program and minimizes volatility in changes to risk scores from the 2024 benefit year to the 2025 benefit year. We also propose to continue applying a market pricing adjustment to the plan liability associated with Hepatitis C drugs in the HHS risk adjustment models, consistent with the approach adopted beginning with the 2020 benefit year HHS risk adjustment models.

We propose to recalibrate the CSR adjustment factors for AI/AN zero-cost sharing and limited cost sharing CSR plan variant enrollees for the 2025 benefit year, and to retain the proposed AI/AN CSR adjustment factors, if finalized, for all future benefit years unless changed through notice-and-comment rulemaking. We also propose to maintain the current CSR adjustment factors for silver plan variant enrollees (70 percent, 73 percent, 87 percent, and 94 percent AV plan variants)²⁷⁸ for the

²⁷⁸ See 83 FR 16930 at 16953; 84 FR 17478 through 17479; 85 FR 29190; 86 FR 24181; 87 FR 27235 through 27236; and 88 FR 25772 through 25774.

2025 benefit year and beyond, unless changed through notice-and-comment rulemaking. In addition, we affirm that for plan liability risk score calculations under the State payment transfer formula, we use the CSR adjustment factors that align with the AV of the plan. Thus, for unique State-specific plans that have higher plan liability than the standard silver plan variants (for example, CSR wrap-around and Medicaid-expansion plans), we would continue to apply the applicable CSR adjustment factor that corresponds to the plan's AV, as determined by HHS in consultation with the applicable State Departments of Insurance and other relevant State institutions.

We anticipate that this proposal would result in an increase in overall individual market risk pool HHS risk adjustment transfers under the State payment transfer formula in States with a sizable share of AI/AN enrollees. All things being equal, we anticipate that recalibrating the AI/AN CSR adjustment factors as proposed would increase transfer payments (or decrease transfer charges) to the issuers with the larger shares of the AI/AN subpopulation and increase transfer charges (or decrease transfer payments) under the State payment transfer formula for the issuers with smaller shares of the AI/AN subpopulation. Therefore, we anticipate that issuers with larger shares of AI/AN enrollees would have the ability to lower premium rates slightly, as the additional plan liability associated with AI/AN CSR recipients would be offset by the increase in HHS risk adjustment transfer payments (or decrease in transfer charges) to these issuers.

Based on internal analyses, the States with the highest proportion of AI/AN enrollees as a percentage of member months in the 2021 benefit year were Oklahoma (15 percent), Alaska (4 percent), Montana (2 percent), South Dakota (2 percent), and North Dakota (1 percent). Based on internal analyses of 2021 enrollee-level EDGE data, we anticipate that recalibrating the AI/AN CSR adjustment factors as proposed would increase total transfers under the State payment transfer formula by 8 percent in Oklahoma, 2.5 percent in Alaska, 2 percent in Montana, and less than 0.5 percent in South Dakota and North Dakota. We further anticipate that these transfer impacts would result in modest decreases in premiums among issuers that enroll a high proportion of AI/AN consumers, as issuers with larger AI/AN enrollment would benefit from increased transfer payments (or decreased transfer charges) under the State payment transfer formula. We do not anticipate that States with a low

proportion of AI/AN enrollees would experience a transfer or premium impact due to the very low number of enrollees (less than 1 percent) who would be impacted by the proposed recalibrated CSR adjustment factors for this population in those States.

We seek comment on these impacts and assumptions.

5. HHS Risk Adjustment User Fee for 2025 Benefit Year (45 CFR 153.610(f))

For the 2025 benefit year, HHS will operate risk adjustment in every State and the District of Columbia. As described in the 2014 Payment Notice (78 FR 15416 through 15417), HHS' operation of risk adjustment under section 1343 of the ACA on behalf of States is funded through a risk adjustment user fee. For the 2025 benefit year, we propose to use the same methodology to estimate our administrative expenses to operate the HHS risk adjustment program as was used in the 2024 Payment Notice. As discussed previously in this proposed rule, risk adjustment user fee costs for the 2025 benefit year are expected to increase from the prior 2024 benefit year estimates. However, we project higher enrollment than our prior estimates in the individual and small group (including merged) markets in the 2024 and 2025 benefit years due to the enhanced PTC subsidies provided for in section 9661 of the ARP²⁷⁹ and extended through the 2025 benefit year pursuant to section 12001 of the IRA.

We estimate that the total cost for HHS to operate the risk adjustment program on behalf of all States and the District of Columbia will increase from \$60 million in 2024 to approximately \$65 million in 2025. However, we believe that the increased enrollment projections will more than offset the increased risk adjustment user fee costs, and therefore, the proposed risk adjustment user fee would be reduced from the \$0.21 PMPM for the 2024 benefit year to \$0.20 PMPM for the 2025 benefit year. We expect the proposed risk adjustment user fee for the 2025 benefit year to reduce the amount transferred from issuers of risk adjustment covered plans to the Federal government by approximately \$3.5 million.

We seek comment on these impact estimates and assumptions.

6. Audits and Compliance Reviews of Risk Adjustment Covered Plans (45 CFR 153.620(c))

We propose amending § 153.620(c)(4) to require issuers of risk adjustment

covered plans to complete, implement, and provide to HHS written documentation of any corrective action plans when required by HHS if a high-cost risk pool audit results in the inclusion of a finding or certain observations in the final audit report. Based on data from the 2018 benefit year high-cost risk pool audits, we estimate that each issuer audited may receive approximately 2 observations on average in future benefit years of high-cost risk pool audits where there is evidence of non-compliance with applicable Federal requirements, thereby triggering the proposed requirement for the issuer to take corrective action. We also estimate that it would take approximately 4 hours by a business operations specialist (at \$73.12 per hour), 2 hours by a compliance officer (at \$68.94 per hour), and 2 hours by a computer systems analyst (at \$98.30 per hour) to complete, implement, and provide documentation to HHS of a corrective action plan for 2 observations. This results in a total cost per issuer of \$626.96 (4 hours × \$73.12 per hour + 2 hours × \$68.94 per hour + 2 hours × \$98.30 per hour). We estimate that we may conduct high-cost risk pool audits for approximately 40 issuers for each benefit year. Therefore, the total estimated cost to issuers of risk adjustment covered plans for each benefit year being audited would be approximately \$25,078.40 (40 issuers × \$626.96 per issuer).

We seek comment on these burden estimates and assumptions.

7. Approval of a State Exchange (45 CFR 155.105)

We propose to add a requirement that a State seeking to transition to a State Exchange must first operate an SBE-FP, meeting all requirements under § 155.200(f), for at least one plan year, including its first open enrollment period.

We do not anticipate this proposal would create an additional burden to the States that are currently transitioning to a State Exchange, since those States have already operated an SBE-FP for at least 1 year or will first be operating an SBE-FP. Since PY 2020, all States that have transitioned to a State Exchange have first transitioned to an SBE-FP for one or more plan years. Furthermore, based on our experience, the costs for a State to transition from the FFE to operating an SBE-FP is relatively low in comparison to the costs a State would incur to transition from an FFE, or an SBE-FP, to establishing a State Exchange. This is due to the significant investment of costs incurred in implementing and operating a State

²⁷⁹ Public Law 117–2.

Exchange consumer-facing website, eligibility and enrollment technology platform, and associated eligibility and enrollment support infrastructure, such as the State Exchange's consumer call center technology and resources, that FFEs and SBE-FPs rely on HHS to provide. We would also expect the impact and costs to States that are considering, or may consider, establishing a State Exchange in the future to be minimal because we believe there would be sufficient time to plan for operating as an SBE-FP before operating as a State Exchange.

We believe that one of the primary benefits of States operating an SBE-FP prior to implementing and operating a State Exchange lies in the investment of time and resources that a State transitioning to, and operating, an SBE-FP makes in the establishment of direct relationships with their consumers, assisters, issuers, and other interested parties that will ultimately help in the successful implementation and operation of its State Exchange. Furthermore, we believe that the benefit of these activities to a State and its consumers and partners far outweigh the relatively low cost for the State to first transition to, and operate, an SBE-FP for at least one year before implementing and operating a State Exchange. We are also of the view that this proposal would mitigate the significant risk and disruption, for consumers, assisters, issuers, and other interested parties, associated with a scenario where a State wishes to transition from an FFE to establishing and operating a State Exchange in a timeframe of less than a year or otherwise not in alignment with the timelines associated with the approval of a State Exchange specified in § 155.106.

We seek comment on these assumptions of the financial impact of this proposal, if finalized, on States that transition to an SBE-FP for at least one plan year before operating a State Exchange pursuant to this proposal, if finalized.

8. Election To Operate an Exchange After 2014 (45 CFR 155.106)

As discussed in the preamble, we propose to add that we may require that a State submitting a Blueprint Application to implement a State Exchange provide supplemental documentation demonstrating progress toward meeting State Exchange Blueprint requirements, or documentation that details a State's implementation of its State Exchange Blueprint requirements. This could include a State submitting detailed

plans regarding its State Exchange consumer assistance, such as information on its direct outreach plans.

We do not anticipate additional burden associated with this proposal, as HHS already has the authority to request any evidence it determines necessary for the State to show progress towards implementing the required Exchange functionality in the State Exchange Blueprint, or documentation that details the implementation of the required Exchange functionality. In this proposal, we are merely seeking to codify in our regulations a clear expectation for a State establishing a State Exchange that, as part of the State's submission of a State Exchange Blueprint Application. The information collection burden associated with this proposal is already accounted for under approved OMB control number: 0938-1172, Expiration date: August 31, 2025.

Further, as discussed in the preamble, we propose to require that when a State submits its State Exchange Blueprint application to HHS for approval, the State must provide the public with notice and a copy of its State Exchange Blueprint application. We also propose to require that at some point following a State's submission of its State Exchange Blueprint application to HHS, a State must conduct at least one public engagement (such as a townhall meeting or public hearing), in a timeline and manner considered effective by the State, with concurrence from HHS, at which interested parties can learn about the State's intent to transition to a State Exchange and the State's progress toward effectuating that transition. We also propose to require that while a State is making this transition and until HHS has approved or conditionally approved the State Exchange Blueprint application, a State conducts periodic public engagements at which interested parties can continue to learn about the State's progress toward finalizing its transition to a State Exchange, in a timeline and manner, either in-person or virtually, considered effective by the State.

We do not anticipate significant additional burden associated with these proposals, as States are currently required to submit a State Exchange Blueprint application to HHS for approval, and so the impact of sharing a copy of the submitted Exchange Blueprint application with the public using their website would be de minimis. Further, we believe that since States seeking to establish, or are in the process of establishing, a State Exchange for PY 2025 or in subsequent years would be given broad flexibility to design the public engagements in a

manner that best suits their respective State, for meeting the interested party consultation requirement under § 155.130, that States will design their public engagements in a manner such that the additional burden incurred by the State would be minimal. The goal of the proposed changes at § 155.106(a)(2)(ii) is to clearly state, for States who are seeking to establish State Exchanges, HHS' expectations of the State engaging with the public regarding its transition to a State Exchange, thus strengthening the transparency requirements of the State Exchange Blueprint review and approval process. We believe this proposal would help States that establish a State Exchange meet the consultation requirements of interested parties at § 155.130 during the period when the State is establishing a State Exchange, by formalizing a process whereby States and interested parties communicate about the State's establishment of a State Exchange throughout the transition process. As such, we believe the impact of this proposal would be de minimis.

We seek comment on this burden estimate and assumptions.

9. Additional Required Benefits (45 CFR 155.170)

We propose to amend § 155.170(a)(2) to provide that benefits covered in a State's EHB-benchmark plan would not be considered in addition to EHB and thus would not be subject to defrayal by the State beginning with PY 2025. We believe that this revision would have a mixed effect on the cost to the Federal government. In States that update EHB-benchmark plans to include benefits, the costs of which are currently being defrayed, the percentage of premium attributable to coverage of EHB for purpose of calculating APTC may increase just as if the State updated its EHB-benchmark plan through the process set forth in § 156.111 and any increase remains subject to the typicality requirement in that section. In a State that enacts a mandate for a benefit that is currently covered in its EHB-benchmark plan, there will be no effect on Federal government expense as the benefit was already included in the percentage of premium attributable to coverage of EHB for purpose of calculating APTC since it was EHB. States may choose to evaluate the overlap between mandates and EHB benchmark-plans for benefits they are currently defraying the costs of but are not required to. Issuers may have to make modifications to their plan designs and plan filings to reflect any possible changes in designation of benefits as EHB because of this

proposal, if finalized, in the regular course of updating those annual materials. We do not anticipate an additional burden on States or issuers associated with this proposal.

We seek comment on these impacts and assumptions.

10. Consumer Assistance Tools and Programs of an Exchange (45 CFR 155.205)

As discussed in the preamble, we propose additional minimum standards for Exchange call center operations, such that Exchanges, other than SBE-FPs and SHOP Exchanges that do not provide for enrollment in SHOP coverage through an online SHOP enrollment platform, meet the following additional requirements: their call center must provide consumers with access to a live call center representative during the Exchanges' published hours of operation and their live call center representatives must be able to assist consumers with submitting their application for QHP coverage.

We believe this proposal would support the intent of sections 1311(d)(4)(B) and 1413(b)(1)(A)(ii) of the ACA by codifying the requirement that a consumer must be able to obtain live call center support with submitting an application for QHP coverage during reliable, published hours of operation. It is our presumption that speaking to a live representative would better aid in troubleshooting consumer QHP application issues, provide a real time opportunity for a live representative to explain QHP application terminology to a consumer, provide for a live representative to ensure the consumer provides the most correct information to the QHP application (thereby alleviating unnecessary follow-up), and provide greater overall consumer satisfaction.

As stated in the preamble, we believe that all State Exchanges already meet these proposed minimum standards, and we know that the Exchanges on the Federal platform do. As such, we do not anticipate an additional burden associated with this proposal.

We seek comment on these impacts and assumptions.

11. Requirement for Centralized Exchange Eligibility and Enrollment Platform on the Exchange's Website (45 CFR 155.205(b) and 155.302(a)(1))

We propose to amend § 155.205(b)(4) to require that an Exchange operate a centralized eligibility and enrollment platform on the Exchange's website (or, for an SBE-FP, through the Federal eligibility and enrollment platform) such that the Exchange allows for the submission of the single, streamlined

application for enrollment in a QHP and insurance affordability programs by consumers, in accordance with § 155.405, through the Exchange's website and performs eligibility determinations for all consumers based on submissions of the single, streamlined application. Further, we propose to amend § 155.302(a)(1) to clarify that the Exchange, through the centralized eligibility and enrollment platform operated on the Exchange's website (or, for an SBE-FP, the Federal eligibility and enrollment platform) is the entity responsible for making all determinations regarding the eligibility for QHP coverage and insurance affordability programs regardless of whether an individual files an application for enrollment in a QHP on the Exchange's website, or on a website operated by an entity described under § 155.220, such as a web-broker defined at § 155.20, or a direct enrollment entity or QHP issuer described under § 155.221. This amendment to § 155.302(a)(1) would also clarify that only entities that an Exchange elects to contract with to operate its centralized eligibility and enrollment platform can perform this function on behalf of an Exchange and would prohibit Exchanges from solely relying on non-Exchange entities, including a web-broker (defined at § 155.20) or other entities under § 155.220 or § 155.221, from making such eligibility determinations on behalf of an Exchange.

We also propose to amend § 155.205(b)(5) to require that an Exchange operate a centralized eligibility and enrollment platform through the Exchange's website (or, for an SBE-FP, by relying on the Federal eligibility and enrollment platform) so that the Exchange (or, for an SBE-FP, the Federal eligibility and enrollment platform) meets the requirement under § 155.400(c) to maintain records of all effectuated enrollments in QHPs, including changes in effectuated QHP enrollments.

Since all Exchanges, including State Exchanges, SBE-FPs, and FFEs, currently provide access to a centralized eligibility and enrollment platform and process for consumers that they serve, and all Exchanges also currently perform all eligibility determinations through the operation of a centralized eligibility and enrollment platform on their websites, we believe the burden of this proposal on Exchanges and interested parties would be minimal.

We seek comment on the assumptions and estimated impacts of this proposal.

12. Adding and Amending Language To Ensure Web-Brokers Operating in State Exchanges Meet Certain Standards Applicable in the FFEs and SBE-FPs (45 CFR 155.220)

We propose to amend § 155.220 to apply to web-brokers operating in State Exchanges, and consequently in State Exchanges, for both the State Exchange's Individual Exchange and SHOP, certain existing Federal standards governing use of web-brokers' non-Exchange websites to assist consumers with enrolling in QHPs and applying for APTC/CSRs in a manner that constitutes enrollment through an Exchange. As discussed in the preamble of this proposed rule, the proposed regulatory amendments would require these State Exchanges to draft policy, update standards, and potentially hire more staff to perform functions not currently being performed by the State Exchange as a result of applying the identified § 155.220 standards to web-brokers participating in State Exchanges. These proposed changes would also require web-brokers hosting non-Exchange websites in these State Exchanges to perform web-development and oversight to ensure compliance with the Federal minimum standards this rulemaking proposes to extend to these web-brokers. These proposed changes would also require web-brokers in State Exchanges who want to assist consumers with enrolling in QHPs and applying for APTC and CSRs to display standardized disclaimers, display QHP comparative information, display information pertaining to a consumer's eligibility for APTC or CSRs, to participate in operational readiness reviews and potentially maintain relevant documentation, and to extend downstream agent and broker requirements to web-brokers operating in State Exchanges. Although these proposals allow States certain flexibility for State Exchanges with regards to establishing procedures and requirements for website displays (including flexibility to add State-specific information to required disclaimers and for the State Exchange to determine how consumer educational information is displayed), downstream agent and broker access to and use of web-broker non-Exchange websites, and demonstration of operational readiness, we expect the impact and costs to be reasonably based on the impacts seen on the FFEs and SBE-FPs.

Although there would be some additional burden for web-brokers operating in State Exchanges, amounting to approximately \$48,586.60 per web-broker as discussed in the

information collection requirements section of this proposed rule, we anticipate that some of these State Exchanges may utilize web-broker entities already participating in the FFEs and SBE-FPs, which would help provide administrative savings related to the approval process if the State Exchange does not impose additional State-specific requirements beyond the HHS minimum standards. We encourage State Exchanges to leverage web-broker operational readiness demonstrated for the FFEs and SBE-FPs when possible. Additionally, we expect those web-brokers already participating in the FFEs and SBE-FPs to be able to leverage their existing web-development work with additional burden and costs only required for tailoring the website display, operational readiness, and downstream agent and broker access to any State-specific requirements adopted by the applicable State Exchange. Additionally, as described in the accompanying ICR discussion, we anticipate an impact on State governments totaling \$2,346,128 for 5 States to opt to host a web-broker program for their State Exchange.

We estimate a total cumulative burden of \$1,071,474.40 associated with this proposal for an estimated 20 web-brokers operating across the 5 State Exchanges. We anticipate these proposed changes to extend certain HHS minimum standards governing web-broker participation in FFEs and SBE-FPs to also apply to State Exchanges and their web-brokers would be beneficial to consumers by establishing uniform, baseline requirements for agent, broker, and web-broker participation across all Exchange types. These proposed changes would allow State Exchanges to leverage the framework that has already been established and currently applies to FFEs and SBE-FPs, thereby decreasing the burden to these State Exchanges to establish such a program, while providing some flexibility for these State Exchanges to tailor the new requirements to include State-specific content (such as the updating disclaimer language to refer to the State Exchange website rather than the *HealthCare.gov* website). Additionally, these proposed changes would establish administrative and operational consistency throughout the Exchanges, which is beneficial to agents, brokers, and web-brokers by allowing them to expand their business into States with State Exchanges in a more streamlined fashion, as well as to Exchanges and their consumers.

We seek comment on these estimated impacts and assumptions.

13. Ability of States To Permit Agents and Brokers and Web-Brokers To Assist Qualified Individuals, Qualified Employers, or Qualified Employees Enrolling in QHPs (45 CFR 155.220(h))

As discussed in the preamble to this proposed rule, we propose to revise and add language to § 155.220(h) to specify that the CMS Administrator, a principal officer, would review agent, broker, and web-broker requests for reconsideration of decisions to terminate their Exchange agreement(s) under § 155.220(h)(3). We propose that the CMS Administrator's determination would be final and binding. We believe this proposal would positively impact agents, brokers, and web-brokers by ensuring entities who utilize the FFE and SBE-FPs know, through increased transparency, who would be responsible for handling these reconsideration decisions under § 155.220(h)(3).

14. Establishing Requirements for DE Entities Mandating *HealthCare.gov* Changes Be Reflected on DE Entity Non-Exchange Websites Within a Notice Period Set by HHS (45 CFR 155.221(b))

We propose to amend § 155.221 to require that DE Entity non-Exchange websites implement and prominently display website changes in manner consistent with that adopted by HHS for *HealthCare.gov* by implementing standards defined by HHS within a notice period set by HHS, unless HHS approves a deviation. We also propose to require State Exchanges implement a similar process to require display changes on State Exchange websites be reflected on the websites of their DE entities, with the procedures for defining standards defined by the State Exchange.

As discussed in the preamble of this proposed rule, this proposal would require web-brokers and QHP issuers participating in DE to update their non-Exchange websites to incorporate website display changes that mirror those adopted by HHS for *HealthCare.gov* by conforming with standards defined by HHS. This proposal would provide DE entities flexibility in their user interface graphic design, provided that their design complies with the standards defined by HHS. This proposal would also allow DE entities to submit a deviation request for review and approval by HHS if they would like to implement a display that does not meet those standards. We anticipate an average of three or fewer required display changes annually, with the majority of changes being simpler website display changes that are relatively easy to implement.

Furthermore, HHS would provide examples and associated disclaimer text with the release of any required website display changes pursuant to this proposal, and therefore we expect the overall impact of these simple website display changes to be minimal. As described in the information collection requirements section of this proposed rule, we estimate a total cumulative annual burden of \$240,120 associated with the requirement for DE entity non-Exchange websites to incorporate website display changes that mirror those adopted by HHS for *HealthCare.gov* and a burden of \$5,171 associated with completing and submitting a request to deviate from the *HealthCare.gov* display.

As discussed in the preamble for this rule, we continue to support DE entities' use of innovative decision-support tools and user interface designs, and this proposal is not intended to prohibit the implementation of display features beyond the baseline provided by *HealthCare.gov*. As such, there may be occasions where some web-brokers and QHP issuers participating in direct enrollment may have implemented the standards of the desired display before the change was made on *HealthCare.gov*. In these instances where the DE entity non-Exchange website is already meeting the minimum standards associated with the website display changes communicated by HHS pursuant to this proposal, the entity would not have to make any further website updates. We also anticipate approximately one more complex display change per plan year, potentially involving updates to backend UI algorithms and display methodologies. Although more complex display changes may represent additional burden for DE entities, we would ease the burden by providing them with examples of *HealthCare.gov*'s display, technical implementation guidance (including Marketplace API (MAPI) or Public Use Files (PUF) data integration guidance), and technical assistance as needed. We anticipate that giving examples of a user interface design that meets HHS' standards will ease the burden of implementation as compared to solely providing HHS' standards and relying on DE entities to determine how to configure their websites to meet those standards.

The proposed new § 155.221(j) would extend this new proposed DE entity non-Exchange website display requirement to require State Exchanges to require their DE entities to implement and prominently display changes adopted for display on the State Exchanges' websites on their non-

Exchange websites for purposes of assisting consumers with DE in QHPs offered through the Exchange in a manner that constitutes enrollment through the Exchange. This would require State Exchanges to establish requirements for DE entities operating in State Exchanges to reflect changes to the State Exchange website on their DE entity non-Exchange websites. This change would also require State Exchanges to establish processes for communicating and defining standards and for setting advance notice periods. We also encourage State Exchanges to consider the same factors (that is, complexity of the change and the urgency with which the change must be reflected on the DE entity's non-Exchange website) when setting advance notice periods. Similarly, we encourage State Exchanges to provide DE entities operating in their States examples of the State Exchange display, and technical assistance, including technical implementation guidance, to ease the burden of required display changes.

We anticipate this proposal would benefit consumers by codifying and expanding our existing EDE HHS-initiated change request process to apply to all DE entities and ensuring that all Exchange consumers receive consistent, clear, and accurate information in a timely fashion as they navigate the QHP selection and enrollment process. We are further of the view that this proposal would mitigate the risk that consumers receive different, and possibly confusing or misleading, information based on the platform they choose to utilize when enrolling in or applying for coverage. This proposal would help ensure consumers using the DE pathways benefit from policies we introduce to improve the *HealthCare.gov* website display, and in State Exchanges the State Exchange website, by enhancing the consumer experience, increasing consumer understanding, and simplifying the plan selection process.

As discussed in the ICR for this proposal, the cumulative cost estimate as a result of this proposal would be approximately \$1,226,453 for 100 entities operating in the Exchanges (including State Exchanges under new proposed paragraph § 155.221(j)(3)) in the 2025 benefit year. Entities that submit a request to deviate from the display approach adopted by *HealthCare.gov*, or in State Exchanges, the State Exchange website, would incur a cumulative cost of approximately \$31,023 annually.

We seek comment on the estimated impacts associated with this proposal.

15. Adding and Amending Language To Ensure DE Entities Operating in State Exchanges Meet Certain Standards Applicable in the FFEs and SBE-FPs (45 CFR 155.221)

We propose to amend § 155.221 to apply to DE entities operating in State Exchanges, and consequently State Exchanges that utilize DE entities, certain existing Federal standards regarding DE entities assisting consumers with enrolling in QHPs and applying for APTC/CSRs, both for the State Exchange's Individual Exchange and SHOP.

As discussed earlier in this proposed rule, the proposed regulatory amendments would require these State Exchanges to draft policy, update standards, and potentially hire additional staff to perform functions not currently being performed by the State Exchange because of applying certain § 155.221 standards to State. The proposal would also require DE entities participating in DE programs in State Exchanges to perform web-development to ensure compliance with the Federal minimum standards this rulemaking proposes to extend to these DE entities, along with any State-specific requirements that may be adopted under the proposed flexibility provided to State Exchanges in this rulemaking.

Although there will be additional burden for DE entities operating in State Exchanges, amounting to approximately \$138,447 per DE entity, as discussed in the information collection requirements section of this proposed rule, we anticipate that some of these State Exchanges may utilize DE entities already participating in the FFEs and SBE-FPs, which would help provide administrative savings related to the approval process under § 155.221(b)(4) if the State does not impose additional State-specific requirements beyond the Federal standards. We encourage State Exchanges to leverage DE operational readiness demonstrated for the FFEs and SBE-FPs when possible.

Additionally, we expect those DE entities already participating in the FFEs and SBE-FPs to be able to leverage their existing web-development work with additional burden only required for tailoring the website display to any State-specific requirements adopted by the State Exchange (for example, updating website disclaimers to reference the State Exchange website rather than the *HealthCare.gov* website). Although these proposals allow States certain flexibility for State Exchanges with regards to establishing procedures and requirements for website displays and demonstration of operational

readiness, we expect the impact and costs to be reasonably based on the impacts seen on the FFEs and SBE-FPs. As described in the information collection requirements section, we anticipate a total cumulative burden of \$6,762,281 for DE entities in State Exchanges to comply with this proposal to ensure DE entities operating in these State Exchanges are meeting certain requirements applicable in the FFEs and SBE-FPs. Additionally, we anticipate this proposal would have an impact on State governments totaling \$3,353,467.90 for 5 States to opt to host a DE program for their State Exchange.

We anticipate that these proposed changes to extend certain minimum Federal standards governing DE entity participation in FFEs and SBE-FPs to also apply to State Exchanges would benefit consumers by establishing uniform, baseline requirements for DE entity participation across all Exchange types. These proposed changes would allow State Exchanges to leverage the framework that has already been established and currently applies to FFEs and SBE-FPs, thereby decreasing the burden to these State Exchanges to establish such a program, while providing some flexibility for these State Exchanges to tailor the applicable standards to include State-specific content. Additionally, this proposal would establish administrative and operational consistency throughout the Exchanges, which benefits DE entities by allowing them to expand their business into States with State Exchanges with minimal costs and burdens. Consumers would also benefit by the expansion of entities and enrollment pathways available to assist with enrolling in health insurance coverage.

We seek comment on these estimated impacts and assumptions.

16. Failure To Reconcile (FTR) Process (45 CFR 155.305(f)(4))

We are proposing in connection with the FTR process described in § 155.305(f)(4) that Exchanges would be required to send notices to tax filers for the first year in which they failed to reconcile APTC as an initial warning to inform and educate tax filers that they need to file and reconcile, or risk being determined ineligible for APTC if they fail to file and reconcile for a second consecutive year.

Under this policy, Exchanges on the Federal platform would continue to send notices to tax filers for the year in which they have failed to reconcile APTC as an initial warning to inform and educate tax filers that they need to file and reconcile, or risk being

determined ineligible for APTC if they fail to file and reconcile for a second consecutive tax year. Our proposal to codify this practice and require it of all Exchanges, including State Exchanges, would ensure that tax filers who have been determined to have FTR status for 1 year are adequately educated on the file and reconcile requirement, and have ample opportunity to address the issue and file and reconcile their APTC before they are determined to have FTR status for 2 consecutive years. We request comment on how best to conduct outreach to tax filers who need more intensive assistance in understanding FTR status, including directing them to resources such as Navigator or Assistors that could help explain what they need to do to reconcile their APTC.

This proposal would support compliance with the filing and reconciling requirement under 36B(f) of the Code and its implementing regulations at 26 CFR 1.36B–4(a)(1)(i) and (a)(1)(ii)(A), minimize the potential for APTC recipients to incur large tax liabilities over time, and support eligible enrollees' continuous enrollment in Exchange coverage with APTC by avoiding situations where enrollees become uninsured when their APTC is terminated. Additionally, this proposal would better align State Exchanges' failure to reconcile processes with that of the Exchanges on the Federal platform.

We are aware of seven States that will operate their own State Exchange for PY 2025 and have not yet fully implemented the infrastructure to run FTR operations for plan years through 2024 due to the flexibility the Exchanges were given to temporarily pause FTR operations due to the COVID–19 PHE. We are seeking comment on the estimated one-time costs for these States to fully implement the functionality and infrastructure to conduct FTR operations, and the estimated annual costs to maintain FTR operations.

17. Verification Process Related to Eligibility for Enrollment in a QHP Through the Exchange (45 CFR 155.315(e))

We believe that the proposal to revise § 155.315(e) so that Exchanges can accept incarceration attestations without further verification and verify incarceration status using an HHS-approved data source only if they choose to, would minimize administrative costs and burdens for Exchanges. Flexibility in verifying incarceration status for Exchanges would result in significant cost savings through not creating and processing

incarceration DMIs. The current incarceration verification process resulted in a high number of DMIs, almost all of which are resolved in favor of the applicant and has been burdensome and costly for the Exchanges to implement. By revising the current incarceration verification process, this proposal would also eliminate undue burdens and barriers to care for applicants, particularly formerly incarcerated people, a population comprised of a significant number of people with disabilities.²⁸⁰ Many documents that can prove incarceration status cannot be obtained without an unexpired proof of identity document, and most cannot be obtained without submitting non-refundable payments. Incarceration may inhibit one's financial savings, and formerly incarcerated individuals are less likely to secure employment.²⁸¹ As discussed further in the information collection requirements section for this proposal, we anticipate a one-time cost to 11 State Exchanges of approximately \$23,770 to conduct analyses to determine whether to accept consumer attestation of incarceration status or use an alternative data source to verify incarceration status and to submit such request to HHS, and make associated changes to their eligibility systems and processes to implement the option they choose.

From PY 2018 to 2019, there were 110,802 incarceration DMIs generated. In PY 2019, nearly 38,000 out of 78,000 applicants submitted documents to attempt to resolve the incarceration DMI. Conducting an intensive incarceration verification check through the DMI process for each DMI caused HHS to incur additional costs totaling about \$0.57 million per year for verification of incarceration along with the PUPS annual maintenance and transaction fees. The additional costs associated with generating incarceration DMIs include the costs to inform applicants of their DMI through their eligibility determination notice, and to process the DMI and any documentation mailed by the applicants. State Exchanges have likely incurred similar costs. Of the 13 State Exchanges (operating in 12 States and the District of Columbia) with incarceration verification processes, eight conduct incarceration verifications similar to those conducted by the Exchanges on the Federal platform. We estimate that incarceration DMI processing costs

approximately \$9,561,000 annually across all eight of these State Exchanges. Of the 13 State Exchanges with incarceration verification processes, five State Exchanges connected to an individual State or local incarceration facility for verifications and fully process incarceration DMIs. These State Exchanges currently incur DMI processing costs, including costs associated with noticing the applicant of their DMIs and costs associated with DMI and appeals casework. Based on costs incurred by the Exchanges on the Federal platform to process DMIs, we estimate that incarceration DMI processing costs State Exchanges approximately \$7,171,000 annually across all 5 of these State Exchanges. Finally, 3 States are transitioning to State Exchanges. We anticipate their incarceration verification operations would cost approximately \$3,585,000 annually. In total, the costs to an anticipated 16 State Exchanges would be approximately \$20,317,000 annually if current policy continued.

By providing flexibility to Exchanges to verify incarceration status and allowing Exchanges to accept applicant attestations without verification, this proposal would enable HHS and Exchanges to avoid incurring the aforementioned costs associated with DMI creation and processing. Exchanges would not have to invest resources into building data transfer connections with an alternative incarceration verification data source and would not have to invest in providing DMI notices and support to applicants. Therefore, the cost savings to State Exchanges associated with this proposal would be approximately \$20,317,000.

As previously mentioned, conducting an intensive incarceration verification check through the DMI process for each DMI caused HHS to incur additional costs totaling approximately \$570,000 per year for verification of incarceration along with the PUPS annual maintenance and transaction fees. While overall, this proposal would reduce the burden and costs associated with incarceration verification operations and data sourcing, there would be a modest up-front cost of \$1,200,000 to HHS to modify the Federal platform's current incarceration verification processes for the purposes of verifying eligibility for QHP, and it would cost \$340,000 to update the Federal platform's system logic for HHS to stop sending incarceration verification requests to PUPS. Once these operations and noticing have stopped, no further costs should be incurred by HHS, or by Exchanges that opt to act on the flexibilities provided by this proposal.

²⁸⁰ Robert Apel, Gary Sweeten, *The Impact of Incarceration on Employment during the Transition to Adulthood*, Social Problems, Volume 57, Issue 3, 1 August 2010, Pages 448–479, <https://doi.org/10.1525/sp.2010.57.3.448>.

²⁸¹ *Id.*

In total, we anticipate a cost of \$1,540,000 to HHS because of this proposal. We reiterate that this cost would be overshadowed by the expected savings of approximately \$20,317,000 as a result of this proposal, if finalized.

We seek comment on these estimates.

18. Verification Process Related to Eligibility for Insurance Affordability Programs (45 CFR 155.320)

We are proposing to amend § 155.320(c) by adding a new requirement at paragraph (c)(1)(iii) to now require that State Exchanges pay in advance for their utilization of the CSI data provided by the VCI Hub service to verify a tax household's attested annual income and, or the current income of the Medicaid household for an application member due to our reinterpretation of State Exchange and State Medicaid and CHIP agency use of the Hub to access and use the income data provided by the optional VCI Hub service as a State Exchange or a State Medicaid and CHIP agency function. We propose that beginning on July 1, 2024, State Exchanges will be required to pay in advance for 100 percent of the costs of their utilization of the CSI data. We anticipate working with States to develop an estimate of their annual usage of the CSI data service. States that notify HHS that they want to continue to use the CSI data through the VCI Hub service must pay in advance to HHS for the total each respective State Exchange's anticipated annual utilization, specifically the anticipated number of successful transactions to the VCI Hub service that return usable CSI data, as defined by the criteria discussed above in preamble, multiplied by the fixed price. We are also planning that beginning on July 1, 2024, State Medicaid agencies and HHS will share in the costs with State Medicaid agencies being responsible for 25 percent of the cost of the utilization of the VCI Hub service and HHS responsible for the remaining 75 percent of the costs.

Because the price per transaction for CSI data is proprietary information, we are unable to provide those numbers, or the precise utilization rates for State Exchanges and State Medicaid agencies as this would be a direct conflict of the contract that HHS holds with the CSI contractor. However, based on HHS' own analysis, in fiscal year (FY) 2022, State Exchange utilization of the VCI Hub service led to costs of approximately \$26 million dollars. Similarly, in FY 2022, State Medicaid agency utilization of the VCI Hub service resulted in costs of

approximately \$77 million dollars. We also estimate that by having State Medicaid agencies pay for 25 percent of their transaction costs, the Federal government can save between \$32 to \$55 million per year. By having State Exchanges pay for 100 percent of their transaction costs, we estimate savings to the Federal government could be between \$39 and \$67 million per year; this cost estimate includes an assumption of one to two States transitioning to State Exchanges in future years. Assuming one to two new States transition to a State Exchange in the next 4 years, we applied a 5 percent increase to estimate the additional pings from these additional States. We estimate that taken together, this proposed policy would result in a transfer of between \$72 to \$122 million per year of costs from the Federal government to States beginning in 2024.

We are aware that six State Exchanges currently only have one connection for both their State Exchange and State Medicaid agency, which may pose a challenge when determining which VCI Hub transactions are attributable to the State Exchange, and which are attributed to the State Medicaid agency. We anticipate that one to three State Exchanges may elect to build a separate connection in order to accurately account for which VCI Hub transactions originate from their State Exchange and their State Medicaid agency and we estimate about \$1 to 3 million in one-time costs in 2024 to build the IT infrastructure for a second Hub connection, totaling about \$3 to 6 million in one-time costs for the one to three States that choose to make any changes with how they currently access the VCI Hub service. States that do not elect to build a separate connection would instead need to develop a cost allocation methodology to track VCI Hub transaction volume from their State Exchange and State Medicaid agency and communicate this to HHS so that HHS can invoice accurately and appropriately.

As noted in preamble, under this proposal, States would pay annually in advance for their anticipated utilization of the optional VCI Hub service. States would be required to reconcile with HHS on an annual basis the anticipated utilization of CSI data provided by the VCI Hub service with the actual utilization. In the alternative, HHS would invoice States on a monthly basis for their actual utilization of CSI data provided by the VCI Hub service after that utilization occurs. Because we are still exploring how HHS will invoice States and State Medicaid agencies for their respective utilization of the VCI

Hub Service depending on which invoicing methodology HHS ultimately finalizes, we believe that there may be some increased costs to the Federal Government, including contractor resources and administrative costs associated with collecting these funds from States. We estimate the ongoing administrative annual costs beginning in 2024 to be approximately \$1 million and cover operational expenses for maintaining systems and collections. We estimate an additional \$2.3 million as a one-time cost in 2024 to build the invoicing process/structure and setup operations. We note, however, that these estimates may be higher or lower, as they are dependent on whether HHS finalizes advanced billing as proposed or an alternative invoicing structure, such as monthly billing.

We seek comment on these estimates.

19. Eligibility Redetermination During a Benefit Year (45 CFR 155.330(d))

We propose to revise § 155.330(d) to require Exchanges to conduct periodic checks for deceased enrollees twice yearly and subsequently end deceased enrollees' QHP coverage beginning with the 2025 calendar year. Additionally, we propose to amend § 155.330(d)(3) to grant the Secretary the authority to temporarily suspend the PDM requirement during certain situations or circumstances that lead to the unavailability of data needed to conduct PDM.

Currently, § 155.330(d)(3) defines "periodically" only for PDM activities that identify enrollment in Medicare, Medicaid, CHIP, and BHP, meaning that Exchanges must conduct Medicare PDM, Medicaid or CHIP PDM, and BHP PDM twice a year. The current regulation does not specify the frequency by which PDM activities to identify deceased enrollees must occur. The 2019 Program Integrity Rule did not require Exchanges to perform PDM for death at least twice in a calendar year so that Exchanges could prioritize the implementation of the new requirement to conduct PDM for Medicare, Medicaid, CHIP and, if applicable, BHP eligibility or enrollment at least twice yearly. Periodic checks for deceased enrollees are a critical aspect to ensuring Exchange program integrity.

We propose to revise § 155.330(d) to require Exchanges to conduct periodic checks for deceased enrollees twice yearly and subsequently end deceased enrollees' QHP coverage beginning with the 2025 calendar year. This proposal would not only align with current policy and operations on the Exchanges on the Federal platform but would also prevent overpayment of QHP premiums

and accurately capture household QHP eligibility based on household size.

Based on internal data, we anticipate that it will cost the Federal Government approximately \$58,923 to conduct an additional check for deceased enrollees per year. In 2023, we conducted two rounds of Death PDM where the average number of expired households was 7,151; the average APTC amount per household was \$549 per month; and, at the time of the expiration activities, there was an average of 6.5 months left in the plan year. We calculate the APTC savings to be approximately \$25 million. Prior to implementing Death PDM in 2019, we looked at the number of consumers that were removed from coverage by the surviving family without the aid of Death PDM and close to 50 percent of the deceased consumers were removed from coverage. Thus, we estimate the net amount of APTC saved is estimated would be approximately \$12.5 million per year beginning in 2025.

State Exchanges that are not already conducting Death PDM with the proposed required frequency, or deemed in compliance with PDM requirements, would be required to engage in IT system development activity to communicate with these programs and act on enrollment data either in a new way, or in the same way more frequently if this proposal is finalized. Thus, there may be additional associated administrative cost for these State Exchanges to implement the proposed PDM requirement, if finalized. As discussed in the information collection requirements section of this proposed rule, for a State Exchange not already conducting death PDM at least twice a year, we estimate that it would cost approximately \$3,932 per State Exchange (a total of \$43,252 for all 11 State Exchanges currently not meeting the proposed requirement) to implement this proposed provision through their system. We assume that this cost would be incurred primarily in 2025 by State Exchanges. These costs would be incurred by the State Exchanges as they are required to be financially self-sustaining and do not receive Federal funding for their establishment or operations.

We seek comments in response to the burden estimates for this policy.

20. Incorporation of Catastrophic Coverage Into the Auto Re-Enrollment Hierarchy (45 CFR 155.335(j))

We propose to amend the regulations at § 155.335(j)(1) and (2) to require Exchanges to re-enroll enrollees in catastrophic coverage as defined in section 1302(e) of the ACA into QHP

coverage for the coming plan year. We believe that some Exchanges already re-enroll these enrollees, and we generally do so in Exchanges on the Federal platform when issuers include a plan crosswalk information for catastrophic plans when they submit the information part of the annual QHP Certification process. However, explicitly incorporating catastrophic plan enrollees into the rules at § 155.335(j) would help ensure continuity of coverage in cases where the issuer does not offer the catastrophic plan for the subsequent plan year and these enrollees do not actively select a different QHP. We also propose to add new § 155.335(j)(5) to establish that an Exchange may not newly auto re-enroll an enrollee into catastrophic coverage who is currently enrolled in coverage of a metal level as defined in section 1302(d) of the ACA. We believe that Exchanges likely also adhere to this practice, but that all interested parties would benefit from clear regulation on this aspect of the re-enrollment process.

If this proposal is finalized, we would also update the FFE Enrollment Manual to incorporate catastrophic coverage into the re-enrollment hierarchy for alternate enrollments, which we use to implement the regulation to crosswalk enrollees whose current issuer will no longer offer plans available to them through the Exchange under § 155.335(j)(3).

The inclusion of additional criteria in the auto re-enrollment process may result in a small increase in costs and burden for issuers and Exchanges. However, burden in Exchanges on the Federal platform would be mitigated because we already encourage issuers to submit crosswalk options for catastrophic enrollees, including those who will lose eligibility for catastrophic coverage. We solicit comment on whether these proposals reflect current practices of State Exchanges that are not on the Federal platform. Finally, we believe this change would make it more likely that catastrophic coverage enrollees will be auto re-enrolled. This support may disproportionately benefit enrollees who are less likely to have the time or background knowledge to compare their coverage options for the coming plan year, such as those with limited health insurance literacy.

We seek comment on these impacts and assumptions.

21. Premium Payment Deadline Extensions (45 CFR 155.400(e)(2))

We anticipate that the proposal to amend § 155.400(e)(2) to codify that flexibility for issuers experiencing billing or enrollment problems due to

high volume or technical errors is not limited to extensions of the binder payment will benefit issuers. Because HHS has already provided enforcement discretion in the past to account for such situations, we do not anticipate that there would be any additional costs for HHS associated with this proposal, nor do we anticipate any costs to interested parties.

We seek comment on these impacts and assumptions.

22. Initial and Annual Open Enrollment Periods (45 CFR 155.410)

We propose amending § 155.410(e)(4)(ii) to revise parameters around the adoption of an alternative open enrollment period by a State Exchange not utilizing the Federal platform. We propose that for benefit years beginning on or after January 1, 2025, State Exchanges may extend the open enrollment period so that the open enrollment period begins on November 1 of the calendar year preceding the benefit year and ends no earlier than January 15 of the applicable benefit year.

We have previously observed that when open enrollment ends in December, certain consumers may be subjected to unexpected plan cost increases that they may not be notified about until January. This proposal would benefit consumers by reducing the number of consumers who may be subjected to such unexpected plan cost increases. This proposal would also ensure ample time for Navigators, certified application counselors, agents, and brokers to fully assist all interested consumers during open enrollment while also improving access to health coverage by giving consumers ample time to react to updated plan cost information and seek enrollment assistance, including consumers in underserved communities who face additional barriers to accessing health coverage. Finally, by reducing consumer confusion, increasing consumer access to assisters, and giving consumers more time to consider up-to-date plan cost information, this proposal could increase QHP enrollment, benefiting all interested parties, including consumers, Exchanges, issuers, and assisters.

All 18 State Exchanges except one already meet these proposed parameters, beginning their annual open enrollment periods on November 1 and concluding on or after January 15 of the benefit year, pursuant to current § 155.410(e)(4)(ii). Moreover, many continue open enrollment beyond January 15 of the benefit year. Since most State Exchanges already are aligned with the parameters described

in the new proposal, we anticipate that this proposal would have a de minimis impact and not impose significant additional burden overall.

We seek comment on this burden estimate and assumptions. We are particularly interested in comments regarding whether this proposal would impose a significant burden on outlying State Exchanges and interested parties (for instance, Navigators, assisters, issuers).

23. Special Enrollment Periods—Effective Dates of Coverage (45 CFR 155.420(b))

We propose amending § 155.420(b)(1) and (b)(3)(i) to align the effective dates of coverage after selecting a plan during certain special enrollment periods across all Exchanges, including State Exchanges, so that during a special enrollment period that follows the regular effective dates of coverage listed at § 155.420(b)(1), qualifying individuals or enrollees who select and enroll in a QHP receive coverage beginning the first day of the month after the consumer selects a QHP.

In the 2021 Payment Notice final rule (85 FR 29251) where this policy was finalized for Exchanges on the Federal platform, we noted that ensuring that consumers who select a plan during a special enrollment period provided using the regular effective dates at § 155.420(b)(1) receive coverage on the first day of the following month, rather than on the first day of the second month following plan selection, would result in several benefits, such as reducing consumer confusion and minimizing coverage gaps while also enhancing operational efficiency. In addition, we noted that the standardization of effective coverage dates for special enrollment periods provided using the regular effective dates at § 155.420(b)(1) would result in standardization for issuers due to more plans beginning in the same month, Exchanges, and consumers; the reduction of system errors and related casework, including reduced confusion among relevant consumer support staff; and simplified Exchange billing practices due to the expedited effective dates. We believe that State Exchanges, and the issuers and consumers in those States will also experience these benefits under the proposal to align the effective coverage dates across all Exchanges for special enrollment periods that use the regular effective dates of coverage at § 155.420(b)(1) (unless an earlier coverage effective date were selected pursuant to § 155.420(b)(3), which would reduce

potential burdens associated with this proposal.

Additionally, we maintain our expectation that issuers will not incur substantial new costs as a result of applying this policy across Exchanges since they routinely effectuate coverage on the first of the month following plan selection or earlier when permitted or required under applicable regulation. We expect that consumers in States which do not currently apply this policy will also benefit from a faster effectuation of coverage, as this will result in fewer coverage gaps for consumers transitioning between or newly enrolling in a health insurance plan.

We seek comment on these assumptions.

24. Special Enrollment Periods—Monthly Special Enrollment Period for APTC-Eligible Qualified Individuals With a Household Income At or Below 150 Percent of the Federal Poverty Level (45 CFR 155.420(d)(16))

We are proposing to amend § 155.420(d)(16) to revise the parameters around the availability of a special enrollment period (SEP) for APTC-eligible qualified individuals with a projected household income at or below 150 percent of the Federal Poverty Level (FPL), hereinafter referred to as the “150 percent FPL SEP.” Specifically, we are proposing to remove the limitation that this SEP be available only when the applicable taxpayer’s applicable tax percentage is set to zero, a circumstance provided for under section 9661 of the American Rescue Plan (ARP) and later under the Inflation Reduction Act (IRA).

The impact of this policy would be zero if enhanced subsidies under the IRA were continued beyond 2025. It is difficult to estimate, with confidence, the impacts of this policy on premiums, PTC payments, and enrollment if the enhanced subsidies are not continued, and we note that those impacts are likely to be quite different by State. However, under various scenarios, we estimate that if this proposed policy were to be finalized, national premiums in the individual market could increase by an average of 3 to 4 percent for plan year 2026 when the enhanced PTC provisions of the IRA are due to expire. We would expect that any average national impact would have a high variance between States that have expanded Medicaid coverage compared to States that have not, because States that have not expanded Medicaid coverage are likely to have more consumers with projected annual household income below 150 percent FPL applying for coverage through the

Exchange. Unknown factors making these parameters difficult to estimate include the utilization of this SEP by healthy and unhealthy enrollees, the impact to the average duration of coverage for enrollees, and additional policy changes between now and 2025. At an aggregate level, PTC outlays could increase nationally up to \$2 billion to \$3 billion beginning in 2026. The direction and magnitude of enrollment changes in the individual market is also highly uncertain.

We seek comment on these estimates, including on the premium impacts at the State level.

25. Termination of Exchange Enrollment or Coverage (45 CFR 155.430)

We anticipate that the proposal to permit enrollees in Exchanges on the Federal platform to retroactively terminate coverage back to the date in which they retroactively enroll in Medicare Part A or B would benefit enrollees by allowing them to avoid an overlap in coverage and paying premiums for coverage they do not need. We anticipate that there would be some minor costs for HHS associated with processing the additional requests for retroactive terminations of coverage allowed by this proposal. However, we do not have adequate data to estimate the number of requests for retroactive termination HHS is likely to receive, and so we cannot provide an estimate for these costs, nor for the amount of APTC that is likely to be returned to the government as a result of this proposal. In addition, we anticipate that there would be a minor financial impact to issuers associated with processing the additional retroactive termination requests allowed by this proposal, including reversing claims and refunding premium paid by the enrollee, but we likewise do not have adequate data to estimate these costs.

Finally, we also anticipate that there may be a financial impact to State Exchanges associated with implementing this proposal if the rule is finalized such that implementation is optional for State Exchanges or required for all Exchanges. However, we do not have access to the data necessary to estimate the costs to State Exchanges associated with implementing this proposal, nor do we have access to the data necessary to determine how long it would take State Exchanges to implement it.

We seek comment on these impacts and assumptions, as well as any additional data sources we could use to estimate the costs associated with this proposal.

26. Establishment of Exchange Network Adequacy Standards (45 CFR 155.1050)

Effective for plan years beginning on or after January 1, 2025, we propose to require that State Exchanges and SBE-FPs establish and impose quantitative time and distance QHP network adequacy standards that are at least as stringent as the FFEs' time and distance standards established for QHPs under § 156.230. We also propose that State Exchanges and SBE-FPs be required to conduct quantitative network adequacy reviews prior to certifying any plan as a QHP, consistent with the reviews conducted by the FFEs under § 156.230. We further propose to require State Exchanges and SBE-FPs to permit issuers that are unable to meet the specified network adequacy standards to participate in a justification process after submitting their initial network adequacy data to account for variances and potentially earn QHP certification. Finally, we propose to mandate that State Exchanges and SBE-FPs require all issuers seeking QHP certification to submit information to the State Exchange or SBE-FP about whether network providers offer telehealth services.

For purposes of the proposal to require State Exchanges and SBE-FPs to establish and impose quantitative time and distance network adequacy standards for QHPs that are at least as stringent as standards for QHPs participating on the FFEs under § 156.230, "as stringent as" means time and distance standards that use a specialty list that includes at least the same specialties as our provider specialty lists and time and distance parameters that are at least as short as our parameters. States would be permitted to implement network adequacy standards that are more stringent than those performed by the FFEs under § 156.230. In other words, States could use a specialty list that is broader than our specialty lists, but it must include all the provider specialties included in our lists. Similarly, the time and distance parameters could also be narrower than our parameters, meaning they could require shorter time and/or distances, but they cannot be less demanding than our time and distance parameters. Consistent with the standards for the FFEs, the State Exchanges and SBE-FPs' time and distance standards would be calculated at the county level and vary by county designation. State Exchanges and SBE-FPs would be required to use a county type designation method that is based upon the population size and density parameters of individual counties.

Under this proposal, the time and distance standards State Exchanges and SBE-FPs would establish and impose would apply to our provider specialty lists. To count towards meeting the time and distance standards, individual and facility providers in these lists would have to be appropriately licensed, accredited, or certified to provide services in their State, as applicable, and would need to have in-person services available.

We propose that State Exchanges and SBE-FPs be required to conduct quantitative network adequacy reviews prior to QHP certification, and that they conduct them consistent with network adequacy reviews conducted by the FFEs under § 156.230. When we refer to the review being consistent with the network adequacy reviews conducted by the FFEs under § 156.230, we propose that State Exchanges and SBE-FPs would be required to conduct, prior to QHP certification, quantitative network adequacy reviews to evaluate compliance with requirements under § 156.230(a)(1)(ii) and (iii), and (a)(2)(i)(A), while providing QHP certification applicants the flexibilities described under § 156.230(a)(2)(ii) and (a)(3) and (4). Under this proposal, State Exchanges and SBE-FPs would be prohibited from accepting an issuer's attestation as the only means for plan compliance with network adequacy standards. We further propose that State Exchanges and SBE-FPs would make available to SADP applicants the limited exception available to SADPs under § 156.230(a)(4), pursuant to which SADPs may not be required to meet FFE network adequacy standards under § 156.230(a)(4). This exception is not available to medical QHP issuers.

We acknowledge that State-specific challenges may necessitate exceptions, and so we propose to require State Exchanges and SBE-FPs to permit issuers that are unable to meet the specified standards to participate in a justification process after submitting their initial data to account for variances, consistent with the processes specified under § 156.230(a)(2)(ii) and (a)(3) and (4). The issuer would include this justification as part of its QHP application and describe how the plan's provider network provides an adequate level of service for enrollees and how the plan's provider network will be strengthened and brought closer to compliance with the network adequacy standards prior to the start of the plan year. The issuer would be required to provide information as requested by the State Exchange or SBE-FP to support this justification. State Exchanges and SBE-FPs would be required to review

the issuer's justification to determine whether making such health plan available through the Exchange is in the interests of qualified individuals in the State or States in which such Exchange operates as specified under § 156.230(a)(3). In making this determination, the factors State Exchanges and SBE-FPs could consider include whether the exception is reasonable based on circumstances such as the local availability of providers and variables reflected in local patterns of care. If the State Exchange or SBE-FP determines that making such health plan available through its Exchange is in the interests of qualified individuals in the State or States in which such Exchange operates, it could then certify the plan as a QHP.

We are aware that some States Exchanges employ robust, quantitative network adequacy standards that differ from those used by the FFEs, but still ensure that QHPs provide consumers with reasonable, timely access to practitioners and facilities to manage their health care needs, consistent with the ultimate aim of these proposals. In light of this, we propose a framework for granting exceptions to the requirements that State Exchanges and SBE-FPs are required to establish and impose network adequacy time and distance standards for QHPs that are at least as stringent as the standards applicable to QHPs in FFEs and conduct quantitative network adequacy reviews that are consistent with those carried out by the FFEs under § 156.230. HHS could grant State Exchanges and SBE-FPs an exception if it determines that the Exchange applies and enforces quantitative network adequacy standards that are different from the FFEs' but ensure reasonable access as defined under § 156.230. The exception would be available only to State Exchanges and SBE-FPs that conduct quantitative reviews of network adequacy prior to certifying plans as QHPs. Exchanges seeking to employ alternative quantitative network adequacy standards would be required to submit an exception request, in a form and manner specified by HHS, and to support their exception request with evidence-based data demonstrating that such standards ensure reasonable access as defined under § 156.230.

We further propose to require State Exchanges and SBE-FPs to require that all issuers seeking certification of plans to be offered as QHPs submit information to the respective State Exchanges or SBE-FPs about whether network providers offer telehealth services. This data would be for informational purposes; it would be

intended to help inform the future development of telehealth standards and would not be displayed to consumers. We note that this proposal is not intended to suggest that telehealth services would be counted in place of in-person service access for the purpose of meeting network adequacy standards for PY 2025. While we acknowledge the growing importance of telehealth, we want to ensure that telehealth services do not reduce the availability of in-person care. For this purpose, telehealth encompasses professional consultations, office visits, and office psychiatry services delivered through technology-based methods, including virtual check-ins, remote evaluation of pre-recorded patient data, and inter-professional internet consultations. Currently, for issuers in FFEs to comply with telehealth reporting standards, issuers must indicate whether each provider offers telehealth with the options 'Yes,' 'No,' or 'Requested information from the provider, awaiting their response.' We are proposing that State Exchanges and SBE-FPs also impose this same standard.

As discussed in the information collection requirements section of this proposed rule, we estimate that the total annual burden associated with State Exchanges and SBE-FPs establishing and imposing the proposed network adequacy standards, conducting the network adequacy reviews as proposed, collecting telehealth information from issuers seeking QHP certification, and submitting any exception to be up to 19,800 hours and to have a total cost of \$1,365,012 per year. This estimate includes State Exchanges and SBE-FPs developing the proposed standards, reviewing any issuer justification, and submitting any exception requests to HHS. We further estimate that the total annual burden associated with both medical QHP and SADP issuers in State Exchanges and SBE-FPs gathering and submitting the time and distance and telehealth data, including any justification, to the respective State Exchanges or SBE-FPs beginning in 2025 would be approximately \$114,992.

As discussed in the information collection requirements section of this proposed rule, the proposed requirement that State Exchanges and SBE-FPs collect telehealth data may increase related administrative costs for State Exchange and SBE-FP issuers that do not already possess these data, though many issuers already collect and submit this information for network adequacy submissions in other markets. While we anticipate that increased burden related to telehealth data collection would be minimal for many

State Exchange and SBE-FP issuers, the increased burden could ultimately lead to an increase in premiums for consumers. As noted previously, we believe that obtaining telehealth information and using it to inform future network adequacy standards is in the best interests of both QHP enrollees and QHP issuers. As such, we anticipate that the additional burden would be outweighed by the expected benefits.

We seek comment on the potential costs and benefits associated with this proposal.

27. FFE and SBE-FP User Fee Rates for the 2025 Benefit Year (45 CFR 156.50)

We propose an FFE user fee rate of 2.2 percent of monthly premiums for the 2025 benefit year, which is the same FFE user fee rate finalized in the 2024 Payment Notice (88 FR 25845 through 25847). We also propose an SBE-FP user fee rate of 1.8 percent for the 2025 benefit year, which is the same SBE-FP user fee rate finalized in the 2024 Payment Notice. Therefore, because this proposal would impose the same user fee rates as the 2024 Payment Notice, we do not anticipate that these proposed user fee rates would have any impact on premiums compared to the 2024 benefit year. We believe that maintaining the same user fee rates as in the 2024 Payment Notice (that is, the previous benefit year) will provide stability and certainty to issuers and enrollees.

We seek comment on these impact estimates and assumptions.

28. State Selection of EHB-Benchmark Plans for Plan Years Beginning on or After January 1, 2027 (45 CFR 156.111)

For plan years beginning on or after January 1, 2027, we propose to revise the standards for State selection of EHB-benchmark plans at § 156.111 to consolidate the options for States to change EHB-benchmark plans at § 156.111(a); revise the regulatory standard for States to comply with scope of benefit requirements at § 156.111(b)(2); and revise § 156.111(e)(3) to require States to submit a formulary drug list as part of their application to change EHB-benchmark plans only if the State is seeking to change their prescription drug EHB.

We understand that certain aspects of the current process to change EHB-benchmark plans under § 156.111 may impose unanticipated difficulty for and burden on States, and we have received feedback that this difficulty can have a chilling effect on States' ability to make more frequent or more substantial changes to their EHB-benchmark plans. We believe that, to the extent States take

advantage of the proposed changes to the EHB-benchmark plan standards, if finalized, States would experience an overall decrease in burden to develop new EHB-benchmark plans compared to if they were to do so under the existing requirements at § 156.111. We anticipate that these proposals would reduce the burden on States to perform additional actuarial analyses to comply with the typicality and generosity standards at § 156.111(b)(2)(i) and (ii), respectively. Instead of performing an indeterminate number of actuarial analyses to find a typical employer plan with an actuarial equivalent scope of benefits, a State may only need to perform two such actuarial analyses to identify the State's least generous typical employer plan and the State's most generous typical employer plan. Further, States would no longer need to perform an actuarial analysis to demonstrate compliance with the generosity standard at § 156.111, which we are proposing to remove as a requirement in this proposed rule. As a result, we estimate an overall decrease in burden to States utilizing this proposed provision to change their EHB-benchmark plan.

We also estimate a potential increase in burden to States and issuers to develop new policies and implement new plan designs, to the extent these proposed changes would result in more frequent or more substantial changes to EHB-benchmark plans by States. It is our aim that these proposals would allow States and issuers to offer more comprehensive and innovative benefit structures that benefit the consumer, including by addressing health equity concerns. However, we realize that this proposed policy would have varied impact on consumers depending on how a State chooses to implement these proposals. To the extent these proposed changes result in more frequent or more substantial changes to EHB-benchmark plans by States, consumers enrolled in individual and small group market plans would be impacted by changes to EHB in that their benefits may change, and in some cases, premiums could increase or decrease depending upon State implementation of the proposed policies. Additionally, a new EHB-benchmark plan selection may impact the amount of PTC and CSRs for enrollees in a State. For these consumers, subsidies would increase or decrease when compared to their State's current EHB-benchmark plan. PTC is available only for that portion of a plan's premium attributed to EHB, so to the extent that a State's EHB-benchmark plan leads to lower premiums for the second lowest cost silver plan, PTC

would be reduced, but not the percent of income a consumer with PTC is expected to contribute to their premium. This effect would represent a transfer from consumers who receive PTC to the Federal government. Individual and small group market enrollees who do not receive PTC would experience lower premiums for less comprehensive coverage that could result in more affordable coverage options but possibly higher out-of-pocket costs for the consumer. To the extent that a State's EHB-benchmark plan leads to higher premiums for the second lowest cost silver plan, we expect the opposite outcome to occur.

Consumers who have specific health needs may also be impacted by the proposed changes. In the individual and small group markets, depending on the selection made by the State in which the consumer lives, consumers with more comprehensive plans may gain coverage for certain services. In other States, again depending on State choices, consumers may no longer have coverage for some services, though we note that no State has sought to remove benefits from their EHB-benchmark plan to date under § 156.111.

Although we are uncertain as to how States might take advantage of these proposals, if finalized, and as States are not required to make any changes under this policy, we also believe the reduced burden might produce premium savings in the long-term, as States would have greater incentive to update their EHB-benchmark plans more frequently and more substantively. We believe that States with more regular and more substantive EHB-benchmark plan changes would better respond to public health priorities and would contribute to greater overall population health, which would improve the health of the State's risk pool over time and reduce plan premiums, increasing affordability of health insurance for consumers in the individual and small group markets in the State.

We stress that States would not be required to make any changes under this proposal; as already implemented at § 156.115(d)(1), if a State does not make an EHB-benchmark plan selection by the first Wednesday in May of the year that is 2 years before the effective date of the new EHB-benchmark plan, or its benchmark plan selection does not meet the requirements of this section and section 1302 of the ACA, the State's EHB-benchmark plan for the applicable plan year will be that State's EHB-benchmark plan applicable for the prior year.

As discussed in the ICR for this policy, we anticipate a total annual cost

estimate associated with this policy of approximately \$18,036.

We solicit comments on the impact of these proposals on the EHB-benchmark plan selection process and whether other impacts should be considered.

29. Provision of EHB (45 CFR 156.115)

We propose to remove the regulatory prohibition at § 156.115(d) on issuers from including routine non-pediatric dental services as an EHB.

Removing the prohibition on issuers from including routine non-pediatric dental services as an EHB would remove regulatory and coverage barriers to expanding access to adult dental benefits. This would allow States greater flexibility to add benefits to improve adult oral health and overall health outcomes, which are disproportionately low among marginalized communities such as people of color and people with low incomes. Therefore, this policy would promote health equity by addressing adult oral health disparities and improving the health outcomes of vulnerable populations.

Pursuant to section 2707(b) of the ACA, a group health plan must ensure that any annual cost sharing imposed under the plan does not exceed the limitations provided for under section 1302(c)(1) of the ACA. To the extent that a group health plan selects an EHB-benchmark plan that includes non-routine pediatric dental coverage as an EHB, such plan would need to ensure that any cost sharing for those services is limited in accordance with section 1302(c)(1) of the ACA.

We do not anticipate any immediate costs to the Federal government, States, issuers, or enrollees because of this proposed policy. This proposal would simply remove the prohibition on issuers from including routine non-pediatric dental services as an EHB; it would not automatically make any routine non-pediatric dental services an EHB. This policy would only have a premium impact to the extent that States choose to include routine non-pediatric dental services in their EHB-benchmark plans. It may also increase costs for issuers to expand their networks to cover these new required services, although issuers could contract with a dental vendor to administer the routine non-pediatric dental EHB if such a benefit is adopted by a State as an EHB. It should also be noted that the size of adult dental networks varies by State. Therefore, some States would be affected by the need to build a new network of dental providers (or contract with dental vendors) more than others. It is up to each State to consider the potential costs and network burden and

determine whether to add routine non-pediatric dental services as an EHB.

We solicit comment on the impact of this proposal to remove the regulatory prohibition on issuers from including routine non-pediatric dental services as an EHB and whether other impacts should be considered.

30. Prescription Drug Benefits (45 CFR 156.122)

At § 156.122(a)(3)(i), we propose to update P&T membership standards by adding a new proposed § 156.122(a)(3)(i)(E), which would require the P&T committee to include a consumer representative as part of its membership for plan years beginning on or after January 1, 2025. While there is no Federal requirement to provide compensation to P&T committee members, those plans or issuers that choose to compensate their P&T committee members for their service to the committee may incur a nominal fee when adding an additional member to the committee. Further, we estimate a potential increase in burden to States and issuers to develop criteria used to select a consumer representative for the P&T committee, to create or revise standard operating procedures for the committee, as well as for any additional training that may be required of the selectee because of the new membership standard. We believe that the impact of this burden would be most notable during the initial plan year that this policy, if finalized, goes into effect and should be minimal in future years. We solicit comments on the impact of this proposal to the P&T committee membership standards and whether other impacts should be considered.

We also propose to amend § 156.122 to codify the requirement for coverage of prescription drug benefits. Specifically, we propose to amend § 155.122 by adding a new § 156.122(f) to further clarify that, to the extent that a health plan covers drugs in excess of the benchmark, these drugs would be considered an EHB and are subject to requirements, including that cost sharing incurred for drugs must count towards the annual limitation on cost sharing and the restriction on annual and lifetime dollar limits, consistent with § 156.130. This policy would apply unless the coverage of the drug is mandated by State action and is in addition to EHB pursuant to § 155.170, in which case the drug would not be considered EHB. Given that this revision merely codifies our existing policy regarding the coverage of prescription drugs as EHB, we do not anticipate any additional burden on States or issuers.

We seek comment on these impact estimates and assumptions.

31. Standardized Plan Options (45 CFR 156.201)

We propose to update the standardized plan options for PY 2025 with minor changes to ensure these plans continue to have AVs within the permissible *de minimis* range for each metal level. We believe that maintaining a high degree of continuity in the approach to standardized plan options year over year minimizes the risk of disruption for interested parties, including issuers, agents, brokers, States, and enrollees. We believe that making major departures from the approach to standardized plan options set forth in the 2023 and 2024 Payment Notices could result in changes that may cause undue burden for interested parties. For example, if the standardized plan options we create vary significantly from year to year, those enrolled in these plans could experience unexpected financial harm if the cost sharing for services they rely upon differs substantially from the previous year. Ultimately, we believe consistency in standardized plan options is important to allow both issuers and enrollees to become accustomed to these plan designs.

Thus, like the approach taken in the 2023 and 2024 Payment Notices, we propose standardized plan options that would continue to resemble the most popular QHP offerings that millions of consumers are already enrolled in. As such, these proposed standardized plan options are based on updated PY 2023 cost sharing and enrollment data to ensure that these plans continue to reflect the most popular offerings in the Exchanges.

By proposing to maintain an approach to standardized plan options like that taken in the 2023 and 2024 Payment Notices, issuers would continue to be able to utilize many existing benefit packages, networks, and formularies, including those paired with standardized plan options for PY 2024. Also, issuers would continue to not be required to extend plan offerings beyond their existing service areas.

Furthermore, as discussed earlier in the preamble, we would continue to differentially display standardized plan options on *HealthCare.gov* per § 155.205(b)(1). Since we would continue to assume responsibility for differentially displaying standardized plan options on *HealthCare.gov*, FFE and SBE-FP issuers would continue to not be subject to this burden.

In addition, as noted in the preamble, we would continue enforcement of the

standardized plan option display requirements for approved web-brokers and QHP issuers using a direct enrollment pathway to facilitate enrollment through an FFE or SBE-FP—the Classic DE and EDE Pathways—at §§ 155.220(c)(3)(i)(H) and 156.265(b)(3)(iv), respectively. We believe that continuing the enforcement of these differential display requirements would not impose a significant burden on these entities or require major modification of their non-Exchange websites, especially since the bulk of this burden was previously imposed in the 2018 Payment Notice,²⁸² which finalized the standardized plan option differential display requirements, or during the PY 2023 open enrollment period, when enforcement of these requirements resumed.

Finally, since we would continue to allow approved web-brokers and QHP issuers to submit requests to deviate from the manner in which standardized plan options are differentially displayed on *HealthCare.gov*, the burden on these entities would continue to be minimal. We intend to continue providing access to information on standardized plan options to web-brokers through the Health Insurance Marketplace Public Use Files (PUFs) and QHP Landscape file to further minimize burden by ensuring that affected entities have timely access to accurate and helpful information on standardized plan option requirements, including those related to the differential display of these plans.

We seek comment on these impact estimates and assumptions.

32. Non-Standardized Plan Option Limits (45 CFR 156.202)

In this proposed rule, we propose an exceptions process at § 156.202 that would allow issuers to offer additional non-standardized plan options more than the limit of two per product network type, metal level, inclusion of dental and/or vision benefit coverage, and service area if particular requirements are met. We previously finalized this limit in the 2024 Payment Notice (88 FR 25855 through 25865).

Specifically, issuers would be permitted to offer more than two non-standardized plan options if these additional plans' cost sharing for benefits pertaining to the treatment of chronic and high-cost conditions (including benefits in the form of prescription drugs, if pertaining to the treatment of the condition(s)) is at least

25 percent lower, as applied without restriction in scope throughout the plan year, than the cost sharing for the same corresponding benefits in an issuer's other non-standardized plan option offerings in the same product network type, metal level, and service area. The reduction could not be limited to a part of the year, or an otherwise limited scope of benefits. Instead, issuers would be required to apply the reduced cost sharing for these benefits any time the covered item or service is furnished. For example, an issuer could not reduce cost sharing for the first three office visits or drug fills and then increase it for remaining visits or drug fills. Furthermore, issuers would be prohibited from conditioning reduced cost sharing for these benefits on a particular diagnosis. That is, although the benefit design would have reduced cost sharing to address one or more articulated conditions, the reduced cost sharing must be available to all enrolled in the plan who receive the service(s) covered by the benefit.

Under this proposal, no other plan design features (such as the inclusion of additional benefit coverage, different provider networks, different formularies, or reduced cost sharing for benefits provided through the telehealth modality) would be evaluated under this exceptions process, meaning no other differences in plan design features would allow issuers to be excepted from the limit to the number of non-standardized plan options offered per product network type, metal level, inclusion of dental and/or vision benefit coverage, and service area.

We do not anticipate that the exceptions process proposed in this rule would substantially impact the average weighted number of non-standardized plan options available to each consumer, the average weighted number of standardized plan options available to each consumer, the average weighted number of total plan options available to each consumer, the number of plan-county discontinuations, or the number of affected enrollees since we do not anticipate a substantial number of issuers would utilize this exceptions process to offer the aforementioned additional non-standardized plan options that would substantially benefit consumers with chronic and high-cost conditions. This is because we expect that most issuers would believe that the burden of creating and certifying additional plans intended to benefit a comparatively small population of consumers would outweigh the benefit of doing so. We also previously solicited comment on innovative plan designs, such as in the 2024 Payment Notice

²⁸² These differential display requirements were first effective and enforced beginning with PY 2018. See 81 FR 94117 through 94118, 94148.

proposed rule, but received only two examples of such plan designs.

Although we do not anticipate that a substantial number of issuers would utilize this exceptions process, we acknowledge that issuers that choose to do so would be impacted. Specifically, if issuers choose to utilize this exceptions process, they would be required to design additional non-standardized plan options and proceed through QHP certification for these plans, which would necessarily entail additional burden.

Furthermore, issuers would be required to submit a written justification in a form and manner and at a time prescribed by HHS that would: (1) identify the specific condition(s) for which cost sharing is reduced, (2) explain which benefits would have reduced annual enrollee cost sharing (as opposed to reduced cost sharing for a limited number of visits) for the treatment of the specified condition(s) by 25 percent or more relative to the cost sharing for the same corresponding benefits in an issuer's other non-standardized plan offerings in the same product network type, metal level, and service area, and (3) explain how the reduced cost sharing for these services pertain to clinically indicated guidelines for treatment of the specified chronic and high-cost condition(s). We estimate the burden of this would be approximately \$95,182 for an estimated 50 issuers annually, and we discuss this burden in further detail in the ICRs Regarding Non-Standardized Plan Option Limits (§ 156.202) section of the Collection of Information Requirements section of this proposed rule.

We also acknowledge that this exceptions process could impact consumers in a range of ways. Specifically, if we were to finalize this proposed exceptions process, and if issuers choose to utilize this exceptions process to offer additional non-standardized plan options, consumers with qualifying chronic and high-cost conditions would benefit from reduced cost sharing for benefits that pertain to the treatment of these conditions. We reiterate that, for purposes of this standard, chronic conditions are those that have an average duration of one year or more and require ongoing medical attention or limit activities of daily living, or both. We also reiterate that, for purposes of this standard, high-cost conditions are those that account for a disproportionately high portion of total Federal health expenditures. Reduced cost sharing for these benefits would reduce barriers to access to benefits important to consumers with these chronic and high-cost conditions,

which could play an important role in combatting health disparities and advancing health equity since disadvantaged populations²⁸³ are disproportionately affected by many of these conditions.²⁸⁴ In addition to enhancing health outcomes, this exceptions process could also reduce the risk of financial harm to individuals with chronic and high-cost conditions by reducing their cost sharing obligations for treatment for those conditions.

We do not have sufficient data to further estimate the costs associated with these proposed changes. As such, we seek comment from interested parties regarding cost estimates associated with this proposal and data sources that may be used to determine those estimates.

33. CO–OP Loan Terms (45 CFR 156.520)

In this rule, we propose to revise § 156.520(f) to provide a clear mechanism by which an existing CO–OP may request termination of its loan agreement with CMS to enable it to pursue new, innovative business plans that are otherwise not compatible with CO–OP requirements, but which CMS believes would be in the best interest of affected consumers. Of the 23 CO–OP loan agreements CMS successfully executed with qualified borrowers in 2012, only 3 remain in operation as active insurance companies offering QHPs. The others have been placed in receivership by State regulators, or otherwise gone out of business due to the borrower's inability to establish a viable CO–OP that is financially stable and on course to ultimately repay the loans. As discussed in section III.E.8 of this preamble, CO–OPs operate under governance and product limitations that can present significant obstacles to new business opportunities. To provide a means to overcome these limitations, under the proposed revisions to § 156.520(f), we would be able to consider proposals initiated by a CO–OP to terminate its loan agreement with us if we believe the proposal would benefit consumers by enhancing consumer access to quality, affordable, member-focused, non-profit health care options in affected markets. Examples of such proposals that may be deemed

²⁸³ Disadvantaged populations are groups of persons that experience a higher risk of poverty, social exclusion, discrimination, and violence than the general population, including, but not limited to, ethnic minorities, migrants, people with disabilities, isolated elderly people, and children.

²⁸⁴ Waters, H., & Graf, M. (2018). The Cost of Chronic Disease in the U.S. Milken Institute. https://milkeninstitute.org/sites/default/files/reports-pdf/ChronicDiseases-HighRes-FINAL_2.pdf.

innovative and in the interests of consumers would be plans that appear well-calculated to lead directly to marketing non-profit, member-focused health plans in new regions of a State, to offer health plans on a Statewide basis for the first time, to expand operations into new States, or enhance consumer access to new non-profit products that are not qualified health plans, in particular when such plans are likely to favorably impact traditionally underserved communities. These examples are illustrative, however, not exclusive.

This regulatory proposal also contemplates plans that involve non-profit enterprises, and that reflect a strong consumer focus. A strong consumer focus would generally consist of an enterprise that focuses informational or financial resources, or plans to focus informational or financial resources, on member-oriented programs such as health education, consumer education, or forms of direct or indirect health-related financial assistance. We recognize that significant coordination with State regulators would be essential to implementing any plans to act on the proposed regulatory changes, if finalized.

Given that only three CO–OPs remain in business operating with small portfolios across five States, we do not believe there would be a significant economic impact because of this proposal for at least several years, if ever. We seek comment on these impact estimates and assumptions.

34. Conforming Amendment to Netting Regulation To Include Federal IDR Administrative Fees (45 CFR 156.1215)

We propose to amend § 156.1215(b) and (c) to align with the policies and regulations proposed in the Federal Independent Dispute Resolution Operations proposed rule (88 FR 75744). If finalized, these amendments would provide that administrative fees for utilizing the No Surprises Act Federal IDR process for health insurance issuers that participate in financial programs under the ACA would be subject to netting as part of HHS' integrated monthly payment and collections cycle.

To implement this policy, we propose to amend § 156.1215(b) to allow HHS to net payments owed to issuers and their affiliates operating under the same TIN against amounts due to the Federal government from the issuers and their affiliates operating under the same TIN for APTC, advance payments of and reconciliation of CSRs, payment of FFE user fees, payment of SBE–FP user fees, HHS risk adjustment, reinsurance, and risk corridors payments and charges,

and administrative fees from these issuers and their affiliates for utilizing the Federal IDR process in accordance with § 149.510(d)(2). We also propose to amend § 156.1215(c) to provide that any amount owed to the Federal government by an issuer and its affiliates for unpaid administrative fees due to the Federal government from these issuers and their affiliates for utilizing the Federal IDR process after netting under proposed § 156.1215(b) would be the basis for calculating a debt owed to the Federal government.

We do not believe that the proposed amendments would impose substantial additional costs to HHS beyond the costs previously estimated in the Federal Independent Dispute Resolution Process proposed rule.²⁸⁵ Furthermore, this proposal would only apply to those issuers and their affiliates operating under the same TIN that participate in the financial programs under the ACA. Since the provisions of the Federal IDR process apply more broadly to include issuers and their affiliates that do not participate in the financial programs under the ACA currently specified in the list of programs for which netting is permitted,²⁸⁶ we believe that only a small proportion of issuers that utilize the Federal IDR process would be subject to netting under this proposal.

Therefore, we anticipate that this proposal would streamline our payments and collections processes and limit the administrative burden for operating our programs.

We seek comment on these impact estimates and assumptions.

35. Regulatory Review Cost Estimation

If regulations impose administrative costs on private entities, such as the time needed to read and interpret this proposed rule, we should estimate the cost associated with regulatory review. Due to the uncertainty involved with accurately quantifying the number of entities that will review the rule, we assume that the total number of unique commenters on last year's proposed rule (286) will be the number of reviewers of this proposed rule. We acknowledge that this assumption may understate or overstate the costs of reviewing this rule. It is possible that not all commenters reviewed last year's rule in detail, and it is also possible that some reviewers chose not to comment on the proposed rule. For these reasons, we believe that the number of past

commenters would be a fair estimate of the number of reviewers of this rule. We welcome any comments on the approach in estimating the number of entities which will review this proposed rule.

We also recognize that different types of entities are in many cases affected by mutually exclusive sections of this proposed rule, and therefore, for the purposes of our estimate we assume that each reviewer reads approximately 50 percent of the rule. We seek comments on this assumption.

Using the wage information from the BLS for medical and health service managers (Code 11–9111), we estimate that the cost of reviewing this rule is \$100.80 per hour, including overhead and fringe benefits.²⁸⁷ Assuming an average reading speed of 250 words per minute, we estimate that it would take approximately 4.75 hours for the staff to review half of this proposed rule. For each entity that reviews the rule, the estimated cost is \$478.80 (4.75 hours × \$100.80 per hour). Therefore, we estimate that the total cost of reviewing this regulation is approximately \$136,937 (\$478.80 per reviewer × 286 reviewers).

D. Regulatory Alternatives Considered

For the HHS-operated risk adjustment program (§ 153.320), we propose to recalibrate the CSR adjustment factors for AI/AN zero cost sharing and limited cost sharing CSR plan variant enrollees for the 2025 benefit year, and we propose to retain the proposed AI/AN CSR adjustment factors for future benefit years unless changed through notice-and-comment rulemaking. We also propose to maintain the current CSR adjustment factors for silver plan variant enrollees (70 percent, 73 percent, 87 percent, and 94 percent AV plan variants)²⁸⁸ for the 2025 benefit year and beyond, unless changed through notice-and-comment rulemaking. As an alternative, we considered not proposing any changes to the CSR adjustment factors used in the State payment transfer formula. However, after continuing to conduct analyses on more recently available enrollee-level EDGE data, we found the underprediction of plan liability in the State payment transfer formula for AI/AN zero cost sharing and limited cost sharing CSR plan variant enrollees continued. We also considered recalibrating all the silver CSR adjustment factors. However, we are not

proposing any changes to those factors at this time, because we continue to find that the current silver CSR adjustment factors (70 percent, 73 percent, 87 percent, and 94 percent plan variants) are reasonably accurately predicted given the offsets, described above, that continue to occur for these enrollees.

As an alternative to our proposed amendments to § 155.315(e), we considered using an electronic data source other than PUPS to verify applicant incarceration status. However, we estimate that sourcing an alternative national incarceration verification data source would be a significant expense to HHS, costing the agency approximately \$35 million annually. Additionally, these other data sources are currently not sufficiently comprehensive to meet the needs of the Exchanges using the Federal eligibility and enrollment platform and therefore may not provide Exchanges with accurate results on a consistent basis. Thus, the alternative data source must be current, accurate, and minimize burden and costs to administration.

About the proposed changes to § 155.320(c), we considered taking no action to add new language in paragraph (c)(1)(iii) that State Exchanges and State Medicaid agencies must pay in advance for their use of the VCI Hub service to verify income. However, we determined that this proposed reinterpretation and proposed policy change is appropriate given our better understanding of how the VCI Hub service is used by State Exchanges and State Medicaid agencies to verify eligibility for QHP coverage or other insurance affordability programs. We also considered requiring State Medicaid agencies and State Exchanges to obtain their own contracts to administer their CSI data usage; however, we had concerns that these services cannot be procured reasonably and expeditiously, which would undermine the system we have implemented under section 1413 of the ACA. We also believe that there may be benefits to the State Medicaid agencies and State Exchanges that prefer to use the CSI data accessible through the VCI Hub service in their States. Therefore, we propose to retain optional access to the VCI Hub service on behalf of State Medicaid agencies and State Exchanges that prefer to continue to use this service and are willing to pay for their CSI data usage in advance. Under this proposal, State Medicaid agencies and State Exchanges can choose to discontinue their use of the CSI data accessible through the VCI Hub service. As described in the preamble of this rulemaking, we are also seeking comment on an alternative approach

²⁸⁵ 88 FR 75814 through 75815.

²⁸⁶ See 86 FR at 55982 (explaining that the No Surprises Act applies to group health plans and health insurance issuers offering group or individual health insurance coverage in the Code, ERISA, and the PHS Act).

²⁸⁷ https://www.bls.gov/oes/current/oes_nat.htm.

²⁸⁸ See 83 FR 16930 at 16953; 84 FR 17478 through 17479; 85 FR 29190; 86 FR 24181; 87 FR 27235 through 27236; and 88 FR 25772 through 25774.

that we could finalize that would have HHS invoice States on a monthly basis for their actual utilization of CSI data provided by the VCI Hub service after that utilization occurs.

About amending 155.330(d)(2), we have considered maintaining the status quo for continuing the PDM requirements under § 155.330(d)(1)(i) and (d)(ii) but note that it may be difficult or infeasible to operationalize existing processes and operations during certain emergency situations. Allowing consumers to go uninsured during a national emergency, such as a public health emergency like the COVID-19 public health emergency, will not improve the national health and well-being of all consumers. We found it to be least burdensome for Exchanges to implement as a successful pause of PDM operations occurred during the 2020 pandemic.

We considered only updating sub-regulatory guidance to incorporate catastrophic coverage into the auto re-enrollment hierarchy, for example, through the annual draft and final Letters to Issuers. However, we believe that instead incorporating catastrophic coverage into the auto re-enrollment hierarchy in regulation at § 155.335(j) creates stronger authority for Exchanges to auto re-enroll catastrophic enrollees and provides better transparency for our auto re-enrollment operations in the Exchanges on the Federal platform.

We considered taking no action regarding the proposal to amend § 155.400(e)(2) to codify that the flexibility for issuers experiencing billing or enrollment problems due to high volume or technical errors is not limited to extensions of the binder payment. However, we believe it is important to clarify for interested parties that HHS may provide enforcement discretion for other premium payment requirements.

We considered taking no action related to amending § 155.420(d)(16), to revise the parameters around the availability of a SEP that grants APTC-eligible qualified individuals with a projected household income at or below 150 percent of the FPL. However, HHS believes that many consumers will benefit from having additional opportunities to enroll in low-cost Exchange coverage, and that those who will be eligible for this special enrollment period and who do not enroll during the annual open enrollment period are likely to have been unaware of their option to enroll in a plan with no monthly premium through the Exchange, after application of APTC.

We considered taking no action regarding our proposal to modify § 155.430(b)(1)(iv) to permit enrollees in Exchanges on the Federal Platform to retroactively terminate coverage back to the date in which they retroactively enroll in Medicare Part A. However, we believe it is important to allow enrollees to retroactively terminate coverage when they were unable to do so prospectively due to retroactive enrollment in Medicare coverage. We considered whether to also permit Exchange enrollees to retroactively terminate coverage back to the date in which they enrolled in Medicaid, CHIP, or BHP coverage retroactively, but we determined that this would not be appropriate due to the increased risk that claims reversed by QHP issuers would not be covered by providers under these programs.

For standardized plan options (§ 156.201), we considered a range of proposals, such as modifying the methodology used to create the standardized plan options for PY 2025. Specifically, we considered lowering the deductibles in these plan designs and offsetting this increase in plan generosity by increasing cost sharing amounts for several benefit categories. We also considered simultaneously maintaining the current cost-sharing structures and decreasing the deductibles for these plan designs, which would increase the AVs of these plans to the ceiling of each *AV de minimis* range. Ultimately, we decided to propose to maintain the AVs of these plans near the floor of each *de minimis* range by largely maintaining the cost sharing structures and deductible values from the standardized plan options from PY 2024, as well as by increasing the MOOP values and, to a lesser degree, the deductible values for these plan designs. We believe this proposed approach strikes the greatest balance in providing enhanced pre-deductible coverage while ensuring competitive premiums for these standardized plan options.

For non-standardized plan option limits (§ 156.202), we considered a range of proposals. Specifically, for PY 2025 and subsequent years, we considered maintaining the PY 2024 limit of four non-standardized plan options per product network type, metal level, inclusion of dental and/or vision benefit coverage, and service area. We also considered not proposing an exceptions process that would allow issuers to offer non-standardized plan options more than the limit of two that we previously finalized for PY 2025 and subsequent years. We also considered basing this exceptions process on a

range of other factors, including the degree of plan proliferation in a given service area (as determined by the number of plan offerings per consumer or issuer), whether a plan has a sufficiently differentiated network, and whether a plan has a sufficiently differentiated formulary. We also considered permitting issuers to request to offer only one additional non-standardized plan option per product network type, metal level, and service area, as opposed to an indefinite number (as in the current proposal). We also considered permitting exceptions only for an exclusive list of chronic and high-cost conditions, as opposed to any condition that is chronic and high-cost in nature (as described in the current proposal).

However, we ultimately decided to propose an exceptions process that would allow issuers to offer more than two non-standardized plan options if these additional plans' cost sharing for benefits pertaining to the treatment of chronic and high-cost conditions (including benefits in the form of prescription drugs, if pertaining to the treatment of the condition(s)) is at least 25 percent lower, as applied without restriction in scope throughout the plan year, than the cost sharing for the same corresponding benefits in an issuer's other non-standardized plan option offerings in the same product network type, metal level, and service area, which is discussed in greater detail in section III.E.7 of the preamble to this rule.

We proposed this approach primarily because we believe that allowing exceptions to the non-standardized plan option limit of two could play an important role in enhancing the quality of life for those affected by these conditions, combatting health disparities, advancing health equity, and reducing health care expenditures. We further believe that introducing this exceptions process would balance the dual aims of reducing the risk of plan choice overload while simultaneously ensuring that issuers can continue to offer truly innovative plan designs that may benefit consumers with chronic and high-cost conditions.

E. Regulatory Flexibility Act (RFA)

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 small businesses, nonprofit organizations, and small governmental jurisdictions are small entities as that term is used in the RFA. The great majority of hospitals and most

other healthcare providers and suppliers are small entities, either by being nonprofit organizations or by meeting the SBA definition of a small business (having revenues of less than \$8.0 million to \$41.5 million in any 1 year). We do not anticipate that providers would be directly impacted by the provisions in this proposed rule. Individuals and States are not included in the definition of a small entity. The provisions in this proposed rule would affect issuers, agents, brokers, web-brokers, and DE entities.

For purposes of the RFA, we believe that health insurance issuers and DE entities²⁸⁹ will be classified under the North American Industry Classification System (NAICS) code 524114 (Direct Health and Medical Insurance Carriers). According to SBA size standards, entities with average annual receipts of \$47 million or less will be considered small entities for these NAICS codes. Issuers could possibly be classified in 621491 (HMO Medical Centers) and, if this is the case, the SBA size standard will be \$44.5 million or less.²⁹⁰ We believe that few, if any, insurance companies underwriting comprehensive health insurance policies (in contrast, for example, to travel insurance policies or dental discount policies) fall below these size thresholds. Based on data from MLR annual report submissions for the 2021 MLR reporting year, approximately 87 out of 483 issuers of health insurance coverage nationwide had total premium revenue of \$47 million or less.²⁹¹ This estimate may overstate the actual number of small health insurance issuers that may be affected, since over 77 percent of these small issuers belong to larger holding groups, and many, if not all, of these small companies are likely to have non-health lines of business that will result in their revenues exceeding \$47 million. Therefore, although it is likely that fewer than 87 issuers are considered small entities, for the purposes of this analysis, we assume 87 small issuers/DE entities would be impacted by this proposed rule.

We further believe that agents, brokers, and web-brokers will be classified under NAICS code 524210 (Insurance Agencies and Brokerages). According to SBA size standards, entities with average annual receipts of \$15 million or less will be considered small entities for these NAICS codes. Therefore, based on SBA data and for

purposes of this analysis, we assume 122,547 agents, brokers, and web-brokers are small entities. However, the policies impacting agents, brokers, and web-brokers proposed in this rule would only impact such entities in States with State Exchanges that host web-broker programs. Currently, no States with State Exchanges host web-broker programs, but we estimate 5 States could opt to host a web-broker program for their State Exchange in the future. We further estimate that 20 web-brokers could operate in those States in the future and seek comment on this estimate.

The proposed policies that would result in an increased burden to small entities are described below.

We propose to require issuers of risk adjustment covered plans to complete, implement, and provide to HHS written documentation of any corrective action plans when required by HHS if a high-cost risk pool audit results in the inclusion of a finding or certain observations in the final audit report. The annual burden per issuer associated with this proposal is \$627. For more details, please refer to the Regulatory Impact Analysis section associated with this policy in this proposed rule.

We propose to apply to agents, brokers, and web-brokers operating in State Exchanges that operate their own eligibility and enrollment platform, and consequently in State Exchanges, for both the State Exchange's Individual Exchange and SHOP, certain existing Federal standards regarding web-brokers assisting consumers with enrolling in QHPs and applying for APTC/CSRs. The one-time burden per agent, broker, or web-broker associated with this proposal is \$48,587. For more details, please refer to the information collection requirements section associated with this policy in this proposed rule.

We propose to require that display changes adopted by *HealthCare.gov* be reflected on DE entity websites within a time period specified by HHS, unless HHS approves a deviation. The annual burden associated with this proposal is \$2,608 (\$2,401 to comply with the requirements and \$207 to make a request to deviate from the requirements). For more details, please refer to the information collection requirements section associated with this policy in this proposed rule.

We propose to apply to DE entities operating in State Exchanges that operate their own eligibility and enrollment platform, and consequently State Exchanges that utilize DE entities, certain existing Federal standards regarding DE entities assisting consumers with enrolling in QHPs and applying for APTC/CSRs, both for the State Exchanges Individual Exchange and SHOP program. The one-time burden per DE entity associated with this proposal is \$138,447. For more details, please refer to the information collection requirements section associated with this policy in this proposed rule.

We also propose to require State Exchange and SBE-FP issuers to gather and submit network adequacy data, including time and distance data and telehealth data. The annual burden per issuer associated with this proposal is \$689. For more details, please refer to the information collection requirements section associated with this policy in this proposed rule.

Finally, we propose to permit issuers to offer non-standardized plan options in excess of the limit of two per product network type, metal level, inclusion of dental and/or vision benefit coverage, and service area for PY 2025 and subsequent years, if issuers demonstrate that these additional non-standardized plans beyond the limit at § 156.202(b) have specific design features that would substantially benefit consumers with chronic and high-cost conditions. The annual burden per issuer associated with this proposal is \$1,904. For more details, please refer to the information collection requirements section associated with this policy in this proposed rule.

Thus, the per-entity estimated annual cost for small issuers and DE entities is \$5,828, and the total estimated annual cost for small issuers and DE entities is \$507,036. The per-entity estimated one-time cost for small issuers and DE entities is \$138,447, and the total estimated one-time cost for small issuers and DE entities is \$12,044,889. The per-entity estimated one-time cost for small agents, brokers, and web-brokers is \$48,587, and the total estimated one-time cost for small agents, brokers, and web-brokers is \$971,740. There is no estimated annual cost for small agents, brokers, and web-brokers. See Tables 19, 20, 21, and 22.

²⁸⁹ DE entities are QHP issuers approved by CMS to enroll consumers in Exchange coverage directly from their websites.

²⁹⁰ <https://www.sba.gov/document/support-table-size-standards>.

²⁹¹ <https://www.cms.gov/CCIIO/Resources/Data-Resources/mlr.html>.

TABLE 19: Detailed Annual Costs for Small Entities

Description of Cost	Annual Cost per Small Issuer/DE Entity
High-cost risk pool audit	\$627
Applying <i>HealthCare.gov</i> display changes	\$2,608
Network adequacy	\$689
Non-standardized plan options	\$1,904
Total	\$5,828

TABLE 20: Aggregate Annual Costs for Small Entities

Affected Entity	Affected Small Entities	Annual Cost per Entity	Aggregate Annual Cost for Small Entities
Issuers/DE entities	87	\$5,828	\$507,036

TABLE 21: One-Time Costs for Small Entities

Description of Cost	One-Time Cost per Small Issuer/DE Entity	One-Time Cost per Small Agent, Broker, or Web-broker
Applying Federal standards to State Exchange entities	\$138,447	\$48,587
Total	\$138,447	\$48,587

TABLE 22: Aggregate One-Time Costs for Small Entities

Affected Entity	Affected Small Entities	One-Time Cost per Entity	Aggregate One-Time Cost for Small Entities
Issuers/DE entities	87	\$138,447	\$12,044,889
Agents, brokers, and web-brokers	20	\$48,587	\$971,740

The annual cost per small issuer/DE entity of \$5,828 is approximately 0.32 percent of the average annual receipts per small issuer. We anticipate that small issuers could pass on these increased costs to consumers in the form of higher premiums, resulting in an increase in receipts commensurate with the increase in costs. However, because the proportion of cost to receipts is so small, we anticipate this would have a *de minimis* impact on premiums, if any impact at all. We seek comment on this assumption.

We seek comment on this analysis and seek information on the number of small issuers/DE entities, agents, brokers, or web-brokers that may be affected by the provisions in these proposed rules.

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. We do not believe that this threshold will be reached by the

requirements in this proposed rule, given that the annual per-entity cost of \$5,828 per small issuer represents approximately 0.32 percent of the average annual receipts for a small issuer,²⁹² and there is no annual per-entity cost per small agent, broker, or web-broker. Therefore, the Secretary has certified that this proposed 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 603 of the RFA. For the 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 fewer than 100 beds. While this rule is not subject to section 1102 of the Act, we have determined that this rule will not affect small rural hospitals. Therefore, the Secretary has certified that this proposed rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

F. Unfunded Mandates Reform Act (UMRA)

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 is approximately \$177 million. Although we have not been able to quantify all costs, we expect that the combined impact on State, local, or Tribal governments and the private

²⁹² United States Census Bureau (March 2020). 2017 SUSB Annual Data Tables by Establishment Industry, Data by Enterprise Receipt Size. <https://www.census.gov/data/tables/2020/econ/susb/2020-susb-annual.html>.

sector does not meet the UMRA definition of unfunded mandate.

G. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it issues a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications.

In compliance with the requirement of E.O. 13132 that agencies examine closely any policies that may have Federalism implications or limit the policy making discretion of the States, we have engaged in efforts to consult with and work cooperatively with affected States, including participating in conference calls with and attending conferences of the NAIC, and consulting with State insurance officials on an individual basis.

While developing this rule, we attempted to balance the States' interests in regulating health insurance issuers with the need to ensure market stability. By doing so, we complied with the requirements of E.O. 13132.

Because States have flexibility in designing their Exchange and Exchange-related programs, State decisions will ultimately influence both administrative expenses and overall premiums. States are not required to establish an Exchange or risk adjustment program. For States that elected previously to operate an Exchange, those States had the opportunity to use funds under Exchange Planning and Establishment Grants to fund the development of data. Accordingly, some of the initial cost of creating programs was funded by Exchange Planning and Establishment Grants. After establishment, Exchanges must be financially self-sustaining, with revenue sources at the discretion of the State. Current State Exchanges charge user fees to issuers.

In our view, while this proposed rule will not impose substantial direct requirement costs on State and local governments, this regulation has Federalism implications due to potential direct effects on the distribution of power and responsibilities among the State and Federal Governments relating to determining standards relating to health insurance that is offered in the individual and small group markets. For example, we propose to add requirements by which a State seeking to transition to a State Exchange provide the public with a notice and copy of its State Exchange Blueprint application. We further propose to require that a State, within 3 months of submitting its

State Exchange Blueprint to HHS for approval, conduct at least one public hearing whereby interested parties can learn about the State's intent to transition, as well as a State's progress toward transitioning, and conduct regular hearings every 3 months until the transition is complete. However, we believe the Federalism implications of this proposal are mitigated because States have the option to establish their own Exchange, and we do not anticipate any additional burden on States because of this proposal.

We believe that the proposal to revise § 155.220(h) does not have Federalism implications as the CMS Administrator review of agent, broker, and web-broker requests for reconsideration of decisions to terminate their Exchange agreement(s) is not based on State law, nor does it prevent a State from taking other legal actions under State law against an entity whose Exchange agreement(s) are terminated for cause by HHS.

We believe that the proposals to revise §§ 155.220 and 155.221 to apply certain web-broker and DE entity standards to State Exchanges that operate their own eligibility and enrollment platform may have Federalism implications, but they are substantially mitigated by allowing State Exchanges to leverage the oversight framework established by HHS for Exchanges that utilize the Federal Platform to evaluate web-broker and DE entity operational readiness to participate in an Exchange. We expect State Exchanges would be able to leverage audits conducted for the FFEs and SBE-FPs, as well as disclaimer language developed by HHS, while State operational costs would include any State-specific requirements or language to be added at the States' discretion. We believe that providing State Exchanges the opportunity to leverage the FFEs' oversight framework would likely reduce costs to State Exchanges as compared to the costs associated with State Exchanges establishing an independent framework for oversight and web-broker or DE entity approval independent of the FFEs.

We believe that the proposal to revise § 155.315(e) has Federalism implications due to our proposal to use existing requirements and flexibilities under § 155.315(e) permitting all Exchanges to accept consumer attestation of incarceration status without further electronic verification. However, Exchanges that wish to continue electronically verifying an individual's incarceration status would be permitted to do so, if HHS determines their data source is current, accurate,

and minimizes administrative costs and burdens.

In addition, we believe this proposed rule does have Federalism implications due to the proposed revisions pertaining to State selection of EHB-benchmark plans. The existing requirements pertaining to State selection of EHB-benchmark plans at § 156.111 already imposed Federalism implications on States that choose to change or revise their EHB-benchmark plans. As discussed elsewhere in this proposed rule, we understand that certain aspects of the current process to change or revise EHB-benchmark plans may impose unanticipated difficulty on and create confusion for States. Accordingly, the proposals to revise § 156.111 are intended to reduce State burden and confusion to change or revise EHB-benchmark plans. As a result, we believe the proposals to revise § 156.111 would reduce the existing Federalism implications.

We believe that our proposal to amend § 155.320 by adding new paragraph (c)(1)(iii) does have Federalism implications for States given that State Exchanges and State Medicaid agencies use the VCI Hub service. However, we believe that the Federalism implications are mitigated as State Exchanges and State Medicaid agencies continue to have flexibility as the use of the VCI Hub service is optional and that States continue to have flexibility under § 155.315(h) and § 155.320(c)(3)(iv) to use other data sources, like State wage data, when income is not verified using IRS tax data or SSA Title II data.

We believe that our proposal to amend § 155.420(d)(16) has Federalism implications; however, we believe that by maintaining the 150 percent FPL SEP to be available at the option of the Exchange, these implications are mitigated because we allow State Exchanges to decide whether to implement it based on their specific market dynamics, needs, and priorities.

Chiquita Brooks-LaSure, Administrator of the Centers for Medicare & Medicaid Services, approved this document on XX XX, 2023.

List of Subjects

31 CFR Part 33

Health care, Health insurance, and Reporting and recordkeeping requirements.

42 CFR Part 435

Eligibility in the States, District of Columbia, the Northern Mariana Islands, and American Samoa.

42 CFR Part 600

Administrative practice and procedure, Health care, health insurance, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

45 CFR Part 153

Administrative practice and procedure, Health care, Health insurance, Health records, Intergovernmental relations, Organization and functions (Government agencies), Reporting and recordkeeping requirements.

45 CFR Part 155

Administrative practice and procedure, Advertising, Brokers, Conflict of interests, Consumer protection, Grants administration, Grant programs-health, Health care, Health insurance, Health maintenance organizations (HMO), Health records, Hospitals, Indians, Individuals with disabilities, Intergovernmental relations, Loan programs-health, Medicaid, Organization and functions (Government agencies), Public assistance programs, Reporting and recordkeeping requirements, Technical assistance, Women and youth.

45 CFR Part 156

Administrative practice and procedure, Advertising, Advisory committees, Brokers, Conflict of interests, Consumer protection, Grant programs-health, Grants administration, Health care, Health insurance, Health maintenance organization (HMO), Health records, Hospitals, Indians, Individuals with disabilities, Loan programs-health, Medicaid, Organization and functions (Government agencies), Public assistance programs, Reporting and recordkeeping requirements, State and local governments, Sunshine Act, Technical assistance, Women, and Youth.

Department Of The Treasury

For the reasons set forth in the preamble, the Department of the Treasury proposes to amend 31 CFR subtitle A, part 33 as set forth below:

PART 33—WAIVERS FOR STATE INNOVATION

■ 1. The authority citation for part 33 continues to read as follows:

Authority: Sec. 1332, Pub. L. 111–148, 124 Stat. 119.

■ 2. Section 33.112 is amended by adding paragraph (c)(3) to read as follows:

§ 33.112 State public notice requirements.

* * * * *

(c) * * *

(3) Such public hearings shall be conducted in an in-person, virtual (that is, one that uses telephonic, digital, and/or web-based platforms), or hybrid (that is, one that provides for both in-person and virtual attendance) format.

* * * * *

■ 3. Section 33.120 is amended by revising paragraph (c) introductory text to read as follows:

§ 33.120 Monitoring and compliance.

* * * * *

(c) *Post award.* Within at least 6 months after the implementation date of a section 1332 waiver and annually thereafter, a State must hold a public forum to solicit comments on the progress of a section 1332 waiver. The State must hold the public forum at which members of the public have an opportunity to provide comments and must provide a summary of the forum to the Secretary as part of the quarterly report specified in § 33.124(a) that is associated with the quarter in which the forum was held, as well as in the annual report specified in § 33.124(b) that is associated with the year in which the forum was held. The public forum shall be conducted in an in-person, virtual (that is, one that uses telephonic, digital, and/or web-based platforms), or hybrid (that is, one that provides for both in-person and virtual attendance) format.

* * * * *

Department Of Health And Human Services

For the reasons set forth in the preamble, under the authority at 5 U.S.C. 301, the Department of Health and Human Services proposes to amend 42 CFR chapter IV, subchapters C and I, and 45 CFR subtitle A, subchapter B, as set forth below.

Title 42 Public Health

PART 435—ELIGIBILITY IN THE STATES, DISTRICT OF COLUMBIA, THE NORTHERN MARIANA ISLANDS, AND AMERICAN SAMOA.

■ 1. The authority citation for part 435 continues to read as follows:

Authority: 42 U.S.C 1302.

§ 435.601 [Amended]

■ 2. Section 435.601 is amended by removing paragraph (d)(4), redesignating paragraph (d)(5) as paragraph (d)(4).

PART 600—ADMINISTRATION, ELIGIBILITY, ESSENTIAL HEALTH BENEFITS, PERFORMANCE STANDARDS, SERVICE DELIVERY REQUIREMENTS, PREMIUM AND COST SHARING, ALLOTMENTS, AND RECONCILIATION

■ 3. The authority citation for part 600 continues to read as follows:

Authority: Section 1331 of the Patient Protection and Affordable Care Act of 2010 (Pub. L. 111–148, 124 Stat. 119), as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, 124 Stat. 1029).

■ 4. Section 600.320 is amended by revising paragraph (c) to read as follows:

§ 600.320 Determination of eligibility for and enrollment in a standard health plan.

* * * * *

(c) *Effective date of eligibility.* The State must establish a uniform method of determining the effective date of eligibility for enrollment in a standard health plan which –

(1) Follows the Exchange effective date standards at 45 CFR 155.420(b)(1);

(2) Follows the Medicaid effective date standards at 42 CFR 435.915 exclusive of § 435.915(a); or

(3) Follows an effective date of eligibility of the first day of the month following the month in which BHP eligibility is determined.

* * * * *

Title 45 Public Welfare

PART 153—STANDARDS RELATED TO REINSURANCE, RISK CORRIDORS, AND HHS RISK ADJUSTMENT UNDER THE AFFORDABLE CARE ACT

■ 5. The heading for Part 153 is revised to read as set forth above:

■ 6. The authority citation for part 153 continues to read as follows:

Authority: 42 U.S.C. 18031, 18041, and 18061 through 18063.

■ 7. Section 153.620 is amended by revising the section heading and paragraph (c)(4) introductory text to read as follows:

§ 153.620 Compliance with HHS risk adjustment standards.

* * * * *

(c) * * *

(4) *Final audit findings.* If an audit results in the inclusion of a finding or observation in the final audit report, the issuer must comply with the actions set forth in the final audit report in the manner and timeframe established by HHS, and the issuer must complete all of the following, if required by HHS:

* * * * *

**PART 155—EXCHANGE
ESTABLISHMENT STANDARDS AND
OTHER RELATED STANDARDS
UNDER THE AFFORDABLE CARE ACT**

■ 8. The authority citation for part 155 continues to read as follows:

Authority: 42 U.S.C. 18021–18024, 18031–18033, 18041–18042, 18051, 18054, 18071, and 18081–18083.

■ 9. Section 155.105 is amended—

■ a. In paragraph (b)(2) by removing “and” after the semicolon;

■ b. In paragraph (b)(3) by removing “.,” and adding in its place “; and”; and

■ c. Adding paragraph (b)(4).

The revision reads as follows:

§ 155.105 Approval of a State Exchange.

* * * * *

(b) * * *

(4) The Exchange first operates successfully a State Exchange on the Federal platform under § 155.106(c), meeting all requirements established under § 155.200(f), for at least one plan year, including its first open enrollment period, as part of the establishment of a State Exchange.

* * * * *

■ 10. Section 155.106 is amended by revising paragraph (a)(2) to read as follows:

§ 155.106 Election to operate an Exchange after 2014.

(a) * * *

(2) Submit an Exchange Blueprint application for HHS approval at least 15 months prior to the date on which the Exchange proposes to begin open enrollment as a State Exchange. HHS requires that a State submitting a Blueprint Application to operate a State Exchange provide, upon request, supplemental documentation to HHS detailing the State’s implementation of its State Exchange functionality.

(i) *Public notice.* Upon submission of an Exchange Blueprint application to operate a State Exchange, the State shall issue a public notice of its Exchange Blueprint application submission through its website and include a copy of the Exchange Blueprint application, a description of the Plan Year for which the State seeks to transition to a State Exchange, language indicating that the State is seeking approval from HHS to transition to a State Exchange, and information about when and where the State will conduct public engagements regarding the State’s Exchange Blueprint application, as described in paragraph (a)(2)(ii) of this section.

(ii) *Public engagements.* After a State issues its public notice as described in paragraph (a)(2)(i) of this section and until HHS approves, or conditionally

approves, the State’s Exchange Blueprint application, a State must conduct at least one public engagement (such as a townhall meeting or public hearing) either in-person or virtually, regarding the State’s Exchange Blueprint application progress, in a timeline and manner considered effective by the State and with HHS’ concurrence. A State shall provide public notice of the public engagement. Such public engagement shall also provide interested parties the opportunity to learn about the State’s progress in transitioning to a State Exchange and offer input on that transition. Following the initial public engagement described in this paragraph and until HHS approves or conditionally approves the State Exchange Blueprint application, a State shall conduct periodic public engagements, either in-person or virtually, in a timeframe and manner considered effective by the State.

* * * * *

■ 11. Section 155.170 is amended by revising paragraph (a)(2) to read as follows:

§ 155.170 Additional required benefits.

(a) * * *

(2) A benefit required by State action taking place on or before December 31, 2011, a benefit required by State action for purposes of compliance with Federal requirements, or a benefit covered in the State’s EHB-benchmark plan is considered an EHB. A benefit required by State action taking place on or after January 1, 2012, other than for purposes of compliance with Federal requirements that is not a benefit covered in the State’s EHB-benchmark plan, is considered in addition to the essential health benefits.

* * * * *

■ 12. Section 155.205 is amended by revising paragraphs (a) introductory text and (b)(4) and (5) to read as follows:

§ 155.205 Consumer assistance tools and programs of an Exchange.

(a) *Call center.* If the Exchange is not an Exchange described in paragraphs (a)(1) or (2) of this section, the Exchange must provide for operation of a toll-free call center that addresses the needs of consumers requesting assistance and meets the requirements outlined in paragraphs (c)(1), (c)(2)(i), and (c)(3) of this section. At a minimum, the Exchange call center must provide consumers with access to a live call center representative during an Exchange’s published hours of operation and a live call center representative who must be able to assist consumers with their QHP application, including providing

consumers with information on their eligibility for advance premium tax credits and cost-sharing reductions, helping consumers understand their QHP options, helping consumers select a QHP, and helping consumers submit QHP enrollment applications to the Exchange. If the Exchange is an Exchange described in paragraphs (a)(1) or (2) of this section, the Exchange must provide at a minimum a toll-free telephone hotline that includes the capability to provide information to consumers about eligibility and enrollment processes, and to appropriately direct consumers to the applicable Exchange website and other applicable resources.

* * * * *

(b) * * *

(4) Allows for an individual to submit a single streamlined eligibility application to the Exchange in accordance with § 155.405 and for the Exchange to make all determinations of eligibility for enrollment in a QHP and insurance affordability programs, in accordance with subpart D of this part, through the operation of a centralized eligibility and enrollment platform on the Exchange’s website; or, if the Exchange is a State-based Exchange on the Federal platform, through the Federal eligibility and enrollment platform.

(5) Allows a qualified individual to select a QHP and allows the Exchange to maintain records of all QHP enrollments, in accordance with subpart E of this part, through the operation of a centralized eligibility and enrollment platform on the Exchange’s website; or, if the Exchange is a State-based Exchange on the Federal platform, through the Federal eligibility and enrollment platform.

* * * * *

■ 13. Section 155.220 is amended by—

■ a. Adding paragraph (c)(4)(iii);

■ b. Revising paragraphs (h)(2) and (3); and

■ c. Adding paragraph (n).

The additions and revisions read as follows:

§ 155.220 Ability of States to permit agents and brokers and web-brokers to assist qualified individuals, qualified employers, or qualified employees enrolling QHPs.

* * * * *

(c) * * *

(4) * * *

(iii) Web-brokers operating in State Exchanges that do not use the Federal platform that permit other agents and brokers, through a contract or other arrangement, to use their internet website to help an applicant or enrollee complete a QHP selection or complete

the Exchange eligibility application must comply with the standards in paragraphs (c)(4)(i)(A), (B), (D) and (F), except that all references to “Federally-facilitated Exchange” or “HHS” in paragraphs (c)(4)(i)(A), (B), (D), and (F) of this section will be understood to mean “the applicable State Exchange.”

* * * * *

(h) * * *

(2) *Timeframe for request.* The agent, broker, or web-broker must submit a request for reconsideration to the CMS Administrator within 30 calendar days of the written notice from HHS.

(3) *Notice of reconsideration decision.* The CMS Administrator will provide the agent, broker, or web-broker with a written notice of the reconsideration decision within 60 calendar days of the date the CMS Administrator receives the request for reconsideration. This decision will constitute HHS’ final determination.

* * * * *

(n) *Application to State Exchanges that do not use the Federal platform.* A web-broker that assists or enrolls qualified individuals, qualified employers or qualified employees in coverage in a manner that constitutes enrollment through the State Exchange, or assists individual market consumers with submission of applications for advance payments of the premium tax credit and cost-sharing reductions through the State Exchange, must comply with the Federally-facilitated Exchange standards in paragraphs (c)(3)(i)(A), (G), (I), and (j)(2)(i) of this section, including any additional State-specific standards under paragraph (n)(1) of this section, and the State Exchange’s operational readiness standards under paragraph (n)(2) of this section. For the purposes of paragraph (j)(2)(i) of this section, references to “HHS” and “the Federally-facilitated Exchanges” will be understood to mean “the applicable State Exchange, applied for web-brokers”, and the reference to “HealthCare.gov” will be understood to mean “the State Exchange website, applied for web-brokers.”

(1) State Exchanges may add State-specific information to the standardized disclaimers and information under paragraphs (c)(3)(i)(A), (G), and (I) of this section that does not conflict with the HHS-provided language.

(2) State Exchanges must establish the form and manner for their web-brokers to demonstrate operational readiness and compliance with applicable requirements prior to the web-broker’s internet website being used to complete an Exchange eligibility application or a QHP selection, which may include

submission or completion of the following items to the State Exchange, in the form and manner specified by the Exchange:

- (i) Operational data including licensure information, points of contact and third-party relationships;
- (ii) Enrollment testing, prior to approval or renewal;
- (iii) website reviews performed by the State Exchange;
- (iv) Security and privacy documentation, including:
 - (A) Penetration testing results;
 - (B) Security and privacy assessment reports;
 - (C) Vulnerability scan results;
 - (D) Plans of action and milestones; and
 - (E) System security and privacy plans.
- (v) Agreements between the web-broker and the State Exchange.

■ 14. Section 155.221 is amended by—

- a. Revising paragraphs (a) introductory text; and
- b. Adding paragraphs (a)(1)(i) and (ii), (b)(6), and (j).

The revisions and addition read as follows:

§ 155.221 Standards for direct enrollment entities and for third-parties to perform audits of direct enrollment entities.

(a) *Direct enrollment entities.* All Exchanges may permit the following entities to assist consumers with direct enrollment in QHPs offered through the Exchange in a manner that is considered to be through the Exchange, to the extent permitted by applicable State law:

(1) * * *

(i) For purposes of applying the requirements of § 156.1230(b) of this subchapter to State Exchanges, all references to “Federally-facilitated Exchange” and “HHS”, and “HealthCare.gov” will be understood to mean “the applicable State Exchange”, “the applicable State Exchange”, and “the applicable State Exchange website”, respectively.

(ii) [Reserved]

* * * * *

(b) * * *

(6) Implement and prominently display website changes in a manner consistent with display changes made to the Federally-facilitated Exchange website by meeting standards communicated and defined by HHS within a time period set by HHS, unless HHS approves a deviation from those standards. Direct enrollment entities may request a deviation by submitting a proposed alternative *display and* accompanying rationale to HHS for review.

* * * * *

(j) *Application to State Exchanges that do not use the Federal platform.* A direct enrollment entity that enrolls qualified individuals, qualified employers, or qualified employees in coverage in a manner that constitutes enrollment through the State Exchange, or assists consumers with submission of applications for advance payments of the premium tax credit and cost-sharing reductions through the State Exchange, must comply with the Federally-facilitated Exchange standards in paragraphs (b)(1), (2), (3), and (d) of this section, including the exceptions in paragraph (c) of this section, where applicable; any additional State-specific standards under paragraph (j)(1) of this section; the State Exchange’s operational readiness standards under paragraph (j)(2) of this section; and the State Exchange’s website display change standards under paragraph (j)(3) of this section. Paragraph (d) references § 155.415(b), and § 155.415(b)(1) will be understood to also apply to State Exchanges.

(1) State Exchanges may add State-specific information to the standardized disclaimer under paragraph (b)(2) of this section that does not conflict with the HHS-provided language.

(2) State Exchanges must establish the form and manner for their direct enrollment entities to demonstrate operational readiness and compliance with applicable requirements prior to the direct enrollment entity’s internet website being used to complete an Exchange eligibility application or a QHP selection, which may include submission or completion of the following documentation to the State Exchange, in the form and manner specified by the Exchange:

(i) Business audit documentation including:

- (A) Notices of intent to participate including auditor information;
- (B) Documentation packages including privacy questionnaires, privacy policy statements, and terms of service; and
- (C) Business audit reports including testing results.

(ii) Security and privacy audit documentation including:

- (A) Interconnection security agreements;
- (B) Security and privacy controls assessment test plans;
- (C) Security and privacy assessment reports;
- (D) Plans of action and milestones;
- (E) Privacy impact assessments;
- (F) System security and privacy plans;
- (G) Incident response plans; and
- (H) Vulnerability scan results.

(3) State Exchanges must require their direct enrollment entities to implement

and prominently display changes adopted for display on the State Exchanges' websites, consistent with the process of defining and communicating standards and setting advance notice periods in paragraph (b)(6) of this section, except that all references to "Federally-facilitated Exchange website" would be understood to mean "State Exchange website" and references to "HHS" would be understood to mean "State Exchange" in paragraph (b)(6) of this section.

■ 15. Section 155.302 is amended by revising paragraph (a)(1) to read as follows:

§ 155.302 Options for conducting eligibility determinations.

(a) * * *

(1) Directly, through contracting arrangements in accordance with § 155.110(a) under which the Exchange carries out all eligibility determinations for QHP coverage and related insurance affordability programs; or, as a State-based Exchange on the Federal platform, through a Federal platform agreement under which HHS carries out eligibility determinations and other requirements contained within this subpart; or

* * * * *

■ 16. Section 155.305 is amended by adding paragraphs (f)(4)(i) and (ii) to read as follows:

§ 155.305 Eligibility standards.

* * * * *

(f) * * *

(4) * * *

(i) If HHS notifies the Exchange as part of the process described in § 155.320(c)(3) that APTC payments were made on behalf of either the tax filer or spouse, if the tax filer is a married couple, for 1 year for which tax data would be utilized for verification of household income and family size in accordance with § 155.320(c)(1)(i), and the tax filer or the tax filer's spouse did not comply with the requirement to file an income tax return for that year as required by 26 U.S.C. 6011, 6012, and their implementing regulations and reconcile APTC for that period, the Exchange must send a notification, consistent with the standards applicable to the protection of Federal Tax Information to the tax filer, that informs the tax filer that the Exchange has determined that the tax filer or the tax filer's spouse, if the tax filer is part of a married couple, has failed to file and reconcile, and educate the tax filer that they need to file and reconcile or risk being determined ineligible for APTC if they fail to file and reconcile for a second consecutive tax year. Only the FTR Open Enrollment notices sent

directly to the tax filer may directly state that the IRS data indicates the tax filer failed to file and reconcile.

(ii) [Reserved]

* * * * *

■ 17. Section 155.315 is amended by revising paragraph (e) to read as follows:

§ 155.315 Verification process related to eligibility for enrollment in a QHP through the Exchange.

* * * * *

(e) *Verification of incarceration status.* The Exchange must verify an applicant's attestation that the applicant meets the requirements of § 155.305(a)(2) by—

(1) Accepting an applicant's attestation that they are not currently incarcerated; or

(2) Verifying an applicant's attestation of incarceration status using any electronic data source that is available to the Exchange and which has been approved by HHS for this purpose. HHS will approve an electronic data source for incarceration verification if it provides data that are current and accurate, and if its use minimizes administrative costs and burdens.

(3) If an Exchange verifies an applicant's attestation of incarceration status using an approved data source under paragraph (e)(2) of this section, to the extent that an applicant's attestation is not reasonably compatible with information from the approved data source or other information provided by the applicant or in the records of the Exchange, the Exchange must follow the procedures specified in § 155.315(f).

* * * * *

■ 18. Section 155.320 is amended by adding paragraph (c)(1)(iii) to read as follows.

§ 155.320 Verification process related to eligibility for insurance affordability programs.

* * * * *

(c) * * *

(1) * * *

(iii) *Payment to use income data through the Verify Current Income Hub service.* Beginning July 1, 2024, State Exchanges that elect the option to access the Verify Current Income service through the Federal Data Services Hub ("the Hub") to verify an individual's income as described in paragraph (c)(3)(vi)(A) of this section, must pay an annual advanced payment to HHS, in the timeframe and manner established by HHS, for use of the income data provided by the Verify Current Income Hub service equal to the product of the anticipated number of purchased transactions returned from the Verify Current Income Hub service and the

price per transaction established under the contract maintained by HHS to provide the VCI Hub service.

Participating States would be required to reconcile with HHS on an annual basis the anticipated utilization of CSI data provided by the VCI Hub service with the actual utilization.

* * * * *

■ 19. Section 155.330 is amended by revising paragraph (d)(3) to read as follows:

§ 155.330 Eligibility redetermination during a benefit year.

* * * * *

(d) * * *

(3) *Definition of periodically.* (i) Beginning with the 2021 calendar year, the Exchange must perform the periodic examination of data sources described in paragraphs (d)(1)(ii) of this section at least twice in a calendar year. State Exchanges that have implemented a fully integrated eligibility system with their respective State Medicaid programs, that have a single eligibility rules engine that uses MAGI to determine eligibility for advance payments of the premium tax credit, cost-sharing reductions, Medicaid, CHIP, and the BHP, if a BHP is operating in the service area of the Exchange, will be deemed in compliance with the Medicaid/CHIP PDM requirements and, if applicable, BHP PDM requirements, in paragraphs (d)(1)(ii) and (d)(3) of this section.

(ii) Beginning with the 2025 calendar year, the Exchange must perform the periodic examination of data sources described in paragraph (d)(1)(i) of this section at least twice in a calendar year.

(iii) Notwithstanding the requirements of paragraphs (d)(3)(i) and (ii) of this section, the Secretary has authority to temporarily suspend the requirement that Exchanges conduct the PDM processes described at paragraphs (d)(3)(i) or (ii) of this section during certain situations or circumstances that lead to the unavailability of data needed to conduct PDM.

* * * * *

■ 20. Section 155.335 is amended by—

■ a. Revising paragraphs (j)(1)(ii) through (iv);

■ b. Adding paragraph (j)(1)(v);

■ c. Revising paragraphs (j)(2)(i) through (iii); and

■ d. Adding paragraphs (j)(2)(iv) and (j)(5).

The revisions and additions read as follows:

§ 155.335 Annual eligibility redetermination.

* * * * *

(j) * * *

(1) * * *

(ii) If the enrollee's current QHP is not available through the Exchange, the Exchange will re-enroll the enrollee in a QHP within the same product at the same coverage level as described in sections 1302(d) or (e) of the ACA as the enrollee's current QHP that has the most similar network compared to the enrollee's current QHP;

(iii) If the enrollee's current QHP is not available through the Exchange and the enrollee's product no longer includes a QHP at the same coverage level as described in sections 1302(d) or (e) of the ACA as the enrollee's current QHP and—

(A) The enrollee's current QHP is a silver level plan, the Exchange will re-enroll the enrollee in a silver level QHP under a different product offered by the same QHP issuer that is most similar to the enrollee's current product and that has the most similar network compared to the enrollee's current QHP. If no such silver level QHP is available for enrollment through the Exchange, the Exchange will re-enroll the enrollee in a QHP under the same product that is coverage level higher or lower than the enrollee's current QHP and that has the most similar network compared to the enrollee's current QHP; or

(B) The enrollee's current QHP is not a silver level plan, the Exchange will re-enroll the enrollee in a QHP under the same product that is one coverage level higher or lower than the enrollee's current QHP and that has the most similar network compared to the enrollee's current QHP;

(iv) If the enrollee's current QHP is not available through the Exchange and the enrollee's product no longer includes a QHP that is at the same coverage level as described in sections 1302(d) or (e) of the ACA as, or one coverage level higher or lower than, the enrollee's current QHP, the Exchange will re-enroll the enrollee in any other QHP offered under the product in which the enrollee's current QHP is offered in which the enrollee is eligible to enroll and that has the most similar network compared to the enrollee's current QHP; or

(v) Notwithstanding the other provisions in paragraph (j)(1) of this section, if the enrollee's current QHP is a catastrophic plan as described in section 1302(e) of the ACA, and the enrollee will no longer meet the criteria for enrollment in a catastrophic plan as described in section 1302(e)(2) of the ACA:

(A) The Exchange will re-enroll the enrollee in a bronze metal level QHP within the same product as the enrollee's current QHP that has the most

similar network compared to the enrollee's current QHP; or

(B) If no bronze plan is available through this product, the Exchange will re-enroll the enrollee in the QHP with the lowest coverage level offered under the product in which the enrollee's current QHP is offered in which the enrollee is eligible to enroll and that has the most similar network compared to the enrollee's current QHP.

(2) * * *

(i) The Exchange will re-enroll the enrollee in a QHP at the same coverage level as the enrollee's current QHP in the product offered by the same issuer that is the most similar to the enrollee's current product and that has the most similar network compared to the enrollee's current QHP;

(ii) If the issuer does not offer another QHP at the same coverage level as the enrollee's current QHP, the Exchange will re-enroll the enrollee in a QHP that is one coverage level higher or lower than the enrollee's current QHP and that has the most similar network compared to the enrollee's current QHP in the product offered by the same issuer through the Exchange that is the most similar to the enrollee's current product;

(iii) If the issuer does not offer another QHP through the Exchange at the same coverage level as, or one metal level higher or lower than the enrollee's current QHP, the Exchange will re-enroll the enrollee in any other QHP offered by the same issuer in which the enrollee is eligible to enroll and that has the most similar network compared to the enrollee's current QHP in the product that is most similar to the enrollee's current product; or

(iv) Notwithstanding the other provisions in paragraph (j)(2) of this section, if the enrollee's current QHP is a catastrophic plan as described in section 1302(e) of the ACA, and the enrollee will no longer meet the criteria for enrollment in a catastrophic plan as described in section 1302(e)(2) of the ACA:

(A) The Exchange will re-enroll the enrollee in a bronze metal level QHP offered by the same issuer in which the enrollee is eligible to enroll and that has the most similar network compared to the enrollee's current QHP in the product that is most similar to the enrollee's current product; or

(B) If no bronze plan is available through this product, the Exchange will re-enroll the enrollee in the QHP with the lowest coverage level offered under the product in which the enrollee's current QHP is offered in which the enrollee is eligible to enroll and that has

the most similar network compared to the enrollee's current QHP.

* * * * *

(5) For purposes of this section, catastrophic coverage is not a coverage level that is considered higher or lower than metal level coverage when re-enrolling an enrollee to a plan that is a metal level higher or lower than their current plan, and an Exchange may not re-enroll an enrollee that has coverage under section 1302(d) into catastrophic coverage.

* * * * *

■ 21. Section 155.400 is amended by revising paragraph (e)(2) to read as follows:

§ 155.400 Enrollment of qualified individuals into QHPs.

* * * * *

(e) * * *

(2) *Premium payment deadline extension.* Exchanges may, and the Federally-facilitated Exchanges and State-based Exchanges on the Federal platform will, allow issuers experiencing billing or enrollment problems due to high volume or technical errors, or issuers directed to do so by applicable State or Federal authorities, to implement a reasonable extension of the binder payment and other premium payment deadlines.

* * * * *

■ 22. Section 155.410 is amended by revising paragraph (e)(4)(ii) to read as follows:

§ 155.410 Initial and annual open enrollment periods.

* * * * *

(e) * * *

(4) * * *

(ii) For State Exchanges, for the benefit years beginning on or after January 1, 2025, a longer annual open enrollment period end date may be adopted, such that the open enrollment period begins on November 1 of the calendar year preceding the benefit year and ends no earlier than January 15 of the benefit year.

* * * * *

■ 23. Section 155.420 is amended by revising paragraphs (b)(1), (b)(3)(i) and (d)(16) to read as follows:

§ 155.420 Special enrollment periods.

* * * * *

(b) * * *

(1) *Regular effective dates.* Except as specified in paragraphs (b)(2) and (3) of this section, for a QHP selection received by the Exchange from a qualified individual, the Exchange must ensure a coverage effective date of the first day of the month following the QHP selection; except that before

January 1, 2025, for a QHP selection received by the Exchange from a qualified individual between the sixteenth and the last day of any month, the Exchange may ensure a coverage effective date of the first day of the second month following QHP selection.

* * * * *

(3) * * *

(i) For a QHP selection received by the Exchange under a special enrollment period for which the effective dates of coverage specified in paragraph (b)(1) or (b)(2)(i) of this section would apply, the Exchange may provide a coverage effective date that is earlier than specified in such paragraph.

* * * * *

(d) * * *

(16) At the option of the Exchange, a qualified individual or enrollee, or the dependent of a qualified individual or enrollee, who is eligible for advance payments of the premium tax credit, and whose household income, as defined in 26 CFR 1.36B–1(e), is expected to be at or below 150 percent of the Federal poverty level, may enroll in a QHP or change from one QHP to another one time per month.

* * * * *

■ 24. Section 155.430 is amended by revising paragraph (b)(1)(iv) introductory text and adding paragraph (b)(1)(iv)(D) to read as follows:

§ 155.430 Termination of Exchange enrollment or coverage.

* * * * *

(b) * * *

(1) * * *

(iv) The Exchange must permit an enrollee to retroactively terminate or cancel the enrollee's coverage or enrollment in a QHP in the following circumstances, and State Exchanges may permit an enrollee to retroactively terminate or cancel the enrollee's coverage or enrollment in a QHP in accordance with paragraph (D):

* * * * *

(D) In a Federally-facilitated Exchange or a State-based Exchange on the Federal platform, the enrollee demonstrates to the Exchange that the enrollee enrolled in Medicare Part A or B coverage with a retroactive effective date, and requests retroactive termination within 60 days of the enrollment. The effective date of the retroactive termination must be no sooner than the day before the first day of coverage under Medicare Part A or B.

* * * * *

■ 25. Section 155.1050 is amended by revising paragraph (a) to read as follows:

§ 155.1050 Establishment of Exchange network adequacy standards.

(a) Except with regard to multi-State plans:

(1) A Federally-facilitated Exchange must ensure that the provider network of each QHP meets the standards specified in § 156.230 of this subtitle.

(2) State Exchanges and State-based Exchanges on the Federal Platform must ensure that the provider network of each QHP meets applicable standards specified in § 156.230(a)(1)(ii), (a)(1)(iii) and (a)(4) of this subtitle.

(i) For plan years beginning on or after January 1, 2025, to comply with the requirement under paragraph (a)(2) of this section, State Exchanges and State-based Exchanges on the Federal platform must:

(A) Establish and impose network adequacy time and distance standards for QHPs that are at least as stringent as standards for QHPs participating on the Federally-facilitated Exchanges under § 156.230(a)(2)(i)(A) of this subtitle;

(B) Conduct, prior to QHP certification, quantitative network adequacy reviews to evaluate compliance with requirements under § 156.230(a)(1)(ii), (a)(1)(iii), and (a)(2)(i)(A) of this subtitle, while providing QHP certification applicants the flexibilities described under § 156.230(a)(2)(ii) and (a)(3) and (4) of this subtitle; and

(C) Require that all issuers seeking certification of a plan as a QHP submit information to the Exchange reporting whether or not network providers offer telehealth services.

(ii) HHS may grant an exception to the requirements described under paragraph (a)(2)(i) of this section to a State Exchange or State-based Exchange on the Federal platform that demonstrates with evidence-based data, in a form and manner specified by HHS, that:

(A) the Exchange applies and enforces alternate quantitative network adequacy standards that are reasonably calculated to ensure a level of access to providers that is as great as that ensured by the Federal network adequacy standards established for QHPs under § 156.230 of this subtitle; and

(B) the Exchange evaluates whether plans comply with applicable network adequacy standards prior to certifying any plan as a QHP.

* * * * *

■ 26. Section 155.1312 is amended by adding paragraph (c)(3) to read as follows:

§ 155.1312 State public notice requirements.

* * * * *

(c) * * *

(3) Such public hearings shall be conducted in an in-person, virtual (that is, one that uses telephonic, digital, and/or web-based platforms), or hybrid (that is, one that provides for both in-person and virtual attendance) format.

* * * * *

■ 27. Section 155.1320 is amended by revising paragraph (c) introductory text to read as follows:

§ 155.1320 Monitoring and compliance.

* * * * *

(c) *Post award.* Within at least 6 months after the implementation date of a section 1332 waiver and annually thereafter, a State must hold a public forum to solicit comments on the progress of a section 1332 waiver. The State must hold the public forum at which members of the public have an opportunity to provide comments and must provide a summary of the forum to the Secretary as part of the quarterly report specified in § 155.1324(a) that is associated with the quarter in which the forum was held, as well as in the annual report specified in § 155.1324(b) that is associated with the year in which the forum was held. The public forum shall be conducted in an in-person, virtual (that is, one that uses telephonic, digital, and/or web-based platforms), or hybrid (that is, one that provides for both in-person and virtual attendance) format.

* * * * *

PART 156—HEALTH INSURANCE ISSUER STANDARDS UNDER THE AFFORDABLE CARE ACT, INCLUDING STANDARDS RELATED TO EXCHANGES

■ 28. The authority citation for part 156 continues to read as follows:

Authority: 42 U.S.C. 18021–18024, 18031–18032, 18041–18042, 18044, 18054, 18061, 18063, 18071, 18082, and 26 U.S.C. 36B.

■ 29. Section 156.111 is amended by revising paragraphs (a), (b)(2), and (e)(2) and (3) to read as follows:

§ 156.111 State selection of EHB-benchmark plans for plan years beginning on or after January 1, 2020.

(a)(1) Subject to paragraphs (b) through (e) of this section, for plan years beginning on or after January 1, 2020 through December 31, 2026, a State may change its EHB-benchmark plan by:

(i) Selecting the EHB-benchmark plan that another State used for the 2017 plan year under §§ 156.100 and 156.110;

(ii) Replacing one or more categories of EHBs established at § 156.110(a) in the State's EHB-benchmark plan used for the 2017 plan year with the same category or categories of EHB from the EHB-benchmark plan that another State

used for the 2017 plan year under §§ 156.100 and 156.110; or

(iii) Otherwise selecting a set of benefits that would become the State's EHB-benchmark plan.

(2) Subject to paragraphs (b), (c), (d), and (e) of this section, for plan years beginning on or after January 1, 2027, a State may change its EHB-benchmark plan by selecting a set of benefits that would become the State's EHB-benchmark plan.

(b) * * *

(2) *Scope of benefits.* (i) For plan years beginning on or after January 1, 2020 through December 31, 2026:

(A) Provide a scope of benefits equal to the scope of benefits provided under a typical employer plan (supplemented by the State as necessary to provide coverage within each EHB category at § 156.110(a)), defined as either:

(1) One of the selecting State's 10 base-benchmark plan options established at § 156.100, and available for the selecting State's selection for the 2017 plan year; or

(2) The largest health insurance plan by enrollment within one of the five largest large group health insurance products by enrollment in the State, as product and plan are defined at § 144.103 of this subchapter, provided that:

(i) The product has at least 10 percent of the total enrollment of the five largest large group health insurance products in the State;

(ii) The plan provides minimum value, as defined under § 156.145;

(iii) The benefits are not excepted benefits, as established under § 146.145(b), and § 148.220 of this subchapter; and

(iv) The benefits in the plan are from a plan year beginning after December 31, 2013.

(B) Not exceed the generosity of the most generous among a set of comparison plans, including:

(1) The State's EHB-benchmark plan used for the 2017 plan year, and

(2) Any of the State's base-benchmark plan options for the 2017 plan year described in § 156.100(a)(1), supplemented as necessary under § 156.110.

(ii) For plan years beginning on or after January 1, 2027, provide a scope of benefits that is equal to the scope of benefits of a typical employer plan in the State. The scope of benefits in a typical employer plan in a State is any scope of benefits that is as or more generous than the scope of benefits in the least generous plan (supplemented by the State as necessary to provide coverage within each EHB category at § 156.110(a)), and as or less generous

than the scope of benefits in the most generous plan in the State (supplemented by the State as necessary to provide coverage within each EHB category at § 156.110(a)), among the following:

(A) One of the selecting State's 10 base-benchmark plan options established at § 156.100, and available for the selecting State's selection for the 2017 plan year; or

(B) The largest health insurance plan by enrollment within one of the five largest large group health insurance products by enrollment in the State, as product and plan are defined at § 144.103 of this subchapter, provided that:

(1) The product has at least 10 percent of the total enrollment of the five largest large group health insurance products in the State;

(2) The plan provides minimum value, as defined under § 156.145;

(3) The benefits are not excepted benefits, as established under § 146.145(b), and § 148.220 of this subtitle; and

(4) The benefits in the plan are from a plan year beginning after December 31, 2013.

* * * * *

(e) * * *

(2) An actuarial certification and an associated actuarial report from an actuary, who is a member of the American Academy of Actuaries, in accordance with generally accepted actuarial principles and methodologies, that affirms that the State's EHB-benchmark plan complies with the applicable scope of benefits requirements at paragraph (b)(2) of this section.

(3) The State's EHB-benchmark plan document that reflects the benefits and limitations, including medical management requirements, a schedule of benefits and, if the State is changing the number of prescription drugs pursuant to § 156.122(a)(1)(ii), a formulary drug list in a format and manner specified by HHS; and

* * * * *

■ 30. Section 156.115 is amended by revising paragraph (d) to read as follows:

§ 156.115 Provision of EHB.

* * * * *

(d) An issuer of a plan offering EHB may not include routine non-pediatric eye exam services, long-term/custodial nursing home care benefits, or non-medically necessary orthodontia as EHB.

■ 31. Section 156.122 is amended by adding paragraphs (a)(3)(i)(E) and (f) to read as follows:

§ 156.122 Prescription drug benefits.

(a) * * *

(3) * * *

(i) * * *

(E) For plan years beginning on or after January 1, 2026, include a consumer representative who must:

(1) Represent the consumer perspective as a member of the P&T committee.

(2) Have an affiliation with and/or demonstrate active participation in consumer or community-based organizations.

(3) Have experience in the analysis and interpretation of complex data and be able to understand its public health significance.

(4) Have no fiduciary obligation to a health facility or other health agency and have no material financial interest in the rendering of health services.

* * * * *

(f) If a health plan covers prescription drugs in excess of the prescription drugs required to be covered under paragraph (a)(1) of this section, the additional prescription drugs are considered an essential health benefit and subject to the cost-sharing requirements at § 156.130, unless coverage of the drug is mandated by State action and is in addition to an essential health benefit pursuant to § 155.170, in which case the drug would not be considered an essential health benefit.

■ 32. Section 156.202 is amended by adding paragraphs (d) and (e) to read as follows:

§ 156.202 Non-standardized plan option limits.

* * * * *

(d) For plan year 2025 and subsequent years, an issuer may offer additional non-standardized plan options per product network type, metal level, inclusion of dental and/or vision benefit coverage, and service area if it demonstrates that these additional plans' cost sharing for benefits pertaining to the treatment of chronic and high-cost conditions (including benefits in the form of prescription drugs, if pertaining to the treatment of the condition(s)) is at least 25 percent lower, as applied without restriction in scope throughout the plan year, than the cost sharing for the same corresponding benefits in an issuer's other non-standardized plan option offerings in the same product network type, metal level, and service area. The reduction must not be limited to a part of the year, or an otherwise limited scope of benefits, and the reduced cost sharing for these benefits cannot be conditioned on a consumer having a particular diagnosis. Chronic and high-cost

conditions that may qualify an issuer for this exception will be determined by HHS.

(e) An issuer that seeks to utilize this exceptions process is required to submit a written justification in a form and manner and at a time prescribed by HHS that:

(1) Identifies the specific condition(s) for which cost sharing is reduced;

(2) Explains which benefit(s) would have reduced annual enrollee cost sharing (as opposed to reduced cost sharing for a limited number of visits) for the treatment of the specified condition(s) relative to the same corresponding benefits in an issuer's other non-standardized plan offerings in the same product network type, metal level, and service area; and

(3) Explains how the reduced cost sharing for these benefits pertain to clinically indicated guidelines for treatment of the specified chronic and high-cost condition(s).

■ 33. Section 156.520 is amended by revising paragraph (f) to read follows:

§ 156.520 Loan terms.

* * * * *

(f) *Conversions and voluntary terminations.* (1) The loan recipient shall not convert or sell to a for-profit or non-consumer operated entity at any time after receiving a loan under this subpart. The loan recipient shall not undertake any transaction that would result in the CO-OP implementing a

governance structure that does not meet the standards in this subpart.

(2) CMS may, in its sole discretion, approve a request by a loan recipient to voluntarily terminate its loan agreement with CMS, and cease to constitute a QNHII, for the purpose of permitting a loan recipient to pursue innovative business plans that are not otherwise consistent with the requirements of this subpart, provided that all outstanding CO-OP loans issued to the loan recipient are repaid in full prior to termination of the loan agreement, and CMS believes granting the request would meaningfully enhance consumer access to quality, affordable, member-focused, non-profit health care options in affected markets.

■ 34. Section 156.1215 is amended by revising paragraphs (b) and (c) to read as follows:

§ 156.1215 Payment and collections processes.

* * * * *

(b) *Netting of payments and charges for later years.* As part of its payment and collections process, HHS may net payments owed to issuers and their affiliates operating under the same tax identification number against amounts due to the Federal government from the issuers and their affiliates under the same taxpayer identification number for advance payments of the premium tax credit, advance payments of and reconciliation of cost-sharing

reductions, payment of Federally-facilitated Exchange user fees, payment of State Exchanges utilizing the Federal platform user fees, HHS risk adjustment, reinsurance, and risk corridors payments and charges, and administrative fees for utilizing the Federal Independent Dispute Resolution process in accordance with § 149.510(d)(2).

(c) *Determination of debt.* Any amount owed to the Federal government by an issuer and its affiliates for advance payments of the premium tax credit, advance payments of and reconciliation of cost-sharing reductions, Federally-facilitated Exchange user fees, including any fees for State-based Exchanges utilizing the Federal platform, HHS risk adjustment, reinsurance, risk corridors, and unpaid administrative fees for utilizing the Federal Independent Dispute Resolution process in accordance with § 149.510(d)(2), after HHS nets amounts owed by the Federal government under these programs, is a determination of a debt.

Xavier Becerra,

Secretary, Department of Health and Human Services.

Lily L. Batchelder,

Assistant Secretary of the Treasury (Tax Policy), Department of the Treasury.

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Part III

Department of Labor

Employment and Training Administration

20 CFR Parts 651, 652, 653, et al.

Wagner-Peyser Act Staffing; Final Rule

DEPARTMENT OF LABOR**Employment and Training
Administration****20 CFR Parts 651, 652, 653, and 658**

[Docket No. ETA–2022–0003]

RIN 1205–AC02

Wagner-Peyser Act Staffing**AGENCY:** Employment and Training Administration, Labor.**ACTION:** Final rule.

SUMMARY: The U.S. Department of Labor (Department or DOL) is issuing a final rule that requires States to use State merit staff to provide Wagner-Peyser Act Employment Service (ES) services. In the notice of proposed rulemaking (NPRM), the Department proposed that this requirement would apply to all States. However, the Department recognizes three States that have been approved by the Department to administer ES services using alternative staffing models for decades and is allowing only these three States to continue using the alternative staffing models. The requirement to use State merit staff to provide all ES services applies to all other States, including those States that implemented staffing flexibility under the 2020 Final Rule. The Department additionally is revising the ES regulations to strengthen the provision of services to migrant or seasonal farmworkers (MSFWs) and to enhance the protections afforded by the Monitor Advocate System and the Employment Service and Employment-Related Law Complaint System (Complaint System). States have 24 months to comply with this final rule.

DATES:

Effective Date: This final rule is effective January 23, 2024.

Compliance Date: All States will have 24 months from the effective date to comply with the requirements of this final rule. The compliance date of the final rule is January 22, 2026.

FOR FURTHER INFORMATION CONTACT: Kim Vitelli, Administrator, Office of Workforce Investment, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room C–4526, Washington, DC 20210, Telephone: (202) 693–3980 (voice) (this is not a toll-free number). For persons with a hearing or speech disability who need assistance to use the telephone system, please dial 711 to access *telecommunications relay services*.

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I. Acronyms and Abbreviations

2020 Final Rule Wagner-Peyser Act Staffing Flexibility; Final Rule, 85 FR 592 (Jan. 6, 2020)

AJC(s) American Job Center(s) (also known as one-stop(s) or one-stop center(s))

AOP(s) Agricultural Outreach Plan(s)

ARS Agricultural Recruitment System

BFOQ bona fide occupational qualification

BLS U.S. Bureau of Labor Statistics

CARES Act Coronavirus Aid, Relief, and Economic Security Act

CFR Code of Federal Regulations

Complaint System Employment Service and Employment-Related Law Complaint System

COVID–19 coronavirus disease 2019

CRC DOL Civil Rights Center

CSRA Civil Service Reform Act

Department or DOL U.S. Department of Labor

EEOC Equal Employment Opportunity Commission

E.O. Executive Order

EO Officer(s) Equal Opportunity Officer(s)

ES Wagner-Peyser Act Employment Service

ETA Employment and Training Administration

FR Federal Register

FTE(s) full-time equivalent(s)

FY(s) Fiscal Year(s)

IC(s) information collection(s)

ICR(s) information collection request(s)

IPA Intergovernmental Personnel Act of 1970

IT information technology

LEP limited English proficiency

MOU(s) Memorandum/a of Understanding

MSFW(s) migrant or seasonal farmworker(s)

MSPA Migrant and Seasonal Agricultural Worker Protection Act

NAICS North American Industry Classification System

NFJP National Farmworker Jobs Program

NMA National Monitor Advocate

NPRM or proposed rule notice of proposed rulemaking

O*NET Occupational Information Network

OALJ Office of Administrative Law Judges

OFLC Office of Foreign Labor Certification

OIRA Office of Information and Regulatory Affairs

OMB Office of Management and Budget

OPM Office of Personnel Management

OSHA Occupational Safety and Health Administration

OWI Office of Workforce Investment

PIRL Participant Individual Record Layout

PRA Paperwork Reduction Act of 1995

Pub. L. Public Law

PY(s) Program Year(s)

QCEW Quarterly Census of Employment and Wages

RA(s) Regional Administrator(s)

RESEA Reemployment Services and Eligibility Assessment

RFA Regulatory Flexibility Act

RIN Regulation Identifier Number

RMA(s) Regional Monitor Advocate(s)

Secretary Secretary of Labor

SMA(s) State Monitor Advocate(s)

SNAP Supplemental Nutrition Assistance Program

SOC Standard Occupational Classification

SSA Social Security Act

Stat. United States Statutes at Large

SWA(s) State Workforce Agency/ies

TAA Trade Adjustment Assistance

TANF Temporary Assistance to Needy Families

UI unemployment insurance

UMRA Unfunded Mandates Reform Act of 1995

U.S.C. United States Code

WHD Wage and Hour Division

WIA Workforce Investment Act of 1998

WIOA Workforce Innovation and Opportunity Act

II. Executive Summary

The Department is amending its regulations regarding Wagner-Peyser Act staffing to require that States use State merit staff to provide ES services, except three States—Colorado, Massachusetts, and Michigan—that have longstanding reliance interests in using alternative staffing models. The final rule requires these three States to participate in rigorous multistate evaluation activities to be conducted by the Department to determine whether such models are empirically supported. This evaluation will include review of services delivered by States that use State merit-staffing, as necessary.

In the NPRM, the Department proposed to require that all States use State merit staff to deliver ES services. The Department determined that it is vital for the ES to be administered so that States deliver services effectively and equitably to unemployment insurance (UI) beneficiaries and other ES customers, including services provided to MSFWs. In the NPRM, the Department reasoned that the demands placed on State UI systems by the economic impact of the coronavirus disease 2019 (COVID-19) pandemic highlighted the necessity of States to be able to rely on eligible ES State merit staff to be deployed to assist with UI activities that must be performed by State merit staff.¹ The Department noted that States also have experienced the benefits of deploying ES State merit staff to assist with UI activities in response to recessions, the onset of natural disasters, and mass regional layoffs. The Department also noted that requiring States to utilize State merit staff to deliver ES services would help to ensure that ES services are delivered by qualified, nonpartisan personnel. These professionals would be required to meet objective professional qualifications, trained to assure high-quality performance, and expected to maintain certain transparent standards of performance. States would be required to assure that employees are treated fairly and protected against partisan political coercion. This final rule adopts the proposal that States are required to use State merit staff to deliver ES services, with one change explained in the following paragraph.

While the Department maintains its position that aligning ES and UI promotes efficiency and uniformity in

the operation of the ES, the Department also recognizes that three States—Colorado, Massachusetts, and Michigan—have been approved by the Department for decades to deliver ES services using staffing models alternative to full State merit-staffing. The Department received many comments on the NPRM regarding the longstanding reliance interests of these States and the potential disruptions to service delivery in these States specifically that could result from having to implement a complete State merit-staffing requirement. Based on these comments, the Department is permitting these three States, which were authorized to use alternative staffing models since the 1990s, to use the staffing model consistent with that previously authorized for that State. These three States may use the merit-staffing flexibility only to the same extent the Department previously authorized prior to February 5, 2020. Also, the final rule requires these three States to participate in rigorous evaluation activities to be conducted by the Department to determine whether such models are empirically supported. The Department is requiring that State Monitor Advocate (SMA) functions be performed by State merit staff in all States because SMAs monitor the State Workforce Agency (SWA), must report on SWA compliance to the State Administrator, and liaise between the SWA and external groups. Because the SMA position requires overseeing State agency functions and creating accountability for those functions, including discussing needed process improvements with State officials and ETA's Regional and National Monitor Advocates, such oversight functions are more appropriately performed through State merit-staffing.

The Department is additionally revising the ES regulations to strengthen the provision of services to MSFWs and to enhance the protections afforded by the Monitor Advocate System and the Complaint System. These changes include the following:

- Better serving MSFWs and promoting equity in the workforce system, including requiring States to use State merit staff to provide ES services to MSFWs.
- Revising several defined terms related to the provision of ES services to MSFWs to modify the criteria for designating *significant MSFW one-stop centers* and *significant MSFW States*, and to ensure that full-time students who otherwise meet the criteria set forth in the definitions will be afforded the same benefits and protections under the ES as other MSFWs.

- Strengthening the role and status of SMAs, including requirements to help to ensure that States employ highly qualified candidates, that SMAs have the appropriate authority necessary to effectively carry out their duties, and that SMAs are not assigned duties that are inconsistent with their role to provide oversight.

- Prohibiting the State Administrator or ES staff from retaliating against staff, including against the SMA, for monitoring or raising any issues or concerns regarding non-compliance with the ES regulations.

- Requiring SMAs to conduct onsite reviews of one-stop centers regardless of whether the one-stop center is designated as a significant MSFW one-stop center.

- Requiring the SMA to establish an ongoing liaison with the State-level Equal Opportunity Officer (E.O. Officer) to enhance equity and inclusion for farmworkers.

- Further specifying SWA staffing requirements for significant MSFW one-stop centers.

- Requiring SWAs to collect and report data on the number of reportable individuals who are MSFWs to help SWAs, SMAs, and ETA monitor equity in the provision of ES services to MSFWs.

- Aligning the ES regulations with the language access requirements of the Workforce Innovation and Opportunity Act (WIOA) nondiscrimination regulations at 29 CFR 38.9 to reduce duplication and to ensure States provide the broadest language access protections available for MSFWs with limited English proficiency (LEP).

- Strengthening outreach to MSFWs by, among other things, requiring SWAs to conduct outreach to MSFWs on an ongoing basis; specifying that all States must have some degree of outreach at all times and full-time outreach staff must spend 100 percent of their time on the outreach responsibilities described at § 653.107(b); requiring SWAs to employ enough outreach staff to contact a majority of MSFWs in their States annually; prohibiting SWAs from relying on National Farmworker Jobs Program (NFJP) grantee activities as a substitute to meet outreach obligations; specifying that SWAs must ensure hiring officials put a strong emphasis on hiring qualified candidates for outreach staff positions; and requiring outreach staffing levels to align with and be supported by information in the Agricultural Outreach Plan (AOP) that a State must submit pursuant to § 653.107(d).

- Changing the record retention requirement for outreach logs from 2

¹ <https://www.dol.gov/agencies/eta/advisories/unemployment-insurance-program-letter-no-12-01-change-2>.

years to 3 years to align with the Office of Management and Budget (OMB) Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal awards to non-Federal Entities (Uniform Guidance) record retention requirements at 2 CFR 200.334.

- Amending the information SWAs must include in their AOP to include the number of full-time and part-time outreach staff that the State will employ and a description of how the SWA intends to staff significant MSFW one-stop centers in accordance with § 653.111.
- Removing “random” from the definition of field check to ensure SWAs are able to target the field checks that they conduct in response to known or suspected compliance issues.
- Revising several regulations within part 658, subpart E, to conform with proposed revisions to definitions listed at § 651.10, remove redundancies and make other non-substantive technical edits, clarify or modify certain requirements, and improve equity and inclusion for MSFWs in the ES system.
- Revising requirements for how ETA regional offices process complaints to align with the revised process SWAs must follow in referring nondiscrimination complaints under § 658.411(c) and to refine other requirements applicable to regional offices.

The Department also is making technical amendments and global edits to modernize the ES regulations, to clarify and use plain language, and to further promote equity by using gender-inclusive language throughout the regulations.

In the NPRM, the Department proposed an 18-month transition period for States to comply with the requirements in this rulemaking. Based on comments received on the NPRM indicating that States would need more time to comply, the Department is providing 24 months to comply with the provisions of the final rule.

The final rule adds severability provisions in parts 652, 653, and 658.

This final rule reflects changes made in response to public comments received on the NPRM that was published on April 20, 2022, at 87 FR 23700. The Department received many comments from the public and nonprofit sectors, as well as private citizens. The Department considered these comments in determining this final rule, and the changes made to the regulatory text are detailed below in the Department’s responses to related comments.

III. Background and Justification

The Wagner-Peyser Act of 1933, 29 U.S.C. 49 *et seq.*, established the ES program, which is a nationwide system of public employment offices that provide public labor-exchange services. The ES program seeks to improve the functioning of the nation’s labor markets by matching job seekers with employers that are seeking workers. Section 3(a) of the Wagner-Peyser Act directs the Secretary of Labor (Secretary) to assist States by developing and prescribing minimum standards of efficiency and promoting uniformity in the operation of the system of public employment offices. *See* 29 U.S.C. 49b(a). This final rule amends regulations in 20 CFR parts 651, 652, 653, and 658. With limited exceptions, the final rule requires States to use State merit staff to provide ES services, including services and activities under parts 653 and 658. The Department also is targeting revisions to the regulations at parts 651, 653, and 658. These revisions are intended to ensure that SWAs provide MSFWs with adequate access to ES services and that the role of the SMA is effective. In addition, this final rule amends parts 651, 652, 653, and 658 to further integrate gender-inclusive language. Finally, the Department is making technical corrections to these CFR parts to improve consistency across the parts and to make them easier to understand.

Historically, the Department relied on its authority in secs. 3(a) and 5(b) of the Wagner-Peyser Act to require that ES services, including Monitor Advocate System activities for MSFWs and Complaint System intake, be provided by State merit-staff employees.² The Department consistently applied this requirement, with limited exceptions, until 2020. Specifically, beginning in the early 1990s, the Department authorized demonstration projects in which it allowed Colorado and Massachusetts limited flexibility to set their own staffing requirements for the provision of ES services. Colorado was authorized to use county and State merit staff to deliver ES services. The State contracts for these services with county and State sub-recipients, but has not allowed further sub-contracting by the sub-recipients. Massachusetts was approved to use non-State-merit staff to provide ES services in just four of the State’s 16 local areas. In these local areas, the State has generally relied on local one-stop career center/American Job Center (AJC) staff for ES services. In

1998, the Department permitted Michigan to use State and local merit-staff employees to deliver ES services, pursuant to a settlement agreement arising out of *Michigan v. Herman*, 81 F. Supp. 2d 840 (W.D. Mich. 1998). Michigan was still required to use State merit staff for services to MSFWs, veterans, and individuals with disabilities. All three States continued to operate with staffing flexibility through their approved State plans,³ though all three also used State merit staff for the SMA position. Through rulemaking effective February 5, 2020, the Department removed the requirement that ES services be provided only by State merit staff. *See* Wagner-Peyser Act Staffing Flexibility; Final Rule, 85 FR 592 (Jan. 6, 2020) (2020 Final Rule). In the preamble to the 2020 Final Rule, the Department explained that it sought to allow States maximum flexibility in staffing arrangements. *Ibid.* Accordingly, under the regulations in effect under the 2020 Final Rule, several States were approved to use a variety of staffing models to provide ES services, as described in their approved State plans.

In light of the events of the last few years, the Department has reassessed the approach adopted in the 2020 Final Rule and determined instead to reinstate the requirement that States use State merit staff to deliver ES services. State merit-staffing is a generally reliable method to ensure quality and consistency in ES delivery, and the demands placed on State UI systems by the economic impact of the COVID-19 pandemic highlighted the necessity of States to be able to rely on eligible ES State merit staff to be deployed to assist with UI activities as needed.

In adopting this State merit-staffing requirement, the Department relies on its authority under secs. 3(a) and 5(b)(2) of the Wagner-Peyser Act, as well as authority under sec. 208 of the Intergovernmental Personnel Act (IPA), 42 U.S.C. 4728, as amended. Each of these provisions, standing alone, provides the Department with the authority to require States to use State merit staff to provide ES services.

Specifically, sec. 3(a) of the Wagner-Peyser Act requires the Secretary to assist in coordinating the ES offices by “developing and prescribing minimum standards of efficiency.” 29 U.S.C. 49b(a). As the court in *Michigan v. Herman* concluded, “the language in [sec. 3(a)] authorizing the Secretary to develop and prescribe ‘minimum standards of efficiency’ is broad enough

² *Workforce Innovation and Opportunity Act; Department of Labor; Final Rule*, 81 FR 56072 (Aug. 19, 2016) (WIOA DOL-only Rule) (*see* 20 CFR 652.215, 653.108, 653.111, 658.602).

³ *See* WIOA DOL-only Rule, 81 FR at 56267 and 56341 (2016).

to permit the Secretary of Labor to require merit staffing.” 81 F. Supp. 2d at 848.

In addition, sec. 5(b)(2) of the Wagner-Peyser Act provides that the Secretary shall from time to time certify to the Secretary of the Treasury for payment to each State that, among other things, “is found to have coordinated the public employment services with the provision of [UI] claimant services.” 29 U.S.C. 49d(b). As explained previously, the State merit-staffing requirement would align the staffing of ES services with the staffing that States are required to use in the administration of critical UI services. Therefore, it is reasonable for the Department to base the finding required by sec. 5(b)(2) of the Wagner-Peyser Act, in part, on a State’s agreement to use State merit staff to administer and provide ES services.

Furthermore, sec. 208 of the IPA authorizes Federal agencies to require, as a condition of participation in Federal assistance programs, systems of personnel administration consistent with personnel standards prescribed by the Office of Personnel Management (OPM).⁴ In accordance with 5 CFR 900.605, the Department submitted the proposed rule to OPM for review and received approval prior to the publication of the NPRM.

In the IPA, 42 U.S.C. 4701, *et seq.*, Congress found that the quality of public service could be improved if government personnel systems are administered consistent with certain merit-based principles. Requiring States to employ the professionals who deliver ES services in accordance with these principles would help ensure that ES services are delivered by qualified, non-partisan personnel who are directly accountable to the State. Among other things, such professionals would be required to meet objective professional qualifications, be trained to assure high-quality performance, and maintain certain standards of performance. *See* 42 U.S.C. 4701. They would also be prohibited from using their official authority for purposes of political interference, and States would be required to assure that they are treated fairly and protected against partisan political coercion. *Ibid.*

The Department acknowledges that this constitutes a change in its position taken under the 2020 Final Rule and requires certain States to adjust how

they deliver ES services. The Department notes that Federal agencies are permitted to change their existing policies if they acknowledge the change and provide a reasoned explanation for the change. *See, e.g., Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016). In the NPRM, the Department acknowledged the proposed policy change and explained the reason for the change. The ES system is designed to “promote the establishment and maintenance of a national system of public employment service offices,” 29 U.S.C. 49, and the UI and ES systems together provide a basic level of employment support for more than 4 million job seekers per year to enter and re-enter the workforce. The Department believes that it is vital that the ES be administered so that services are delivered effectively and equitably to UI beneficiaries and other ES customers. The COVID–19 pandemic and the ensuing demand placed on the UI system demonstrated a need for centrally trained, high-quality staff to be able to step in to assist States as needed. Further, the ES is a universal access program, and it is critical that it be administered by nonpartisan personnel held to transparent, objective standards designed to assure high-quality performance. A State merit-staffing requirement is a generally reliable method to ensure quality and consistency in delivery of ES services and supports the well-established connection between ES and UI services. As explained further in this preamble, the Department believes an evaluation of the alternative staffing models, though not legally required, is prudent to determine whether use of such alternative staffing models is empirically supported.

The Department is further adjusting its position to account for the unique history of three States’ administration of ES services. Colorado, Massachusetts, and Michigan have been allowed by the Department to use various forms of non-State-merit staff models to deliver ES services since the 1990s. The Department acknowledges the longstanding reliance interests of these three States. The final rule allows these States to continue to use those alternative staffing models, but the States must continue to use merit staff to the same extent they were using it prior to February 5, 2020, the effective date of the 2020 Final Rule. Those are the staffing models on which the three States have decades-long reliance. Adopting a standard that preserves the level of merit-staffing each of the three States had been implementing since the

1990s is reasonable and consistent with the final rule’s overall State merit-staffing requirement.

Establishing a different standard for these three States is supported by the text of section 3(a) of the Wagner-Peyser Act, which permits the Department to establish “standards of efficiency.” The Department’s history of allowing these States to use alternative staffing models since the 1990s has created the present reality that requiring complete State merit-staffing in these three States would have a harmful effect on the States’ ES services and program participants. While the final rule explains above the benefits of requiring all the other States to use State merit staff to deliver all ES services, and the proposed rule articulated the strong preference for uniformity in staffing across all States, those interests are outweighed by the disruptive and negative effects that a complete State merit-staffing requirement would have on these States’ programs that have such long reliance on alternative staffing models.

These three States have provided some initial justification and data for being able to continue using their longstanding alternative staffing models. These three States also provided information about the service disruption that would result from having to upend their longstanding service delivery models. However, the justifications and data presented do not provide clear evidence of causation. Therefore, the Department will further examine various staffing models and methods of delivering labor exchange services through a rigorous evaluation. Given the Department’s clear and supported policy preference for State merit-staffing in the ES program, it logically follows that the Department believes it is prudent to evaluate whether alternative staffing models are empirically supported. The rule requires these States’ participation in any evaluation activities about merit-staffing, which will likely consist of a single evaluation but may span more than one study, including any data collection associated with those evaluation activities. The Department will seek required approvals under the Paperwork Reduction Act for data collection, as necessary. This plan for evaluations is consistent with the Secretary’s authority under section 3(c)(2) of the Wagner-Peyser Act, which requires the Secretary to “assist in the development of continuous improvement models for [the nationwide system of labor exchange services] that ensure private sector satisfaction with the system and meet the demands of jobseekers relating

⁴ 42 U.S.C. 4728(b); *see also* 5 CFR 900.605 (authorizing Federal agencies to adopt regulations that require the establishment of a merit personnel system as a condition for receiving Federal assistance or otherwise participating in an intergovernmental program with the prior approval of OPM).

to the system, and identify and disseminate information on best practices for such system.” 29 U.S.C. 49b(c)(2). The Department will conduct this evaluation of the three States’ provision of ES services, including review of services of other States that participate, as necessary, to determine whether such models are empirically supported.

In the section-by-section discussion, the Department further explains why it is requiring that States use State merit staff to provide ES services.

Comments Expressing Support for the Department’s Legal Authority for the State Merit-Staffing Requirement

Comment: Some commenters, including unions, a State employee association, an advocacy organization, and private citizens, expressed support for the Department’s authority to institute a nationwide merit-staffing requirement in the Wagner-Peyser Act regulations for ES services. In particular, a State employee association, an advocacy organization, and private citizens agreed with the Department that clear legal authority for reinstituting a nationwide ES merit-staffing requirement is found under secs. 3(a) and 5(b) of the Wagner-Peyser Act, which give the Department authority to develop and prescribe minimum standards of efficiency for ES services and to promote uniformity in their administrative procedures. A union argued that the statutory requirement to prescribe minimum standards of efficiency and promote uniformity requires that States use merit staff to administer ES programs, citing studies the commenter said show that State merit-staffed ES offices deliver services more equitably and effectively.

An advocacy organization and a State employee association argued that the proposed merit-staffing requirement is supported by the historical record and reinstates the Department’s longstanding requirement that ES services be administered by State merit staff. Specifically, according to these commenters, the Wagner-Peyser Act establishes “a national system of public employment service offices” and, because a principal component of a public system is State government employees who are hired and promoted on a merit basis under a civil service system, the Department argued in *Michigan v. Herman* that merit-based staffing is required by the Wagner-Peyser Act because Congress intended merit-staffing to be a key component of “public” employment service.

Similarly, a private citizen argued that the Wagner-Peyser Act’s use of the word

“public” clearly falls within the word’s common dictionary usage as something “of or relating to government.” Given that the Wagner-Peyser Act defines “employment service office” as “a local office of a State agency,” this commenter concluded that the Wagner-Peyser Act created a network of State governmental ES offices. Similarly, the commenter argued that the statutory text does not envision using local agencies to provide ES services. Referencing 1998 and 2014 amendments to the Wagner-Peyser Act, this commenter said that Congress has never altered the language providing authority for the Secretary to require merit-staffing for ES services. In conclusion, this commenter argued that “claims of flexibility do not give the Department sufficient legal authority to permit local agencies, community colleges, local governments, or other entities to [provide] ES [services] in substitution of state agency merit-staffed employees,” although a State is free to provide additional resources to job seekers beyond ES-staffed services.

A union commented that the Wagner-Peyser Act’s creation of nationwide ES offices was intended to displace and transform the ineffectual system of employment placement services available to the jobless that existed prior to the Act’s passage. The commenter described that system as a patchwork, fragmented, and inequitable system that consisted primarily of private agencies, which the commenter said were usually exploitative, predatory, and corrupt, as well as a handful of local public employment offices, which the commenter asserted were tainted by underfunding, patronage hiring, and political influence.

Asserting that Congress has reaffirmed the Wagner-Peyser Act’s requirement of merit-staffing over time, an advocacy organization said that the Intergovernmental Personnel Act of 1970 (IPA) specifically named the Wagner-Peyser Act as one of two acts administered by the Department that transferred merit authority to the Civil Service Commission (succeeded by OMB). Further, according to the commenter, the Civil Service Reform Act (CSRA) in 1978 amended the IPA to make clear the intent that merit system guarantees for public employees are to remain a condition of Wagner-Peyser Act funding to States. In support of this assertion, one of the commenters cited Pub. L. 95–454 (Oct. 13, 1978), 92 Stat 1111, which the commenter stated added subsection (h) to 42 U.S.C. 4271 to exempt the Wagner-Peyser Act’s merit-staffing requirement, among others, from the CSRA provision otherwise abolishing all statutory

personnel requirements established as a condition of the receipt of Federal grants-in-aid by State and local governments.

Additionally, a State employee association asserted that the State merit-staffing requirement is rooted in the Wagner-Peyser Act’s provisions giving the Department the authority to develop and prescribe minimum standards of efficiency for public employment services and to promote uniformity in their administrative procedure. Finally, these commenters remarked that, when the Department attempted to change its legal interpretation of the Wagner-Peyser Act in 2006, Congress reaffirmed its position by blocking the proposal by including language in the Fiscal Year (FY) 2007 and subsequent annual appropriations to prohibit the Department from taking such action. A State employee association commented that this 90-year history of the ES State merit-staffing requirement remaining in place through statutory amendments and court decisions is highly suggestive of a Congressional intent to require the delivery of ES services by merit-based employees.

An advocacy organization and a State employee association discussed additional components of the Wagner-Peyser Act historical record that they said supported the necessity of delivery of ES services by qualified, non-partisan personnel who are directly accountable to the State. For example, the commenters said the first ES director concluded that, to avert patronage and favoritism in hiring, State ES programs were legally required to adopt merit personnel systems for appointments and promotions. These commenters and a union also stated that, as States adopted companion laws to conform with the Wagner-Peyser Act in the 1930s, the Department withheld certification of nine States until they provided assurances that they would merit staff any State-administered public employment office.

A State employee association quoted the CSRA implementing regulations as describing the Wagner-Peyser Act merit-staffing requirement as “a statutory requirement for the establishment and maintenance of personnel standards on a merit basis” in Wagner-Peyser Act-funded programs (5 CFR part 900, subpart F, Appendix A). Further, this commenter quoted the final rule implementing the Workforce Investment Act of 1998 (WIA) in which the Department responded to inquiries asking if States may seek a waiver of the merit-staffing requirement for its ES program by stating, “The requirement that Wagner-Peyser Act services be

provided by State merit staff employees derives from sections 3 and 5(b)(1) of the Wagner-Peyser Act. Accordingly, we do not intend to, nor do we have authority to entertain or grant waivers of the Wagner-Peyser Act merit-staffing requirement.” 65 FR 49294, 49306 (Aug. 11, 2000).

Citing the public comment it submitted on the 2019 proposal to allow ES services to be provided under flexible staffing models, an advocacy organization said that, for more than 85 years, Congress acted many times to require merit-staffing in the ES program to guarantee workers receive unbiased and high-quality employment services.

Response: The Department generally agrees with these commenters that the Department has authority to require State merit-staffing under the Wagner-Peyser Act and the IPA. The Department also generally agrees that Congressional actions over time have affirmed the Department’s authority to require State merit-staffing. The Department weighed this authority and historic precedent when it proposed uniform State merit-staffing in the NPRM. As explained above, the Department also weighed the public comments that described the detrimental effects that the uniform requirement would have on the three States with longstanding reliance on using alternative staffing models. Congress’ decision not to disturb these three States’ alternative staffing models when it passed both WIA and WIOA suggests Congressional acquiescence with these States’ arrangements. The Department is therefore returning to the longstanding requirement of State merit-staffing for ES, with the limited exception that Colorado, Massachusetts, and Michigan may continue to use the alternative staffing models they had been using before the 2020 Final Rule became effective. This includes the requirement that these three States use merit-staffing to deliver ES services to the same extent they had been using it.

Comments Expressing Concerns About the Department’s Legal Authority

Comment: Some commenters, including an association of workforce boards, a think tank, and a one-stop center employee, expressed doubts about the Department’s interpretation of its legal authority to require nationwide merit-staffing for ES services. In particular, an association of workforce boards and a think tank commented that the Wagner-Peyser Act does not mandate a one-size-fits-all staffing model. Specifically, an association of workforce boards asserted that the Wagner-Peyser Act does not explicitly require that ES staff in States be merit-

based, nor do existing statutes speak specifically to State merit-staffing requirements for ES offices. This commenter stated that the *Michigan v. Herman* court suggested that the Department may interpret section 3(a) of the Wagner-Peyser Act to permit staffing flexibility, based on the court’s statements that the Wagner-Peyser Act “does not explicitly require merit-staffing” and that the language of section 3(a) is “broad enough to permit [the Department] to require merit-staffing.” Further, the commenter remarked that, since the *Michigan v. Herman* ruling, the Department has twice affirmed that Federal law does not require delivery of ES services by State merit staff: (1) allowing existing exemptions from ES State merit-staffing requirements to continue (2016), and (2) the 2020 Final Rule. The commenter concluded that dictating to States and local communities how to appropriately staff ES offices is a Departmental interpretation that will cause significant disruption and harm to the workforce system.

Response: The Department proposed in the NPRM to require that all States use State merit staff to provide ES services. The Department has considered the alternative viewpoints provided. As these commenters noted, the Wagner-Peyser Act does not require the use of State merit staff for ES services, but the Act does provide the Secretary with discretion to require State merit-staffing, as explained above. State merit-staffing for ES services is widely used in many States and its requirement will not create disruption for the vast majority of States. Upon consideration of the public comments that described the detrimental effects that the State merit-staffing requirement would have on the three States with longstanding reliance on alternative staffing models, the Department will allow the three States with such reliance to continue use of the models they had been using prior to February 5, 2020, the effective date of the 2020 Final Rule. Further, the Department is committed to evaluating ES programs in these States to determine whether such models are empirically supported. With respect to States that may have adopted ES staffing flexibilities as a result of the 2020 Final Rule, the Department understands there may be some additional costs associated with the transition from non-merit staff to State merit staff. In response to comments, the Department is providing a 24-month compliance period from the effective date of this final rule to minimize disruption of services in those States.

IV. General Comments on the Proposed Rule

The NPRM, published on April 20, 2022, invited written comments from the public concerning the proposed rulemaking; the comment period closed on June 21, 2022. The comments received on the NPRM may be viewed at <https://www.regulations.gov> by entering docket number ETA–2022–0003.

The Department received timely comment submissions from 1,090 commenters, of which 776 were unique. The Department identified 12 form letter campaigns, which were read and considered with the other comments received. The Department also received additional comments that were duplicates or not related to the subject of this rule. The commenters represented a range of stakeholders from the public and nonprofit sectors. Public sector commenters included State and local government agencies, local workforce development boards, and one-stop operators. Nonprofit sector commenters included public policy organizations, advocacy groups, national and local labor unions, and a trade association. Of the unique comments, nearly one-third came from SWAs. The Department also received several comments from private citizens.

These comments are addressed in the summary of general comments and the section-by-section discussion. About half of the unique comments supported aspects of the proposal but opposed others, while a smaller number conditioned their support for the proposal on the Department adopting certain changes in this final rule.

Summary of General Comments on the Proposed Rule

Comment: A State government agency expressed its support for the rule on the grounds that the State already provides ES services with State merit staff only and thus the rule would require no change in its operations.

Several commenters, mostly private citizens, expressed general support for the proposed merit-staffing requirement without providing detailed rationale or supporting data. Some arguments provided by commenters supporting the rule included:

- States are better equipped than local areas or contractors to administer ES services professionally, consistently, and with greater transparency and accountability.
- A State merit-staffing requirement would ensure the (UI) system remains effective in times of need.
- State merit staff have consistently provided job seekers with career

enhancement and reemployment services to ensure they have productive lives.

A union called the proposed rule a policy correction from the 2020 Final Rule and agreed the proposed rule is appropriate, given the environment in which that rule was developed (historically low demand for ES services and UI) and the subsequent severe labor market impacts of the COVID-19 pandemic that sent demand for ES and UI services surging. Similarly supporting the return to the pre-2020 standard for ES staffing, a farmworker advocacy organization commented that the decision to depart from a merit-based staffing model was unsupported by the Department's own findings on the efficiency of merit-based staffing. Specifically, this commenter cited a 2004 ETA study that they said compared merit-based ES staffing models with non-merit models, and it found that the States with non-merit models listed significantly fewer jobs and fewer referrals and job placement than merit-based staffing States.

Response: The Department is adopting the proposed State merit-staffing requirement as a generally reliable method to ensure quality and consistency in ES delivery and one that supports the well-established connection between ES and UI services. The Department notes that it has allowed three States to use alternative staffing models for decades, and these States have provided some justification and data for being able to keep such models. The States also provided information about the service disruption that would result from having to upend their longstanding service delivery models. However, the justifications and data presented do not provide clear evidence of causation; that is, no compelling data emerged in the public comment period or in previous research that showed that alternative staffing models are the cause of higher or more consistent employment outcomes. While the Department recognizes the decades-long practice on which three States rely, such partial and correlation-only data are not sufficient to expand these models to other States, especially not when, as explained in the NPRM, fluctuations in UI demand from a pandemic or natural disasters clearly show a need for centrally trained, high-quality staff to be able to step in to bolster State review of UI claims and appeals if needed.

Therefore, the Department is adopting the State merit-staffing requirement as proposed with a partial adjustment: the final rule is requiring all States, except Colorado, Massachusetts, and Michigan,

to use State merit staff to provide ES services. The Department will further examine various staffing models and methods of delivering labor exchange services through a rigorous evaluation, as discussed above. Given the Department's clear and supported policy preference for State merit-staffing in the ES program, the Department believes it is prudent to evaluate the delivery of ES services using the experience of States operating longstanding alternative staffing models to determine whether such models are empirically supported. The three States with decades-long reliance on using alternative staffing models may use the same service-delivery models they used prior to February 5, 2020, and will be required to participate in this forthcoming evaluation activities. All other States will have 24 months to comply with the requirement to use State merit staff to provide all ES services.

Comment: Several commenters, including one-stop center staff and private citizens, opposed the proposed merit-staffing requirement. Some arguments provided by commenters against the proposed merit-staffing requirement included:

- Commenters from States operating longstanding alternative staffing models stated that they view local resource centers and the services they provide as essential.

- Commenters from States operating longstanding alternative staffing models stated that the change would ruin the one-stop service model that provides seamless, equitable services that facilitate real-time, meaningful referrals.

- Commenters stated that the Federal government has consistently demonstrated inadequacy when it comes to administration of programs that directly affect those at the local level.

- Commenters from States operating longstanding alternative staffing models stated that there is great value in staffing local offices with local staff rather than State merit employees. Each individual and business has their own unique challenges to progress, development, and success, which can only be understood and addressed at the local level.

- Commenters from States operating longstanding alternative staffing models stated that the proposed change would redirect responsibilities and funds to the State, which would be a mistake. The commenters said that the current system at the local level is working well without any issues.

- Commenters from States operating longstanding alternative staffing models

stated that the proposed change would harm job seekers and businesses, resulting in lower quality and fewer services being provided, including services to veterans, immigrant and refugee navigator services, Clean Slate services for formerly incarcerated people, support navigating the UI benefits process, job training, career events, job fairs, and industry led collaboratives.

- Commenters from States operating longstanding alternative staffing models stated that the proposed rule would have a negative impact on local communities, including causing job centers to close and the loss of many jobs. The loss of centers would also impact students who rely on local offices to assist with educational support and other assistance.

Many private citizens from States operating longstanding alternative staffing models provided personal experiences asserting the value and need for services at one-stop centers, which they stated would be impacted if a State merit-staffing requirement changed the availability of services or the number of one-stop centers. Other commenters, including one-stop center staff, described their experience as local merit staff or working with the workforce development system and the positive impact on the community.

Response: The Department proposed to require that all States use State merit staff to provide ES services and has considered reasons provided by these commenters for opposing the proposed rule. The proposal to require State merit staff does not preclude the State from providing services locally, and the vast majority of States provide high quality services in one-stop centers with a mix of State merit staff delivering ES locally and other staff providing other services locally. Without evidence that alternative staffing models directly cause higher employment outcomes, balanced against widespread success in delivering services while maintaining State merit staff for ES, and further balanced by the need for ES State merit staff to be available for surges in UI claims and appeals, the Department is generally adopting the proposed requirement that States use State merit staff to provide ES services.

However, the Department recognizes that three States (Colorado, Massachusetts, and Michigan) have been allowed to administer ES services using alternative staffing models for decades. The Department understands that these States' long experience with their particular models results in an affinity and preference for their model. During the comment period, these States

provided information that the State merit-staffing requirement proposed to be applied to all States would have extremely detrimental impacts on the provision of ES services in these three States because of the facts and circumstances, particularly the decades-long reliance interests, in these States. Based on this information, the Department is adjusting the final rule from the original proposal. The final rule requires all States, except the three States with decades-long reliance on using alternative staffing models, to use State merit staff to provide ES services. The expansion of alternative staffing models to additional States occurred without study, before the landscape-altering impact of the pandemic on the UI and workforce system. The Department will require the three States to participate in a rigorous evaluation of the services provided in the three alternative States to determine if using alternative models benefit ES service delivery. All other States will have 24 months to comply with the requirement to use State merit staff to provide ES services.

Comment: Several commenters, including private citizens, presented a mixed stance or unclear position on the proposed rule. Many commenters, including private citizens, employers, and one-stop center staff, discussed Michigan's public workforce system, known as Michigan Works!, without addressing the proposed rule. Other commenters, including a trade association, career service provider, and employer, generally discussed the importance of programs or "communities." A one-stop center employee commented that ES services offer job seekers help navigating the UI process.

Response: The Department agrees that one-stop centers are valuable assets in a community, often provide services to a wide range of individuals, and are instrumental in shaping a local workforce's skills as part of larger economic development. The Department also notes that one-stop centers play this role across the country, including in the vast majority of States that maintain State merit staff in delivering ES services. Changes in how a one-stop center operates can impact a local community, and thus the Department weighs such impacts very carefully in its regulations. The Department recognizes the significant challenges that a return to State merit-staffing would present for States with decades-long reliance on using alternative models. Therefore, after serious consideration of comments received from the public, the

Department is requiring all States to use State merit staff to deliver ES services, except the three States that have been allowed to use alternative staffing models for decades. Due to their longstanding reliance, these States are permitted to use merit-staffing flexibility to the same extent the Department allowed them to use it before the 2020 Final Rule became effective, but the Department is not permitting them to expand their staffing flexibility any further.

Comment: An anonymous commenter asked whether State merit staff will be required to colocate in one-stop centers.

Response: WIOA requires ES offices to be colocated in AJCs, also known as one-stop centers, regardless of the staffing model used. This is unchanged under this final rule.

Comment: An anonymous commenter asked whether Federal appropriations will provide adequate resources to support the recruitment, hiring, and training of ES State merit staff or if the costs will be assumed by the States.

Response: Recruiting, hiring, and training ES staff is an allowable cost for ES grants to States. In considering this comment, the Department determined that a greater amount of Federal funding is available now compared to other years. The FY 2022 and FY 2023 appropriations each provided an increase for Wagner-Peyser Employment Service grants to States over the years prior. In FY 2023, Congress appropriated \$5 million more than in FY 2022 for the ES formula grants to States, which are the grants allotted to States to operate the ES. With the increased funding, the Department expects the ES to serve approximately 20,000 more individuals nationwide in 2023 (2,913,438). The estimates are not dependent on the type of staffing model a State uses to deliver ES services. The States' latest financial reports show that many States, including those States that must make changes to come into compliance with the final rule's State merit-staffing requirement, still have previous years' ES grant funds not yet expended. One of these States has expended under half of its Program Year (PY) 2022 allotment, and all of these States had lower expenditure rates in PY 2022 than in previous years. The Department notes that many States have used general funds made available under the American Rescue Plan Act and other resources to bolster overall workforce development services. Therefore, compared to other years, this is an appropriate time for a transition back to the use of State merit staff because of the above average resources available.

Comment: An anonymous commenter asked what impact implementation of the proposed rule will have on the monitor advocate requirements.

Response: Because the Monitor Advocate System is a part of the Wagner-Peyser ES, the requirement for States to use State merit staff for ES services also applies to Monitor Advocate services described at parts 653 and 658. Aside from Colorado, Massachusetts, and Michigan, the Department is requiring States to use State merit staff to conduct outreach to MSFWs, as described at § 653.107. Colorado, Massachusetts, and Michigan must use merit-staffing for MSFW outreach to the same extent authorized in their approved longstanding alternative staffing model. This means that if the State was required to use State merit staff for MSFW outreach (as in the case of Michigan) prior to February 5, 2020, then the State must continue to use State merit staff for MSFW outreach. If the State was permitted to use a combination of local merit staff and State merit staff for MSFW outreach prior to February 5, 2020, then the State must continue using merit staff for MSFW outreach. The Department is also requiring all States to use State merit staff to fulfill their SMA responsibilities, as described at § 653.108. Colorado, Massachusetts, and Michigan all use State merit staff for the SMA position as part of their longstanding staffing model and are required to continue doing so. All States will have 24 months to comply with this final rule.

Comment: The Department received several comments that were beyond the scope of the proposed rule and included issues with the processing of UI claims, the politics of social justice campaigns, the status of pandemic unemployment assistance, and the actions of President Biden's administration generally.

Response: These are issues that cannot be resolved or implemented through this regulatory process or are not within the Department's purview.

V. Section-by-Section Discussion of Final Rule

The discussion below details the decisions the Department made in adopting the final rule text. It responds to section-specific comments and explains any changes made in response to those comments. If the Department did not receive comments regarding a particular section, that section is not discussed in detail below, and the final rule adopts that section as proposed for the reasons set forth in the NPRM. The Department also has made nonsubstantive changes to the

regulatory text to correct grammatical and typographical errors, in order to improve the readability and conform the document stylistically, that are not discussed in detail below.

A. Technical Amendments and Global Edits

In the NPRM, the Department proposed several technical amendments and global changes, as discussed in detail below. The Department did not receive substantive comments on these proposed changes, and it adopts them as proposed in the final rule.

To conform with the proposed changes to the definition of *Wagner-Peyser Act Employment Service (ES)* also known as *Employment Service (ES)* in § 651.10, the Department is making technical changes to replace the phrases “employment services,” “Wagner-Peyser Act services,” and “services provided under the Wagner-Peyser Act” with “ES services.” Changes also have been made to replace the phrase “employment office” with “ES office,” and “Wagner-Peyser Act participants” with “ES participants.” These changes will simplify and standardize the use of terminology. The language is also intended to improve usage of plain language within the regulations. Technical changes to articles, specifically changing “a” to “an” where necessary, have been made as well when preceding “ES office.” These changes have been made in § 651.10 within the definitions of *applicant holding office*, *Employment Service (ES) office*, *field visits*, *outreach staff*, *placement*, and *reportable individual*, in addition to the changes in the definition of *Wagner-Peyser Act Employment Service (ES)* also known as *Employment Service (ES)*. Conforming changes have also been made to the subpart heading at part 652, subpart C, and within the regulatory text at §§ 652.205, 652.207, 652.215, 653.107, 653.108, 658.411, 658.502, 658.602, and 658.603.

The Department is adopting several technical edits to refine gender-inclusive language within the regulatory text while maintaining plain language principles. Throughout parts 651, 653, and 658, the term “he/she” was used to denote an individual of unknown gender. Using terms with a slash may not be in keeping with plain language principles and may also exclude people who are nonbinary. The Department has made three technical edits to replace “he/she” with more inclusive language employing plain language principles.

First, where “he/she” refers to an individual in their professional capacity, the Department uses their job title instead of a pronoun. These edits

largely affect regulations impacting the National Monitor Advocate (NMA) or the Regional Monitor Advocate (RMA). In these cases, “he/she” has been replaced with “the NMA” or “the RMA” as appropriate and “his/her” with the possessive pronoun “their.” These edits are made as proposed at §§ 658.602 and 658.603.

Second, where “he/she” refers to an employer that is not an individual person, the Department uses the pronoun “it.” Where the possessive pronouns “his/her” were used, the Department proposed using “its.” This is appropriate because employers are entities, not individuals, and the proper pronoun is “it.” This edit is made as proposed at §§ 658.502 and 658.504.

In all other cases where “he/she” was used, the Department uses the pronoun “they” in its capacity as a gender-inclusive third-person singular pronoun but conjugated with third-person plural verbs. Where the possessive pronouns “his/her” were used, the Department proposed using “their.” These changes are designed to remove binary gender language so that the regulatory text is gender inclusive. The Department makes these changes as proposed in § 651.10 in the definition of *seasonal farmworker*. Edits are also made as proposed to §§ 653.107, 653.108, 653.111, 653.501, 653.502, 658.400, 658.410, 658.411, 658.421, 658.422, 658.602, 658.603, 658.702, 658.705, 658.706, and 658.707.

In addition, the Department replaces the words “handle” and “handled” with “process” and “processed,” as appropriate, to clarify that actions by ES staff and Federal staff must follow the processing requirements listed throughout part 658, subparts E and H, which use the word “process.” The word “handle” does not have a specific meaning in the regulatory text and may be unclear to SWAs.

In some instances, the Department also made conforming technical amendments to correct grammar in the regulations, as needed, because of these changes. In addition to such conforming technical amendments, the Department added and removed commas throughout the regulatory text to improve clarity and readability. These global changes and technical amendments described in this section are not explicitly identified later in the section-by-section discussion.

Finally, the Department is correcting the citation for its rulemaking authority for parts 651 and 652.

B. Part 651—General Provisions Governing the Wagner-Peyser Act Employment Service

Part 651 (§ 651.10) sets forth definitions for parts 652, 653, 654, and 658. In the NPRM, the Department proposed to define several new terms in this section and to make revisions to a number of other terms that were already defined in this section. The Department received comments on some of the proposed additions and revisions. After carefully considering these comments, the Department has decided to adopt most of the additions and revisions as proposed, with exceptions, as discussed in detail below.

Apparent Violation

The Department proposed to add a definition for *apparent violation* to clarify that the term means a suspected violation of employment-related laws or ES regulations, as set forth in § 658.419.

Comment: A State government agency appreciated the Department’s efforts to define apparent violation but felt that additional clarification was required to aid implementation. This commenter suggested that the Department clarify the proposed definition of *apparent violation* by adding the following language at the end: “for which ES staff observes, has reason to believe, or is in receipt of information that a violation has occurred.”

Response: The Department agrees that the proposed definition for this term should be clarified by specifying that ES staff process apparent violations. In reviewing the commenter’s suggestion, the Department further identified that it would be beneficial to include in the definition that apparent violations relate to information received about suspected employer noncompliance, as § 658.419 has historically described. Additionally, upon further review of the NPRM, the Department is further clarifying the definition of apparent violation to state explicitly that the definition does not include complaints as defined in § 651.10. This change is meant to make the distinction between complaints and apparent violations clearer. The Department is also removing the parenthetical “as set forth in § 658.419 of this chapter” because it is unnecessary with the changes the Department is making in § 658.419 to be more clearly consistent with this definition. Accordingly, the Department has decided to amend the definition of apparent violation adopted in this final rule to mean “a suspected violation of employment-related laws or employment service (ES) regulations by an employer, which an ES staff member

observes, has reason to believe, or regarding which an ES staff member receives information (other than a *complaint* as defined in this part)."

Applicant Holding Office

The Department proposed to amend the definition of applicant holding office to replace "a Wagner-Peyser Employment Service Office" with "an ES office," and did not receive any comments on this proposed change. This change is consistent with the changes proposed to the definition of *Wagner-Peyser Employment Service (ES) also known as Employment Service (ES)*. The Department adopts the revision to "applicant holding office" as proposed.

Bona Fide Occupational Qualification (BFOQ)

As noted in the preceding section on technical amendments and global edits, the Department added commas throughout the regulatory text to improve clarity and readability, including in the first sentence of the definition of *bona fide occupational qualification (BFOQ)*. The Department did not receive any comments on this proposed change. In this final rule, the Department adds a necessary cross-reference to the EEOC's regulation regarding national origin found at 29 CFR part 1606 and corrects the cross-reference to the EEOC's BFOQ regulation found at 29 CFR part 1627.

Career Services

The Department proposed to amend the definition of career services to refer to WIOA by its acronym rather than its full title because the full title is previously spelled out at the beginning of this section. The Department did not receive any comments on this proposed change and adopts it as proposed.

Clearance Order

The Department proposed to amend the definition of clearance order to add a citation to the Agricultural Recruitment System (ARS) regulations at part 653, subpart F. The purpose of this addition is to clearly identify the ARS regulations to which the term refers. The Department did not receive any comments on this proposed change and adopts it as proposed.

Complaint System Representative

The Department proposed to amend the definition of Complaint System Representative to specify that the Complaint System Representative must be trained. The addition of the word "trained" makes the definition consistent with the requirement in § 658.410(g) and (h) that complaints are

processed by a trained Complaint System Representative. The Department also proposed to remove the words "individual at the local or State level" due to proposed changes to the definition of ES staff. The Department did not receive any comments on the changes proposed to the definition of *complaint system representative*. While the Department is not adopting the changes that it proposed to the definition of *ES staff*, the reference to an "individual at the local and State level" in the definition of *complaint system representative* is not necessary regardless of whether the Department revises the definition of *ES staff*. Accordingly, the Department adopts the proposed revisions to the definition of *complaint system representative*, including the removal of these words, without change.

Decertification

The Department proposed to amend the definition of Decertification to specify that the Secretary to which this definition refers is the Secretary of Labor. The Department did not receive any comments on this proposed change and adopts it as proposed.

Employment and Training Administration

The Department proposed to amend the definition of *Employment and Training Administration (ETA)* to remove the words "of Labor" after "Department" because *Department* is previously defined in this section as "the United States Department of Labor." The Department did not receive any comments on this proposed change and adopts it as proposed.

Employment Service (ES) Office and Employment Service (ES) Office Manager

The Department proposed to amend the definition of *Employment Service (ES) office* to replace "Wagner-Peyser Act" with "ES," to align with other proposed changes to the regulatory text. The Department further proposed to amend the definition of *Employment Service (ES) Office Manager* to replace the phrase "all ES activities in a one-stop center" with the phrase "ES services provided in a one-stop center," to align with other proposed changes to the regulatory text. In the same definition, the Department also proposed to replace "individual" with "ES staff person" to clarify that the *ES Office Manager* must be *ES staff*, as defined in this section.

Comment: Several commenters, including a one-stop center employee, supported the requirement in the

definition of *Employment Service (ES) office* that it be colocated in a one-stop center, saying this is part of Michigan's current practice. However, the commenters expressed concern about the term *Employment Service (ES) Office Manager*, arguing that it is misleading and implies greater authority than may be appropriate for onsite one-stop center ES staff.

Response: The Department acknowledges the comment but notes that there is no requirement for the ES Office Manager to be located onsite. ES Office Managers are responsible for all ES services provided in a one-stop center. It is possible for one ES Office Manager to manage more than one ES Office; however, each ES Office must have an assigned ES Office Manager. The Department adopts the change as proposed.

Employment Service (ES) Staff

The Department proposed to amend the definition of *Employment Service (ES) staff* in two ways: first, by replacing the phrase "individuals, including but not limited to State employees and staff of a subrecipient," with "State government personnel who are employed according to the merit system principles described in 5 CFR part 900, subpart F—Standards for a Merit System of Personnel Administration, and" to conform with the imposition of the merit-staffing requirement proposed in § 652.215; and, second, by deleting the phrase "to carry out activities authorized under the Wagner-Peyser Act," because this language is unnecessary as parts 652, 653, and 658 describe the activities and services that ES staff may or must carry out. The proposal also added that ES staff includes a SWA official.

Comment: Multiple commenters, including a trade association, a one-stop center employee, and an advocacy organization, recommended the Department expand the definition of *Employment Service (ES) staff* to include local merit staff in addition to State merit staff. The trade association reasoned that a more expansive definition is needed in light of the nationwide employment crisis and to enable the hiring of qualified local personnel. A group of Colorado local government employees also in favor of expanding the definition described the braided services they provided to a job seeker who needed extra support, arguing that the individual likely would not have received the same opportunities from State merit staff. Some commenters and a one-stop center employee asked the Department to explicitly state in the final rule that ES

staff should be a part of the local AJC, arguing that standalone ES offices undermine the WIOA one-stop concept and hinder access to comprehensive services for job seekers and employers.

A State government agency requested guidance on which classifications of ES staff would need to be cross-trained, noting that the NPRM only defines ES staff as those who are funded, in whole or in part, by Wagner-Peyser Act funds. The commenter stated that in their State, some workers may meet this definition of ES staff but only perform administrative functions.

Response: The Department has considered the comments recommending expanding the definition of ES staff to include local merit staff and requesting clarification regarding which staff are included in the definition. Because the Department is adopting the proposed State merit-staffing requirement with the limited exception that Colorado, Massachusetts, and Michigan may continue to use alternative staffing models, the Department is removing the reference to merit system principles from the definition of ES staff. The final rule defines ES staff to mean “Individuals who are funded, in whole or in part, by Wagner-Peyser Act funds to carry out activities authorized under the Wagner-Peyser Act.” The Department is not adopting the proposal that would have added that ES staff includes a SWA official because SWA officials may include individuals funded by programs other than Wagner-Peyser. In response to the comment stating the final rule should require that ES staff be a part of the local AJC because stand-alone ES offices undermine the WIOA one-stop concept, the Department notes that the existing regulations at 20 CFR 652.202 and 678.315 state that stand-alone ES offices are not permitted, and States must collocate ES offices with one-stop centers. In response to the comment inquiring about cross-training, the Department notes that, while there are benefits to cross-training, the NPRM did not propose requiring States to cross-train employees nor does this final rule require cross-training.

Field Checks

The Department proposed several amendments to the definition of *field checks*. First, the Department proposed to replace the term “job order” with “clearance order,” which is more accurate because field checks must be conducted on clearance orders as defined in § 651.10. Second, the Department proposed to clarify that field checks may be conducted by non-ES State staff, in addition to ES or

Federal staff, where the SWA has entered into an arrangement with a State or Federal enforcement agency (or agencies) for their enforcement agency staff to conduct field checks. Third, the Department proposed to remove the word “random” from the existing definition to clarify that the selection of the clearance orders on which the SWA will conduct field checks need not be random, though random field checks may still occur, and to clarify that field checks may be targeted, where necessary, to respond to known or suspected compliance issues.

Comment: A State government agency supported the revised definition of *field checks* but requested that the Department clarify in the rule or guidance either the circumstances that warrant targeted field checks or the responsibility of States to define the circumstances in policy. Another State government agency stated that the proposal to amend the definition of *field checks* to allow non-ES State staff to conduct field checks would necessitate coordination, training, and reporting to ensure that non-ES staff perform field checks properly and timely. The agency recommended that the Department remove the language allowing non-ES staff to perform field checks. A farmworker advocacy organization also supported the proposal to remove the word “random” from the definition of *field checks*, which it said would help improve protections for farmworkers. The organization stated that it believed the Department should go further to expand the definition of *field checks* to include locations beyond where ES placements have been made, stating that the ES placement limitation significantly reduces the number of worksites eligible for these essential compliance checks and incentivizes employers to hire H-2A workers—whose employment does not currently create the possibility of a field check—instead of hiring U.S. workers through the ES.

Response: Regarding the request for clarification on the circumstances that warrant targeted field checks, the Department clarifies that the circumstances must relate to the terms and conditions on the clearance order. Thus, where it is known or suspected that wages, hours, and working and housing conditions are not being provided as specified in the clearance order, a targeted field check may be warranted. The Department will issue guidance on this change.

Regarding the recommendation that the Department remove the language allowing non-ES staff to perform field checks, the Department notes that this

proposed revision to the definition of *field checks* is not a new requirement. Rather, it is intended to align the definition with the existing regulation at § 653.503(e), which allows SWA officials to enter into formal or informal arrangements with appropriate State and Federal enforcement agencies where the enforcement agency staff may conduct field checks instead of and on behalf of the SWA, as described in § 653.503(e). The Department, therefore, declines to adopt this recommendation, and maintains that non-ES staff may conduct field checks under certain circumstances.

Regarding the recommendation that the Department expand field checks to locations beyond where ES placements have been made, the Department acknowledges the concerns raised by the farmworker advocacy organization regarding the limited instances in which a SWA may conduct field checks to evaluate employer compliance but disagrees that existing field check requirements incentivize employers to hire H-2A workers over U.S. workers. The Department agrees that compliance monitoring is essential, but notes that field checks are not the sole means by which such monitoring occurs, and employers are prohibited from rejecting able, willing, and qualified U.S. workers (referred to them through the ES or otherwise) in favor of H-2A workers. The Department further notes that field checks only pertain to placement of U.S. workers via the ARS. The Department’s Wage and Hour Division (WHD) conducts investigations and evaluates agricultural employers’ compliance with the terms and conditions of the H-2A program (including H-2A employers’ compliance with the terms and conditions that they offer in clearance orders) (see 29 CFR part 501). To the extent the advocacy organization is recommending field checks for H-2A employment, the operative regulations are outside the scope of this rulemaking and the Department declines to adopt this recommendation. The Department adopts the changes to this definition as proposed in the NPRM.

Field Visits

The Department proposed several amendments to the definition of *field visits*. First, the Department proposed to clarify that field visits are announced appearances by SMAs, RMAs, the NMA, or NMA team members, in addition to outreach staff, to clarify which Monitor Advocates may conduct field visits and that the appearances are announced (and not unannounced, as with the proposed definition of field checks). Second, the Department proposed to

replace the reference to “employment services” with “ES services” to conform with the use of the “ES” abbreviation throughout the regulatory text. Third, the Department proposed an amendment to specify that field visits include discussions on farmworker rights and protections, to help ensure that these issues are consistently addressed.

Comment: A farmworker advocacy organization supported the proposal to amend the definition of *field visits* to include discussions on farmworker rights and protections. The organization agreed with the Department’s observation that outreach staff and SMAs do not always discuss farmworker rights and protections during field visits as part of broader discussions on ES services. A State government agency requested that the Department clarify the role of monitor advocates with respect to field visits. The agency stated that the Department’s intent to refocus monitor advocate responsibilities on monitoring appears to be contradicted by its expectation that monitor advocates conduct more field visits, which is not a monitoring activity. The commenter asked the Department to clarify that the monitor advocate’s role in field visits is to monitor that ES staff conduct field visits in accordance with part 653.

Response: The Department appreciates the advocacy organization’s support for the inclusion of discussions of farmworker rights and protections in the definition of field visits. Regarding the State agency’s request for clarification on monitor advocate roles in field visits, the Department notes that the proposed revisions do not require additional field visits, but instead clarify that the monitor advocates who may conduct field visits include SMAs, RMAs, and the NMA and NMA staff. The existing regulations provide that SMAs conduct field visits in accordance with § 653.108(o) and (q), the NMA (and NMA staff) in accordance with § 658.602(n), and RMAs in accordance with § 658.603(p). As part of their monitoring duties, the NMA (and NMA staff) and RMAs accompany selected outreach workers on field visits as part of their review and assessment responsibilities in §§ 658.602 and 658.603. For SMAs, the Department proposed in § 653.108 to clarify that the purpose of a SMA field visit is to discuss the SWA’s provision of ES services and obtain input on the adequacy of those services from MSFWs, crew leaders, and employers. The SMA is not responsible to provide direct employment services during field visits or other activities. Instead, the

SMA’s field visits are designed to gather information the SMA needs to evaluate how the SWA is currently serving MSFWs, which the SMA uses to assess SWA compliance and to advocate for improvements.

After carefully reviewing the comments, the Department has decided to update the definition of *field visits* to cross reference the citations that describe activities Monitor Advocates and outreach staff perform during field visits. To further clarify the role of monitor advocates with respect to field visits, the Department has decided to remove the proposed reference to NMA team members and instead refer to NMA staff, as identified in § 658.602(h).

During consideration of the comments, the Department noticed that the proposed definition did not specify that field visits may occur at the gathering places of MSFWs, which is necessary to align the definition with the requirement in § 653.107(b)(1) that outreach staff must explain certain information and services to MSFWs at their working, living, or gathering areas. To align the definition with § 653.107(b)(1), the Department is further revising the definition of field visits to include that field visits may occur at places where MSFWs gather, in addition to working and living locations.

Hearing Officer

The Department proposed to amend the definition of *Hearing Officer* to remove the words “of Labor” because § 651.10 previously defines “Department” as “the United States Department of Labor.” The Department did not receive any comments on this proposed change and adopts it as proposed.

Interstate Clearance Order

The Department proposed to amend the definition of *interstate clearance order* to indicate that it is an agricultural “clearance” order for temporary employment instead of a “job” order. This change aligns the definitions of job order and clearance order. The Department did not receive any comments on this proposed change and adopts it as proposed.

Intrastate Clearance Order

The Department proposed to amend the definition of *intrastate clearance order* in two ways: first, by indicating that it is an agricultural “clearance” order for temporary employment instead of a “job” order, to align the definition with the definitions of *job order* and *clearance order* in this part; and, second, by clarifying that the term

means an agricultural clearance order for temporary employment describing one or more hard-to-fill job openings that an ES office uses to request recruitment assistance from all other ES offices within the State, to help SWAs understand that an intrastate clearance order must be circulated to all ES offices within the State.

Comment: A State government agency said that amending the definition of *interstate clearance order* to require an ES office to request recruitment assistance from all ES offices (not just significant MSFW one-stop centers) will necessitate changes to the review tool its monitor advocate office uses to conduct annual reviews (*i.e.*, to reflect that all offices must conduct recruitment). Another State government agency asked the Department to clarify what recruitment assistance means in the definition of *intrastate clearance order*.

Response: The Department acknowledges that the changes may require some SWAs to update their review tools and notes that intrastate recruitment, not interstate recruitment, involves recruitment assistance from all other ES offices within the State. However, the Department believes that the majority of SWAs will not need to update review tools or other processes because the revised definition is consistent with their current practices. The Department has found through monitoring that the majority of SWAs place intrastate clearance orders into their web-based labor exchange systems and make them available for recruitment throughout the entire State. Most SWAs do not direct recruitment efforts to specific ES offices because their labor exchange systems are not programmed to do so. Therefore, this change will not increase burden for most SWAs.

The Department has considered the impact of updating the definition to specify that intrastate clearance orders request recruitment assistance from all other ES offices in the State and finds it to be beneficial. Specifically, requesting recruitment assistance from all other ES offices increases the likelihood that the employer will find the workers it needs. Because the definition applies to criteria and non-criteria clearance orders, the description also allows the employer and SWA to recruit as broadly as possible and assists ETA in assessing the need for interstate clearance requests, including requests connected to the H-2A visa program. The intended result is that intrastate clearance will be more likely to result in employment of U.S. workers.

The Department adopts the definition as proposed and will provide guidance and technical assistance, as needed,

including how other ES offices provide recruitment assistance.

Migrant Farmworker and Seasonal Farmworker

The Department proposed to amend the definition of *migrant farmworker* by removing the exclusion of full-time students who are traveling in organized groups, to make available to these individuals the benefits and protections of the Monitor Advocate System, including ES service requirements and safeguards built into the Complaint System. Relatedly, the Department proposed to remove the exclusion of non-migrant full-time students from the definition of *seasonal farmworker*, to allow full-time students who work in seasonal farmwork to be considered seasonal farmworkers and to make the definition of *seasonal farmworker* consistent with the definition of *migrant farmworker*. The Department adopts these definitions as proposed.

Comment: Referencing the Department's proposal to remove the exclusion of non-migrant full-time students from the definition of *seasonal farmworker*, thus making the definition of *seasonal farmworker* consistent with the definition of *migrant farmworker*, an anonymous commenter remarked that seasonal farmworkers (such as non-migrant full-time students) are not the same as migrant farmworkers (who they said are usually noncitizens admitted to the United States for specific timeframes with green card status). The commenter also mentioned an ES office in Traverse City, Michigan, with a specific division for assisting migrant farmworkers and stated that hiring extra migrant farmworkers may not suffice for fresh produce processing of their State's agriculturally diverse crops.

Response: The proposed changes maintain two separate definitions for seasonal farmworkers and migrant farmworkers and remove the exclusion of full-time students from both definitions to ensure MSFW students have access to the benefits and protections of the Monitor Advocate System.

Removal of Migrant Food Processing Worker

The Department proposed to remove the definition of *migrant food processing worker* because migrant food processing worker status has not been a separately tracked part of the MSFW definition since the ES regulations were updated in the WIOA final rule promulgated in 2016. See 81 FR 56071 (Oct. 18, 2016). Current ETA reporting does not require States to document migrant food processing workers as a

particular type of MSFW and this definition is unnecessary because the existing MSFW definitions are inclusive of individuals who perform work as migrant food processors. The Department did not receive any comments on its proposal to remove this defined term and adopts its removal as proposed.

Occupational Information Network (O*NET)

The Department proposed to amend the definition of *Occupational Information Network (O*NET)* to remove the word "system" from the definition, as it is not needed to describe O*NET. The Department did not receive any comments on this proposed change. The Department adopts the change as proposed.

O*NET-SOC

The Department proposed to amend the definition of *O*NET-SOC* to remove the words "of Labor" after "Department" because Department is previously defined in this section as "the United States Department of Labor." The Department did not receive any comments. The Department adopts the change as proposed.

Outreach Staff

The Department proposed to amend the definition of outreach staff to clarify that an SMA is not "outreach staff" for purposes of § 653.107. While an SMA may join outreach staff on field visits, an SMA cannot fulfill a SWA's responsibility under § 653.107(a) to provide outreach staff. This aligns with a revision in § 653.108(d) to specify that the SMA and their staff cannot assist with outreach responsibilities, which is further discussed in the section-by-section analysis for § 653.108. The Department did not receive any comments on the clarification proposed to the definition, and it adopts the revision to this definition as proposed.

Participant and Reportable Individual

To align with the proposed changes to replace references to "employment services," "Wagner-Peyser Act services," and "services provided under the Wagner-Peyser Act" with "ES services" and "ES," the Department proposed to amend the definition of *participant* by replacing the phrase "Wagner-Peyser Act participants" with "ES participants" and to amend the definition of *reportable individual* by replacing the phrase "Wagner-Peyser Act services" with "ES services." The Department did not propose any other changes to these definitions. The Department received one comment

related to the definitions for each of these terms, which is summarized and responded to below. After consideration of this comment, the Department adopts the revisions to both of these definitions as proposed.

Comment: A State government agency suggested the Department should define *reportable individual* versus *participant* for States to accurately collect and report information on these groups.

Response: The Department appreciates the comment requesting that the Department clarify who is considered reportable individuals or participants. The Department's existing regulations in part 651 provide definitions for *reportable individual* and *participant* at § 651.10. This final rule adopts only minor revisions to each term to replace existing references to the "Wagner-Peyser Act" with "ES." As noted in § 651.10, *participant* means a reportable individual who has received services other than the services described in § 677.150(a)(3) of this chapter, after satisfying all applicable programmatic requirements for the provision of services, such as eligibility determination (see 20 CFR 677.150(a)). This definition notes that individuals who use only self-services or information-only services or activities are not considered participants. As outlined in § 677.150(a)(4) of this chapter, programs must include participants in their performance calculations.

Placement

The Department proposed to amend the definition of *placement* (along with other terms) to replace the phrase "employment office" with "ES office." The Department did not propose any other changes to this definition. The Department did not receive any comments on this proposed definition and adopts it as proposed.

Respondent

The Department proposed to revise the definition of *respondent* by removing the parenthetical language "including a State agency official" because the term "State agency" is assumed to include "State agency officials" and is therefore unnecessary to clarify. The Department did not receive any comments on this proposed change and adopts it as proposed.

Significant MSFW One-Stop Centers and Significant MSFW States

The Department proposed to revise the definition of *significant MSFW one-stop centers* in two ways: first, by removing the text stating these designations are made annually; and,

second, by adding to the criteria by which the Department designates significant MSFW one-stop centers, so that they will include ES offices where MSFWs account for 10 percent or more of reportable individuals in the ES annually. First, as explained in the NPRM, the Department proposed to remove the text stating that significant MSFW one-stop centers are designated annually, because in making the designation, the Department relies on multiple data sources that are published in intervals up to every 5 years. Based on the Department's analysis, the data do not change significantly on an annual basis, and therefore it is often unnecessary to change the designations. This change in the definition would allow the list of significant MSFW one-stop centers to remain the same if there is no compelling reason to make a change. Also as proposed, the designation of significant one-stop centers would include ES offices where MSFWs account for 10 percent or more of participants or reportable individuals who are served by that ES office annually, and any other ES offices that the Office of Workforce Investment (OWI) Administrator includes due to special circumstances such as an estimated large number of MSFWs in the service area. The Department proposed to add reportable individuals to the criteria it considers in making this designation so that the one-stop centers designated as significant MSFW one-stop centers also account for the number of MSFWs in the area who are likely to benefit from access to ES services.

The Department similarly proposed to revise the definition of *significant MSFW States* in two ways: first, by removing the text stating that these designations will be made annually; and second, to change the basis on which this designation is made from the 20 States with the highest number of MSFW participants to the 20 States with the highest estimated total number of MSFWs. The Department proposed to change the basis on which it makes this designation so that it will reflect States with the highest total estimated MSFW activity—rather than the highest numbers of MSFW ES participants—so that the designation will better reflect the 20 States with the highest numbers of MSFWs who may ultimately seek assistance from the ES, rather than just those States with the highest numbers of MSFWs who have already sought such assistance.

The Department received a few comments that address the revisions proposed to these definitions. A summary of these comments and the Department's response is below. After

thoroughly considering the issues and questions that these commenters presented, the Department has decided to adopt the revisions as proposed, with a clarification to the definition of significant MSFW one-stop centers as described below.

Comment: A couple of State government agencies expressed concern that the Department planned to designate *significant MSFW one-stop centers* and *significant MSFW States* based on a blend of data from the Quarterly Census of Employment and Wages (QCEW) and Census of Agriculture, because, as they explained, the QCEW and the Census of Agriculture use disparate definitions and methodologies. Both commenters recommended that the Department use only QCEW data, from which they assert the Department could derive annual variable employment using a time series decomposition model that disaggregates covered employment by industry in States, agriculture reporting areas, and counties.

One of these State agencies noted that it did not object to the proposal to remove annual designations of *significant MSFW one-stop centers* and *significant MSFW States*, but sought confirmation that States would still be able to submit annual amendments to add or remove a designated office as warranted by data or due to ES-staffing challenges in specific offices, site closures, and/or challenges posted by the Americans with Disabilities Act. This State agency also asked whether the proposed change would affect the use of Special Circumstance MSFW one-stop centers, and expressed concern that the proposed revisions could increase the number of one-stop centers designated as significant MSFW one-stop centers, which would create a need for additional resources and State merit staff in offices so designated.

A farmworker advocacy organization supported the Department's proposal to designate *significant MSFW one-stop centers* based on the percentage of reportable individuals (not just participants) who are MSFWs, reasoning that many farmworkers who do not participate in the ES rely on other SWA services and are affected by the SWA's outreach and monitoring activities.

Response: The Department appreciates the commenters' recommendation to use QCEW data. The changes will not limit the Department's consideration to the Census of Agriculture; therefore, the Department may also consider QCEW data. The Department disagrees with the commenters that using QCEW and the Census of Agriculture data is

problematic even though they use disparate definitions and methodologies. The Department often consults multiple data sources to develop planning estimates and will take differences in source methodologies while making determinations for significant MSFW one-stop centers.

In response to the commenter's question regarding whether States may submit annual updates regarding significant MSFW one-stop center activity levels, the Department confirms that States may submit such information and the Department will consider the information to determine if an update is appropriate. As mentioned in the NPRM, if annual adjustments are warranted by the data, the Department will make adjustments. This change would allow the list of significant MSFW one-stop centers to remain the same if there is no compelling reason to make a change.

The Department notes that the revised methodology will apply to all significant MSFW one-stop center designations, including those significant MSFW one-stop centers that are designated due to special circumstances and may increase the number of significant MSFW one-stop centers in some States. An increase in the number of significant MSFW one-stop centers will not create a need for additional State merit staff in offices so designated. It would, however, require the SMA to monitor additional offices onsite.

After further consideration, the Department identified a need to clarify that the administrator who determines which ES offices must be included as significant MSFW one-stop centers based on special circumstances is the OWI Administrator. Accordingly, the Department adopts the changes as proposed, except to add that the OWI Administrator makes the determinations.

Removed Definition of Significant Multilingual MSFW One-Stop Centers

The Department proposed to delete the definition of *significant multilingual MSFW one-stop centers* because proposed changes to § 653.102 would remove specific requirements for offices that meet this definition. The Department proposed to remove specific requirements for significant multilingual MSFW one-stop centers in part 653, because all one-stop centers must comply with the comprehensive language access requirements in 29 CFR 38.9, which prohibit discrimination on the basis of national origin, including LEP, and establish that language access requirements apply to services that ES

recipients provide to all individuals with LEP at all one-stop centers and are broader than the existing requirements for significant multilingual MSFW one-stop centers.

The Department received two comments that address its proposed removal of the definition of *significant multilingual MSFW one-stop centers*. Both comments and the Department's response are discussed below. After thoroughly considering these comments, the Department has decided to remove this definition as proposed.

Comment: Agreeing with the Department's proposal to remove specific requirements for significant multilingual MSFW one-stop centers (e.g., removing the definition of *significant multilingual MSFW one-stop centers*) because all one-stop centers must comply with language access requirements, commenters including a one-stop center employee remarked that Michigan's one-stop centers have multilingual staff to provide their customers access to a broader set of services. In contrast, a State government agency expressed concern that the proposal would result in ES offices with no bilingual staff at present needing to hire additional staff who can assist participants with LEP.

Response: The Department notes that all ES offices must meet the language access requirements in 29 CFR 38.9, regardless of how many significant multilingual MSFW one-stop centers exist in a State. Pursuant to 29 CFR 38.9, SWAs must make services available in all needed languages. SWAs may use bilingual staff to meet this requirement, but other alternatives are available, such as in-person interpretation or telephone interpretation services.

State Workforce Agency (SWA) Official

The Department proposed to remove the definition of *State Workforce Agency (SWA) official*, because SWA officials would be considered ES staff based on the Department's proposed revisions to the definition of *ES staff* in this rulemaking.

Comment: Two State government agencies and an anonymous commenter warned that confusion and inconsistency could result from the Department's proposal to remove the definition of *State Workforce Agency (SWA) official* but continue using the SWA naming convention elsewhere in the regulatory text. The commenters recommended the Department keep *State Workforce Agency (SWA) official* as a defined term, similar to how title I of WIOA defines *chief elected official*, while clarifying that a SWA official is also considered ES staff.

Response: The Department appreciates the comments regarding the potential for confusion or inconsistency related to the use of SWA official. The Department agrees with these comments. Although the Department proposed to remove the definition of SWA official, the final rule maintains the definition of SWA official in existing § 651.10, which means an individual employed by the SWA or any of its subdivisions.

Wagner-Peyser Act Employment Service (ES) Also Known as Employment Service (ES)

The Department proposed to amend this definition to replace the phrase "employment services" with "ES services." The Department also proposed to remove the words "and are" from the definition for greater clarity. The Department did not receive any comments on this proposed definition and adopts it as proposed.

C. Part 652—Establishment and Functioning of State Employment Service

1. Subpart A—Employment Service Operations

Subpart A of part 652 includes an explanation of the scope and purpose of the ES; the rules governing allotments and grant agreements; authorized services; administrative provisions; and rules governing labor disputes. The changes to this subpart focus on administrative provisions governing nondiscrimination requirements. This final rule also includes a severability provision for part 652 in subpart A.

Section 652.8 Administrative Provisions

The Department proposed to amend § 652.8(j)(2) to correct the statutory reference regarding the BFOQ exception currently listed in the regulation as 42 U.S.C. 2000(e)–2(e) to 42 U.S.C. 2000e–2(e). However, there was a typographical error in the proposed regulatory text. The final rule reflects the correct statutory reference, 42 U.S.C. 2000e–2(e). The final rule also adds a necessary cross-reference to the EEOC's regulation regarding religion found at 29 CFR part 1605.

The Department proposed to amend § 652.8(j)(3) to remove an outdated reference to affirmative action requests to make the Department's regulation consistent with U.S. Supreme Court jurisprudence on race-based affirmative action.⁵ The proposed revision clarifies

that the States' obligation is to comply with 41 CFR 60–300.84. The regulation at 41 CFR 60–300.84 requires ES offices to refer qualified protected veterans to fill employment openings required to be listed with ES offices by certain Federal contractors; give priority to qualified protected veterans in making such referrals; and, upon request, provide the Office of Federal Contract Compliance Programs with information as to whether certain Federal contractors are in compliance with the mandatory job listing requirements of the equal opportunity clause (41 CFR 60–300.5).

Comment: A one-stop operator and an advocacy organization expressed concern that, in appearing to prioritize UI recipients over job seekers as a whole, the proposed rule may not strengthen nondiscrimination requirements but rather could be discriminatory toward certain classes of individuals, such as people on public assistance, immigrants and refugees, people experiencing homelessness, second-chance customers, people with disabilities, and other groups with historically lower labor market participation rates. Similarly, a private citizen stated that staffing flexibility has allowed Colorado to promote and deliver equitable access to the ES for marginalized and underserved populations (i.e., priority populations under WIOA) but the proposed rule emphasizes UI above other services. Several other commenters also stated that staffing flexibility led to more localized services that better met the needs of marginalized communities.

A one-stop center employee and other commenters stated that Michigan satisfies the requirement to give priority to qualified protected veterans through a 24-hour hold on all job orders. The comments also discussed how Michigan meets its affirmative outreach obligation to ensure equal access to services and activities by coordinating with WIOA partners on outreach and accommodating individuals with LEP. The comments argued that the proposed changes would result in staffing cuts, reduced hours, and office closures that could threaten Michigan's proven record of adhering to nondiscrimination requirements and providing universal access to ES services. The commenters added that these impacts would be felt most by people in rural areas and individuals with LEP.

Response: The changes to this section were made to correct a statutory reference and to remove an outdated reference to affirmative action requests

⁵ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009); *Adarand Constructors, Inc. v. Peña*, 515 U.S.

200, 238 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989).

to ensure that the Department's regulations are consistent with U.S. Supreme Court jurisprudence on race-based affirmative action. The changes do not constitute a change in the Department's policies or treatment of individuals. Just as the previous longstanding State merit-staffing requirement, which was based in part on the close relationship between the ES and UI programs, did not violate the nondiscrimination obligations of the Department and States in administering the ES program, the reinstatement of the State merit-staffing requirement in this final rule for similar reasons does not run afoul of the nondiscrimination obligations of the Department and States administering the ES program. In realigning ES and UI, the Department is not prioritizing individuals eligible for UI benefits over individuals in historically underserved or marginalized populations. The ES is a universal access program. In the Department's view, reinstating a State merit-staffing requirement not only supports the historical alignment between ES and UI, but it also helps to maintain universal access and helps to protect the integrity of the ES program. As articulated further in discussion of § 652.215 of this preamble, a State merit-staffing requirement helps to ensure that ES services are delivered by nonpartisan personnel held to transparent, objective standards designed to assure high quality performance. In response to the NPRM, three States—Colorado, Massachusetts, and Michigan—provided initial justification and data to support use of their longstanding staffing model and provided information about significant service disruption that would result from having to upend their longstanding ES staffing model. However, the initial justifications and data presented do not provide clear evidence of causation. Without evidence that alternative staffing models directly cause higher employment outcomes, balanced against widespread success in delivering services while maintaining State merit staff for ES, and further balanced by the need for ES State merit staff to be available for surges in UI claims and appeals, the Department is generally adopting the proposed requirement that States use State merit staff to provide ES services. The three States with longstanding reliance interests are permitted to continue using the staffing model consistent with the model the Department previously authorized for that State. The Department will conduct an evaluation of the three States' provision of ES services, including

review of services of other States that participate, as necessary, to determine whether such models are empirically supported and must participate in an evaluation to determine whether alternative staffing models are empirically supported. The commenters who indicated that Wagner-Peyser staffing flexibility allowed States to provide better services to marginalized communities did not include any data that demonstrates causal evidence to support this claim. Likewise, the Department has not identified such evidence to support it.

The Department reminds SWAs that they have an affirmative outreach obligation under 29 CFR 38.40 that requires them to take appropriate steps to ensure they are providing equal access to services and activities authorized under the Wagner-Peyser Act, as well as any other WIOA title I-financially assisted programs and activities. As outlined in that regulation, these steps should involve reasonable efforts to include members of the various groups protected by the WIOA sec. 188 regulations, including but not limited to persons of different sexes, various racial and ethnic/national origin groups, members of various religions, individuals with LEP, individuals with disabilities, and individuals in different age groups.

Section 652.10 Severability

Given the numerous and varied changes the Department proposed and is adopting, the Department intends the provisions of this rule to be severable and is including a severability provision in parts 652, 653, and 658 in this final rule. That intent was reflected in the structure of and descriptions in the proposed rule. The inclusion of severability provisions in this final rule confirms the Department's belief that the severance of any affected provision will not impair the function of the regulation as a whole and that the Department would have proposed and implemented the remaining regulatory provisions even without any others. To the extent that a court holds any provision, or any portion of any provision, of part 652 invalid, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision will be severable from this part and will not affect the remainder thereof.

2. Subpart C—Employment Service Services in a One-Stop Delivery System Environment

Subpart C of part 652 discusses State agency roles and responsibilities; rules governing ES offices; the relationship between the ES and the one-stop delivery system; required and allowable ES services; provision of services for UI claimants; and State planning. Among other changes, the changes to the regulations under subpart C are tailored to require all States to use State merit staff to provide ES services, except the three States using longstanding alternative staffing models previously authorized by the Department. As was true when the regulations were changed in 2020, none of the changes in this section will impact the personnel requirements of the Vocational Rehabilitation (VR) program, one of the six core programs in the workforce development system. Title I of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended by title IV of WIOA, which authorizes the VR program, has specific requirements governing the use of State VR agency personnel for performing certain critical functions of the VR program.

Section 652.204 Must funds authorized under the Wagner-Peyser Act Governor's Reserve flow through the one-stop delivery system?

The Department proposed to simplify the section heading to remove reference to the Wagner-Peyser Act because reference to the Governor's Reserve is adequate. The Department also proposed amending this section to reference professional development and career advancement of ES staff instead of SWA officials. After further consideration, the Department is not finalizing the proposed change to the section heading in order to differentiate the Wagner-Peyser Act Governor's Reserve from the WIOA Governor's Reserve. Instead, the Department is making a slight revision to the current section heading. The new section heading reads, "Must funds authorized through the Wagner-Peyser Act Governor's Reserve flow through the one-stop delivery system?" In addition, because of the Department's change to the NPRM's proposed definition of "ES staff" in this final rule, the Department retains the text of the existing regulation for this section.

Section 652.215 Can Wagner-Peyser Act-funded activities be provided through a variety of staffing models?

The Department proposed to amend § 652.215 to require all States to use

State merit staff to provide ES services and proposed giving States 18 months to comply with this requirement. After further consideration, the Department adopts a rule requiring all States to use State merit staff to deliver ES services, except the three States using longstanding alternative staffing models previously authorized by the Department. States authorized to use alternative staffing models will be required to participate in evaluation(s) of their delivery of ES services to be conducted by the Department. While the Department plans on conducting a single evaluation, the rule requires these States' participation if evaluation activities span more than one study, including any data collection associated with those evaluation activities. The Department will conduct this evaluation of the three States' provision of ES services, including review of services of other States that participate, as necessary, to determine whether such models are empirically supported. All States have 24 months to comply with the staffing requirements in this section.

The Department believes that a State merit-staffing requirement is a generally reliable method to ensure quality and consistency in ES services and supports the well-established connection between ES and UI services. Paragraph (a) of § 652.215 provides that except as provided in paragraph (b) of § 652.215, all States must deliver labor exchange services described in § 652.3 using State merit-staff employees employed according to the merit-system principles described in 5 CFR part 900, subpart F—Standards for a Merit System of Personnel Administration. This staffing requirement also applies to the provision of services and activities under parts 653 and 658.

The Department also recognizes the longstanding reliance interests of three States that had been authorized to use alternative staffing models in the 1990s. These States provided initial justification and data to support use of their longstanding staffing model and provided information about significant service disruption that would result from having to upend their longstanding ES staffing model. These three States have built systems, developed partnerships, and established a service delivery model that could be reversed only at significant cost to the State and with significant harm to job seekers and employers. Accordingly, in paragraph (b) the Department permits only these three States authorized to use alternative staffing models prior to February 5, 2020, the effective date of the 2020 Final Rule, to continue using the staffing model consistent with the

model the Department previously authorized for that State. It is the use of a particular staffing model in each State that engendered each State's strong reliance interest. Therefore, paragraph (b) also provides that these States may use merit-staffing flexibility only to the same extent that the Department authorized it prior to February 5, 2020. This means that if any of the States covered by paragraph (b) sought to use the 2020 Final Rule to expand flexibility beyond what was previously authorized in that State, that State must return to the staffing model in use as authorized by the Department prior to February 5, 2020.

Paragraph (c) requires that the States permitted to use an alternative staffing model must participate in evaluations of their delivery of ES services to be conducted by the Department. The Department's goal will be to assess ES service delivery in several States. Requiring the three States authorized to use their longstanding alternative staffing models to participate in evaluation activities will enable the Department to determine whether alternative staffing models are empirically supported.

In response to comments, paragraph (d) lengthens the proposed transition period, requiring all States to comply with the staffing requirements in § 652.215 no later than 24 months after the effective date of this final rule. The Department recognizes that States will need time to address issues, such as obtaining any necessary State authorization, procurement, collective bargaining, hiring, and training.

The following discussion further details the Department's decision.

Potential Impacts of the Rule on the Provision of ES

Benefits of Using State Merit Staff To Deliver ES Services

Comment: Two State government agencies expressed support for the proposed merit-staffing requirement because it would promote Statewide uniformity and consistency of employment security services. In particular, one of these commenters stated the ability to have consistent hiring practices, standardization of staff onboarding and training, and continuous professional development training throughout the State merit staff's employment life cycle ensure the most consistent and best customer service possible across the State. Similarly, two anonymous commenters expressed concern about the lack of consistent ES services throughout Michigan, which one of these

commenters said is a byproduct of local control. These commenters argued that a consistent service delivery model of providing ES services through State merit staff would benefit Michigan job seekers and provide greater transparency and accountability to Michigan residents.

A State employee association commented that, in passing the Wagner-Peyser Act, Congress envisioned a federally supported but State-administered merit system, subject to consistent rules and oversight, to prevent favoritism and promote equality in the delivery of employment services.

Response: The Department agrees that using State merit staff to deliver ES services helps to promote statewide stability and consistency in service delivery. The Department further agrees that using State merit staff helps ensure that employment services are delivered in an equitable manner and on a nonpartisan basis. As noted earlier in this preamble, in the IPA Congress found that the quality of public service could be improved by administering programs according to merit-based principles. Because the ES is a universal access program, it is critical that it be administered by nonpartisan personnel held to transparent, objective standards designed to assure high quality performance.

The Department acknowledges the comments regarding ES service delivery in Michigan. As noted elsewhere in this preamble, Michigan is one of three States that the Department authorized to use an alternative staffing model beginning in the 1990s. Due to the State's strong reliance interest developed from longstanding use of a particular service delivery model and the potential service disruption that would ensue if the State is required to adopt a full State merit-staffing model, the Department is permitting Michigan to continue using its longstanding alternative staffing model. The Department is requiring the State to participate in an evaluation of service delivery in the State to be conducted by the Department.

Potential Cost Increases of State Merit Staff That May Reduce the Availability of ES Staff

Comment: Numerous commenters, including an association of State elected officials, Michigan, Colorado, and Delaware State government agencies, and Michigan and Colorado local governments, expressed concern that the proposed rule could make the provision of employment services less efficient in States that use flexible staffing models and may reduce access

to critical workforce resources for job seekers and employers because the proposal would reduce the number of available ES staff. In contrast, a private citizen argued that there is little evidence that the proposed rule would reduce access to workforce resources, reasoning that in Michigan, if there is a threat of service reduction it is because the State has used ES funding as a substitute for WIOA funding, for local staff, or for overhead costs for staff not fully dedicated to providing ES services.

Many commenters, including Michigan and Colorado State elected officials, Michigan, Colorado, and Delaware State government agencies, and Michigan and Colorado local governments, argued that the rule would cause a significant reduction in ES staff in States that use flexible staffing models, as well as the closure of many one-stop employment centers, with the greatest losses occurring in rural areas.

Response: The Department acknowledged in the NPRM that there would be costs to some States to transition to using State merit staff to deliver ES services, requested feedback on the transition costs, and requested feedback on the proposed 18-month transition period. The Department notes that information that is supported with evidence and data sources is more strongly considered than information that is unsubstantiated. The States of Delaware, Michigan, and Colorado provided new information in their comments on the NPRM that are relevant to the NPRM's regulatory impact analysis. These States detailed impacts on existing contracts and procurement, recruitment, training, staffing, collective bargaining, technology costs, infrastructure changes, funding, and the extent of service disruptions that would result from imposition of a State merit-staffing requirement because these States have utilized approved alternative staffing models for many years. Some commenters provided information based on a survey stating that there will be job losses and center closures as a result of the State merit-staffing requirement. A few additional States responded to indicate that they may be utilizing staffing flexibility, although the Department was previously not aware they intended to utilize the staffing flexibility provided by the 2020 Final Rule. Those States did not estimate transition impacts as requested by the Department in the NPRM.

The Department has considered the comments opposing the reinstatement of the State merit-staffing requirement and found the comments from Colorado, Massachusetts, and Michigan the most

compelling due to their longstanding reliance interests on using alternative staffing models. Based on these comments the Department has determined that States are required to use State merit staff to provide ES services, except Colorado, Massachusetts, and Michigan. The final rule is allowing these three States to use merit-staffing flexibility to the same extent previously allowed by the Department prior to February 5, 2020, the effective date of the 2020 Final Rule. As discussed above, the Department is requiring these States to participate in an evaluation of ES service delivery staffing models. All States will have 24 months to comply with the requirements in this final rule.

ES Service Delivery and Customer Impacts

Comment: Many commenters described the services made available through Wagner-Peyser Act funding and expressed concern about a disruption or outright elimination of such services due to the proposed merit-staffing requirement, as described below.

Many Michigan commenters, including private citizens and one-stop center staff, discussed the value of the supportive services they have received or provided through Michigan Works! offices, including assistance with important tasks for job seekers such as developing a resume, strengthening interviewing skills, and performing job searches; some of these commenters, including one-stop center employees, stated that local center staff help alert customers to the availability of such services. A one-stop center employee stated that local ES workers have the best understanding of community needs and are often the first point of contact to help customers navigate available programs.

Many commenters, including Michigan and Massachusetts State government agencies, Michigan and Colorado local governments, and advocacy organizations, went on to more specifically describe one-stop employment centers' role in preparing job seekers for employment and connecting them with employers who want to hire them, including services such as facilitating training programs, hosting job fairs and career awareness events, organizing industry collaboratives, helping craft resumes, and providing job searching and interviewing tips. According to some of these commenters, including Michigan local governments, a key benefit of staffing flexibility is strong local strategic relationships with businesses, higher education, nonprofits, childcare,

elementary and secondary education, adult education providers and other partners, which allows for more efficient customer service to connect job seekers to in-demand jobs and training opportunities.

Furthermore, many commenters, including Michigan and Colorado State elected officials, Michigan and Colorado local governments, and advocacy organizations, claimed that the status quo staffing flexibility has helped States and localities achieve specific, positive outcomes in terms of newly employed individuals, employment rates, average worker earnings, numbers of employers served, total economic impact, increased tax revenue, and returns on investment.

Response: The Department appreciates the concerns raised by commenters and agrees that the quality of ES services is important. The commenters highlighted the benefits of the services provided to participants but did not provide evidence that the staffing model is a causal factor in the quality of those services. Though the Department agrees that local relationships are important in business services, local areas in States across the country using State merit staff for ES manage to develop such relationships. Commenters did not provide any evidence that strong local relationships are only possible with alternative staffing models, or that using a non-State-merit staffing model is a causal factor in developing strong business relationships. Without such evidence, balanced against the benefits of State merit-staffing described above, the Department will not extend the ability to use alternative staffing models to other States besides Colorado, Massachusetts, and Michigan. Therefore, the Department has determined that States are required to use State merit staff to provide ES services, except the three States that have long been allowed to use alternative staffing models.

Comment: A State workforce development board said that data shows that former demonstration States using local merit and non-merit staff to deliver ES services have been successful and argued that all States should examine strategies to further service integration. Another State workforce development board and a professional association stated that it appreciated the approach "created by Congress" wherein the Federal government partners with State and local workforce program, providing performance goals and broad working parameters, but leaves States to manage their operations based on the diverse needs of businesses and workers in their

communities. These commenters urged the Department to permanently codify staffing flexibility.

Response: As explained earlier in the preamble, the Act gives the Secretary discretion to require that States use a staffing model that will promote the goals of the ES program. For reasons articulated in the NPRM and this final rule, the Department has determined that that model is State merit-staffing. Three States using longstanding alternative staffing models presented arguments in support of retaining those models, but the information provided did not show a causal impact of the staffing model in these States and performance. Accordingly, the Department declines to extend staffing flexibility to all States. The Department reinstates a State merit-staffing requirement for ES services with the exception of the three States with longstanding reliance interests. These States are required to participate in evaluation of their delivery of ES services conducted by the Department, including review of services of other States that participate, as necessary, to determine whether such models are empirically supported.

Comment: Some commenters, including one-stop operators, private citizens, and others, listed several potential impacts on customer service as reported by stakeholders concerned about the proposal, including closure of ES offices (particularly in rural areas), reduced hours of operation for offices, disruption of referrals, curtailed services to immigrants, veterans, and other vulnerable populations, fewer opportunities for career awareness events or job fairs, and reduced access to technology. Many commenters, including Michigan local governments, a Michigan State elected official, and Michigan one-stop operators, also warned that the rule would cause one-stop centers to reduce or eliminate their job seeker and employer workshops, career fairs, and career awareness events, as well as their efforts to facilitate job seekers' enrollment in and funding for schools and training programs. Some commenters, including Michigan one-stop operators, Michigan one-stop center staff, and an employer, warned that with the reduced staffing flexibility under the rule, customer service in employment services would decline, with reductions in virtual services, less personal services, and with services only provided by appointment to customers who meet specific criteria. Several commenters, including a one-stop center employee, private citizens, and a Michigan State government agency, asserted that

Michigan Works! staff anticipate disruptions to the "more than 3,600 services" provided to industry-led collaboratives, 7,500 job fairs, and other services that have been successfully delivered over a 25-year period.

Several commenters referred to the minimum services required by § 652.3 noted in the NPRM (including facilitating the connection between job seekers and employers) and questioned how their State would continue to provide these essential services with just an estimated 25 percent of their current staffing level. The commenter asked whether a certain service or customer sector would take priority in cases where staffing shortages impact service availability, and further questioned how robust services would be provided if ES staff are reassigned to UI. A few one-stop center employees and a local government remarked that the proposal would disrupt convenience or would lengthen "turnaround time" for service delivery to job seekers, an outcome that the commenters warned would adversely impact job seekers, employers, and the local community.

A local workforce development board described how ES staff work with job seekers to determine their unique needs, increase their marketability in the labor market, or otherwise provide "intensive job search assistance." The commenter said these comprehensive services would be disrupted, causing a gap in service provision, and adversely affecting job seekers. The commenter provided figures to demonstrate the economic value of participation in the WIOA's adult and youth programs and expressed concern that these economic impacts would be reduced or lost if existing ES staff are unable to support the comprehensive set of services they currently provide. A private citizen said ES customers need career services to build a sustainable work history.

Several commenters asserted that one-stop organizations in its area take pride in providing quality customer service and argued that local control over Wagner-Peyser Act ES programs is critical to positive impacts associated with its workforce development programs, citing statistics about the numbers of individuals and businesses served, numbers of workshops and hiring events hosted, and economic figures demonstrating economic impact and an overall return on investment.

A State government agency recommended that the Department maintain staffing flexibility to avoid service disruption during emergencies. An anonymous commenter expressed concern that changing a system that works well will place "stress" on their

State government, which is dealing with challenges related to the pandemic and unemployment.

Some commenters, including a Michigan State government agency and an employer, asserted that the proposal would result in the loss of many full-time employees and expressed concern about the ability of fewer State merit staff to handle the leftover caseload. The Michigan State agency asserted that this staffing shortfall would cause one-stop customers to experience increased delays, inefficiencies due to remote service delivery or multiple case managers, and challenges in scheduling appointments (potentially resulting in increased transportation or childcare costs).

Response: The Department appreciates the concerns raised by the commenters. Commenters' concerns appear to generally stem from an assumption that the use of State merit staff for ES services would be more expensive and thus result in the closure of one-stop centers, reduction of one-stop hours, and programming cuts. While the commenters provided no evidence that the rule change would result in these reductions or closures, the Department understands that there may be costs and disruption associated with a transition to State merit staff, particularly for the three States that have longstanding reliance on being able to use alternative staffing models, as described above. Therefore, the Department will permit alternative staffing models in the three States with long-time reliance on such models.

Service to Specific Populations or Vulnerable Populations

Comment: Many commenters, including a Colorado State government agency, Colorado local government agencies, and advocacy organizations, warned that the rule would cause reductions in ES services in States that use flexible staffing models. These commenters expressed concern that such reductions would be associated with services that are designed specifically to aid vulnerable populations, or those who otherwise have significant difficulty in finding employment, thus doing them particular harm. In this category of vulnerable populations, commenters included groups such as veterans, immigrants, refugees, youth, people living in rural areas, people with disabilities, formerly incarcerated people, and other vulnerable job seekers.

Several commenters, including private citizens, advocacy organizations, a local government, and others, stated that local Michigan Works! offices serve

the most vulnerable populations in a given community, including veterans, low-income adults, dislocated workers, individuals with intellectual disabilities, older workers, youth, and immigrants and refugees, and expressed concern that the proposal would disrupt or eliminate services to the detriment of these vulnerable populations. A one-stop center employee similarly referred to these population groups and expressed concern that the proposal would delay service delivery for these groups and would adversely impact “follow through” and information sharing between States and agencies. Some commenters, including a Michigan State government agency, a Colorado local government agency, and many Michigan one-stop center staff, also described the specific needs of the people generally served by one-stop centers; in general, these are vulnerable and low-income populations, in need of significant support in the job seeking process, including transportation, clothing, food, childcare, technology assistance, substance abuse counselling, and medical care.

An academic commenter described their organization’s strong relationship with a local Michigan Works! office and expressed concern that the proposal would disrupt services to the most vulnerable communities in their area. The commenter said their organization benefits from employment and training services for immigrants and students and expressed particular concern about the potential elimination of the Teach Talent Thrive program that promotes lifelong learning and career readiness.

An adult education provider stated that their organization partners with the local Michigan Works! office to provide career training and education services to adults and students, including coaching for career readiness, job searching, and aligning skills with a desired career pathway. The commenter also said the proposal would “compromise” Governor Whitmer’s Sixty by 30 plan that seeks to close socioeconomic gaps for vulnerable populations, including the economically vulnerable adults served by the commenter’s organization.

Some commenters, including an employer, an advocacy organization, and a private citizen, expressed concern that the proposal would disrupt services for veterans, including programs that support employment for veterans with employment barriers, services for active-duty military members, and military spousal services.

An advocacy organization expressed concern that “impactful” programs such as the Clean Slate program (which provides supportive services for

formerly incarcerated individuals or individuals with criminal records) and the Going Pro Talent Fund (which provides skills-based certificate training) would be adversely affected by the proposal. A local workforce development board stated that local ES staff partner with programs like the Disability Program Navigator to enhance local capacity to provide services for people with disabilities, including helping such individuals navigate available services. A private citizen described how receiving supportive services from their local Michigan Works! service center has benefited their family member with intellectual disabilities and remarked that such services are difficult to find.

A private citizen concerned about a disruption of critical services to vulnerable populations remarked that Michigan Works! has proven it is “best in class” as an ES provider, citing figures from 2018 and 2019 that showed Michigan was among the 10 States with the lowest costs of career services per participant served.

Response: The Department appreciates the concerns raised by commenters and agrees that the quality of ES services is important, particularly for vulnerable populations. The ES is a universal access program. The Department prioritizes the needs of vulnerable populations in this rulemaking and believes that changes in this rulemaking further the goal of universal access. Requiring States to use State merit staff to provide ES services will better protect vulnerable individuals because State merit staff are employees of the State who are subject to merit system principles and are thus directly accountable to the State and administer the ES with greater transparency and accountability than other staffing models.

The staffing requirements in part 652 apply to the delivery of services and activities under parts 653 and 658. Using State merit staff for these services is appropriate because these staff positions perform worker protection functions for MSFWs, who are particularly vulnerable to employment-related abuses. These staff require centralized training and management from the State to ensure they are equipped to assess and respond to farmworker needs, including responding to complaints and apparent violations in the field, which may include highly sensitive subject matter like human trafficking.

As stated above, the Department also recognizes the longstanding reliance interests of three States—Colorado, Massachusetts, and Michigan—and

based on comments received about the negative impacts that requiring these States to change their ES service delivery models would have on service delivery, the final rule is allowing these three States to use the staffing models they have been allowed to use since the 1990s. Adjusting to avoid negative impacts to these three States’ service delivery caused by the transition costs involved in changing decades-long practice is aligned with the Department’s prioritization of the service delivery needs of vulnerable populations.

Business Services and Partnerships

Comment: In addition to comments focused on the rule’s detrimental effects on job seekers, many commenters, including Michigan local governments, a Michigan State elected official, and Michigan one-stop operators, also expressed concern that the rule would have a significant negative effect on businesses and employers, primarily by reducing recruiting services to businesses seeking help in filling vacancies, as well as reduced job retention efforts. Numerous commenters, including an association of State elected officials, Michigan, Colorado, Massachusetts, and Delaware State government agencies, and Michigan and Colorado local governments, argued that the one-stop employment centers, operated by local merit staff, deliver high-quality, cost-effective services to job seekers, and that existing staffing flexibility enables local centers to create strategic partnerships with businesses, schools, and nonprofits, all of which help better serve job seekers and businesses. Some commenters, including Michigan local governments, a Michigan State elected official, Michigan one-stop operators, and others, also warned that the rule would force one-stop centers to cut their industry-led collaboratives. Some commenters from Massachusetts, including a State government agency, local workforce development boards, and a local government employee, argued that implementing the rule would undermine business commitments and partnerships with ES services in States that use flexible staffing models because of the appearance of political instability and unnecessary bureaucratic change.

Several commenters, including employers, one-stop center employees, and a local workforce development board, described how ES services benefit businesses, such as through job fairs, retention services, online job postings, and other programs that connect job seekers and employers. The

commenters expressed concern that the proposal would disrupt such services. Some commenters, including a private citizen and an employer, remarked that many businesses are struggling to find employees and credited local services that use Wagner-Peyser Act funding with providing critical assistance connecting employers and employees. Several commenters stated that Michigan Works! has provided “more than 141,000 services to businesses” and cited responses from program stakeholders who believed these services would be reduced or eliminated if reinstating merit-staffing impacted uses of Wagner-Peyser Act funding. A private citizen remarked that Michigan Works! services in their area assist employers with upskilling and retention of employees. A Colorado State government official asserted that the use of local merit staff for Wagner-Peyser Act programs has allowed Colorado to fully implement the “primary vision” of WIOA, effectively emphasize employer engagement, encourage work-based learning, and maximize support for local businesses based on local community and competitive needs.

Some commenters, including a Colorado local workforce development board, an employer, and a one-stop center employee, specifically claimed that one-stop centers have been particularly helpful in connecting employers with skilled employees in the manufacturing sector, as well as facilitating training; thus, the implementation of this rule would do particular harm to the struggling manufacturing sector in the States that use flexible staffing models.

Several commenters, including a Colorado State government, local governments, employers, and private citizens, asserted that the proposal would fracture relationships forged at the local level, harming both job seekers and employers. A Colorado local government and a local workforce development board said strong relationships between ES staff and local employers has resulted in a Subsidized Employment program that connects employers and entry level workers and expressed concern that this program and other comprehensive wrap around services would be lost due to the State merit-staffing requirement. An anonymous commenter remarked that local residents consider the local one-stop center to be a “neutral third party” for businesses and job seekers, and expressed concern that this would be disrupted due to the merit-staffing requirement.

A local workforce development board stated that their State’s current one-stop

delivery model works well for businesses by connecting them with job seekers as well as training resources. Some commenters asserted that as a result of the proposal, employers will lose access to support for posting job orders and connecting with job seekers.

A one-stop center employee argued that serving business requires staff “out in the field” and remarked that one-stop workers must seek out businesses, not the other way around. A trade association similarly remarked that the proposal would make it harder for businesses to engage with the workforce system and could result in the cancellation of contracts or other transition costs.

A private citizen remarked that their local Michigan Works! office has effectively helped businesses attract and develop their workforces, including assisting businesses in securing grants to train and invest in current employees and add new staff. Similarly praising Michigan Works! employees’ support for local businesses, another private citizen expressed concern that the proposed merit-staffing requirement would negatively impact local communities at a time when labor concerns hinder businesses across the State.

Some commenters, including State and local workforce development boards from Colorado, a trade association, a commenter from academia, and an employer, discussed the value of working with local ES staff due to their expertise in the local economy and knowledge of competitive factors in a given area, arguing that the ability to provide ES services using local merit staff maximizes the level of support provided to local businesses. A local government expressed concern that the proposal would disrupt established relationships between local staff and employers and economic development organizations at the community level.

Some commenters, including an advocacy organization, a trade association, a Colorado local government, and private citizens, discussed the value of local knowledge in serving the needs of local businesses and job seekers, with some discussing the varied needs of businesses and job seekers in urban and rural areas. A Colorado local government and a Colorado one-stop operator similarly argued that employers benefit from working with staff who have a regional perspective on what businesses need. A Colorado local workforce development board similarly discussed the value of local control of ES services and the knowledge of local and regional

economic conditions, including whether the economy is prosperous, whether employers are facing labor shortages or scarcity, and whether unemployment rates are high or low. The commenter said removing local control would result in slower services and a less nuanced and dynamic response to citizen and business needs.

An advocacy organization described the value of local industry-led initiatives in serving employers’ unique regional needs and expressed concern about such initiatives’ continued success if ES staff are reduced or reassigned. A Colorado local workforce development board described sectoral partnerships developed by local staff working in the communities they serve, including partnerships in the healthcare, information technology (IT), construction, and transportation sectors. A different Colorado local workforce development board expressed concern that the proposal would “dismantle” successful regional industry sector work that has developed over the past decade. A private citizen and an anonymous commenter described services provided to businesses made possible by local staff’s relationships with those businesses and expressed concern that the proposal would result in the loss of “local control.”

A Colorado employer and a few private citizens argued that county merit staff have developed expertise on the local economy and community needs, asserting that State or Federal employees are less capable of developing successful local connections with local businesses.

Several commenters, including trade associations, private citizens, a one-stop center employee, an advocacy organization, and Colorado local workforce development boards, argued that local workforce staff have the necessary local and regional understanding to establish effective partnerships with local partners and organizations. Several commenters, including a Michigan State elected official, a Michigan local elected official, Michigan local workforce development boards, one-stop operators, and Michigan local governments, similarly remarked that the ability to develop strategic partnerships with local nonprofits, businesses, educational institutions, and other organizations is a key benefit of ES staffing flexibility because these relationships facilitate connections between students, job seekers, training providers, and local employers.

A private citizen remarked that staff in their local Michigan Works! office had a knowledge of local business needs

and hiring trends that was critical in accessing the right services for the commenter to remain competitive in the local job market.

Response: The commenters highlighted the benefits of the services provided to businesses, and the Department agrees that business services and partnerships with businesses are important. However, the commenters did not explain why the ES staffing model is a causal factor in the quality of those business services and partnerships. Many other States use State merit staff to successfully provide services to businesses and job seekers. The Department recognizes the longstanding reliance interests of Colorado, Massachusetts, and Michigan, and will therefore allow these States to utilize the longstanding alternative staffing models the Department previously allowed them to use. These States may exercise merit-staffing flexibility to the same extent previously authorized by the Department for that State prior to February 5, 2020, the effective date of the 2020 Final Rule. The Department also is requiring these three States to participate in evaluations of their ES service delivery model to be conducted by the Department.

Access—Transportation and Virtual Services

Comment: Some commenters, including an anonymous commenter, a one-stop center employee, a local workforce development board, and a private citizen, stated that their local service office has offered assistance in using technologies or online services that are vital to employment and expressed concern about losing access to such support.

Some commenters, concerned about the disruption or closure of Michigan Works! offices in their area, including a local workforce development board and a one-stop center employee, worried that customers would need to travel longer distances to access needed services, with many stating that rising gas prices and other complications (such as the sparse availability of public transportation in certain areas) will make transportation particularly challenging for many one-stop center customers.

Response: The COVID-19 pandemic highlighted the need for States to have staff to serve as surge capacity for times of high demand for UI claims. The Department agrees that in-person services are valuable, even as technology makes virtual services easier to develop and deliver. States across the country, the vast majority of which use State merit staff, have successfully used

a combination of comprehensive and affiliate AJCs, access points, mobile AJCs, and online and virtual services to reach geographically distant job seekers and those without reliable transportation. Data do not show a relationship between staffing models and the number of AJCs or access points per capita in the State. The Department also recognizes the longstanding reliance interest that Colorado, Massachusetts, and Michigan have in using alternative staffing models authorized by the Department. The Department is permitting these States to continue using the longstanding staffing models the Department allowed them to use in the 1990s. These States may use merit-staffing flexibility to the extent permitted by the Department in that State prior to February 5, 2020, the effective date of the 2020 Final Rule. All other States, including those that began using the staffing flexibility provided by the 2020 Final Rule, are required to use State merit staff to provide ES services. The Department will further examine various staffing models and methods of delivering labor exchange services, including evaluation activities for which the Department will require the participation of the three alternative staffing model States. All other States will have 24 months to comply with the requirement to use State merit staff to provide ES services. No additional States are permitted to pursue adoption of an alternative staffing model during the transition period; the final rule is effective 60 days after publication in the **Federal Register**. The 24-month transition period for complying with the State merit-staffing requirement is intended only for those few States that began using staffing flexibility in response to the 2020 Final Rule and now must transition back to using State merit staff.

Training and Other Considerations for Employees Delivering Services

Comment: A think tank remarked that many State agencies face multiple challenges, including staffing shortages, funding shortfalls, and backlogs, and warned that the proposal could exacerbate these issues because contract staffing or other staffing flexibilities offer workable solutions. A local government expressed concern about forcing programs to re-structure existing staffing models, stating that the proposed rule could result in laid off staff, damage to staff morale, and a reduction of “vital employment services” like labor exchange services, career workshops, and services related to community engagement and service navigation.

Some commenters, including a one-stop center employee and a private citizen, warned that hiring or training new staff could lead to discrimination or bias against existing staff or entry-level staff. A private citizen remarked that local agencies may have different retirement or healthcare benefits for staff based on agreements with local or country governments, and expressed concern that changing staffing arrangements could disrupt pension or healthcare benefits for some workers. A one-stop operator acknowledged that ensuring employees receive fair wages and benefits was a motivation for the NPRM and remarked that the retirement and medical benefits available for public employees in its county are among the top plans nationwide.

An anonymous commenter argued that it would not make sense to train new individuals to replace the current staff in Workforce Centers, who have already developed relationships with customers.

A private citizen remarked that Colorado’s current staffing model creates a greater level of oversight because county merit-staff employees are accountable to both the State and county government. A State government referred to the Department’s rationale about State merit staff’s accountability and asserted that county merit employees are already sufficiently accountable to their local county government. An advocacy organization stated that currently employee performance is assessed and measured using customer service metrics and they expressed concern that the proposal would alter and complicate performance assessments.

Response: The Department recognizes that there will be transition costs to some States, which was included in the NPRM’s regulatory impact analysis. New information regarding transition costs and impacts was provided in comments to the NPRM from States utilizing alternative staffing models. The Department considered these comments in developing the final rule but, for the reasons discussed throughout, the Department has decided to require that States use State merit staff to provide ES services, with limited exception. The Department is allowing the three States with longstanding reliance interests—Colorado, Massachusetts, and Michigan—to continue to utilize their longstanding alternative staffing models for ES services and is requiring their participation in an evaluation to be conducted by the Department.

Transition Period

Comment: In addition to reduced future employment services, some commenters, including an association of State elected officials, a Colorado State government agency, Colorado local government agencies, and others, claimed that there will be significant transition costs and logistical challenges for States to transition to a model by which employment services are only provided by State merit staff.

During this transition period and for some time after, a Colorado State elected official and State government agency warned that compliance and performance standard failures will likely become more common.

While most commenters wrote about the effects the rule would have if implemented, some commenters, including a Colorado State elected official, a Colorado local government agency, and a one-stop center employee, argued that the proposed merit-staffing requirement has already had a chilling effect, with former demonstration State one-stop centers and localities unable to approve budgets, not knowing what future grant levels will be, and with one-stop center staff already seeking employment elsewhere in anticipation that their positions will be terminated soon anyway.

A State government agency discussed the challenging logistics of implementing a State merit-staffing model within 18 months, anticipating additional staffing needs as well as a challenging timeline for State legislature approval of additional funding for additional staff. The commenter requested a 3-year implementation timeframe to make requests for additional staff and funding during the State legislature's budget cycle.

Conversely, several unions who supported the proposal agreed with the proposed 18-month transition timeline and recommended that the Department provide assistance and support to any States using alternative or flexible staffing models, reasoning that such assistance would help prevent disruptions to Wagner-Peyser Act services. One union suggested that the Department "require sufficient staffing to monitor and support" the transition in States using flexible staffing models.

State and local workforce development boards, a Colorado State government agency, and a Colorado local government requested a 36- to 40-month transition timeline (depending on if and when the rule is finalized) allowing for full compliance by December 31, 2025. The commenters cited the State legislative process and

funding needs to both maintain quality services and hire and cross-train new staff as factors that necessitate a longer transition period.

A Colorado State government agency and State and local workforce development boards said State legislation would be needed to allow Colorado to come into compliance with the Federal rule and anticipated that current staff may leave their posts as soon as the rule is finalized (which, the commenters asserted, would require time and funding to find and train their State merit-staff replacements). The commenters also stated that the funding and effort required to hire and train new State merit staff would require funding from the PY 2024 Wagner-Peyser Act allocation as the PY 2023 amount likely would not be sufficient.

A Colorado one-stop operator argued that the transition timeline is "irrelevant" because the proposal will cause impacts immediately. The commenter argued that the proposal has already created concerns among local employees about their job security and, thus, announcement of a finalized nationwide merit-staffing requirement would result in immediate departure of ES staff, concluding that Wagner-Peyser Act services will "cease immediately" if the proposal becomes final.

A Michigan State government agency requested an extension of the implementation period from 18 months to 3 years, arguing that modifications to State departments' structure, State budget processes, and public sector recruitment, hiring, and training functions will take time. The commenter anticipated that 90 new staff members would need to be hired and trained and remarked that this would require the State legislature to approve a staffing structure modification (adding that their State legislature is "extremely resistant" to adding new full-time employees to State departmental budgets). The commenter said the longer implementation period would be necessary to ensure there are no disruptions to service delivery and reorient the local workforce development structure. If the Department finalizes the merit-staffing requirement as proposed, this commenter also requested a 3-year reprieve from Wagner-Peyser Act and WIOA title I performance reporting and suggested that a new performance baseline would need to be negotiated and established.

Opposing the proposed merit-staffing requirement, several commenters, including a one-stop center employee, argued that 18 months was insufficient to "revamp" an ES delivery system that

has been constructed over the past 25 years and requested that, if the proposal is finalized, more than 18 months be provided for transition and transition should align with a new program year. These commenters described the "painful" impacts of Michigan's 1998 transition from State merit staff to local merit staff, including lack of coordination in program delivery and diminished customer service.

A Massachusetts State government agency opposed to the proposal requested a "significantly longer timeline" to assess, plan for, and implement the merit-staffing requirement, asserting this would require the conversion of more than 40 local Wagner-Peyser Act staff into State merit staff. The State government listed difficulties associated with an anticipated "major infrastructure change," including facilitating staff turnover and hiring new staff, negotiating with unions, approval of "spending controls," and considerations of lease or other contractual agreements. The commenter also mentioned that the forthcoming WIOA reauthorization potentially complicates the overall timeline. Ultimately, the commenter requested that the implementation period should last until at least January 2025.

Describing the proposal as a major disruption to Colorado's workforce system, the commenter discussed how the staffing transition would impact program offices in Colorado, including "mass layoffs" of 145 county staff (and associated negative impacts on morale), fewer full time Wagner-Peyser Act staff resulting in scaled back services for vulnerable populations, lost productivity, customer service disruptions, increased errors by "unseasoned staff," and potential lawsuits or other complications due to union representation of State staff.

Several commenters remarked that, based on average turnover rates, Michigan's local offices may have 18 open ES positions at any given time. A Colorado State government agency asserted that the proposal would make it difficult to hire new outreach staff. Additionally, a Delaware State government agency further warned that the process to replace Wagner-Peyser Act contractors and local staff with State merit staff will be procedurally challenging and time consuming, with no guarantee that the staff requests will be approved by the relevant State government bodies. A local workforce development board remarked that its local service center could not move forward with planning programming and strategies for the forthcoming

program year (which begins on July 1st of this year) because they are unclear as to the financial implications of the proposal. Similarly, a Colorado State government agency expressed concern about changing regulations during “the current 2020–2023 demonstration period” because neither former demonstration States nor the Department would have enough time to provide evaluative data on the benefits and challenges with the flexible staffing model approach.

Response: The Department proposed an 18-month transition period for States to comply with the requirement to use State merit staff to provide ES services and estimated transition costs in its regulatory impact analysis. In the proposed rule the Department specifically requested information regarding States’ transition costs and the proposed 18-month transition period should this requirement be implemented for all States. The Department received comments regarding the length of the transition period, with some commenters suggesting a 2-year transition period, while others suggested a longer or unspecified period of time. The three States with longstanding reliance interests requested a 3- to 4-year transition period. As noted throughout this preamble, based on information provided by these three States in response to the NPRM, the Department is allowing these States to continue to use the alternative staffing models consistent with the models previously approved by the Department in these States. The Department is requiring these three States to participate in evaluations of their ES service delivery models. The Department recognizes that there are certain transition costs associated with shifting back to the use of State merit-staffing, which may include State legislation, budget restructuring, and hiring, and these processes, particularly those that require State legislative action, may take longer than 18 months. Therefore, the Department is requiring all other States, including States that began using alternative staffing models following the 2020 Final Rule, to comply with the requirement to use State merit staff for ES services within 24 months of the effective date of this final rule. This includes the requirement to use State merit staff to conduct outreach and provide other services to MSFWs under parts 653 and 658.

Relationship Between Employment Services and Unemployment Insurance Consequences of Having the Same Staff Manage ES and UI in States That Are Currently Operating Flexible Staffing Models

Comment: Many commenters, including a Michigan State elected official, a Massachusetts State government agency, and Colorado local governments, articulated that local merit staff at one-stop centers in former demonstration States already provide significant resources, guidance, and other support to UI claimants, many of whom face technological and transportation barriers in making successful unemployment claims, and claimed this role was particularly important during the UI demand surge caused by the COVID–19 pandemic.

Some commenters, including one-stop center staff and a private citizen, warned that assigning ES staff to UI adjudications during UI surges would unnecessarily burden ES staff and cause the quality of employment services in the States that use flexible staffing models to degrade even further during UI surges.

An advocacy organization argued that the relatively small number of new State merit staff this rule would create in States that use flexible staffing models would not make the States significantly more prepared to handle UI surges. Similarly, a Colorado State elected official and a Colorado local workforce development board argued that States that already require Wagner-Peyser Act ES services to be provided by State merit staff did not perform any better in processing UI claims during the UI surge caused by the COVID–19 pandemic than the former demonstration States.

A one-stop center employee similarly argued that the rule could actually decrease the number of staff available to assist with UI claims during a UI surge in States that use flexible staffing models; this commenter argued that because one-stop center staff in former demonstration States are already assisting with the UI claims process, by causing an overall reduction in ES staff, such States would lose this surge capacity.

Some commenters, including one-stop center employees, trade associations, and a private citizen, expressed concern about skill misalignment and warned that the proposal would require retraining workers who provide employment services to perform tasks related to adjudicating UI claims, functions the commenters argued require different skill sets and

workstyles. A one-stop center employee expressed concern about ES staff taking on the duties of UI staff and argued that ES staff will not be familiar with practices critical to the management of UI benefits (such as timely administration of the “work test.”) A private citizen remarked that Michigan’s local ES offices have been successful in providing a wide range of services to both job seekers and businesses seeking employees while, in their view, the merit-staffed State UI program has been “a debacle.”

A Colorado State government agency expressed concern about the effort and funding required to onboard or cross-train staff and remarked that new hires may not be available to provide services throughout their first year due to the time needed to complete required trainings for both UI and Wagner-Peyser Act programs.

Response: The Department proposed to require that States use State merit staff to provide ES services, which aligns the provision of ES services with the requirement that States administer certain UI activities with State merit staff. The Department notes that the NPRM did not propose requirements on States to train or use their ES staff for UI activities. Neither is the Department requiring that States cross-train ES staff for UI activities in this final rule. However, the ability for States to cross-train would generally better equip States to be able to use ES staff for certain UI activities that require State merit staff in times of high need. While the Department encourages States to plan for increases in UI demand including through cross-training, a State can develop cross-training that it wishes to implement at its own pace. The Department recognizes the role that other staff in an AJC may play in connecting job seekers with UI services, but also notes that the ES has specific duties to assist UI claimants to become reemployed. Providing information and meaningful assistance in filing a claim for unemployment compensation is an allowable cost under the Wagner-Peyser Act. The Department also recognizes the longstanding reliance interests of Colorado, Massachusetts, and Michigan, in utilizing alternative staffing models and that a requirement to use State merit staff may impact these States differently than other States. Therefore, the Department is allowing these three States to continue to use the longstanding alternative staffing models previously approved by the Department in these States. The Department is requiring these three States to participate in evaluations of ES service delivery and alternative staffing models.

Support Ability of State Merit Staff To Provide Surge UI Claims Processing Capacity

Comment: Many commenters, including unions, advocacy organizations, think tanks, and a State government agency, expressed support for the proposed ES merit-staffing requirement because of State merit staff's ability to play roles in administering UI programs and connecting jobless workers to UI benefits. Specifically, some of these commenters remarked that, because only State merit staff can legally adjudicate UI claims, requiring ES staff to be hired on a merit basis would permit States to rely on them to process and adjudicate UI claims. Some unions, advocacy organizations, think tanks, and a State employee association commented that reinstating the merit-staffing requirement in all States and realigning ES services with the UI program will ensure that workers can continue to receive unbiased, high-quality employment services and effective, qualified help in claiming UI benefits during economic crises "without the threat of partisan political coercion hanging over them."

Several unions, a State government agency, and a think tank agreed with the Department's assessment that any value gained by allowing the ES to be staffed at the local level is outweighed by the benefits of aligning ES staffing with UI administration and adjudication, which would allow ES staff to provide surge capacity for UI during times of high need. As framed by one union, cross-training State merit ES staff enhances the resiliency of UI service delivery. Citing the pandemic and natural disaster emergencies (e.g., Hurricane Sandy) as the best examples of the need for cross-training State merit ES staff to assist UI claimants in periods of high demand, many commenters, including unions, advocacy organizations, and think tanks, argued that, because the frequency of such extreme events is likely to increase, alignment of ES and UI staff is even more important. Several of these commenters reported that during the pandemic, Great Recession, and recent natural disasters, States have relied on State merit ES staff to support UI work, which helped to address historic UI claims surges.

According to unions, advocacy organizations, think tanks, and a State employee association, the U.S. experience with temporary privatization of UI administration permitted by Congress during the pandemic reinforces the importance of reinstating ES merit-staffing. These commenters

asserted that the temporary exemption from the requirement that UI adjudicators be merit-staffed resulted in many States contracting with private companies that hired low paid, poorly trained non-State-merit staff to administer traditional and new temporary UI programs. Citing a May 2022 working paper, these commenters said that this use of non-State-merit staff led to high turnover among contracted staff; corruption in the hiring of staff and in job and training referrals and placements; and poor service and long payment delays for claimants. A State employee association and a union added that incomplete and deficient work by outsourced staff increased the workload for State merit-staff UI adjudicators, who were forced to correct vendor staff errors.

Further, unions, an advocacy organization, a think tank, and a State employee association discussed a State audit of Michigan's UI experience during the pandemic, which they asserted found that insufficient worker onboarding and offboarding practices (e.g., only one-fifth of workers completed required training before starting their duties) resulted in a total of \$3.8 million in UI fraud committed by vendor staff; purchase order delays; conflicts and ethics violations; and unsafe computer sanitization practices. A State employee association and an advocacy organization added that the Michigan audit also found that nearly half of the sampled vendor staff still had access to the State's automated UI system long after they no longer worked for the contractor, which the commenter said created unnecessary risk to the data and systems. Citing the Michigan audit report, an advocacy organization said that contractors also failed to comply with criminal history background checks for their workers.

Also asserting that Michigan UI claimants in particular suffered during the pandemic, an advocacy organization commented that hundreds of claimants reported to legal advocates that they received little to no help from the frontline staff who were hired to handle the surge of claims during the pandemic. Asserting that non-merit UI workers hired during the pandemic did not receive adequate training, unions and a State employee association agreed with the Department's statement in the NPRM that providing adequate training for UI adjudicators takes several months to a year. A think tank commented that State UI offices increasingly are using contractors for identity verification, which is delaying benefits and creating backlogs for unemployed workers,

which is impacting individuals of color and their communities.

An advocacy organization and a private citizen commented that cross-training ES merit staff would alleviate a lot of the pressure on UI merit staff during crises. Citing a lag of increased UI administrative funding at the start of economic downturns, another advocacy organization argued that cross-training State merit ES staff allows ES staff to fill this gap before the Department is able to distribute additional funds to respond to increased administrative needs.

A think tank commented that it has heard from a wide range of legal aid and UI advocates that State UI systems are overwhelmed and fighting cyber fraud due to staffing shortages. Citing a 2020 news article about a Michigan UI agency employee committing fraud, an advocacy organization argued that cross-training ES State merit staff to provide UI services during surges—rather than relying on contractors or new hires—could limit the risk of fraud and ensure the program is run with high integrity and efficiency.

Some commenters, including unions, advocacy organizations, and think tanks, remarked that merit-based State ES employees provide professional, unbiased ES services to job seekers and employers and help UI claimants navigate the job market and comply with work search requirements to initiate and remain eligible for UI benefits. Specifically, an advocacy organization commented that ES staff are already familiar with the local worker populations and understand the conditions on the ground. Because ES staff administer the work test to ensure that UI claimants are able to work and are available for and actively seeking work, which is a federally required condition of State UI eligibility, a State employee association asserted that this gatekeeper function makes the role of ES staff "inherently governmental." Citing increased mandatory UI work test duties imposed over time, a private citizen argued that additional State merit ES staff should be physically available in one-stop centers to assist the UI component in a variety of expanded work test functions.

An advocacy organization argued that, to support a unified delivery model in which job seekers can apply for UI benefits through the same agency providing reemployment services, ES and UI programs should work together to ensure that services are provided by conflict-free, public service professionals, so that workers receiving UI benefits can find suitable replacement jobs efficiently. Similarly, a private citizen commented that required

merit-staffing for ES services may promote better coordination between UI staff and ES staff, which is much needed. Commenting that the ES program performs important labor exchange functions that connect employers with qualified workers and help employees gain reemployment more rapidly, a private citizen argued that the ES must be closely involved with UI. A think tank argued that, as new technology will be deployed over the next few years to address UI modernization, it is critical that State level staff are career employees with decent pay and benefits, which “will also help ensure a more equitable UI system for all workers and address the racial inequities.”

Asserting that allowing non-State employees in some States to operate ES and UI services was not a wise policy practice, a private citizen reasoned that deficient or hard-to-manipulate computer-based registration, job finding and placement services, and claims processing often result in frustration, leaving some jobless to abandon government assistance, which erodes overall trust in government services. This commenter concluded that the best way to reestablish the trust of job seekers and UI claimants in the delivery of public services is to improve the national standards of quality and professionalism in staffing of State workforce agencies by hiring superior individuals under merit standards.

Also expressing concern about non-State-merit ES staff causing frustration for UI claimants, an advocacy organization argued that cross-training ES State merit staff, and allowing them limited access to UI claims information, could go a long way towards rebuilding these relationships, and would provide claimants with the in-person access to information that they want. Specifically, this commenter said that most of its clients have limited access to technology and struggle to navigate the UI technology system on their phones, and one-stop center staff cannot help claimants with filing claims or navigating the online portal. Therefore, the commenter remarked that cross-training ES staff and allowing them to provide minimal UI support could help alleviate claimant frustrations, provide better access to UI, and prevent many mistakes that claimants make when filing that later lead to improper payments. Finally, this commenter argued that, because the majority of its clients who seek help at State one-stop centers are from underserved populations, allowing ES State merit staff to provide basic information about UI claim status and assist with

navigating the online systems would ensure greater equity in access to benefits.

A union, a State employee association, an advocacy organization, and a private citizen argued that the history of the ES and UI programs supports the NPRM’s reliance on the ES–UI relationship and the appropriateness of aligning these programs via the State merit-staffing requirement. Specifically, a union and a State employee association commented that these programs originated as intertwined prongs of the New Deal response to mass unemployment and Congress subsequently integrated the funding structure of ES and UI, tasked ES with administering the UI work test, and encouraged the colocation of ES and UI staff to support unified service delivery, all of which also bind these programs together and support alignment.

In particular, because the UI program was created in the Social Security Act (SSA) less than 2 years after passage of the Wagner-Peyser Act, a private citizen stated that Congress developed the UI program with full knowledge of the existing ES public labor exchanges. The commenter described the origins of the UI statutory merit-staffing requirement and asserted that this legislative history provides support for the Department’s linkage of UI and ES. In summary, according to this commenter, the UI merit-staffing requirement was not in the original SSA of 1935, even though the President’s Committee that designed the programs recommended that the selection of administrative personnel for the program be on a merit basis. In 1938, the commenter said, based on an initial UI program review by the Social Security Board, a recommendation was made to require merit-staffing in the UI program for all States, which was implemented by Congress in 1939, while leaving early Federal administrative interpretations requiring merit-staffing for the ES program in place. Therefore, this commenter concluded that the linked historical background of ES and UI demonstrates that the absence of an explicit merit-staffing requirement in the Wagner-Peyser Act does not demonstrate that merit-staffing is beyond the Secretary’s authority, and the record of consistent use of merit-staffing in both ES and UI programs supports the adoption of the proposed merit-staffing requirement.

Asserting that the founders of the unemployment security system felt strongly that ES and UI services should be administered by State merit-staffed employees, a private citizen commented that, without State merit-staff ES

employees, the public character of the one-stop center is ceded to private control, contrary to the intent of the Wagner-Peyser Act. This commenter urged the Department to strengthen its argument for uniform required State merit-staffing for ES services by indicating that it is based on longstanding Department policy, research findings, and relevant recent experience.

A union argued that aligning the staffing requirements of the ES and UI programs would further facilitate their integration and promote their joint aim of alleviating the deleterious effects of unemployment and foster reemployment.

Response: The Department proposed to require that all States use State merit staff to provide ES services due in part to the critical need for alignment between the ES and UI programs. The Department appreciates the comments supporting this alignment. It is vital that the ES be administered so that services are delivered effectively and equitably to UI beneficiaries and other ES customers. The Department’s proposal and justification was supported by these commenters, including that States would be better equipped to handle surges in UI claims with cross-trained ES staff. As the Department noted in the NPRM, emergencies such as natural disasters are occurring with increased frequency such that a need for surge capacity and cross-trained staff is becoming increasingly necessary. The Department further noted that historical data from 1971 through 2021 indicate regular and periodic increases in the number of UI initial claims and first payments, for which having ES staff who are already cross-trained or able to be quickly cross-trained to assist UI claimants would be beneficial. Requiring States to use State merit staff also helps to support universal access to ES services and helps to ensure that services are delivered by qualified, non-partisan personnel who are directly accountable to the State. Such professionals would be required to meet objective professional qualifications, be trained to assure high-quality performance, and maintain certain standards of performance. They would also be prohibited from using their official authority for purposes of political interference, and States would be required to assure that they are treated fairly and protected against partisan political coercion.

The Department further agrees that UI and ES are two mutually reinforcing elements of the Federal government’s commitment to workers and that the legislative history of the two programs

strengthens the Department's authority to require State merit ES staff. The alignment of these two programs remains a core goal of the Department, with the RESEA program's emphasis on connecting UI claimants to Wagner-Peyser and WIOA services being the latest step toward further integration.

Undue Prioritization of UI Services

Comment: Some commenters, including a Colorado State government agency, a one-stop operator, private citizens, and an anonymous commenter, critiqued the proposal over what they perceived as an undue prioritization of UI services over ES and argued that in doing so, the Department would be restricting vulnerable populations' access to needed employment assistance programs because many individuals who would benefit from ES are not eligible for UI. Several commenters, including a Colorado local government employee and an anonymous commenter, argued that the proposal presented "discrimination and civil rights issues" in shifting focus from ES to UI services because the latter does not provide a comprehensive set of services to enable job seekers to find and secure a job. Several commenters, including a Colorado State government agency and a trade association, similarly discussed inequity and civil rights concerns associated with the proposal "prioritizing the delivery of UI services" over ES, arguing that this places increased importance on customers eligible for UI and diminishes the availability of services for vulnerable populations (such as communities of color, people with disabilities, people experiencing homelessness, and self-employed or gig workers) who need employment assistance but may be ineligible for UI.

A trade association remarked that shifting ES staff to UI services would promote benefit payments over assisting customers with employment and would cause the community to perceive AJCs as "the unemployment office" rather than a site to receive employment services.

A one-stop center argued that prioritizing UI services over ES would be harmful to employers. A private citizen stated that the staffing status quo in Colorado enables an equitable delivery of UI and ES services and cited data from 2021 about the numbers of people who accessed such services in their area in asserting that 9,000 people would receive "subpar" ES due to the proposal's undue prioritization of UI.

A State government discussed challenges associated with a rapidly changing labor market and encouraged

the Department to keep flexible staffing models in place, arguing that States need flexibility to effectively deliver UI and reemployment services, in part due to the decrease in Federal Wagner-Peyser Act funding "over the past decades." The commenter said reemployment services require a wide range of "tools, sites, and strategies" and argued that staffing flexibility helps some States deliver such services effectively. A group of local government employees remarked that many of the individuals served in their local area are not eligible for UI benefits but need access to ES services. The commenter said such individuals feel comfortable coming into a local office and expressed concern about a disruption of the equitable and "seamless" delivery of services to marginalized populations, citing an anecdotal example.

Many commenters asserted that it would be counterproductive to require States to use State merit staff to provide ES services and cross-train these employees to process UI claims.

Several commenters, including a Colorado State agency, a trade association, and an advocacy organization, argued that shifting ES staff to perform UI services would repurpose staff to perform duties outside their scope of work, therefore hampering staff ability to perform their main function. These commenters reasoned that ES staff are hired for job coaching, customer support, and relationship building while UI staff focus on short-term problem solving, further stating that the misalignment of these skill sets will create more accessibility problems for all.

Many commenters, including State agencies and an advocacy organization, expressed concern that the proposed rule does not consider the need for surging ES services during UI surges, further questioning who will provide ES services when ES staff are re-assigned to UI adjudication and claim processing. Some commenters, including an association of State elected officials, a one-stop operator, and others, agreed that the lack of staff performing ES services during UI surges will lead to slower service overall. Relatedly, a few commenters, including a one-stop center employee, a think tank, and an anonymous commenter, argued that it is unrealistic to have ES staff turn away from their job duties to handle UI claims as they already have full workloads that can be difficult to keep up with. Several commenters questioned whether ES staff would be relocated to UI offices for training and for the provision of UI services during surges.

Some commenters, including a Colorado State government agency and a trade association, argued that the pandemic created a rare economic crisis, and that requiring nationwide State merit-staffing for ES services is not the most efficient way to fix the UI surge issues brought about by these extraordinary circumstances. Many other commenters, including a Colorado State workforce development board and a Colorado employer, expressed similar sentiments, agreeing that the pandemic is a temporary outlier event, and that implementing these changes will be less effective in supporting job seekers and UI claimants at all other times. A local workforce development board stated there was no compelling need nor sufficient rationale to require State merit staff and asserted the proposal would "void" the ability to innovate in its State.

A Colorado State agency, a Colorado workforce development board, and a private citizen stated that the proposed rule would negatively impact the quality of services to businesses. These commenters reasoned that current local ES staff have experience serving businesses and knowledge of the local economy, while any State merit staff that replace them will not have these advantages or incentive to support employers across multiple programs. The commenters further stated that businesses will suffer during economic hardships because ES staff will be diverted to focus on UI claims.

Two State government agencies recommended that the Department provide more guidance to States about cross-training ES staff with UI services to prepare for the next UI surge. These commenters expressed concern that this responsibility will fall on the States without direction from the agency on how to meet the Department's objective.

A State workforce development board and others expressed concern that the proposed rule would have a disproportionate impact on rural areas, as many States report centralized ES staff in urban areas. The commenters anticipated the required change in staffing would bring about an overall reduction in services, especially during UI surges.

Framing the proposed merit-staffing requirement as prioritizing UI benefits recipients over all other populations, a one-stop operator commented that, because data shows UI recipients do not represent underserved populations, requiring nationwide merit-staffing for ES services would supersede community and business needs to provide backup for UI programs in times of need.

A few associations of workforce boards, a State workforce development board, and a professional association stated that by mandating the use of State merit staff for ES services, the proposed rule would significantly limit the types of technology and tools available to States in times of surging UI demand.

Also arguing that a uniform merit-staffing requirement would harm, rather than assist, Colorado's workforce, a private citizen suggested that the Department instead change the requirement that UI claims must be processed by State merit staff. A think tank similarly argued that the Department should support legislative efforts to create permanent staffing flexibilities in both the ES and UI programs.

Many commenters from Michigan, Colorado, and Massachusetts discussed how the local resource centers in their State were able to pivot to UI surge support amid the pandemic to demonstrate the high efficiency of their current systems. For example, several commenters from Colorado, including a local government, a local workforce development board, a trade association, and others, described how their local staff successfully responded to the spike in phone calls related to UI issues by creating a virtual call center that exclusively answered UI questions, proving that they are able to handle these services at a local level, particularly when unemployment agencies are overwhelmed. Several commenters from Michigan, including one-stop operators, one-stop center staff, and private citizens, stated that local workforce development offices across the State were able to leverage hundreds of staff to assist the unemployment agency in responding to the UI claims they could not keep up with during the pandemic, further requesting that Michigan be allowed to continue utilizing non-State-merit staff to provide ES services. A few commenters from Massachusetts, including a State government agency, a local workforce development board, and a local elected official, stated that the one-stop center staff in their State are trained on the fundamental knowledge of unemployment, along with more in-depth training for designated staff, all of which allows them to assist customers with questions about their UI claims. These commenters further discussed how their ES staff seamlessly transitioned to assisting UI claimants during the pandemic without any disruption of services.

Expressing concern that the proposed rule would result in reduced services at local offices, some private citizens and

an employer expressed appreciation for ES staff helping them with job search and UI claims process issues during periods of unemployment. Similarly, an employer commented that they do not know what they would do without Michigan Works! because they assist them and their employees with UI benefits in their off season. Michigan one-stop center staff also said that they help unemployed customers to navigate the UI system, with some asserting that many UI claimants have challenges using a computer and eliminating local services could escalate customer frustrations.

Response: The Department appreciates the concerns raised by commenters, and agrees with the comments describing the importance of assistance with UI, the ability to access that support, and the close relationship between ES and UI. Similarly, in most of the States across the country, ES State merit staff operate in AJCs and provide assistance with job search, applying for UI benefits, and pivot during surges. The Department proposed to require that States use State merit staff to provide ES services due to the need for critical alignment between the ES and UI programs and to help ensure that services are delivered by qualified, non-partisan professionals accountable to the State. While the Department believes it is vital for ES and UI to be aligned, this final rule does not impose requirements on States to cross-train or utilize ES staff for UI services. Many States already cross-train and utilize ES staff for UI activities, and States with prior issues within their UI program may benefit from having cross-trained ES staff available when there are surges in demand for UI claims. Aligning these programs should not negatively impact or prioritize one program over the other. Rather, aligning the two programs serves to increase consistency of service, as well as capacity, for each. Further, a State merit-staffing requirement helps to promote consistent training and accountability throughout the State from one locality to another. The Department will provide technical assistance to States that are interested in more closely aligning the respective programs.

The Department additionally recognizes the reliance interests of Colorado, Massachusetts, and Michigan, all of which were permitted by the Department to use alternative staffing models beginning in the 1990s. Accordingly, this rule requires all States to use State merit staff to deliver ES services, except for these three States using longstanding alternative staffing models previously authorized by the Department. These three States are

permitted to continue using their longstanding staffing models and must participate in any evaluation of their delivery of ES services conducted by the Department.

The Department recognizes that there will be certain transition costs to some States, which was included in the NPRM's regulatory impact analysis. All States have 24 months to comply with the staffing requirements.

Alignment With Other Programs

Comment: Several commenters, including a one-stop center employee and an advocacy organization, expressed concern that the proposal would disrupt the "integrated service delivery model" in their area and would result in a siloed service delivery model to the detriment of program beneficiaries.

Several commenters, including Michigan local governments, a Michigan local elected official, State and local workforce development boards, and a private citizen, encouraged alignment and integration among programs including the Wagner-Peyser Act ES program, WIOA, the Supplemental Nutrition Assistance Program (SNAP), Temporary Assistance for Needy Families (TANF), and Trade Adjustment Assistance (TAA) and expressed concern that the proposal would disrupt a "streamlined" service delivery model. A trade association remarked that Wagner-Peyser Act funding allows Michigan Works! to leverage funds from other State, Federal, and non-governmental programs to improve services for individuals and businesses.

Many commenters, including Michigan and Colorado State elected officials, Michigan and Delaware State government agencies, and Michigan and Colorado local governments, argued that the rule would eliminate States' ability to integrate the provision of Wagner-Peyser Act-funded services with other workforce development and social support services, such as WIOA and TANF, which would reduce efficiencies and increase administrative costs in States that use flexible staffing models. A one-stop operator requested that the Department reconsider the proposal, arguing that the current flexibility afforded to States has resulted in a more "responsive" workforce development system.

Some commenters, including a training provider, a commenter from academia, and a one-stop center employee, warned that the rule would jeopardize former demonstration States' other grant funding agreements with the Department. Several commenters asserted that the proposal would "de-

couple” services, funding, and practices that have been integrated as a result of their State’s demonstration status. The commenters described the rule as “outdated, inefficient, unnecessary, and overly burdensome.”

Many commenters, including Michigan and Massachusetts State government agencies, advocacy organizations, and trade associations, argued that one significant benefit of the status quo flexibility in staffing and use of funds in States operating flexible staffing models is the ability of local ES staff to braid funds and integrate the provision of Wagner-Peyser Act-funded services with other local workforce development programs and social services, including WIOA and TANF, which makes the services more efficient and reduces administrative costs. An employer commented that flexible ES staffing models like the Michigan Works! system are able to provide the most cost-efficient results because they can leverage Federal, State, and local resources; costs to operate job centers are shared with all partners and programs; and because, at the local level, many organizations provide “in kind” contributions of administrative support, which reduces overall program costs.

Several commenters provided performance data from the Department’s website that demonstrates the success of Michigan’s performance against the national average and argued that the integrated workforce development system in their State is “transformational” for both employers and job seekers. Other commenters, including a trade association, one-stop center staff, and private citizens, made similar arguments that Michigan and Colorado are outpacing the national median on performance metrics and has a low cost per participant. Also asserting that Michigan has been a top performer in nearly every ES-relevant metric, a private citizen questioned the need for the rule and the proposal’s “streamlining or improving services” assertion, commenting that replacing 220 local workforce staff with 80 to 90 State merit staff will hurt rural communities.

Several commenters stated that, in Michigan, alignment with local workforce systems is critical in connecting job seekers with a range of programs that support their ability to remain employed and minimize the need for UI benefits.

An anonymous commenter said the integrated model in their area allows offices to leverage resources, which in turn promotes higher quality of services. A private citizen remarked that current

staffing model in Colorado has encouraged innovation and has led to the creation of an integrated model of program administration, oversight, and delivery. Several commenters, including a one-stop center employee, faulted the proposal for favoring “alignment of ES and UI staffing” over the efficiencies associated with flexible staffing arrangements and expressed concern that the proposal would result in the closure of AJCs (ES offices) and reduced services for employers.

Some commenters, including a one-stop center employee, described their experiences working for or with local service centers and expressed concern about offering Wagner-Peyser Act and WIOA services in different offices or sites and the disruption of access to a more all-encompassing set of services. Some commenters, including a State Workforce Development Board, a trade association, and private citizens, remarked that the proposal could disrupt the WIOA one-stop service delivery model because Employment Service (ES) and WIOA staff would not be housed together. These commenters and others, including an employer and a one-stop center employee, said this divided or siloed environment was contrary to the “vision and intent” of WIOA.

A State employee association that supported the proposal argued that “restoring” State merit-staffing requirements would be beneficial for other programs unrelated to the UI system, such as the employment infrastructure for veterans and the delivery of TAA services for workers impacted by trade. The commenter referred to removal of the merit-staffing requirement for delivering TAA services in the “Trade Adjustment Assistance for Workers” final rule, 85 FR 51896 (Aug. 21, 2020), and urged the Department to also repeal that rule to ensure State merit-staffing is the “standard” in States that may have used staffing flexibility for TAA. A Colorado State government agency similarly remarked that TAA services, which are staffed by county merit staff in Colorado, would be adversely impacted by the proposal, remarking that in 2021, TAA “provided approximately \$956,761 to local areas” to assist with staffing 15 full-time employees.

Conversely, a State workforce development board argued that WIOA’s title programs, and other programs under TANF and SNAP, are aligned to work together in meeting diverse customers’ needs and encouraged the Department to maintain staffing flexibility for the Wagner-Peyser Act ES program, RESEA, TAA, and other

programs that benefit from alignment with local workforce systems. A local workforce development board stated that Colorado’s ability to employ a flexible staffing model has improved integration between WIOA and Wagner-Peyser Act ES services and led to several positive outcomes, including successful employment of customers, services rendered to many unique employers, significant numbers of workshops and hiring events, and a strong overall return on investment. A State government and other commenters similarly remarked that the local merit-staffing model used in Colorado allows for “seamless” service integration and braiding of funding across federally funded programs.

A State Workforce Development Board argued that the Department’s approach in the proposal undermines the “key principle” of State and local flexibility for WIOA services and the Federal workforce system more broadly. The commenter said the proposal would disrupt efficiencies, discourage innovation, and undermine “balance” among the Federal, State, and local partnerships that deliver WIOA and ES services.

Response: The Department proposed to require that all States use State merit staff to provide ES services due to the critical need for alignment between the ES and UI programs. Aligning these programs should not negatively impact or prioritize one program over the other. It simply allows the State, in times of high need to be able to use ES staff for certain UI activities should the State choose to do so. The Department is not imposing additional requirements on the State for how it uses the ES staff, but having cross-trained staff would better equip the States to be able to shift resources in certain situations. The ES and UI are already closely linked as they are both required partners under WIOA, the UI program makes referrals to the ES for reemployment services, and the ES program administers the work test for UI. WIOA also requires the colocation of the ES with WIOA programs (20 CFR 652.202, 678.315) so the concerns regarding certain individuals no longer having access to services is not supported by the information provided. WIOA emphasizes integrated and streamlined service delivery. The nature of ES services is such that ES staff provide basic and individualized career services and make referrals to other programs, no matter the staffing model used. The Department further believes the keys to program success are the intensity of the integration of WIOA and Wagner-Peyser services. Other States that use State merit staff have been able

to innovate and implement the vision of WIOA. Several States have made progress cross-training ES staff and UI staff. Additionally, States have trained all AJC partners including ES staff to perform common intake and make seamless referrals using a “no wrong door” approach to case management irrespective of the Wagner-Peyser ES staffing model. Three States using longstanding alternative staffing models presented arguments in support of retaining those models, but the information provided did not show a causal impact of the staffing model in these States and performance. Accordingly, the Department declines to extend staffing flexibility to all States. The Department reinstates a State merit-staffing requirement for ES services with the exception of the three States with longstanding reliance interests. These States are required to participate in evaluation of their delivery of ES services conducted by the Department, including review of services of other States that participate, as necessary, to determine whether such models are empirically supported.

Other Objections From States With Longstanding Reliance Interests

Comment: Many commenters, including a Michigan State elected official, Colorado local governments, and an advocacy organization, expressed opposition to the rule on the grounds that it would reduce both State and local control over the provision of ES services in the States that use flexible staffing models, and that in many cases this will make the services less personal and less responsive to local needs.

One anonymous commenter argued that as contractors and local government employees, ES staff in States that use flexible staffing models are currently insulated from State partisan politics; this commenter reasoned that by transitioning ES staff to being entirely State employees, they will be more subject to fluctuating partisan demands.

Some commenters, including a Colorado State elected official, a commenter from academia, and a Colorado local workforce development board, warned that implementation of the proposed rule could trigger lawsuits from affected counties and unions in States that use flexible staffing models.

Response: The Department received new information in comments on the NPRM from States with longstanding reliance interests and determined that these States may continue to utilize their longstanding alternative staffing models.

Reliance Interests of Other States

Comment: An association of State elected officials and a State government agency stated that Missouri had been approved by the Department as recently as summer 2021 to begin using non-State-merit staff to provide Wagner-Peyser Act ES services, and that the State had submitted its WIOA State Plan and that the State’s local workforce development boards have already budgeted and planned for Wagner-Peyser Act funding based on this recent approval. As such, the commenters asserted that rescinding the State’s staffing flexibility would create an unnecessary burden.

A State government agency commented that existing ES rules and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) allowed for a degree of staffing flexibility during the COVID–19 pandemic, which enabled quicker and more cost-effective services for client needs during the extraordinary economic circumstances of the pandemic.

A State government agency similarly stated that the current staffing flexibility under the status quo allows for the more efficient provision of ES services; the commenter asserted that rescinding this flexibility will cause services to become less efficient.

Response: While the Department recognizes that any shift in staffing requires transition, the transition for the three States with decades of reliance would experience higher transition costs in contracts, supervision adjustments, bargaining agreements, and IT systems than those that have used alternative staffing for 2 years. As demonstrated in the comments received, these three States have built systems, developed partnerships, and established a service delivery model that could be reversed only at significant cost to the State and with significant harm to job seekers and employers. The expansion of alternative staffing models to additional States occurred without study, before the landscape-altering impact of the pandemic on the UI and workforce system. The Department will evaluate ES services and their staffing models before taking additional actions regarding the use of alternative staffing for other States. Recognizing that some States adopted a different staffing model under the 2020 Final Rule, as discussed above, the Department is further providing 24 months of transition time for any State that needs to adjust its staffing model to adhere to the regulations.

Recommendations To Continue Demonstration State Status

Comment: Based on their objections to the proposal, including an anticipated reduction in the quality and availability of ES in States that would have to make major staffing changes to comply with the State merit-staffing requirement, numerous commenters, including Colorado and Michigan State elected officials, a Michigan State government agency, and Colorado and Michigan local governments, urged the Department to allow the former demonstration States to retain their current status and the flexibility to provide ES services with local merit staff or to otherwise entirely abandon the proposed rule change.

Another State government agency echoed this recommendation, suggesting that the Department grant continuing exemptions to the proposed rule to the former demonstration States, but not to any other States.

Alternatively, a think tank suggested that, at a minimum, the former demonstration States should be allowed to maintain their current status until the end of the established performance period, and that results from these States should be evaluated when considering if their staffing flexibility model should be extended.

Several commenters, including one-stop operators, State and local workforce development boards, a trade association, a Colorado local government, and a Colorado State elected official, requested that the Department permit their State to continue utilizing flexible staffing models to deliver for Wagner-Peyser Act-funded ES services. A Michigan one-stop operator and one-stop center employee argued that staffing flexibility allows programs to provide ES services to customers, including businesses and vulnerable populations such as youth, refugees, and veterans, in the most efficient and effective manner possible.

A Colorado State elected official asserted the loss of its ability to provide ES services using a flexible staffing model would cause costly disruptions to businesses and citizens. The commenter remarked that its workforce development staffing model had bipartisan support in the State Congress and that statewide stakeholders remain committed to this “nimble and agile” workforce service delivery model. The commenter further asserted that national organizations like the National Association of State Workforce Agencies, the National Association of Workforce Boards, and the National Association of Counties support the

State's request to continue operating this model.

A Massachusetts local workforce development board did not challenge the Department's ability to roll back the 2020 Final Rule providing widespread staffing flexibility but opposed using the proposal to void "waivers" previously granted to the former demonstration States.

A Michigan training provider asserted the proposal would jeopardize successful programs in States providing ES services using a flexible staffing model, such as Michigan, if they are not "exempted" from the State merit-staffing requirement. The commenter provided attachments that, in their view, provide evidence that the workforce development structure employed in the former demonstration States should instead be the national standard.

A think tank suggested that the Department "grandfather" the flexible staffing models for the former demonstration States because they have been operating successfully for more than two decades, and further suggested that the Department extend waivers for similar staffing flexibility to other States.

Response: For reasons explained throughout this section, the Department is allowing Colorado, Massachusetts, and Michigan to use the same longstanding alternative staffing models that the Department has allowed them to use since the 1990s. The Department is requiring these three States to participate in an evaluation to be conducted by the Department. All other States are required to use State merit staff to provide ES services.

Other Arguments Against Requiring State Merit Staff

Comment: A think tank argued that flexibility was more beneficial for States than "rigid rules" and described how certain restrictions hamper State workforce programs. The commenter cited the National Association of Medicaid Directors' 2022 request for flexibility to hire non-merit staff for processing Medicaid and SNAP renewals to "handle increased workloads from the fallout of COVID-19" as an example of the personnel challenges facing workforce and welfare agencies. Citing WIOA provisions concerning the one-stop delivery system, the commenter said that the issue of flexibility in workforce programs "extends beyond staffing models." The commenter stated that current law places "handcuffs" on SWAs, hampering how they can spend WIOA funds. For example, the

commenter stated that under WIOA, "states' ability to design pay-for-performance contracts based on job placement is limited to non-federal funds and youth workforce services" and that WIOA restricts States' ability to use Federal funds related to work requirements in welfare to solely Employment and Training programs (arguing that WIOA funds should be able to be used to administer more meaningful work requirements like the able-bodied adult-without-dependent work requirements for SNAP). The commenter concluded that the ES should be designed to move as many individuals as possible into self-sufficiency by increasing their marketability in the labor market and argued that staffing flexibility allows States to design ES programs that accomplish these goals.

A one-stop operator in Texas remarked that while State merit-staff employees are performing well, "funding limitations have hampered the ability to provide salary increases for many years." The commenter stated that "[w]hile employees are able to receive one-time, merit-based pay, being in a merit-based system has, in fact, negatively impacted retention and attraction of employees, which are key elements in maintaining a quality staff." A one-stop center employee stated that the proposal would cause Michigan to be non-compliant with a State "One-Stop Operator statute." A Michigan one-stop center employee asked how the proposed merit-staffing requirement will save the State money, time, or resources.

A local government stated that the proposal would create an unnecessary layer of bureaucracy and would disrupt an integrated service model that meets the local community's needs. A one-stop operator argued that the proposal would result in too few employees to service job seekers and employers through Wagner-Peyser Act programs in their State and expressed confusion as to how "a few organizations" in its State could express support for the proposal. The commenter suspected that the proposal is meant to favor employers that provide for union representation of employees and faulted a local union for ceasing representation for a group of employees last year.

Some commenters, including a private citizen, a one-stop center employee, a trade association, and an advocacy organization, remarked that the former demonstration States successfully developed locally based staffing models that work across budgetary and programmatic silos to create a more integrated system

providing higher quality services. A professional association said Colorado's use of a flexible staffing model to provide ES services has proven effective because staffing flexibility allows local areas to react more quickly to local market conditions. An employer remarked that delivering ES at the local level produces optimally cost-efficient and effective results, and a Colorado local government similarly argued that the proposal would lead to inefficiencies and would disrupt a streamlined service delivery model. An anonymous commenter similarly argued that separating local merit WIOA staff and ES State merit staff would jeopardize the effectiveness of the one-stop delivery model.

A Colorado local government asserted that increasing State control over local ES offices would lose county workers' regional understanding of local needs around ES, arguing that county input is essential to avoid the "disconnect" that occurs in larger bureaucracies because counties have unique needs and characteristics. A Michigan private citizen remarked that State agencies, including the State UI agency, come across as "bureaucratic and impersonal" and argued that State agency leaders may not listen to local concerns due to their limited local knowledge. Another Michigan private citizen preferred to continue dealing with local ES staff and expressed concern about "centralizing" ES in their State's capitol. A State government agency argued that ES staffing flexibility allows local workforce development boards to staff offices appropriately based on the needs of individual communities. The commenter said some communities would not need a "full accompaniment" of local and State merit staff and also expressed concern about clients needing to engage with either local or State staff based on the type of service they need, reasoning that such an approach could make clients feel as though they are being "ferried around" rather than establishing a relationship with a single point of contact.

A Colorado one-stop operator remarked that providing ES services at the local level allows for better integration of Federal, State, and local programs and rejected the Department's assertion that local government employees are treated less fairly or are more susceptible to political influence, arguing that this argument was "naïve" and unsupported by evidence. A Colorado State government agency similarly remarked that the Department's argument that ES services provided by State merit staff would be "quantitatively or qualitatively better"

than services delivered by county merit staff was not supported by evidence and asserted that county merit staff are hired using objective and transparent standards. The commenter stated that local merit staff are accountable to their local county government to best position such staff to provide services in their communities. A think tank agreed and disputed the Department's argument that the adherence of non-State entities to State policies is unobservable, reasoning that contracts contain performance goals and metrics, and sometimes include financial penalties for underperformance. The commenter also asserted that these standards do not exist for "merit" staff.

Some commenters, including anonymous commenters and a Colorado local government, remarked that the proposal would transfer duties from local workers to a smaller group of State staff; the commenters asserted this would result in considerable and challenging workloads and diminished services for participants. A private citizen who preferred local staffing for ES suggested that a possible compromise could be to increase funding and add a State merit-staff employee to each local office who would serve as a liaison for State programs and services.

Several commenters stated that Colorado's current staffing model allows for effective partnerships with community-based organizations because local staff have developed strong relationships with such organizations. The commenters expressed concern that the proposal would disrupt or reduce services for community-based organizations. A private citizen remarked that State merit staff would find it more difficult to establish partnerships and navigate local resource networks, arguing that local staff successfully participate in such networks through community engagement.

Expressing opposition to the proposed merit-staffing requirement, a private citizen and a few one-stop center staff quoted the proposed § 652.215(a) language ("The Secretary requires that the labor exchange services described in § 652.3 be provided by ES staff, as defined in part 651 of this chapter."), arguing that this change would have a detrimental impact on the provision of ES services.

A Michigan one-stop center employee listed the minimum services required by § 652.3, including connecting job seekers with employment opportunities and assisting employers with filling jobs, and questioned how States would

provide these "robust" services if they face a major staffing reduction.

Response: The Department maintains that using State merit staff helps to provide for high-quality, consistent, and politically neutral ES services. State merit staff are held accountable for their work through State-managed performance management plans and must meet certain service benchmarks and milestones.

With respect to comments about local partnerships, the Department notes that the vast majority of ES services nationwide are provided by State merit staff who are able to establish working relationships with community-based organizations. Additionally, the Department notes that State WIOA funds can be used for an extremely broad set of activities, including career and training services for individuals receiving public benefits like SNAP. In multiple States with ES State merit staff, local service delivery in AJCs provides services to a range of job seekers, including those receiving public benefits.

Three States using longstanding alternative staffing models, including local merit staff, presented arguments in support of retaining those models, but the information provided did not show a causal impact of the staffing model in these States and performance. The Department acknowledges the strong reliance interests of these three States—Colorado, Massachusetts, and Michigan—that the Department has allowed to use alternative staffing models to administer ES services since the 1990s. The Department recognizes the adverse impacts a complete State merit-staffing requirement would have on these three States relative to other States that began using alternative staffing models following the 2020 Final Rule. Therefore, the Department is allowing Colorado, Massachusetts, and Michigan to continue using their longstanding alternative staffing models while requiring their participation in an evaluation to be conducted by the Department to determine whether alternative staffing models are empirically supported.

The Department acknowledges comments regarding funding limitations in the context of merit-staffing models. The Department has detailed the cost burden associated with this final rule in Section VI. Wagner-Peyser ES grant funding is provided annually to deliver employment services. For reasons stated throughout this preamble, the Department has determined that reinstating the requirement to provide ES services using State merit staff will help to allow the States to provide

quality and consistent ES services in an accountable and transparent manner as the Department undertakes an evaluation to determine whether alternative staffing models are empirically supported.

The comments regarding WIOA pay-for-performance and work requirements are out of scope and not addressed by this final rule.

D. Part 653—Services of the Wagner-Peyser Act Employment Service System

Part 653 sets forth services of the Wagner-Peyser Act ES system related to MSFWs. Subpart B provides the principal regulations of the ES concerning the provision of services to MSFWs consistent with the requirement that all services of the workforce development system be available to all job seekers in an equitable fashion. This includes ensuring MSFWs have access to these services in a way that meets their unique needs. MSFWs must receive services on a basis that is qualitatively equivalent and quantitatively proportionate to services provided to non-MSFWs. The regulations in this subpart establish special services to ensure MSFWs receive the full range of career services, as defined in WIOA sec. 134(c)(2), 29 U.S.C. 3174(c)(2), and contain requirements that SWAs establish a system to monitor their own compliance with ES regulations governing services to MSFWs. Subpart F sets forth regulations governing the ARS. It provides requirements for SWA acceptance of intrastate and interstate job clearance orders that seek U.S. workers to perform farmwork on a temporary, less than year-round basis.

The Department proposed to revise various sections of the regulatory text in both subparts and received comments about some of its proposed revisions. In the discussion that follows, the Department responds to these comments, grouping them by the provision that they address and the order in which that provision appears within this part.

1. Subpart B—Services for Migrant and Seasonal Farmworkers (MSFWs)

Subpart B provides the principal regulations of the ES concerning the provision of services to MSFWs. The Department proposed a number of revisions to the regulatory text in this subpart to clarify and enhance the outreach that SWAs provide to MSFWs and to strengthen the monitoring that SMAs conduct pursuant to this part. The Department received a number of comments that generally supported the proposed revisions and its efforts to

strengthen the services that SWAs provide to MSFWs. Although the feedback was primarily positive, several State and local agencies felt the revised provisions were too prescriptive and urged the Department to adopt a more flexible approach. The Department values and appreciates the participation and input from these commenters and the perspectives they have to offer. In the section-by-section discussion below, the Department summarizes and responds to comments that address the revisions it proposed to a particular section in this subpart. After careful consideration of these comments, the Department generally adopts the revisions it proposed to the regulatory text without change, with exceptions as discussed below.

Section 653.100 Purpose and Scope of Subpart

The Department proposed to amend § 653.100(a) to clarify that the provision of services for MSFWs must be consistent with the requirement that all services of the workforce development system be available to all job seekers in an equitable *and* nondiscriminatory fashion. The existing regulation states only that such services must be made available in an equitable fashion. The Department proposed, and this final rule adopts, an amendment to § 653.100 to state such services must be made available in both an equitable and nondiscriminatory fashion. The addition of the phrase “and nondiscriminatory” is intended to clarify that SWAs must not discriminate against farmworkers either because they are farmworkers or because of any characteristics protected under the nondiscrimination and equal opportunity provisions of WIOA, which are contained in section 188 of WIOA, 29 U.S.C. 3248, and the implementing regulations at 29 CFR part 38. The requirements of section 188 of WIOA apply to ES services because the ES is a required one-stop partner, and the requirements of section 188 of WIOA apply to one-stop partners pursuant to 29 CFR 38.2. The Department did not receive any comments on the proposed addition of this language and adopts the revision as proposed.

Section 653.101 Provision of Services to Migrant and Seasonal Farmworkers

The Department proposed to amend § 653.101 by revising the first sentence to clarify that the SWA is the primary recipient of Wagner-Peyser Act funds and, therefore, is the entity responsible for ensuring that ES staff offer MSFWs the full range of career and supportive services. As the Department explained

in the NPRM, it is ultimately incumbent upon the SWA, as the Wagner-Peyser Act grantee, to ensure ES staff at one-stop centers are offering and providing ES services to MSFWs in an appropriate manner. The Department also proposed to replace the requirement for one-stop centers to consider and be sensitive to the preferences, needs, and skills of individual MSFWs and the availability of job and training opportunities with a requirement that SWAs ensure ES staff at one-stop centers tailor the provision of ES services to MSFWs in a way that accounts for their preferences, needs, skills, and the availability of job and training opportunities. The Department proposed this revision to ensure MSFWs are able to participate in the ES and, similar to the revision in the first sentence, to clarify that the SWA is responsible for ensuring compliance with this requirement. The Department received a few comments on the proposed revisions in this section. As discussed below, the Department has not made any changes to the regulatory text in response to these comments and adopts the revisions as proposed.

Comment: The Department received numerous comments from individuals and entities in Michigan explaining that under Michigan’s current service delivery model, local ES staff provide MSFWs the full range of career and supportive services, benefits and protections, and job and training referral services that they provide to non-MSFWs. Some of these commenters noted that under Michigan’s current model, the SWA ensures Wagner-Peyser funded staff provide the full range of career services to MSFWs by providing staff training and conducting one-stop center reviews to ensure compliance. These commenters asserted that while Michigan has historically made ES services available to all job seekers (including MSFWs) in an equitable and nondiscriminatory fashion, the proposed rule would have a chilling effect on their access to services by making fewer offices and staff available to help them. Similarly, a local government agency in Colorado, which opposed the proposed State merit-staffing requirement, discussed its use of local staff to provide MSFWs with equitable ES services that it stated are innovative, personal, and available in multiple languages, and to offer their State’s highest level of outreach to MSFWs.

Response: As discussed in section III above, the Department has decided not to apply the proposed State merit-staffing requirement to several States, including Michigan and Colorado, that have developed strong reliance interests

in providing ES services through longstanding alternative staffing models. Because this final rule will permit Michigan and Colorado to continue to provide ES services in accordance with each State’s longstanding alternative staffing model, it should not result in the “chilling effect” that commenters from Michigan feared or impact the services that local staff in Colorado are currently providing to MSFWs.

Moreover, the Department notes that SWAs, as required one-stop partners, must ensure individual customers are served based on individual needs, including MSFWs. *See* 20 CFR 678.425(b). The final rule would, consistent with this requirement, clarify that SWAs are responsible for ensuring that ES staff at one-stop centers tailor services to meet the particular needs of MSFWs. While some States may already meet this requirement, as asserted in the comments described above, others may not. The revision makes it clear that Wagner-Peyser Act funded staff must serve MSFWs based on their individual needs. In addition, this revision will complement the MSFW-specific staffing requirements in §§ 653.107(a)(3) and 653.111.

It is particularly important to consider the particular needs of MSFWs, because MSFW job seekers may face multiple barriers to employment for which individualized career services are warranted. In implementing this requirement, SWAs must take care to ensure MSFWs are offered appropriate services based on their particular workforce interests (*e.g.*, referral to jobs they may want or need to meet their employment-related goals and not only positions involving farmwork).

Section 653.102 Job Information

The Department proposed several revisions to the text of existing § 653.102. First, the Department proposed to revise the third sentence of § 653.102 to clarify that the SWA is the entity responsible for ensuring that ES staff assist MSFWs to access job order information, for the same rationale as similar changes the Department is making to § 653.101, as described above. Second, the Department proposed to remove the word “adequate” as a modifier to the phrase “assistance to MSFWs,” in order to remove any perceived subjectivity and clarify that a SWA meets its obligation to assist MSFWs by complying with the requirements in parts 653 and 658. Finally, the Department proposed to remove the final sentence of § 653.102, which stated that in designated significant MSFW multilingual offices, assistance with accessing job order

information must be provided to MSFWs in their native language whenever requested or necessary. As the Department explained in the NPRM, this would align language access requirements in the ES regulations with those required by WIOA sec. 188 and its implementing regulations at 29 CFR part 38, because language access requirements apply to individuals with LEP regardless of through which office they seek ES services. The Department received one comment on this provision. For the reasons discussed below, the Department has not made any changes to the proposed regulatory text and adopts it as proposed.

Comment: The Department received a comment from a farmworker advocacy organization that generally supported the Department's proposal to clarify language access requirements throughout part 653, but with some reservations. As relevant here, this commenter opposed the Department's proposal to remove the requirement for MSFW multilingual offices to provide MSFWs access to job order information in their native language whenever requested or necessary. The commenter suggested that the Department take additional steps to ensure individuals with LEP are able to access and engage with ES services and asserted that SWAs should ensure clearance orders are translated to Spanish and other major languages in the area so that all workers are aware of their rights and able to access and review clearance orders in their native language. According to these organizations, such a requirement would align with the practices of certain SWAs that already translate or require submission of translated clearance orders and help to fulfill the Department's language access obligations under Executive Order (E.O.) 13166, in addition to bolstering compliance with the existing regulatory requirement at 20 CFR 655.122(q) that all H-2A workers and workers in corresponding employment receive a copy of the work contract "in a language understood by the worker." Finally, they noted that English-only clearance orders have presented particular barriers for U.S. farmworkers in Puerto Rico, where some local SWA officials have limited English ability and, without translations, are unable to refer workers to available positions elsewhere in the United States.

Response: The Department acknowledges the comment that suggested the regulation should specify that clearance orders should be translated into Spanish and other major languages in the area. However, the Department reiterates that 29 CFR 38.9

spells out the applicable language access requirements more comprehensively, including the obligations to translate vital information (as defined at 29 CFR 28.4(ttt)) that appears in written materials into languages spoken by a significant number or portion of the population eligible to be served, or likely to be encountered, and to make the translations readily available in hard copy or electronically. The regulation at 29 CFR 38.9 also imposes an obligation to take reasonable steps to ensure meaningful access to each individual with LEP served or encountered, including providing oral interpretation or written translation of materials, in the appropriate non-English languages, so that individuals with LEP are effectively informed about and able to participate in the program or activity. Furthermore, once ES staff becomes aware of the non-English preferred language of an individual with LEP, the ES staff must convey vital information to that individual in their preferred language.

The Department adopts the language as proposed in the NPRM and will provide guidance and technical assistance as needed.

Section 653.103 Process for Migrant and Seasonal Farmworkers To Participate in Workforce Development

The Department proposed to make several revisions to § 653.103. First, the Department proposed to revise the requirement in paragraph (a) for one-stop centers to determine whether *participants*, as defined at § 651.10, are MSFWs. As revised, this section would replace "one-stop center" with "ES office," and it would require ES offices to also determine whether *reportable individuals*, as defined at § 651.10, are MSFWs.

Second, in § 653.103(b), the Department proposed to replace the existing provision requiring all SWAs to ensure that MSFWs who are English-language learners receive, free of charge, the language assistance necessary to afford them meaningful access to the programs, services, and information offered by the one-stop centers with a new provision clarifying that all SWAs are required to comply with the language access and assistance requirements at 29 CFR 38.9 with regard to all individuals with LEP, including MSFWs who are LEP individuals, as defined at 29 CFR 38.4(hh). This compliance includes ensuring ES staff comply with these language access and assistance requirements. In the NPRM, the Department explained that this would align the language access requirements for MSFWs with language

access requirements for all individuals with LEP pursuant to 29 CFR 38.9, and it would help to ensure all individuals with LEP, including MSFWs, are provided meaningful access to ES services.

Lastly, the Department proposed to remove the specific requirement in § 653.103(c) for one-stop centers to provide MSFWs a list of available career and supportive services "in their native language." This, too, would align with the proposed revisions to replace the various specific language access requirements in this part with reference to the comprehensive requirements applicable to all individuals with LEP in 29 CFR 38.9.

The Department received comments concerning each of these proposed revisions. For the reasons discussed below, the Department has not made any changes to the proposed regulatory text and adopts it as proposed.

Comment: The Department received several comments from individuals and entities in Michigan that reported Michigan's ES offices are prepared to implement the new requirement to determine whether reportable individuals are MSFWs. Another State agency opposed the proposed requirement for States to determine whether reportable individuals are MSFWs, as defined at § 651.10. The State agency disputed the value of collecting this information, asserting it had previously collected information from reportable individuals to determine whether they were MSFWs and found it was inaccurate, because it was based on self-service registrations that were not reviewed by staff for accuracy unless the self-registrant sought participant-level services. This State agency estimated that, if the proposed requirement is adopted, it would cost \$30,000 to \$50,000 to update its IT systems to track the MSFW-status of reportable individuals, and it asked the Department to provide additional funding to cover these costs.

Response: The Department appreciates the commenter's concern regarding the accuracy of self-reported data. While the Department acknowledges that there may be errors in classification determinations based on self-reported information that are made without assistance from staff in the one-stop center, it believes this risk could largely be addressed if SWAs carefully tailor the questions that they pose to self-registrants so that the answers self-registrants provide are more likely to elicit accurate classification determinations. The Department expects that some States may need to revise their current

information collection (IC) practices and/or make changes to existing IT systems to collect this information from reportable individuals. These costs are allowable under a State's Wagner-Peyser ES grant, and the Department has accounted for them in the regulatory impact and IC analyses provided in sections VI.A and VI.C, respectively, below. The Department does not take lightly the changes that States must make to processes and systems to collect information about participants or reportable individuals, but believes that the value of collecting this data outweighs the estimated burden that SWAs may incur to collect it. Collecting data about participant and reportable individual characteristics, particularly related to populations that have been historically underserved, is an important tool for measuring progress in providing equal opportunity. In this case, collecting MSFW status will help the ES to identify all MSFWs who engage in the ES and the degree of their engagement. To ensure data on the MSFW status of reportable individuals is accurate and used appropriately, § 653.109(e) will require SWAs to periodically verify data collected under this section, take necessary steps to ensure its validity, and submit the data for verification to the Department, as directed by the Department.

Comment: The Department received comments from numerous entities and individuals in Michigan that asserted the costs their State incurs to comply with language access and assistance requirements would increase if the final rule requires Michigan to change its longstanding staffing model to comply with a State merit-staffing requirement, because if the Department were to adopt this requirement, one-stop centers in Michigan could no longer rely on multilingual local staff across an array of workforce programs to provide ES services.

Response: As discussed in section V.C.2 above, this final rule will allow several States, including Michigan, to continue to provide ES services in accordance with their longstanding alternative staffing arrangements. Because this change resolves the circumstances about which the commenters were concerned, this final rule should not impact Michigan's cost of compliance with language access requirements for the reasons that these commenters feared.

Comment: A farmworker advocacy organization largely supported the Department's proposed revisions to align the language access requirements in part 653 with the requirements in 29 CFR 38.9 that apply to all individuals

with LEP, but with some reservations. This commenter expressed concern that removing the phrase "in their native language" from § 653.103(c) could create confusion about a SWA's language access obligations and recommended retaining this language in the regulation for clarity, rather than simply relying on the new provision in § 653.103(b), which clarifies that SWAs must comply with the language access requirements in 29 CFR 38.9.

Response: The Department recognizes that language access is crucial for individuals with LEP and is revising § 653.103 to clarify that SWAs must comply with the language access requirements in 29 CFR 38.9 when providing Wagner-Peyser ES services to MSFWs. The Department disagrees with the commenter's assertion that it is necessary to retain a specific requirement in this section for one-stop centers to provide MSFWs a list of available career and supportive services "in their native language." As explained above, 29 CFR 38.9 spells out the language access requirements that apply comprehensively, including the obligations to translate vital information in written materials and to convey vital information to individuals with LEP in their preferred languages once the one-stop center becomes aware of the individuals' non-English preferred languages.

The Department therefore adopts the changes to this section as proposed and will provide guidance and technical assistance as needed.

Section 653.107 Outreach Responsibilities and Agricultural Outreach Plan

Section 653.107 governs the outreach that SWAs must conduct to ensure that MSFWs receive ES services that are qualitatively equivalent and quantitatively proportionate to the services that the SWA offers and provides to other job seekers. The migrant and seasonal nature of the farmwork that MSFWs perform presents numerous challenges to the effective provision of services to this subpopulation. Accordingly, the Department has historically required SWAs to conduct outreach to MSFWs to ensure that the services they receive are qualitatively equivalent and quantitatively proportionate to the services offered to other job seekers. The Department proposed revisions to the regulatory text throughout § 653.107 to further prescribe the outreach that SWAs must conduct under this section. These revisions and the comments the Department received about them, as well as the Department's responses, are

discussed below in accordance with the paragraph in which they appear in the regulatory text.

Section 653.107(a)

The Department proposed to strengthen SWA outreach by making a number of revisions to the regulatory text in § 653.107(a). Among other things, the proposed revisions emphasize the year-round nature of outreach work; specify that full-time outreach staff may not be assigned to duties other than the outreach responsibilities described in § 653.107(b); provide a standard by which to determine whether a SWA employs an adequate number of outreach staff; and place additional emphasis on the background and training that outreach staff must have in order to successfully perform their duties. A detailed description of the revisions proposed in each subordinate paragraph follows.

First, the Department proposed to amend § 653.107(a)(1) in several ways to emphasize that outreach work must be performed only by outreach staff and that outreach staff in all States must conduct outreach year-round. Specifically, the Department proposed to replace the first sentence of paragraph (a)(1) in the existing regulation—which required each SWA to provide an adequate number of outreach staff to conduct MSFW outreach in their service areas—with a requirement for each SWA to ensure that outreach staff conduct the outreach responsibilities described in paragraph (b) of this section on an ongoing basis. The Department proposed this change to clarify that outreach staff in all States must be employed year-round and perform the outreach activities described in § 653.107(b) on an ongoing basis. The Department did not propose to remove the requirement for a SWA to provide an adequate number of outreach staff, but rather, proposed to relocate this requirement to paragraph (a)(4), and to revise this requirement so that it specifies a means to measure whether a SWA employs an adequate number of outreach staff (discussed further below with the proposed changes to paragraph (a)(4)). The Department further proposed to prohibit a SWA from relying on the outreach activities conducted by NFJP grant recipients (*i.e.*, recipients of grants awarded under WIOA title I sec. 167) to substitute for the outreach responsibilities that outreach staff must conduct under this section. In particular, the Department proposed to revise the second sentence of paragraph (a)(1)—which required SMAs and outreach staff to coordinate their *outreach efforts* with WIOA title I

sec. 167 grantees—to instead require that SMAs and outreach staff coordinate their *activities* with WIOA title I sec. 167 grantees. The Department additionally proposed to include a new sentence at the end of this paragraph to make clear that a SWA cannot rely on the activities of NFJP grantees as a substitute for SWA outreach responsibilities. Taken together, these revisions would require a SWA to coordinate their outreach activities with the activities of NFJP grantees in their State (*i.e.*, SWAs and NFJP grantees would have to work together to strengthen their respective services) but prohibit the SWA from relying on activities of NFJP grantees as a substitute for the outreach responsibilities that outreach staff must conduct under this section.

Second, the Department proposed to revise § 653.107(a)(2)(ii) so that SWAs in all States will be required to conduct thorough outreach efforts with extensive follow-up activities. In particular, the Department proposed to amend the existing regulation—which required SWAs in supply States to conduct thorough outreach efforts with extensive follow-up—to instead require that SWAs in *all* States conduct thorough outreach efforts with extensive follow-up, and to add language specifying that extensive follow-up consists of the activities identified in paragraph (b)(5) of this section.

Third, the Department proposed revisions to § 653.107(a)(3) to operationalize the proposed merit State merit-staffing requirement for outreach staff and strengthen the process by which SWAs hire and assign outreach staff. In particular, the Department proposed to amend the language and structure of this paragraph to make clear that the SWA is responsible for directly hiring outreach staff and to specify the actions that a SWA must take when hiring or assigning outreach staff. The proposed revisions would require a SWA to not only “seek” qualified candidates with certain characteristics when hiring or assigning outreach staff, but to also “place a strong emphasis on hiring and assigning” such candidates. To increase the likelihood that SWAs will employ candidates who meet the required criteria, the Department further proposed to add a new paragraph at § 653.107(a)(3)(ii) that would require a SWA to inform farmworker organizations and other organizations with expertise concerning MSFWs of outreach staff job openings and encourage such organizations to refer qualified applicants to apply for the opening.

Fourth and finally, the Department proposed to make several changes in § 653.107(a)(4) that would bolster outreach staffing requirements. In particular, the Department proposed to move the first sentence in paragraph (a)(1) of the existing regulation—which required each SWA to provide an adequate number of outreach staff—to the beginning of paragraph (a)(4) and to amend this sentence so that it would require each SWA to employ (as opposed to provide) an adequate number of outreach staff to conduct MSFW outreach in each area of the State to contact a majority of MSFWs in all of the SWA’s service areas annually. The revisions to this sentence would make clear each SWA must employ outreach staff to perform the outreach required by this section and provide a measurable means of determining whether the number of outreach staff a SWA employs is adequate. They would also ensure that each SWA conducts outreach in all areas of the State, and not only certain service areas (*e.g.*, only those service areas with significant MSFW one-stop centers). In addition, the Department proposed to add a sentence in paragraph (a)(4) that specifies full-time outreach staff must devote 100 percent of their time to the outreach responsibilities described in § 653.107(b). Finally, the Department proposed adding another sentence to require that SWA outreach staffing levels align with and be supported by the estimated number of MSFWs in the State and the MSFW activity in the State, as demonstrated in the State’s Agricultural Outreach Plan (AOP).

The Department received numerous comments about the changes it proposed, as discussed in detail below. After careful consideration of these comments, the Department largely adopts the proposed regulatory text with minor revisions.

First, this final rule modifies the proposed revisions to § 653.107(a)(1) to replace the phrase “SWA Administrators” with the phrase “State Administrators” in the second sentence of that paragraph. The Department is making this change because § 651.10 defines the term *State Administrator* for purposes of the Wagner-Peyser regulations and does not define the term *SWA Administrator*.

Second, this final rule modifies the proposed revisions to § 653.107(a)(3) and (4) to account for changes to the proposed State merit-staffing requirement adopted in this final rule. Specifically, as adopted in this final rule, § 652.215 will generally require States to deliver the services and activities under this part using State

merit-staff employees, but § 652.215(b) will allow the three States authorized to use alternative staffing models prior to February 5, 2020, to use an alternative staffing model to the extent the Department authorized that State to use an alternative staffing model prior to February 5, 2020. To account for the fact that in these three States, the SWA may not be the entity directly hiring outreach staff, the Department modified the proposed regulatory text for § 653.107(a)(3). The Department is adopting text in this paragraph that clearly requires a SWA to ensure that outreach staff are sought and hired or assigned in the manner that this regulation requires. The Department made similar revisions to the proposed regulatory text for § 653.107(a)(4). Instead of stating that the SWA must employ an adequate number of outreach staff, as proposed, this final rule requires a SWA to ensure an adequate number of outreach staff are employed in accordance with the requirements in this paragraph.

Notably, these revisions are intended to accommodate only those rare instances in which a State may use an alternative staffing model under § 652.215(b). Because the State merit-staffing requirement adopted in § 652.215(a) applies to the services and activities performed by outreach staff under § 653.107, this final rule requires SWAs to directly hire or assign State merit staff to outreach staff positions in all but a very limited number of situations.

Third, as explained in further detail below, the Department is modifying the proposed regulatory text for § 653.107(a)(4) to clarify the manner in which SWAs must determine whether the number of outreach staff employed in their State is adequate. As adopted in this final rule, § 653.107(a)(4) requires each SWA to ensure that there are an adequate number of outreach staff employed in the State to conduct MSFW outreach in each service area of the State and to contact a majority of MSFWs in the State annually.

General Comments

Many commenters expressed general support for the Department’s proposal. For example, a farmworker advocacy organization stated the proposed changes would ensure that SWAs once again provide adequate outreach services to MSFWs. Another farmworker advocacy organization noted MSFW outreach would be improved by underscoring that outreach is a full-time job that deserves priority and which should not be combined with other functions. A number of other

commenters, including several unions, likewise supported the proposed rule's focus on improving outreach to MSFWs. The Department also received comments from several State government agencies that expressed about the impact of the proposed revisions and urged the Department to adopt a more flexible approach. The Department values the input and perspectives that commenters shared and has thoroughly considered their concerns and recommendations. A summary of the specific issues and concerns raised, and the Department's response, follows.

NFJP Activities

Comment: A farmworker advocacy organization supported the Department's approach to improve outreach by strengthening staffing requirements, including the proposal to amend § 653.107(a)(1) to specify that NFJP grantee activities do not fulfill the SWA's outreach obligations under § 653.107. This commenter asserted that the proposed revisions represented an important improvement, and noted its staff had witnessed failed outreach and ineffective services provided by part-time and contract staff in many of the States where the organization serves farmworkers. Another commenter, a State government agency, reported that it has procedures in place to collaborate with its NFJP partner to conduct joint outreach. However, it was not clear whether the joint outreach this commenter referenced would be conducted alongside outreach staff employed by the SWA, as required by this final rule, or in lieu of outreach conducted by ES staff. In addition to joint outreach with the NFJP, the commenter said its staff make other contacts.

Response: The Department appreciates the views that commenters shared about this proposal. The Department agrees that MSFW outreach will be more effective if it is performed by outreach staff who are not expected to perform other functions. This is partly achieved by ensuring there is dedicated outreach staff to perform the outreach activities required by § 653.107 and informing SWAs that they may not rely on outreach activities of NFJP grantees to substitute for the outreach that these regulations require. It was not clear whether the State government agency that reported it has procedures in place to conduct joint outreach with its NFJP partner has been conducting this joint outreach in a manner that would comply with this final rule. Under this final rule, § 653.107(a)(1) will require a SWA to coordinate

outreach with the activities of NFJP grantees, and it will permit a SWA to conduct joint outreach with NFJP grantees. But it will not permit a SWA to rely on the activities of an NFJP grantee to satisfy the MSFW outreach requirements set forth in § 653.107. The Department has decided to adopt this rule because a SWA's responsibility to conduct outreach to MSFWs under § 653.107 differs in purpose and scope from the recruitment activities of NFJP grantees. The activities of NFJP grantees differ from the responsibilities of outreach staff under this section, because § 653.107(b) requires outreach staff to perform a number of specific tasks, such as provide MSFWs certain information (e.g., a basic summary of farmworker rights, information about services available at the local one-stop center, the ES and Employment-Related Law Complaint System, and organizations that serve MSFWs in the area) and offer to directly provide access to certain ES services onsite. Accordingly, the final rule adopts the revisions to § 653.501(a)(1) as proposed.

Hiring and Assignment of Outreach Staff

Comment: A Delaware State government agency discussed its use of a contractor to provide outreach to MSFWs, arguing that this approach enabled it to significantly increase its outreach to MSFWs. Stating that privatizing the role allowed it to offer competitive pay, attract qualified candidates, and fill the job quickly, the commenter asked the Department for an exemption from the merit-staffing requirement for this outreach position so that a contractor can continue to hold it.

Response: The Department appreciates this commenter's feedback regarding outreach staffing. However, the Department addressed the benefits of State merit staff, including using State merit staff for MSFW outreach, in earlier sections of this preamble, specifically stating that the Department is adopting the proposed State merit-staffing requirement as a generally reliable method to ensure quality and consistency in ES delivery. Aside from allowing the three States to use their alternative staffing models in place as of February 5, 2020, the Department is not permitting further exceptions to the merit-staffing requirement discussed above.

Comment: The Department received several comments related to its proposal to revise the requirements governing the hiring or assignment of outreach staff in § 653.107(a)(3). A farmworker advocacy organization supported the

Department's proposal to strengthen the hiring process for outreach staff, particularly the proposed requirement for SWAs to inform farmworker organizations in their States about job openings, noting such a requirement would help SWAs identify candidates who possess cultural competence and develop broad networks within farmworker communities.

Several commenters from Colorado, including a Colorado State government agency, a State workforce development board, and a trade association, expressed concern that if the Department adopted the proposed rule, it would require Colorado to employ new outreach staff and cross-train them to perform UI services. These commenters argued that it would be more difficult to backfill outreach positions currently held by county merit staff, as the proposed rule would require, if the Department also adopted revisions that raised the qualifications for hiring or assigning ES staff to outreach staff positions. As discussed below, this concern appeared to be based on these commenters' mistaken understanding that the proposed revisions would raise the qualifications for outreach staff positions.

Another State government agency opposed the proposed changes to the outreach staffing requirements in § 653.107(a)(3) based on a similar misunderstanding that the proposed revisions would increase the qualifications required of MSFW outreach staff. This State agency maintained that there was no need to expand current requirements, which it asserted allow the State to meet the needs of the program while maintaining flexibility in a tight labor market. According to this State agency, it is increasingly difficult to find applicants who are from MSFW backgrounds or who have substantial work experience in farmworker activities in a tight labor market, and many individuals already employed in outreach, compliance, and monitoring positions outside of MSFW or farmwork possess the necessary skillset and transferable skills.

A different State government agency agreed with the Department that SWAs should employ outreach staff who meet relevant criteria, but it noted the difficulty that its program managers at significant MSFW one-stop centers have faced when trying to hire qualified outreach staff who meet all requirements, which it said has resulted in program managers hiring outreach staff who are bilingual but do not necessarily have experience working with farmworkers.

Response: The Department appreciates the feedback it received from these commenters. As discussed in section V.C.2 above, this final rule will permit three States, including Colorado, to provide ES services in accordance with their longstanding alternative staffing arrangements. This revision to the proposed State merit-staffing requirement should resolve any concerns raised by commenters from Colorado regarding the impact that such a requirement would have on their State's ability to serve MSFWs. As relevant here, this final rule will not require Colorado to replace its county merit staff with State merit staff. Moreover, neither the proposed rule nor this rule require any State to cross-train ES staff to provide UI services.

Several commenters mistakenly believed that the proposed revisions would increase the qualifications of the individuals who SWAs must seek when hiring or assigning outreach staff. The Department did not propose to change the type of characteristics that SWAs must seek among qualified candidates when hiring or assigning outreach staff. The existing regulation at § 653.107(a)(3) already requires SWAs to seek qualified candidates who speak the language of a significant proportion of the MSFW population in the State and who are from MSFW backgrounds or who have substantial work experience in farmworker activities. Rather, the Department proposed to require SWAs not only seek individuals with these characteristics, but also place a strong emphasis on hiring and assigning such individuals. The Department has long required SWAs to seek out individuals who possess similar characteristics when hiring or assigning ES staff to outreach duties. Nevertheless, the Department has observed that SWAs commonly assign existing staff to fill outreach staff vacancies, without seeking qualified candidates who speak the language of a significant proportion of the State MSFW population and who are from MSFW backgrounds or have substantial work experience in farmworker activities. The Department is concerned that assigning individuals who do not possess these characteristics to outreach staff positions may contribute to low MSFW engagement in the ES program. Individuals who do not meet these characteristics may not have the language skills or experience necessary to effectively explain services to MSFWs or to successfully tailor those services to meet the particular needs of MSFWs. It is important for outreach staff to be able to effectively communicate with the MSFWs whom

they serve, particularly because outreach staff often interact with MSFWs with LEP in remote places, such as rural working and living locations, where interpretation services and aids may not be as widely available. If outreach staff speak the same language as the majority of MSFWs in the State and come from an MSFW background or have substantial work experience in farmworker activities, then they are more likely to be able to effectively communicate with the MSFWs whom they encounter. In sum, the Department has determined SWAs must make a greater effort to employ outreach workers with the characteristics required by § 653.107(a)(3), because such individuals are more likely to have the knowledge and skills to help them effectively communicate and engage with MSFWs. In the Department's view, the benefit of identifying qualified candidates with these characteristics outweighs the burden it places on SWAs to comply with the requirement.

In order to receive applicants from farmworker organizations and other organizations with expertise concerning MSFWs, SWAs must make the job opening available to external candidates. SWAs may recruit internally for outreach staff job openings but they must also recruit externally. SWAs may hire or assign qualified candidates from their internal or external recruitment efforts, provided that they put a strong emphasis on hiring or assigning candidates who meet the characteristics described at § 653.107(a)(3)(i). If a SWA ensures hiring officials properly inform appropriate organizations and recruit externally for outreach staff positions, but these recruitment efforts do not produce qualified candidates who meet the required criteria, then hiring officials may assign existing staff to perform outreach staff responsibilities. In such cases, hiring officials must still put a strong emphasis on assigning candidates who meet at least some of the characteristics described at § 653.107(a)(3)(i). To demonstrate a strong emphasis on hiring or assigning candidates who meet these characteristics, job postings should describe the desired characteristics. This proposed change will also allow the Department to assess whether a SWA has policies and procedures in place to ensure hiring officials place an appropriate emphasis on seeking and hiring or assigning qualified candidates who meet the characteristics described at § 653.107(a)(3)(i). In cases where a SWA has more than one qualified applicant, the Department would expect hiring officials to select the applicant

who meets the required criteria over the one who does not.

The Department appreciates that some SWAs may face difficulties in identifying qualified candidates who meet these characteristics and understands it may not always be possible to identify such candidates when hiring or assigning ES staff to outreach staff positions. Accordingly, this final rule will require SWAs to ensure hiring officials seek and put a strong emphasis on identifying qualified candidates with these characteristics. If hiring officials are not able to find qualified candidates who possess these characteristics, the SWA may proceed to hire or assign the most qualified candidate.

Appropriate Outreach Staffing Levels and Duties

Comment: The Department received comments both in support and opposition to its proposal to revise § 653.107(a)(1) and (4) to clarify and strengthen requirements governing the outreach staff whom SWAs employ to fulfill the requirements set forth in § 653.107. For example, a union organization supported the Department's proposed changes to ensure SWAs employ an adequate number of outreach staff sufficient to reach a majority of MSFWs in all States. A farmworker advocacy organization similarly remarked that the proposed changes would improve MSFW outreach by underscoring that outreach is a full-time job that deserves priority and should not be combined with other functions. This commenter thought the proposed changes would help ensure that outreach staff are available and qualified to provide the outreach and follow-up services required by the regulations. A State employee association supported the proposed rule's focus on outreach services to MSFWs. Similarly, a State government agency agreed with the proposed requirement for outreach staff in significant MSFW States to devote all of their time to outreach rather than merely including outreach among other responsibilities, noting it would further clarify the role and expectations of outreach staff. However, this State agency sought further clarification about how it should determine whether it employs an "adequate" number of outreach staff and inquired whether this determination would involve using a DOL-provided formula to accurately assess the need and determine what is considered a majority of the population.

Several other State government agencies opposed the proposed revisions and urged the Department to

consider alternative approaches that allow for more flexibility. For example, one State government agency expressed concern that the proposed requirement for a SWA to employ a sufficient number of outreach staff to conduct MSFW outreach “in each area of the State” would increase the Department’s expectations for MSFW outreach staffing. Because this State agency did not think the effect of this proposed revision was clear, it asked the Department to clarify what the addition of “in each area of the State” would require and how it would impact the State’s current practice for employing outreach staff. In particular, the State agency was concerned that the proposed requirement to employ an adequate number of outreach staff to conduct MSFW outreach “in each area of the State” might require each workforce development area or one-stop (depending how “each area” is defined) to devote more resources to MSFW outreach based on unknown parameters set by the Department. The State agency noted that it currently employed full-time, year-round outreach staff who serve three of its 12 workforce development areas, and that those workforce development areas covered around 90 percent of the State’s agricultural employment population. The State agency expressed concern that the proposed revisions might require it to employ additional dedicated MSFW outreach staff to serve the nine other workforce development areas (or the other 30 non-significant MSFW one-stops), even though those areas and one-stop centers collectively served only around 10 percent of the State’s MSFW population. The State agency noted that if the Department were to adopt such a requirement, it would decrease the State’s capacity to conduct outreach to other key populations (e.g., different groups statutorily identified as having barriers to employment) and to otherwise serve customers that directly access ES services via one-stops or virtually. The commenter requested that the Department allow States to meet regulatory goals through operational flexibility rather than rigid staffing requirements. Citing annual reports from the SMA to the Department showing frequent turnover among outreach staff, the commenter said a flexible approach was important to avoid gaps in outreach services when attrition occurs.

Another State agency explained that it employed several part-time outreach specialists throughout the State, and asserted that, as a non-significant MSFW State, there would not be enough

outreach work for this staff to perform during peak season if their duties are limited to performing only those activities identified in § 653.107(b). According to this State agency, limiting the job duties that outreach staff can undertake during peak season is neither practical nor cost-effective given the number of MSFWs in the State. The State agency explained this limitation would pose several problems for the State’s ES staff and the services they are able to provide. Specifically, the State agency noted that § 653.107(b) does not include duties like providing services in one-stop centers, attending meetings, and contributing to the one-stop ES services team. This was problematic, according to the State agency, because outreach staff are tasked with encouraging MSFWs to obtain services at one-stop centers, and in order to effectively serve MSFWs in the field or at one-stop centers, outreach staff must be able to devote some time to serving non-MSFWs, so that they stay up to date on the latest services, best practices, employers, and hiring events in their area.

A different State government agency asserted that the proposed requirement for year-round, part-time outreach staff in non-significant MSFW States is untenable because Wagner-Peyser Act funding is not designated for this function and its current staffing level has proven sufficient. Specifically, the commenter reported that its MSFW outreach staff collaborate with the State’s NFJP partner on joint outreach, distribute pamphlets and speak to workers during housing inspections, and reach MSFWs at outreach clinic events hosted by a State public university.

Another State government agency objected to the proposed revision that would require outreach staff in significant MSFW States to spend 100 percent of their time on the outreach responsibilities listed in § 653.107(b), arguing that it would restrict staffing flexibility by prohibiting the assignment of additional duties and limit its staff’s ability to assist MSFWs and their families who are seeking assistance in a one-stop center.

Response: The Department appreciates the feedback it received from State government agencies regarding the revisions it proposed to the outreach staffing requirements in § 653.107(a). The Department proposed these revisions to strengthen the requirements governing outreach staffing levels to ensure that outreach staff are dedicating sufficient time to performing the duties set forth at § 653.107(b) for outreach staff. As noted

above, the Department has carefully considered the concerns these commenters raised and will adopt the proposed revisions to § 653.107(a) with minor revisions.

Some of the requirements about which commenters expressed concern are not new proposals. For example, the existing regulation at § 653.107(a)(4) already required significant MSFW States (i.e., the 20 States with the highest estimated year-round MSFW activity) to provide full-time, year-round outreach staff to conduct outreach duties. It also required the remainder of States to provide at least part-time outreach staff on a year-round basis and full-time outreach staff during periods of the highest MSFW activity.

At the same time, the Department recognizes that some of the revisions to this section introduce new requirements, and that compliance with these requirements will require some SWAs to change the manner in which they have been conducting MSFW outreach or employing outreach staff. For example, if a SWA currently employs outreach staff only in those areas where significant MSFW one-stop centers are located, it will need to ensure that those outreach staff are also able to conduct outreach in all areas of the State (not just those service areas in which the significant MSFW one-stop centers are located) and make enough contacts to reach the majority of MSFWs in the State annually. If a SWA’s existing outreach staff cannot adequately meet these requirements, then the SWA will need to ensure additional outreach staff are hired or assigned to meet these requirements.

While compliance with these requirements will require some SWAs to change the manner in which they currently conduct MSFW outreach, the Department does not anticipate that implementing these changes will impose a heavy burden. States will continue to retain some flexibility in determining how to structure their MSFW outreach in a manner that meets regulatory requirements. For example, a SWA may assign outreach staff to cover more than one service area, provided that the number of outreach staff in the State is adequate to conduct outreach in every service area in the State and to contact at least a majority of MSFWs in the State overall on an annual basis.

It is important that SWAs conduct MSFW outreach in all service areas in the State to ensure MSFWs throughout the State are able to access ES and receive information on farmworker rights from outreach staff. While there may be fewer MSFWs in certain areas, it is important to ensure MSFWs in all

areas have access to ES on an equitable basis. Additionally, when SWAs do not conduct outreach in particular areas of the State, MSFWs in those areas may not be aware of their employment-related rights and the availability of the ES and Employment-Related Law Complaint System. These conditions could make MSFWs in those areas more susceptible to employment-related abuses, including wage theft, exploitation, and trafficking.

As noted above, the Department acknowledges that the changes adopted in this final rule will require some States to change the manner in which they have been employing or assigning outreach staff. The Department has determined any burden this will impose is outweighed by the benefits likely to result from adopting these changes, because compliance with the updated requirements will better ensure that SWAs serve MSFWs in a manner that is qualitatively equivalent and quantitatively proportionate to other job seekers. The Department is concerned that the number of outreach staff in some States is not adequate to provide ES services in accordance with this standard, and that outreach staff are too often assigned other duties that detract from their ability to focus full time on the outreach responsibilities set forth in § 653.107(b).

SWAs contacted only approximately 21 percent of MSFWs in PY 2018 and approximately 19 percent of MSFWs in PY 2020.⁶ The Department believes this level of outreach is not adequate. As described in the NMA Annual Report for PY 2020, the NMA has received information from farmworker organizations that most farmworkers have never experienced outreach contacts from SWAs.⁷ This information aligns with the data described above, which shows SWAs are not contacting the majority of MSFWs. Farmworkers and advocates report that farmworkers are often not aware of their employment-related rights, that they fear retaliation for reporting violations, and that they experience violations of employment-related law and ES regulations. Farmworker advocates also report that farmworkers and advocates do not trust that SWAs will provide help. Section 653.107 requires ES staff to educate farmworkers about their rights, to be alert to observe working

conditions, and to document and process apparent violations and complaints observed during outreach. Through the changes adopted in this final rule, the Department is seeking to increase the outreach provided by SWAs to reach a larger percentage of MSFWs, improve the presence and credibility of SWAs in the farmworker community, and increase the number and percentage of MSFWs who are aware of the ES services, rights, and protections available to them.

In the Department's view, the benefit of having an adequate number of outreach staff to contact a majority of MSFWs in the State annually outweighs the burden it places on SWAs to comply with the requirement. Compliance with this requirement will help to ensure outreach staff in significant MSFW States are able to focus their full attention on performing the outreach activities specified in § 653.107(b) on a year-round basis, and that outreach staff in the remaining States are able to focus on these outreach activities full time during peak seasons. This is important because outreach is an essential service delivery component to effectively serve vulnerable populations and individuals who live in rural communities like MSFWs. MSFWs often experience transportation challenges, work long hours, and are afraid to seek services for numerous factors and they may not be able to go into an AJC in person. It is therefore imperative that SWAs have an adequate number of outreach staff to bridge this service gap and improve accessibility for MSFWs. Outreach staff who devote full time to their outreach responsibilities are better positioned to provide direct services to MSFWs and help connect them to other services. The Department measures the provision of services to MSFWs through its equity ratio indicators and minimum service level indicators. Data suggests that increased outreach staffing would help to improve the provision of ES services in many States. Specifically, while national-level data for PY 2020 and prior years reflects that SWAs are cumulatively meeting equity ratio indicators, State-level data shows that many SWAs are not meeting several measures.⁸

Accordingly, the revisions adopted in this final rule make clear that full-time outreach staff must focus 100 percent of their time on the outreach responsibilities set forth in § 653.107(b). Under this final rule, full-time outreach

staff may not provide services to MSFWs who enter or otherwise contact the one-stop for ES services, or provide any other services, including services related to the ARS in subpart F of this part, such as field checks or housing inspections. MSFWs who make contact with the one-stop outside of the outreach process must instead be assisted by other available ES staff. The role of outreach staff is to locate and contact MSFWs who are not being reached by the normal intake activities conducted by the ES offices. Consistent with § 653.107(b)(5), if an MSFW enters the ES office as a result of a prior outreach contact, the MSFW may be assisted by the outreach staff, provided that the services fall under the description of follow-up contacts necessary and appropriate to provide the assistance specified in § 653.107(b)(1) through (4). If outreach staff are not available, other ES staff must assist the MSFW.

The Department acknowledges there is less need for outreach in States with lower populations of MSFWs. Accordingly, § 653.107(a)(4) requires only those States with the highest estimated year-round MSFW activity to employ full-time, year-round outreach staff. The remainder of States need only employ full-time outreach during periods of the highest MSFW activity and may employ part-time outreach staff the remainder of the year. Under this final rule, SWAs will continue to provide an assessment of need that is particular to their State's service area(s) in the AOP, including information about when peak season in their State occurs and an estimate of the number of MSFWs in the State during peak season. The final rule will require all SWAs to use this data to determine the number of outreach staff that are adequate to conduct MSFW outreach in each service area of the State and to contact a majority of the MSFWs in the State annually.

The Department disagrees with the commenters that allege it is untenable for States with lower populations of MSFWs to employ outreach staff who may perform only those duties described at § 653.107(b) during peak season. The outreach responsibilities described in paragraph (b) include time-consuming services like preparation of applications for ES services, making referrals to employment, providing assistance with filing complaints, referrals to supportive services, assistance in making appointments and arranging transportation to and from local one-stop centers or other appropriate agencies, and follow-up activities necessary to provide the

⁶ See NMA Concern 1 in the PY 2020 NMA Annual Report on Service to MSFWs, available on the Department's website at <https://www.dol.gov/agencies/eta/agriculture/monitor-advocate-system/performance>.

⁷ NMA Annual Report for PY 2020, available at: <https://www.dol.gov/agencies/eta/agriculture/monitor-advocate-system/performance>.

⁸ See NMA Concern 1 in the PY 2020 NMA Annual Report on Service to MSFWs, available on the Department's website at <https://www.dol.gov/agencies/eta/agriculture/monitor-advocate-system/performance>.

assistance described in § 653.107(b)(1) through (4). Outreach staff may, therefore, devote time to providing the direct services identified in § 653.107(b)(4) to the MSFWs they contact through outreach and may work to ensure the MSFWs they enroll as participants receive services the Department measures through its equity ratio indicators and minimum service level indicators. This work is particularly important because, while national-level data for PY 2020 and prior years reflects that SWAs are cumulatively meeting equity ratio indicators, State-level data shows that many SWAs are not meeting several measures.⁹ The condition appears to exist because data from a few larger States that are compliant with these measures compensates for many other States that are not meeting the measures, including States that are not significant MSFW States. These low-performing States often do not have full-time or any outreach staff in peak season, and the Department is concerned that the lack of staffing negatively impacts the ability of MSFWs in these States to receive equitable access to the ES. Accordingly, the Department continues to believe it is necessary for SWAs in all States to employ outreach staff on a year-round basis, and that outreach staff in non-significant MSFW States must devote full-time to outreach work during the periods of highest MSFW activity in the State.

The Department disagrees with the commenter that asserted outreach staff must serve non-MSFWs and perform other duties within a one-stop center in order to learn how to effectively serve MSFWs. In the Department's view, the training that outreach staff receive pursuant to § 653.107(b)(7), which includes training on one-stop center procedures and on the services, benefits, and protections afforded MSFWs by the ES, should sufficiently prepare them to successfully serve MSFWs. Outreach staff may also attend staff meetings and trainings that relate to improving the quality of their outreach and which do not detract from their ability to meet outreach requirements described in this section. Such trainings might include information on one-stop partners, supportive services, and other information or resources available to MSFWs, which may also be available to non-MSFWs. Serving other job seekers

is not necessary to obtain the skills or knowledge necessary to effectively conduct outreach to MSFWs.

In response to the commenter that sought clarification about how a SWA should determine if it employs an "adequate" number of outreach staff, the Department notes that, per the revision to § 653.107(a)(4) adopted in this final rule, the number of outreach staff in a State is "adequate" if the outreach staff in the State are able to (1) conduct MSFW outreach in each service area of the State and (2) contact a majority of MSFWs in the State annually. Section 653.107(a)(4) additionally specifies that outreach staffing levels must align with and be supported by the estimated number of farmworkers in the State and the farmworker activity in the State, as demonstrated by the SWA in the State's AOP.

In response to the commenter seeking clarification about the areas where States must conduct outreach, the Department is modifying the revision it proposed to make in § 653.107(a)(4) so that it explicitly specifies that each SWA must ensure there is an adequate number of outreach staff in the State to conduct MSFW outreach in each service area of the State and to contact a majority of MSFWs in all of the State annually. The final rule will require SWAs to conduct outreach in all of the State's service areas so that MSFWs in all service areas are able to access the full range of ES. The SWA's service areas consist of each local area where the SWA provides labor exchange services under the Wagner-Peyser Act, as described in the Memorandum of Understanding (MOU) that is explained in 20 CFR 678.500. This requirement does not mean that outreach staff must be placed in each local area, only that the State must ensure that there is an adequate number of outreach staff in the State to meet the requirements of this section.

The Department acknowledges the concern raised by some commenters that the revisions to § 653.107(a)(3) will make it more difficult to hire and retain outreach staff, which could impede a SWA's ability to hire an adequate number of outreach staff. However, the Department does not anticipate that compliance with § 653.107(a)(3) will pose the obstacle that these commenters fear. While the revised regulation will require a SWA to ensure hiring officials seek and put a strong emphasis on hiring and assigning qualified candidates who meet the characteristics described in § 653.107(a)(3) (*i.e.*, qualified candidates who speak the language of a significant proportion of

the State MSFW population and who are from MSFW backgrounds or who have substantial work experience in farmworker activities), if a State seeks but does not find qualified candidates who meet the characteristics described in § 653.107(a)(3), the State must still employ an adequate number of outreach staff by hiring or assigning the most qualified among available candidates.

For these reasons, the Department adopts the proposed changes, with the revisions to § 653.107(a)(3) and (4) described above, and will provide technical assistance and guidance to help SWAs meet the requirements, as appropriate.

Section 653.107(b)

Paragraph (b) of § 653.107 describes outreach staff responsibilities. The Department proposed to make several revisions to this section.

In particular, the Department proposed to amend the introductory sentence of paragraph (b) to specify that outreach staff responsibilities include the activities identified in paragraphs (b)(1) through (11) of this section. This revision would reinforce the Department's proposal to add a sentence in § 653.107(a)(4) to specify that full-time outreach means each individual outreach staff person must spend 100 percent of their time performing the outreach responsibilities described in § 653.107(b). Because this revision would remove the colon in the existing regulatory text, the Department proposed to make a conforming amendment to the beginning of the sentence in paragraph (b)(1) so that it begins by stating "outreach staff must" instead of "explaining."

The Department additionally proposed to make several revisions to § 653.107(b)(7) to update the topics about which outreach staff must receive training. In particular, the Department proposed to replace the reference to outreach staff being trained in "local office" procedures with a requirement to train outreach staff in "one-stop center" procedures, which would align with the revised definition of *ES office* that the Department proposed at § 651.10. The Department additionally proposed to require training on sexual coercion, assault, and human trafficking, in addition to the existing requirement to provide outreach staff training on sexual harassment (training on the former topics is suggested but not mandatory in the existing regulations). The Department also proposed to replace the existing requirement for SWAs to train outreach staff in the procedure for informal resolution of complaints with a requirement for

⁹ See NMA Concern 1 in the PY 2020 NMA Annual Report on Service to MSFWs, available on the Department's website at <https://www.dol.gov/agencies/eta/agriculture/monitor-advocate-system/performance>.

SWAs to train outreach staff on the Complaint System procedures at part 658, subpart E, and to require that outreach staff be aware of the local, State, regional, and national enforcement agencies that would be appropriate to receive referrals.

Finally, the Department proposed several non-substantive revisions in paragraph (b) to replace “outreach workers” with “outreach staff” and “employment services” with “ES services.”

The Department received several comments concerning the revisions it proposed to paragraph (b), which it describes and responds to below. Comments regarding the proposal to limit full-time outreach workers to the outreach responsibilities set forth in this paragraph are discussed above in connection with the proposed revision to § 653.107(a)(4).

For the reasons discussed below, the Department has not made any changes to the revisions it proposed to this paragraph and adopts the revisions to § 653.107(b) as proposed. In addition, although the Department did not propose to revise § 653.107(b)(6) in the NPRM, as discussed in the comment responses for § 658.419, the Department received comments requesting additional clarification to the proposed definition of *apparent violation*, which resulted in further revisions to that definition. As a result, the Department has identified that it is necessary to revise § 653.107(b)(6) to remove the reference to suspected violations and to clarify the procedure outreach staff must follow to document and refer apparent violations. Therefore, through this final rule, the Department revises § 653.107(b)(6) to state that outreach staff must be alert to observe the working and living conditions of MSFWs and if an outreach staff member observes or receives information about apparent violations, the outreach staff member must document and refer the information to the appropriate ES Office Manager (as described in § 658.419 of this chapter).

Comment: A farmworker advocacy organization commended the Department’s proposals that emphasize outreach work is a full-time job that deserves priority and should not be combined with other functions. This commenter went on to suggest that the Department add an additional role to outreach responsibilities: collect data to be used for prevailing wage surveys. In particular, this commenter recommended that the Department allow SWAs to leverage outreach staff to collect wage data while conducting outreach work. The commenter asserted

that doing so would help the Department fulfill its duty to determine the prevailing wages for agricultural work and better protect farmworker wages by increasing the frequency of surveys, including worker input in the determination, and addressing instances of insufficient employer data.

Response: The Department declines to adopt the commenter’s suggestion to add an additional role to outreach responsibilities for outreach staff to collect data to be used for prevailing wage surveys. The Department believes that outreach staff must focus their efforts on providing services to MSFWs. Prevailing wage surveys would cause outreach staff to devote time away from providing services to MSFWs.

Comment: The Department received several comments concerning its proposal to revise the training requirements in § 653.107(b)(7). A farmworker advocacy organization endorsed the proposal to amend this paragraph to require that outreach staff receive training on additional topics (*i.e.*, protecting MSFWs against sexual coercion, assault, and human trafficking, as well Complaint System procedures). To support the requirement, this commenter cited news coverage and research findings about human trafficking and asserted that, in order for the ES Complaint System to be effective, outreach workers will first need to make farmworkers aware of its existence.

A State government agency similarly agreed that outreach staff should receive training on protecting MSFWs against sexual coercion, assault, and human trafficking, but it urged the Department to provide appropriate training rather than requiring States to find or develop appropriate trainings locally. This commenter felt the Department (not SWAs) should bear responsibility for providing this training, because the Department identified these topics as issues that are particularly relevant to H-2A workers, and the Department is tasked with administering the H-2A visa program. The commenter further reasoned that if the Department provides training on these topics, it could target the unique challenges facing outreach staff and provide States an opportunity to share lessons learned and best practices.

Other commenters raised more general questions about when and by whom the training required by § 653.107(b)(7) is to be provided. These commenters questioned what training MSFW outreach staff housed at one-stop centers would need regarding one-stop center procedures and how the training requirement could be met when the

proposed rule emphasizes that MSFW outreach staff should be in the field during peak growing season to ensure MSFWs are protected while they work. In contrast, a State government agency asserted that outreach staff must be able to dedicate time to providing services to non-MSFWs so they can remain up to date on the latest services, best practices, employers, hiring events, etc. in their area.

Response: The Department continues to believe that it is critical for outreach staff to receive training on protecting MSFWs against sexual coercion, assault, and human trafficking, as well as training in Complaint System procedures. In response to comments asking who will provide this training (as well as training on the other topics set forth in § 653.107(b)(7)), the Department notes that the existing regulation tasks the State Administrator with the responsibility to develop the training required by this regulation, pursuant to uniform guidelines developed by ETA. The Department did not propose any revisions to this requirement in § 653.107(b)(7). The Department continues to believe the State Administrator is in the best position to develop these trainings, because conditions, resources, and relevant service providers are State-specific. While the Department often provides guidance on protecting MSFWs from employment-related abuses and the Department’s overall regulations for the Complaint System, each State is best positioned to train their outreach staff on the specific resources and procedures in their State. Specifically, the State Administrator can ensure staff receive training on the specific conditions affecting MSFWs in the State and the SWA’s own procedures, including Complaint System procedures. For example, each State has different State-level enforcement agencies about which staff should be informed to make appropriate referrals. Additionally, many States have anti-trafficking taskforces that are specific to the State or to local areas. RMAs are available to provide technical assistance regarding these resources, including sharing contact information for potential training partners.

In response to questions from commenters asking why outreach staff need to be trained on one-stop center procedures and when outreach staff would be available to receive such training if they are working in the field, the Department notes that § 653.107(b) requires outreach staff to spend a majority—but not all—of their time in the field. Outreach staff may use the time when they are not in the field to

attend training, provide follow-up services, or engage in any of the other activities described in § 653.107(b). Because outreach staff are tasked with providing ES services to the MSFWs they contact through their outreach work—either directly in the field or subsequently in a one-stop center—they must be trained on how to provide those services in both the field and at the one-stop center. The Department disagrees that outreach staff must also serve non-MSFWs at the local one-stop in order to effectively serve MSFWs and receive this training. Outreach staff do not need to provide other services in the one-stop to receive this training and provide competent services to MSFWs.

Section 653.107(d)

Paragraph (d) of § 653.107 requires a SWA to develop an Agricultural Outreach Plan (AOP) to include in the Unified or Combined State Plan that its State submits pursuant to sec. 102 or 103 of WIOA. The Department proposed to amend this paragraph to make several changes to the content that SWAs must include in their AOP.

First, the Department proposed to revise § 653.107(d)(2)(ii) to require the AOP to explain the materials, tools, and resources that the SWA will use for outreach.

Second, the Department proposed to revise § 653.107(d)(2)(iii) so that it would require a SWA to describe their proposed activities to contact MSFWs who are not being reached by the normal intake activities conducted by the one-stop centers and to include within this description: (1) the number of full-time and part-time outreach staff in the State; and (2) an explanation demonstrating that there is a sufficient number of outreach staff to contact a majority of MSFWs in all the State's service areas annually. The Department proposed this change to align the information that SWAs provide in the AOP with the proposed requirement in § 653.107(a)(4) for a SWA to employ an adequate number of outreach staff to conduct MSFW outreach in each area of the State to contact a majority of the MSFWs in all of the SWA's service areas annually. As noted below, the Department has modified the proposed regulatory text for this provision to conform with the revisions that it made to the regulatory text in § 653.107(a)(4).

Third, the Department proposed to revise § 653.107(d)(2)(v) to replace the requirement for a SWA in a State with significant MSFW one-stop centers to provide an assurance that it is complying with the requirements in § 653.111 to instead require that SWAs in such States provide a description of

how they how they intend to comply with the staffing requirements for MSFW one-stop centers in accordance with § 653.111.

Fourth, the Department proposed to amend § 653.107(d)(4) to clarify that the AOP must be submitted in accordance with paragraph (d)(1) of this section instead of paragraph (d), as currently written. Paragraph (d)(1) is the accurate reference that explains the SWA's responsibility to develop the AOP as a part of the Unified or Combined State Plan.

Finally, the Department proposed two revisions at § 653.107(d)(5). First, the Department proposed a technical edit to change the reference from § 653.108(s) to § 653.108(u) due to restructuring paragraphs at § 653.108. Second, the Department proposed to replace "its goals" with "the objectives." Referring to "the objectives" is more accurate because the Department does not ask SWAs to provide specific goals in the AOP, rather SWAs identify various objectives.

The Department largely adopts the proposed changes with only minor revisions. Specifically, the Department modified the regulatory text it proposed for § 653.107(d)(2)(iii) to clarify the information that this provision requires States to include in the AOP and to align with the revisions that this final rule adopts at § 653.107(a)(4). The Department adopts all other proposed revisions to § 653.107(d) without change.

Comment: A farmworker advocacy group supported the Department's proposed changes to the content that SWAs must include in an Agricultural Outreach Plan, noting the revisions would require considerably greater detail about how the SWA intended to reach farmworkers who do not normally visit the SWA's one-stop centers.

Response: The Department appreciates the views that this commenter shared. As this commenter noted, the revisions adopted in this rule will require SWAs to provide more detail in their AOPs about the outreach they plan to conduct. They will also require SWAs to provide more detail about how they plan to comply with the staffing requirements for significant one-stop centers in § 653.111. This level of detail is essential to aid SMAs, RMAs, and the NMA in assessing whether SWAs have the appropriate staffing structure to meet the unique needs of farmworkers.

Section 653.108 State Workforce Agency and State Monitor Advocate Responsibilities

Section 653.108 governs the monitoring obligations of the SWA and the SMA. The NPRM proposed numerous revisions to this section intended to strengthen the role of the SMA and enhance the monitoring activities that SMAs perform. The Department received a number of comments addressing these proposals. After careful consideration of the comments received, the Department has decided to adopt the revisions as originally proposed, except as noted in the discussions below. Paragraphs (k), (p), (r), (s), and (t) in this section are redesignated paragraphs because of revisions made elsewhere in this section. The Department did not propose any other changes to these paragraphs, and they are not discussed below.

Section 653.108(a) State Workforce Agency Responsibilities for Service Delivery to Migrant and Seasonal Farmworkers

Paragraph (a) of § 653.108 establishes the SWA's responsibility to monitor the SWA's own compliance with ES regulations in serving MSFWs. The Department proposed to revise this paragraph to explicitly prohibit the State Administrator or ES staff from retaliating against an SMA for performing the monitoring activities required by this section.

Comment: A State government agency and a farmworker advocacy organization commended the Department for proposing to explicitly prohibit the SWA from retaliating against SMAs and their staff for monitoring activities or for raising concerns about noncompliance with ES regulations.

Response: The Department appreciates the commenters' feedback supporting the proposed change prohibiting retaliation. The Department adopts this change as proposed for the reasons set forth in the NPRM.

Section 653.108(b) State Monitor Advocate Requirement and Qualifications

Paragraph (b) of § 653.108 requires SWAs to appoint an SMA who must be a SWA official to monitor SWA compliance with ES regulations in serving MSFWs and sets forth qualifications for the SMA position. The Department proposed to revise this paragraph to remove the requirement that the SMA be a SWA official because the Department proposed to remove the definition of SWA official in § 651.10.

However, as described in the comment responses for § 651.10, the final rule will maintain the current definition of SWA official in existing § 651.10, and therefore, the Department will also maintain the requirement that the SMA be a SWA official in this paragraph.

The Department also proposed to revise § 658.108 to require that SWAs not only seek but also put a strong emphasis on hiring qualified candidates for the SMA position who meet one or more of the criteria listed in paragraphs (b)(1) through (3). The Department adopts the change as proposed.

Comment: A farmworker advocacy organization supported proposed changes to ensure that States prioritize hiring SMAs with experience in the farmworker community, inform farmworker organizations about vacancies in the SMA position, and encourage these organizations to refer qualified applicants. However, the commenter warned that States do not always honor their obligation to work with farmworker organizations when hiring for the SMA position. The commenter expressed hope that the proposed rule's renewed emphasis on the importance of hiring SMAs with relevant experience and connections would alleviate this problem going forward.

A State government agency disagreed with the proposal to establish additional hiring requirements for the SMA role, arguing that putting "a strong emphasis on hiring" qualified candidates who meet the criteria is not needed because SWAs already must "seek" such candidates. The commenter added that it uses detailed job descriptions, screening evaluations, and interviewing benchmarks to hire strong candidates.

Response: The Department acknowledges that some SWAs already have practices in place to hire strong candidates for the SMA position, but some do not. The changes in this paragraph are intended to better ensure that SWAs not only seek qualified candidates by complying with the requirements to contact certain organizations about job openings, but also hire qualified candidates. The Department acknowledges that SWAs may not always be able to attract candidates who meet 100 percent of the criteria outlined in the regulations and therefore mandating that SWAs hire candidates meeting all of the criteria is not practicable. Instead, the Department determined that requiring that SWAs seek and place a strong emphasis on hiring SMAs meeting the criteria in the regulations gives SWAs the flexibility needed to fill SMA positions and also better ensures that SWAs hire qualified

individuals to perform the critical duties of the SMA position.

The proposed change to put a strong emphasis on hiring qualified candidates is important to increase the likelihood that all SWAs will hire SMAs who meet one or more of the criteria, and not simply seek such individuals. This proposed change will allow the Department to assess whether a SWA has policies and procedures in place to ensure it hires qualified candidates. In cases where a SWA has more than one applicant, the Department would expect SWAs to hire the applicant with the listed qualifications, over those that did not meet the qualifications. The Department adopts the change as proposed to better ensure SWAs hire qualified candidates for the SMA position.

Section 653.108(c) State Monitor Advocate Status

Paragraph (c) of § 653.108(c) establishes the status of the SMA within the SWA. The Department proposed several revisions to this paragraph to strengthen the status of the SMA, as many SMAs have reported difficulty in their ability to fully carry out their duties due to insufficient status within the SWA. Specifically, the Department proposed at § 653.108(c) to create new paragraphs (c)(1) through (3). First, proposed paragraph (c)(1) required that the SMA be a senior-level ES staff employee. Second, proposed paragraph (c)(2) required the SMA to report directly to the State Administrator or their designee such as a director or other appropriately titled official in the State Administrator's office who has the authority to act on behalf of the State Administrator. Third, proposed paragraph (c)(3) required that the SMA have the knowledge, skills, and abilities necessary to fulfill the responsibilities as described in this subpart. The Department adopts the changes as proposed.

Comment: Several State government agencies, both those in support of and opposed to the requirements in this paragraph, noted that the requirements will require restructuring or reclassifying the SMA position.

A farmworker advocacy organization agreed with the proposed requirement that SMAs must be senior-level officials within the SWA. A private citizen also supported requiring the SMA to be a senior-level ES staff employee who reports to the State Administrator, remarking that the SMA currently does not have sufficient status within the SWA and reports to a lower level supervisor without decision-making authority, which they said causes delays

or denials of requests by the SMA and even the disregarding of corrective actions. Similarly, some State government agencies and anonymous commenters agreed with proposed changes that would enable SMAs to conduct their role more effectively, such as strengthening their status and giving them more autonomy, but asked the Department to provide SWAs with more guidance on the revised role (e.g., better define "senior-level" and "their designee"). One of the anonymous commenters recommended the Department communicate the changes in the SMA's status directly to SWAs, such as through a webinar, rather than having them learn it from their SMAs. The other anonymous commenter also urged the Department to ensure that when the State Administrator uses a designee, the SMA still has direct, personal access to the State Administrator and the designee is knowledgeable and experienced in the ES and Monitor Advocate System to better assist the SMA and make decisions on behalf of the SWA.

A State government agency remarked that not allowing the State Administrator's designee to be the individual who has direct program oversight of the ES is practical because it ensures compliance standards are met without biases. However, the commenter asked the Department to clarify how it defines "direct program oversight," to ensure that the SMA is reporting to the correct administrator.

A State government agency opposed the proposed requirement that the SMA be a senior-level position reporting directly to the State Administrator, arguing that its approved part-time SMA ensures SWA adherence to all requirements, has access to the State Administrator through the chain of command, and would not have any greater efficacy in oversight at a different level. Another State government agency similarly opposed a requirement for the SMA to be positioned at the senior staff level and expressed its preference to retain flexibility on where the SMA is placed within the agency, arguing it has demonstrated that its SMA can effectively perform their role from their current placement within the agency. This State agency additionally asserted that changing the SMA's current placement within the agency would likely require reclassification of the position and necessitate a strategic recruitment process to identify a candidate with the requisite skills and experience at a senior level. Noting these processes require time, this State agency asked the Department to enlarge

the proposed deadline to comply with this requirement if the Department decided to adopt it, and provide States 2 years from the effective date of any final rule to come into compliance with the requirement. Another State government agency commented that the proposed change would require reorganization of the State's MSFW program office in order to elevate the SMA position to report directly to the State Administrator and to comply with other changes proposed in paragraph (d). This agency stated the proposed changes could adversely impact the level of funding that the agency provides to local ES offices to support MSFW activities.

Some commenters remarked that the proposed changes appear to be a duplicative effort by aligning the status of the SMA and the E.O. Officer. In contrast, a State government agency said there are direct correlations between the SMA and the E.O. Officer and reasoned that improved alignment and partnership of the two positions would better address the statewide need.

Referencing the Department's statement that the proposed change would require the SMA to be "not only a State employee, but a State merit-staff employee," a State government agency asked the Department to clarify or define the terms "State employee" and "State merit-system employee."

Response: While many commenters, including some SWAs, SMAs, and advocacy organizations, supported a requirement to enhance the status of the SMA, the Department recognizes that some SWAs did not. The Department believes these changes are critical to ensure that SMAs can more effectively carry out their duties; having "direct access" to the State Administrator "as needed" as previously required was not enough. The Department recognizes that SWAs will need a reasonable amount of time to implement these changes. The Department requested comment on the appropriate length of time to come into compliance. States requested a range of 2 years to 3 years. The Department is providing 24 months from the effective date of this final rule for SWAs to implement these changes. This is the same amount of time SWAs will have to comply with the State merit-staffing requirements in this final rule. Having one transition period enables SWAs to take the necessary steps to implement all of the changes required under this final rule at one time. These steps include, among others, obtaining any required State authorization, addressing collective bargaining issues and contracts, and conducting recruiting and training. During the transition period,

the Department will provide technical assistance and guidance to help SWAs comply with the new requirements. The Department has detailed the cost burden associated with this final rule in section VI. Wagner-Peyser Employment Service grant funding is provided annually to deliver employment services, and such grant funding is available to cover the cost of implementing this final rule.

The Department noted in the NPRM that many SMAs have reported difficulty in their ability to carry out their duties due to insufficient status within the SWA. The proposed changes strengthen the status of SMA. SMAs are charged with ensuring compliance with ES regulations put in place to ensure that MSFWs have meaningful access to services and equal opportunities. To enhance the SMA's ability to effectively carry out their role, SMAs need to hold a senior-level position that will grant them more direct access to top management. A senior-level position is one having a title and resources commensurate with the level of responsibility for a senior official who reports directly to the State Administrator or the State Administrator's designee having the authority to make decisions on behalf of the State Administrator.

Allowing the State Administrator to select a designee to whom the SMA reports gives States flexibility in how to implement this requirement. If a State Administrator chooses to have the SMA report directly to a designee, the designee must be a position within the State Administrator's office with authority to act on behalf of the State Administrator. However, the designee may not be the individual with direct oversight of the ES, such as the ES director. This restriction is necessary to avoid challenges that may result from having the SMA monitor compliance with decisions made by their direct supervisor or for which their direct supervisor may be responsible.

The Department notes that § 653.108(e) provides States with the ability to have part-time SMAs with prior approval from the Regional Administrator (RA). The Department believes the requirements under paragraph (c) are compatible with the part-time SMA staffing provision in paragraph (e).

The NPRM referenced the E.O. Officer simply as a comparable position to an SMA, having a similar level of responsibility and complexity, that is required to be a senior-level position within a State. The Department did not propose, nor do these final regulations require, any changes to the SMA position that either duplicate the work

of the E.O. Officer or require the SMA to have the exact same position or level as the E.O. Officer. SMAs are responsible for monitoring SWA and ES office compliance with ES regulations in serving MSFWs. The change in this final rule requires the SMA to report to the State Administrator (or designee). E.O. Officers perform a different function in the State.

The Department notes that "State employee" means an individual employed by the State. "State merit staff" means State government personnel who are employed according to the merit system principles described in 5 CFR part 900, subpart F (Standards for a Merit System of Personnel Administration). Requiring the SMA to be State merit staff, not just a State employee, conforms with the merit-staffing requirement in § 652.215.

The Department adopts the changes as proposed to ensure SMAs have the status and authority to monitor SWA compliance with ES regulations.

Section 653.108(d) State Monitor Advocate Staff Responsibilities

Paragraph (d) of § 653.108 describes requirements for staff and other resources to support the SMA in carrying out monitoring functions. The Department proposed to revise § 653.108(d) to require that the SMA have sufficient authority, staff, resources, and access to top management to monitor compliance with the ES regulations. In addition, the Department proposed to prohibit SMA staff from performing outreach responsibilities, ARS processing, and complaint processing to conform with proposed changes to the SMA's role in these activities.

Comment: A farmworker advocacy organization remarked that the proposed revisions ensure SMAs have the authority, tools, and resources they need to monitor SWA compliance with ES regulations. A few State government agencies noted the proposed requirements in paragraphs (c) and (d) together could require restructuring their SMA office (e.g., creating a senior-level staff position and hiring additional analyst staff) and relocating it for direct access to the State Administrator or their designee. One of those State government agencies requested a transition period of 3 years to comply with the requirements. A different State government agency supported the proposed requirement, saying it would amplify the SMA's monitoring capabilities and allow the SMA to maintain program standards. However, referencing the Department's statement that ES staff assigned to help the SMA

carry out its duties may not be assigned conflicting roles, the commenter asked the Department to clarify the functions and responsibilities that ES staff would be assigned under the SMA, which it said would provide it guidance to determine if any conflict exists.

A State government agency requested that the Department require coordination between the SMA and SWA officials responsible for monitoring to help ensure efficient and non-duplicative efforts given the requirement that the SWA also conduct monitoring.

A farmworker advocacy organization agreed with the proposed requirement that SMAs must not serve jointly as outreach staff, reasoning that prohibiting the SMA from serving part-time in an outreach role would eliminate conflict of interest concerns that arise from the SMA's responsibility for monitoring outreach efforts. Citing an article about an investigation of human trafficking by an SMA's relative, the commenter urged the Department to go further to address other significant conflicts of interest that can arise with SMAs, such as by adopting conflict of interest standards for SMAs to ensure that they are not involved in approving clearance orders or handling complaints related to family members or close associates.

Response: The Department recognizes that SWAs will need a reasonable amount of time to implement these changes. The Department will provide 24 months from the effective date of this final rule for SWAs to implement these changes. This is the same amount of time SWAs will have to comply with the State merit-staffing requirements in this final rule. Having one transition period enables SWAs to take the necessary steps to implement all of the changes required under this final rule at one time. These steps include, among others, obtaining any required State authorization, addressing collective bargaining issues and contracts, and conducting recruiting and training. During the transition period, the Department will provide technical assistance and guidance to help SWAs comply with the new requirements.

In the NPRM, the Department proposed changes to prohibit the SMA's staff from being assigned conflicting roles to perform any outreach responsibilities, ARS processing, or complaint processing. The Department proposed regulatory text to prohibit SMA staff from performing work that conflicts with the "monitoring" duties of the SMA. The final regulatory text does not include the word "monitoring" before duties to make clear that SMA

staff must not perform any work that conflicts with any of the SMA's duties, not just the SMA's monitoring duties. The Department notes the recommendation to go further to address other significant conflicts of interest that can arise with SMAs, such as by adopting conflict of interest standards for SMAs in this final rule. The Department is adding in paragraph (e) regulatory text to explicitly prohibit the SMA from performing any work that conflicts with any of the SMA's duties in § 653.108. The Department will further address conflicts of interest and internal controls in technical assistance and guidance.

Section 653.108(e) State Monitor Advocate Full-Time Staffing Requirement and Prohibited Duties

Paragraph (e) of § 653.108 is a new paragraph that was proposed, specifying that no State may dedicate less than full-time staffing for the SMA position unless the RA, with input from the RMA, provides written approval. The Department is also making one change in this section that was not proposed in the NPRM to explicitly state that the SMA must not perform work that conflicts with any of the SMA's duties, such as outreach, ARS processing, and complaint processing.

Comment: Citing reports of issues such as discrimination arising when SMAs split their time between monitoring activities and other duties, a farmworker advocacy organization agreed with the proposed requirement that SMAs must serve in the role full-time.

Response: The Department acknowledges the commenter's support for a full-time SMA staffing requirement. The Department sought to strengthen the regulation permitting part-time SMA staffing (previously described in § 653.108(d)) by (1) including the RMA in the RA's process for determining whether a State has demonstrated that the SMA function can be effectively performed with part-time staffing; and (2) requiring express written approval by the RA. After consideration of comments regarding SMA conflicts, the Department is also revising this paragraph to explicitly state that the SMA must not perform any work that conflicts with any of the SMA's duties described in § 653.108. This change was not proposed in the NPRM, but the Department did propose and has adopted in the definition of "outreach staff" in § 651.10, regulatory text explaining that SMAs are not considered outreach staff. In part 658, the Department proposed and adopted regulatory text prohibiting the SMA

from participating in the complaint process. And in paragraph (d) of this section, the Department proposed an explicit prohibition on the SMA's staff from performing any work that conflicts with the SMA's duties, such as outreach, ARS processing, and complaint processing. It follows that the SMA must not perform work that conflicts with the SMA's duties either. Therefore, the Department is expressly prohibiting the SMA from performing any work that conflicts with the SMA's duties described in this section.

Section 653.108(f) State Monitor Advocate Training

Redesignated paragraph (f) of § 653.108 sets forth required trainings for SMAs and SMA staff to maintain competency. The Department proposed to remove the requirement that SMAs attend a training by the RMA within the first 3 months of the SMA's tenure. Instead, the Department proposed to require all SMAs and their staff to attend trainings offered by the RMA, the NMA, and their team, as well as those trainings necessary to maintain competency and enhance the SMA's understanding of the unique needs of farmworkers. This includes trainings offered by an enumerated list of Federal agencies as well as trainings offering farmworker-related information.

Comment: Numerous commenters, including several labor unions, a couple of think tanks, and an advocacy organization, commended the Department for its commitment to improving the effectiveness of SMAs and ensuring that their staff receive the training necessary to provide MSFWs adequate services. A farmworker advocacy organization agreed it is important that SWA staff receive proper training on key tasks like assessing agricultural jobs and connecting workers with necessary services.

Response: The Department appreciates the comments provided in these areas supporting the proposed changes. After further consideration, the Department identified a need to clarify which staff may require SMAs to attend training. The Department has decided to remove the proposed reference to NMA team members and instead refer to NMA staff, as identified in § 658.602(h). The Department adopts the proposed revisions, with the exception of updating the reference to NMA staff, for the reasons outlined in the NPRM.

Section 653.108(h) State Monitor Advocate Review of State Workforce Agencies and Employment Service Offices

Paragraph (h) of § 653.108 outlines elements of the SMA's review of SWA and ES office service delivery to MSFWs. These requirements were previously described in § 653.108(g). The Department proposed in § 653.108(h)(1) to specify important elements of the ongoing review that the SMA must conduct under this paragraph. In particular, new proposed paragraphs (h)(1)(i) through (iii) would require the SMA to conduct an ongoing review of the delivery of services and protections afforded by the ES regulations to MSFWs by the SWA and ES offices, including: (i) monitoring compliance with § 653.111; (ii) monitoring the ES services that the SWA and one-stop centers provide to MSFWs to assess whether they are qualitatively equivalent and quantitatively proportionate to the services the SWA and one-stop centers provide to non-MSFWs; and (iii) reviewing the appropriateness of informal resolution of complaints and apparent violations as documented in the complaint logs. The Department proposed in § 653.108(h)(3) and to clarify that SMAs must conduct onsite reviews of one-stop centers regardless of whether the one-stop center is designated as a significant MSFW one-stop center. Proposed § 653.108(h)(6) maintained an existing requirement for SMAs to review outreach workers' daily logs and other reports, including those showing or reflecting the workers' activities, but proposed that this review be done on a "regular" rather than a "random" basis. The Department adopts the changes as proposed.

Comment: Some commenters disagreed with the proposed requirement that SMAs must conduct onsite reviews of one-stop centers regardless of whether the one-stop center is designated as a significant MSFW one-stop center, arguing that this is an overreach, that it is duplicative of existing monitoring reviews, and that monitoring of one-stop centers can be accomplished without dismantling the current Michigan model. Quoting the Secretary describing the Industry-Recognized Apprenticeship Program as "a disconnected, duplicative program that does nothing but create confusion," the commenters asserted the same could be said of the proposed requirement, which they warned would slow customer service response time, increase all workforce system costs, and reduce flexibility in meeting the needs

of local communities. In contrast, a farmworker advocacy organization supported the proposed requirement but cautioned that SMAs will need adequate resources to effectively implement this change. A few State government agencies also stated that the proposed revision will require an increase in staffing resources.

A State government agency opposed the proposed requirement that SMAs must monitor whether the ES services provided to MSFWs are qualitatively equivalent and quantitatively proportionate to the services provided to non-MSFWs. The commenter argued that State performance indicators already serve this purpose and are gathered to determine whether services are quantitatively proportionate. The commenter stated that States would need additional guidance from the Department on how the SMA should determine whether services are qualitatively equivalent to ensure all States follow the same standards for such monitoring.

Referencing the Department's proposed clarification that SMAs must review outreach workers' daily logs and other reports, including those showing or reflecting the workers' activities, on a "regular" rather than "random" basis, a State government agency agreed with the proposal, which they said could help identify potential errors or irregular reporting in daily outreach logs and monthly manager reports as well as prevent significant MSFW one-stop offices from receiving a finding during annual reviews.

Response: The Department adopts the changes as proposed.

The monitoring requirements in redesignated paragraphs (h)(1)(i) and (iii) are derived from requirements that previously existed at § 653.108(g)(1). The minor revisions to these requirements are intended only to clarify existing requirements. Specifically, paragraph (h)(1)(i) requires an SMA's ongoing review to include monitoring compliance with § 653.111 to highlight the importance of staffing significant MSFW one-stop centers appropriately to meet the unique needs of farmworkers. This change is necessary to help ensure significant MSFW States meet the minimum service level indicators, some of which measure qualitative outcomes like median earnings in unsubsidized employment and individuals placed in long-term non-agricultural jobs.

All States are required to meet equity indicators that address provision of ES services, including individuals referred to a job, receiving job development, and referred to supportive or career

development. To meet the equity performance standards, the percentage of services provided to MSFWs must be equal to or greater than the percentage of services offered to non-MSFWs. Significant MSFW States must also meet minimum levels of service, which must include, at a minimum, individuals placed in a job, individuals placed long-term (150 days or more) in a non-agricultural job, a review of significant MSFW ES offices, field checks conducted, outreach contacts per quarter, and processing of complaints.

As mentioned in the PY 2020 NMA Annual Report, data SWAs submit through Form ETA-5148 show that the majority of SWAs are not meeting several equity ratio indicators.¹⁰ The data shows that most SWAs are providing MSFWs with equitable access to basic career services but are not providing MSFWs equitable access to higher-level staff assisted services. This condition is particularly concerning because it may impact the ability of MSFWs to access training and employment opportunities necessary to attain and maintain gainful and secure employment. Additionally, between PY 2015 and PY 2019, equity levels trended down in four equity ratio indicators (referred to jobs, received staff assisted services, referred to support service, and job development contact).¹¹ Most notably, there was a 7-percentage-point decrease in States that referred MSFWs to jobs on a quantitatively proportionate basis in PY 2019 compared to PY 2015. The COVID-19 pandemic likely had some impact on the outcomes in PY 2019 but because equity trended down for the last 5 years preceding the pandemic, the pandemic cannot be the only cause.

SWA performance reports also show that significant MSFW States performed considerably below required levels for five of the seven Minimum Service Level Indicators in PY 2019 and PY 2020.¹² Between PY 2015 and PY 2019, performance decreased in six of the seven indicators. While minimum service level indicators improved in PY 2020, all Significant MSFW States still did not meet each indicator. The most significant decrease in PY 2019 was in reviews of Significant MSFW ES Offices. The Department is particularly concerned that the majority of

¹⁰ NMA Annual Report for PY 2020, available at: <https://www.dol.gov/agencies/eta/agriculture/monitor-advocate-system/performance>.

¹¹ NMA Annual Report for PY 2019, available at: <https://www.dol.gov/agencies/eta/agriculture/monitor-advocate-system/performance>.

¹² See performance data available at <https://www.dol.gov/agencies/eta/agriculture/monitor-advocate-system/performance>.

Significant MSFW States and all States have not been meeting the indicator for reviews of Significant MSFW Offices. If properly completed, SMA onsite reviews should identify the same downward trends that the Department identified and should result in corrective action plans to resolve findings of noncompliance. The low rates of Significant MSFW Office reviews completed, therefore, may directly relate to the low rates of compliance with equity ratio indicators and minimum service levels. In § 653.108(h)(1)(ii), the Department clarifies that SMAs are required to monitor whether the ES services provided to MSFWs are qualitatively equivalent and quantitatively proportionate to the services provided to non-MSFWs.

Additionally, as described at § 653.108(h)(3)(ii), the SMA must ensure that the onsite review format, developed by ETA, is used as a guideline for onsite reviews. The Department's Core Monitoring Guide provides the Department's onsite review format and includes guidance on how the SMA may monitor the quality of the program and services.¹³ The existing regulations explain that in addition to ensuring all significant MSFW one-stop centers are reviewed at least once per year by a SWA official, the SMA must ensure ES offices in which significant problems are revealed by required reports, management information, the Complaint System, or other means are reviewed as soon as possible. The existing regulations therefore prescribe that SMAs must review one-stop centers that are not designated as significant MSFW one-stop centers, as appropriate. Revised § 653.108(h)(3) is important to strengthen the SMA's monitoring requirements because it will clearly state that the SMA must participate in onsite reviews of one-stop centers on a regular basis (regardless of whether or not they are designated significant MSFW one-stop centers).

To specifically address the comment that opposed the proposed requirement that SMAs must monitor whether the ES services provided to MSFWs are qualitatively equivalent and quantitatively proportionate to the services provided to non-MSFWs and that State performance indicators already serve the purpose of monitoring ES services, the Department believes the SMA's monitoring is necessary in

addition to the monitoring that the Department conducts. The SMA's ongoing and onsite reviews are necessary to ensure compliance issues are resolved in a more timely manner than the quarterly basis on which States report Equity Ratio Indicators and Minimum Service Level Indicators to ETA. This more timely review helps ensure MSFWs receive equitable services when the MSFWs are still available to benefit from the services before they may become unavailable due to the transient nature of their work.

The Department agrees with the comment that requiring the SMA to review outreach logs on a regular basis could help identify potential errors or irregular reporting in daily outreach logs and monthly manager reports as well as prevent significant MSFW one-stop offices from receiving a finding during annual reviews.

The Department adopts the changes as proposed and will provide technical assistance and guidance to help SWAs comply with the requirements.

Section 653.108(i) SMA Participation in Federal Reviews

In redesignated paragraph (i), the Department proposed to add "as requested by the Regional or National Monitor Advocate," after "The SMA must participate in Federal reviews conducted pursuant to part 658, subpart G, of this chapter." The Department did not receive any comments on this change and adopts the change as proposed for the reasons set forth in the NPRM.

Section 653.108(j) State Monitor Advocate Role in Complaint System

Paragraph (j) of § 653.108 outlines the role of the SMA in the Complaint System. The SMA's role in the Complaint System was previously described in § 653.108(i). In paragraph (j), the Department proposed to require that the SMA perform solely a monitoring role in the Complaint System, consistent with changes made in part 658 of this final rule. The changes removed the ability of the State Administrator to assign the SMA responsibility as the Complaint Service Representative and the requirement that the SMA participate in the Complaint System as described under part 658. The Department made parallel revisions in § 658.410(h). Some commenters, including a farmworker advocacy organization and a State government agency, opposed the change. In part, these commenters stated that the SMA should still have a participant role in the Complaint System due to the SMA's expertise with MSFWs. Some State

government agencies supported the change, stating the change will help ensure that the SMA is objective and not biased. For full discussion of the prohibition on the SMA's acting as the Complaint System Representative and participation in the Complaint System, see the discussion for § 658.410(h). The Department adopts the change in paragraph (j) as proposed to more clearly delineate the SMA's role in monitoring the Complaint System and to avoid conflicts of interest in the SMA role by ensuring separation of duties between SMAs and other ES staff roles.

Sections 653.108(l), 653.108(m), and 653.108(n) State Monitor Advocate Liaison Requirements

Paragraphs (l), (m), and (n) of § 653.108 establish SMA liaison requirements. Proposed paragraph (l) sets forth requirements that previously existed at § 653.108(k) requiring the SMA to liaise with WIOA section 167 NFJP grantees and other organizations serving farmworkers, employers, and employer organizations in the State. In § 653.108(m), the Department proposed to require that the SMA establish an ongoing liaison with the State-level E.O. Officer. In § 653.108(n), the Department proposed a conforming revision to the cross-references so that the representatives with whom the SMA must meet reflect the organizations described in paragraph (l) and the State-level E.O. Officer referenced in paragraph (m).

Comment: A farmworker advocacy organization supported the proposed requirements that SMAs regularly engage with representatives of NFJP grantees, the State Equal Employment Officer, and other organizations serving farmworkers, employers, and employer organizations in the State. The commenter recommended that this engagement should include working with unions, worker organizations, legal service providers, and farmworker attorneys in the State because these are often some of the first groups to hear complaints from workers. A State government agency agreed with the new requirement that the SMA must establish an ongoing liaison with the State-level E.O. Officer, reasoning that it would present States with the opportunity to enhance collaboration between SMAs and E.O. Officers.

Response: The Department appreciates the comments in support of the proposed revisions. The Department will continue to address in guidance or technical assistance which organizations are important for SMA liaison for purposes of paragraph (l). The Department adopts the changes as

¹³ United States Department of Labor, Employment and Training Administration Core Monitoring Guide (Aug. 2018), available at: [https://www.dol.gov/sites/dolgov/files/ETA/grants/pdfs/2%20CMG%20CoreMonitoringGuide_FINAL_20180816\(R\).pdf](https://www.dol.gov/sites/dolgov/files/ETA/grants/pdfs/2%20CMG%20CoreMonitoringGuide_FINAL_20180816(R).pdf).

proposed, for the reasons set forth in the NPRM.

Section 653.108(o) State Monitor Advocate Field Visits

Paragraph (o) of § 653.108 describes requirements for field visits conducted by the SMA. These requirements were previously described in § 653.108(m). The Department proposed that during field visits, the SMA must discuss the SWA's provision of ES services and obtain input on the adequacy of those services from MSFWs, crew leaders, and employers, rather than providing direct employment services and access to other employment-related programs. The Department adopts the proposed change.

Comment: A State government agency requested the Department clarify that SMAs do not conduct field visits, which it said have a specific purpose in regulation, but rather monitor the adequacy of information and services provided to MSFWs by ES staff during field visits. The commenter argued that this clarity is important because treating SMA activity as a field visit is imprecise and detracts from its monitoring purpose.

Another State government agency opposed the proposal that during field visits SMA must discuss the SWA's provision of ES services and obtain input on the adequacy of those services from MSFWs, crew leaders, and employers, asserting that this would not be a useful way to gauge how well the State is providing ES services to MSFWs because few MSFWs reach out for services and even fewer receive them. The commenter suggested that this purpose would be better served by asking MSFWs, crew leaders, and employers if they learned about ES services, worker rights, employment rights, and employer/contractor responsibilities and if they were able to reach out and felt comfortable reaching out to outreach workers or visiting an ES office to seek assistance.

Response: Consistent with the definition of field visits, SMAs do conduct field visits, but they differ from field visits conducted by outreach staff. During SMA field visits, SMAs do not conduct the outreach activities outlined in § 653.107. Instead, as this paragraph requires and consistent with the SMA's monitoring role, SMAs must discuss the SWA's provision of ES services and employment-related activities with MSFWs, crew leaders, and employers. SMAs are still expected to discuss farmworker protection and rights when conducting field visits.

The Department agrees that it is relevant and permissible for SMAs to

ask MSFWs, crew leaders, and employers if they learned about ES services, worker rights, employment rights, and employer/contractor responsibilities and if they were able to reach out and felt comfortable reaching out to outreach workers or visiting an ES office to seek assistance during the SMA's field visits. Asking these questions is one way the SMA may discuss the SWA's provision of ES services and obtain input on the adequacy of those services from MSFWs, crew leaders, and employers. The commenter's statement that few MSFWs reach out for services and even fewer receive them demonstrates that SWAs may not be conducting adequate outreach or making services available to MSFWs, taking into consideration their particular needs. For this reason, it is particularly important that SMAs conduct field visits to identify adequacy of services and to receive input on how to improve services, which informs the SMA's monitoring, reporting, and technical assistance. The Department adopts these changes as proposed, to clarify the role of the SMA and the purpose of field visits.

Section 653.108(u) State Monitor Advocate Annual Summary

Paragraph (u) of § 653.108 outlines requirements for the SMA to prepare an Annual Summary describing how the State provided ES services to MSFWs within the State based on statistical data, reviews, and other activities. These requirements were previously described in § 653.108(s). Subordinate paragraphs (u)(1) through (11) identify the various required components of the Annual Summary. In § 653.108(u)(5), the Department proposed to specify that when the SMA summarizes the outreach efforts undertaken by all significant and non-significant MSFW ES offices in the State, the SMA must include the results of those efforts and analyze whether the outreach levels and results were adequate. Aside from a technical edit, the Department adopts the proposed change for the reasons discussed below. The Department did not receive substantive comments on other revisions proposed in paragraph (u) and adopts those changes for the reasons set forth in the NPRM.

Comment: A Colorado State government agency and other commenters expressed concern about the proposed rule's inclusion of non-significant MSFW offices in the requirement that an SMA submit an Annual Summary report to the Department describing its provision of services to MSFWs. Explaining that Colorado's few significant MSFW offices

are so designated based on the presence of hand labor crops in their geographic area rather than having a high proportion of MSFWs served, the commenters asserted that the proposed requirement implies the need to divert ES staff from assisting job seekers, UI claimants, and businesses to focusing on MSFW outreach in offices with very small numbers of MSFWs.

A State government agency disagreed with the proposed requirement that when the SMA summarizes the outreach efforts undertaken by all significant and non-significant MSFW ES offices in the State, the SMA must include the results of those efforts and analyze whether the outreach levels and results were adequate. The commenter's objections were that outreach activities already have required reporting and—unless the Department clearly defines in the regulations what States must do to meet adequate outreach levels and results outside of the performance measure—SMAs would have to make their own subjective determinations about what is adequate.

Response: Regarding the concerns about the proposed rule's inclusion of non-significant MSFW offices in the SMA's Annual Summary report requirement, the Department acknowledges that there may be less MSFW activity in service areas for ES offices that are not designated as significant MSFW one-stop centers. The Department notes that the SMA was already required to include information about outreach levels in both significant and non-significant MSFW ES offices. It is not the Department's intent to encourage nor does the Department require that non-significant MSFW offices unnecessarily divert local office resources to MSFW outreach where there is no need to do so. However, the SMA is required to review the SWA's overall provision of services to MSFWs throughout the entire State. Doing so allows the SMA to evaluate if the SWA is in compliance with regulatory requirements. Further, existing regulations explain that in addition to ensuring that all significant MSFW one-stop centers are reviewed at least once per year by a SWA official, the SMA must ensure ES offices in which significant problems are revealed by required reports, management information, the Complaint System, or other means are reviewed as soon as possible. Therefore, it is relevant for the SMA to include information about all offices in their Annual Summary.

Additionally, regarding the concern that the SMA must include in their Annual Summary the results of outreach efforts in the State and analyze whether

the outreach levels and results were adequate, the Department believes this is relevant and necessary. As explained in the NPRM, the Department believes this analysis will help the Department understand whether the SMA believes that the SWA has allocated sufficient outreach staff and resources to complete the outreach duties identified at § 653.107, including whether outreach staff are able to reach the majority of MSFWs in the State. The SMA's analysis and opinion on outreach throughout the entire State is central to the SMA's monitoring and reporting functions. Specifically, the Annual Summary described in § 653.108(u) must be prepared by the SMA and is intended to include the SMA's independent assessment of the quantity and quality of ES services provided to MSFWs. The SMA's assessments must be based on quantitative standards, including minimum service level indicators and equity ratio indicators, as well as information the SMA gathers through their monitoring, field visits, and liaison with employers, MSFWs, and farmworker organizations, which inform the SMA's opinions regarding the quality of services.

The SMA's analysis of the SWA's outreach is distinct from the required reporting of the minimum service level indicators that significant MSFW States must meet. The minimum service level indicator regarding number of outreach contacts per quarter measures the quantity of MSFW outreach contacts significant MSFW States make per quarter. This indicator is relevant to significant MSFW States to ensure significant MSFW States conduct minimum levels of outreach year-round because those States must have full-time outreach staff year-round. This indicator does not apply to the remainder of the States because States that are not designated as significant MSFW States may have part-time outreach staff in non-peak season. In all States, outreach staff must contact the majority of MSFWs in the State on an annual basis.

Under this final rule, SWAs will continue to provide an assessment of need that is particular to their State's service area(s) in the AOP, including information about when peak season in their State occurs and an estimate of the number of MSFWs in the State during peak season. The final rule will require all SWAs to use this data to determine the number of outreach staff that are adequate to conduct MSFW outreach in each area of the State and to contact a majority of the MSFWs in the State annually.

MSFWs constitute a critical population of workers with unique

needs and challenges who are vulnerable to exploitation, abuse, and mistreatment. Therefore, the Department wants all States to allocate the necessary resources to reach the majority of MSFWs in the State. The SMA's analysis of the SWA's outreach levels and results in the State will better enable the Department to analyze whether additional State (or Federal) resources may be necessary.

After further review, the Department identified a need to update § 653.108(u)(5) to use the term *significant MSFW one-stop center*, instead of significant MSFW ES office. This change is necessary to align the requirement with the defined term in § 651.10. Aside from this technical edit, the Department adopts the changes to § 653.108(u) as proposed and will provide technical assistance and guidance to help SWAs comply with the requirements.

Section 653.109 Data Collection and Performance Accountability Measures

Section 653.109 sets forth MSFW-specific data collection requirements and performance accountability measures. The Department proposed to amend this section to make two notable changes. First, the Department proposed to add a new data collection requirement at § 653.109(b)(10), which would require SWAs to collect the number of reportable individuals and participants who are MSFWs. This would align the data collection requirements in this section with the new requirement in § 653.103(a) for ES offices to determine whether reportable individuals are MSFWs, as defined at § 651.10 of this chapter. The Department received one comment from a State government agency on this proposal, which is summarized and addressed in the discussion of § 653.103 above. For the reasons explained there, the Department has determined the benefits of collecting this information outweigh the costs, and it adopts the proposed data collection requirement in § 653.109(b)(10) as proposed.

Second, the Department proposed to amend § 653.109(h), which sets forth the minimum levels of service that significant MSFW States must meet, by replacing the requirement for a significant MSFW State to measure the number of outreach contacts per "week" with a requirement that such States measure the number of outreach contacts per "quarter." The Department proposed this change to align with the other quarterly data submissions that SWAs provide to the Department.

A State government agency submitted a comment opposing the Department's

proposal to change the frequency with which outreach contacts are measured. As discussed below, the Department considered these concerns and determined that they do not necessitate any changes to the proposed regulatory text. Accordingly, the Department adopts this revision as proposed.

Comment: Commenters from a State government agency opposed changing the requirement for significant MSFW States to measure the number of outreach contacts from per week to per quarter, reasoning that the change could lead outreach staff to limit outreach contacts to the end of the quarter instead of making outreach contacts throughout the quarter. As an alternative, the commenter recommended the requirement could be changed to once per month to allow some flexibility for outreach staff to meet the requirement even during non-peak seasons.

Response: The Department acknowledges the State agency's concern that the reduction in reporting frequency could lead outreach staff to limit outreach contacts to short periods at the end of the quarter, instead of conducting outreach consistently throughout the quarter. However, the Department does not anticipate that such an outcome is likely to occur, because this final rule retains the requirement for outreach staff to spend a majority of their time in the field, and it will additionally require a State to employ an adequate number of outreach staff to contact a majority of MSFWs in the State annually. It would therefore be difficult for a significant MSFW State to effectively comply with other regulatory requirements governing outreach if the outreach staff in the State limit the outreach they conduct to only a short period at the end of the quarter. Moreover, this change will impact only the frequency with which significant MSFW States must report outreach contacts to the Department. If a SWA or ES office is concerned that outreach staff are not making outreach contacts consistently throughout a quarter, then that SWA or ES office may independently require its outreach staff to report the number of outreach contacts they make on a more frequent basis or to comply with other interim goals that would allow it to monitor the performance of its outreach staff throughout the quarter. Ineffective or noncompliant outreach may be addressed through monitoring and corrective actions by the SWA, ES offices, and SMA.

The Department notes that there will not be a change in the frequency of reporting outreach contacts to the

Department. SWAs report performance data to ETA on a quarterly basis through Form ETA-5148. The revision will align the measure with the existing quarterly reporting timelines for SWA grantees. Additionally, as mentioned in the NPRM, SMAs have provided feedback to the Department that measuring contacts per week is difficult and not an effective measurement of outreach, and they believe it would be a better measure to report contacts per quarter.

After further review, the Department identified a need to update § 653.109(h) to use the term *significant MSFW one-stop centers*, instead of significant MSFW ES office. This change is necessary to align the requirement with the defined term in § 651.10. The Department adopts the changes to § 653.109 as proposed, with the additional reference to *significant MSFW one-stop centers*, for the reasons described above.

Section 653.110 Disclosure of Data

The Department proposed to revise § 653.110(b) by removing the word “the” before “ETA.” No comments were received on this proposed revision, and the Department finalizes this technical edit as proposed.

Section 653.111 State Workforce Agency Staffing Requirements for Significant MSFW One-Stop Centers

Section 653.111 sets forth staffing requirements for significant MSFW one-stop centers. The Department proposed to revise paragraph (a)—which currently requires SWAs to implement and maintain a program for staffing significant MSFW one-stop centers by providing ES staff in a manner facilitating the delivery of employment services tailored to the special needs of MSFWs, including by seeking ES staff that meet the criteria in § 653.107(a)(3)—and divide it into two sentences. The first sentence would provide that a SWA *must* staff significant MSFW one-stop centers in a manner that facilitates the delivery of ES services tailored to the unique needs of MSFWs. The second sentence would clarify that such staffing includes recruiting qualified candidates who meet the criteria for outreach worker positions in § 653.107(a)(3).

The Department received a comment concerning the proposed revisions to this section. Revisions to the merit-staffing requirement adopted in this final rule necessitate revisions to the hiring requirements in this section, as described below.

Comment: A State government agency expressed its opposition to the proposed revisions to this section and the

accompanying revision to § 653.107(a)(3), noting it did not support any increase in requirements for hiring ES staff.

Response: The Department anticipates that the revisions to this section, much like the revisions proposed and adopted in § 653.107(a)(3), will help SWAs recruit staff who are better equipped to assist MSFWs in significant MSFW one-stop centers. The Department is revising the text proposed in this section to conform with changes made to the merit-staffing requirement in § 652.215 of this chapter. Under this final rule, a SWA must ensure hiring officials seek and put a strong emphasis on hiring ES staff for significant one-stop centers who meet the enumerated criteria. As explained above in the section-by-section discussion for § 653.107(a), a SWA will retain some discretion in developing their State’s plan to meet this requirement, and if hiring officials are unable to identify qualified candidates who meet the required characteristics, then the SWA may proceed to hire or assign the most qualified candidate(s). It is particularly important for ES staff in significant MSFW one-stop centers to possess these characteristics, because such staff are more likely to have the skills and experience necessary to facilitate the delivery of ES services tailored to the special needs of MSFWs, and significant MSFW one-stop centers, by definition, serve greater numbers of MSFWs than other one-stop centers. The need for SWAs to ensure hiring officials recruit ES staff who are qualified to serve this unique population is therefore greater in significant MSFW one-stop centers than it is in one-stop centers who serve fewer MSFWs. The Department recognizes that compliance with the recruitment requirements adopted in this rule may require some SWAs to change their current practices. In adopting these requirements, the Department has taken this into consideration and determined that these requirements strike the right balance, because they increase the likelihood that SWAs will hire staff with appropriate skills to adequately serve MSFWs, while providing flexibility if SWAs are not able to find qualified candidates who meet the enumerated criteria.

2. Subpart F—Agricultural Recruitment System for U.S. Workers (ARS)

Subpart F sets forth the regulations governing the ARS, including the requirements that employers must follow when submitting clearance orders for temporary or seasonal farmwork, and the requirements that SWAs must follow in processing the

orders. In subpart F, the Department proposed new requirements for processing clearance orders, initiating discontinuation of services, and conducting field checks. Additionally, the Department proposed several technical, clarifying, and minor edits throughout § 653.501. As described more fully below, with the exception of proposed § 653.501(b) and (c), and the addition of a new severability provision at § 653.504, the Department finalizes subpart F as proposed.

Section 653.501 Requirements for Processing Clearance Orders

Section 653.501 describes the requirements that SWAs and ES staff must follow when processing clearance orders for the ARS. In this section, the Department proposed a new requirement that SWAs consult the Department’s Office of Foreign Labor Certification (OFLC) and WHD debarment lists before placing job orders into clearance, and initiate discontinuation of ES services if an employer is so debarred. The Department also proposed several technical, clarifying, and conforming amendments. The Department’s responses to public comments received on § 653.501 are set forth below. If a proposed amendment is not addressed in the discussion below, the public comments did not address that specific amendment and no changes have been made to the proposed regulatory text. The Department declines to adopt § 653.501(b) and (c), and adopts the remaining provisions in § 653.501 as proposed.

Regarding proposed § 653.501(b) and (c), the Department proposed to add a fourth paragraph to § 653.501(b), at § 653.501(b)(4), which would require ES staff to consult the Department’s OFLC and WHD debarment lists before placing a job order into intrastate or interstate clearance and initiate discontinuation of ES services if the employer is debarred or disqualified from participating in one or all of the Department’s foreign labor certification programs. Additionally, the Department proposed minor edits to § 653.501(c)(3) to clarify that paragraph (c) sets forth a list of the assurances that an employer must make before the SWA may place a job order into intrastate or interstate clearance.

The Department appreciates the views and recommendations of commenters that supported and opposed the proposed changes to § 653.501(b). The Department notes that on September 15, 2023, the Department published the “Improving Protections for Workers in Temporary Agricultural Employment in the United States” NPRM (the

“Farmworker NPRM”) in the **Federal Register**. (88 FR 63750). In the Farmworker NPRM, the Department proposed changes to paragraphs 653.501(b) and (c), which intersect with changes that were proposed in the NPRM for this rule (87 FR 23700). As discussed in the Farmworker NPRM, where the proposed changes in the Farmworker NPRM intersect or conflict with the proposed changes in this rule, the Department will utilize the Farmworker NPRM as the operative rulemaking proceeding to provide notice and opportunity to comment. The Department sees this as the most transparent approach to address this overlap, and the best way to minimize confusion within the regulated community while ensuring the public has a full opportunity to receive notice and provide comments on the proposed changes. Accordingly, as any changes to § 653.501(b) and (c) will be made through the Farmworker NPRM, the Department declines to finalize § 653.501(b) and (c) as proposed.

Comment: The Department notes that a State government agency recommended that, in § 653.501(b)(2), the Department remove the requirement to suppress employer information in clearance orders. The commenter stated that doing so would provide the same transparency to interested workers as that presently afforded when viewing the same clearance orders on the Department’s *SeasonalJobs.gov* site and would remove a barrier for MSFWs that is not faced by non-agricultural job seekers viewing job order information. The commenter said this change would not only align its agricultural recruitment process with that of DOL but also benefit domestic agricultural workers through ready, unfettered access to the same H-2A employer information in the State Agricultural Reporting System as is available through *SeasonalJobs.gov*.

Response: As the Department did not propose changes to § 653.501(b)(2), the State government agency’s recommendation is outside the scope of this rulemaking and the Department declines to adopt it.

Section 653.503 Field Checks

Section 653.503 describes the requirements that SWAs and ES staff must follow when conducting field checks. In this section, the Department proposed to revise § 653.503(a) to add “transportation” to the list of conditions that SWAs must assess and document when performing a field check. The Department also proposed to remove the word “random” from the existing requirement in § 653.503(a) that SWAs

“must conduct random, unannounced field checks” on clearance orders, to clarify that the selection of the clearance orders on which the SWA will conduct field checks does not need to be random, and may respond to known or suspected compliance issues. The Department adopts § 653.503 as proposed.

Comment: Regarding transportation, a State government agency opposed the proposal to add transportation to the list of conditions that SWAs must assess and document when performing a field check. The agency stated that ES staff are not experts on vehicle-related technical matters and should not be expected to have this level of responsibility. The agency asked the Department to clarify whether ES staff would be expected to check on the type of transportation provided by the employer or to assess the safety and maintenance of the transportation used. If the latter, the agency recommended that WHD provide appropriate training to assess transportation during field checks.

Response: The Department appreciates the concern and recommendation raised. In the NPRM, the Department proposed to add “transportation” to the list of conditions that SWAs must assess and document when performing a field check to “increase health and safety of MSFWs by adding an additional safeguard against dangerous transportation tied to their employment.” The Department clarifies that by adding the term “transportation,” it means the specific transportation terms described at § 653.501. The Department is not requiring ES staff to assess the safety or maintenance of transportation used. However, as with any employment-related law, if while conducting a field check, ES staff observe or receive information, or otherwise have reason to believe that an employer is violating an employment-related law—such as the transportation safety standards enforced by WHD—ES staff must document and process this information in accordance with § 653.503(d).

Comment: Regarding the proposal to remove the word “random” from the existing requirement that SWAs “must conduct random, unannounced field checks,” many commenters, including State government agencies, advocacy organizations, think tanks, and several labor unions supported the revision, uniformly stating that it ensures that MSFW working and housing conditions meet basic standards. A State government agency supported the proposed change but requested that the Department clarify in the rule or

guidance either the circumstances that warrant targeted field checks or the responsibility of States to define the circumstances in policy.

Response: The Department appreciates the commenters’ support for this proposed change. As noted in the NPRM, the Department believes that removal of the word “random” will improve MSFW protections by allowing SWAs and ES staff to conduct field checks where there are known or suspected compliance issues. Regarding the request for clarification on the circumstances that warrant targeted field checks, the Department clarifies that the circumstances must relate to the terms and conditions on the clearance order. Thus, where it is known or suspected that wages, hours, and working and housing conditions are not being provided as specified in the clearance order, a targeted field check may be warranted. The Department will issue guidance on this proposed change.

Section 653.504 Severability

Given the numerous and varied changes the Department proposed and is adopting, the Department intends this rule to be severable and is including a severability provision in parts 652, 653, and 658 in this final rule. That intent was reflected in the structure of and descriptions in the proposed rule. The inclusion of severability provisions in this final rule confirms the Department’s belief that the severance of any affected provision will not impair the function of the regulation as a whole and that the Department would have proposed and implemented the remaining regulatory provisions even without any others. To the extent that a court holds any provision, or any portion of any provision, of part 653 invalid, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision will be severable from this part and will not affect the remainder thereof.

E. Part 658—Administrative Provisions Governing the Wagner-Peyser Act Employment Service

Part 658 sets forth systems and procedures for complaints, monitoring for compliance assessment, enforcement, and sanctions for violations of the ES regulations and employment-related laws, including discontinuation of services to employers and decertification of SWAs. The Department proposed several revisions to part 658, including removing the requirement that SMAs serve as

Complaint System Representatives or have any direct role in the Complaint System process, and clarifying the procedures for processing complaints alleging discrimination or reprisal for protected activity. Additionally, the Department proposed revisions throughout part 658 to conform with existing and proposed language in parts 651 and 653, make non-substantive technical edits, remove redundancies, and clarify terms and requirements. The Department's responses to public comments received on part 658 are set forth below. The Department did not receive comments on §§ 658.419, 658.420, and 658.422 in subparts E, G, and H. The Department is finalizing subparts E, G, and H as proposed.

Of note, the Department proposed several revisions to the discontinuation of services provisions in subpart F (§§ 658.500 through 658.504). The Department proposed to amend the bases for discontinuation to include an employer's debarment or disqualification from participating in one of the Department's foreign labor certification programs; to amend the notification procedures to require, where applicable, that SWAs specify the time-period of an employer's debarment or disqualification; and to correct cross-referencing errors in the regulatory text. The Department received comments supporting the proposed changes, but on September 15, 2023, the Department issued an NPRM regarding improved protections for workers in temporary agricultural employment (the "Farmworker NPRM"). 88 FR 63750. In the Farmworker NPRM, the Department proposed further changes to the discontinuation of services provisions, which intersect and, in some instances, conflict with changes that were proposed in the NPRM for this rule (87 FR 23700). As discussed in the Farmworker NPRM, where the proposed changes in the Farmworker NPRM intersect or conflict with the proposed changes in this rule, the Department will utilize the Farmworker NPRM as the operative rulemaking proceeding to provide notice and opportunity to comment. The Department sees this as the most transparent approach to address this overlap, and the best way to minimize confusion within the regulated community while ensuring the public has a full opportunity to receive notice and provide comments on the proposed changes. Accordingly, as any changes to the discontinuation of services provisions will be made through the Farmworker NPRM, the Department declines to finalize subpart F as proposed.

1. Subpart E—Employment Service and Employment-Related Law Complaint System (Complaint System)

Subpart E covers the purpose and scope of the Complaint System, and the requirements for processing complaints at the local, State, and Federal levels. The Department's responses to public comments received on subpart E are set forth below. If a proposed amendment to subpart E is not addressed in the discussion below, the public comments did not address that specific amendment and no changes have been made to the proposed regulatory text. With the exception of a new severability clause, the Department adopts subpart E as proposed.

Comment: Several one-stop center representatives stated they support utilization of a complaint system but questioned who will take incoming complaints when ES staff have been reassigned to UI claims.

A farmworker advocacy organization discussed the need for major procedural reforms to the Complaint System, beyond the modifications set forth in the proposed rule, if it is to be an effective tool for farmworkers to vindicate their rights. The organization asserted that the proposed subpart E ignores fundamental flaws at the heart of the Complaint System. Regarding complaints filed against employers, the organization stated that the Complaint System is often just a slower, more cumbersome means to reach another agency, like WHD or EEOC, and that farmworkers generally are better served by filing their complaints directly with those agencies. Regarding complaints filed against SWAs, the organization stated that the ES complaint process is a "byzantine maze" that can take years to navigate and may involve multiple levels of adjudication. Citing § 658.421(g) and examples of recent cases, the organization stated that the current process eventually reaches the Office of Administrative Law Judges (OALJ), but only after typically at least 2 years of litigation in which a complainant often does not understand the process or their rights, before State-level officials without expertise in the ES system or farmworker issues, and with little chance of systemic relief. The organization recommended that the Department allow workers direct appeal from the SWA to the OALJ, which it said would be analogous to how employers appeal foreign labor certification decisions at § 655.171. The organization stated that the Department should treat employers and workers the same, and that just as growers are allowed to appeal decisions under the

labor certification regulations directly from the OFLC to the OALJ, the Department should allow workers to appeal ES complaints directly from the SWA to the OALJ.

Response: The Department clarifies that while it proposed to require States to use merit staff, in part so that States may leverage ES staff for UI, SWAs must still ensure there are adequate Complaint System Representatives to process complaints at all times. The Department further clarifies that complainants are not required to bring employment-related law complaints through the Complaint System; they may file employment-related law complaints directly with the appropriate enforcement agencies. Nevertheless, SWAs and the Department have an interest in tracking employment-related law complaints as SWAs are required to accept, informally resolve (where appropriate), and refer incoming employment-related law complaints to appropriate enforcement agencies. Additionally, SWAs and the Department have an interest in quickly and efficiently resolving ES-related complaints. The proposed revisions are designed to strengthen training, monitoring, and internal controls so that the Complaint System can more effectively and quickly resolve ES-related complaints at the local level, and quickly resolve violations to the benefit of complainants.

The Department agrees with ensuring an efficient Complaint System but disagrees with the recommendation to allow workers to appeal ES complaints directly from SWAs to the OALJ. The Department notes that the OALJ only resolves Federal administrative disputes before Departmental agencies (e.g., ETA, OFLC), and does not resolve disputes before State agencies (e.g., SWAs). Consequently, the Complaint System only allows for appeal to the OALJ following a formal determination from an RA and does not contemplate direct appeal of a SWA decision to the OALJ. The Department, therefore, declines to adopt this recommendation.

Section 658.410 Establishment of Local and State Complaint Systems

Section 658.410 describes procedures that SWAs and ES Offices must follow in establishing and maintaining local and State complaint systems. In this section, the Department proposed to remove the requirement in § 658.410(h) that the SMA be the Complaint System Representative designated to handle MSFW complaints and replace it with a provision prohibiting the State Administrator from assigning the SMA responsibility for doing so. Relatedly,

the Department proposed to revise § 658.410(m) to replace “SMA” with “Complaint System Representative,” thereby removing the SMA from responsibility for conducting monthly follow-up on MSFW complaints.

The Department also proposed several technical, clarifying, and conforming amendments. For example, in § 658.410(g), the Department proposed to remove the word “local,” which comes before “ES office” in the existing regulatory text, because “ES Office” is a defined term and removal of the word “local” clarifies that the regulatory text is not referring to a different type of ES Office. For that change, the NPRM preamble clearly explained that the Department was proposing to remove “local,” but the proposed regulatory text inadvertently retained the word. The Department adopts the text of § 658.410(g) as described in the NPRM preamble. Aside from that change, the Department adopts the regulatory text of § 658.410 as proposed.

Comment: Regarding the proposed amendments to § 658.410(h), to prohibit the SMA from being assigned to be the Complaint System Representative, a State government agency supported the changes, stating that they would allow the SMA to maintain a neutral stance and create balance within the ES program and could enhance the Complaint System and improve program monitoring and compliance. Similarly, an anonymous commenter described the removal of the SMA from the Complaint Specialist role as a “smart call” that leaves less opportunities for “unwanted liabilities.” In contrast, another State government agency said that removing the SMA from involvement in direct complaint system activities removes the staff member with the greatest expertise in understanding the complexities of the MSFW population and available resources from the complaint-taking process. Regarding the proposed amendment to § 658.410(m), the same agency stated that requiring the Complaint System Representative, and not the SMA, to follow up monthly on the processing of MSFW complaints would decentralize the ES Complaint System follow-up process; require additional time, effort, and coordination with enforcement agencies; and could entail challenges in enforcement agencies responding to ES staff requests.

Regarding the proposed amendment to § 658.410(g), two one-stop center employees opposed the proposed revision but did not state any specific concern with the proposed removal of the word “local” from the regulatory text. The employees stated generally that their local Complaint System

representatives receive annual training from the SMA regarding the Complaint System. A farmworker advocacy organization supported the proposed amendments to § 658.410, in part. The organization stated that while it generally supports having the SMA oversee the Complaint System (rather than serve as the initial complaint recipient), ES complaints (versus complaints involving employment- or discrimination-related laws) still should go to the SMA first. The organization stated that ES complaints allege the type of “within-agency” problems that SMAs are charged with correcting, and are the only avenue for worker communications with SMAs that guarantee a written response. The organization further stated that Complaint System Representatives may lack the authority, information access, or confidence in their position to sufficiently address complaints alleging legal violations by their supervisors. The organization acknowledged that leaving SMAs in charge of responses to ES complaints limits their ability to meaningfully oversee the Complaint System, but stated that the benefits of doing so overshadow this concern; and that such concern is mitigated by the fact that ES complaints are relatively rare.

Response: Regarding the concern that removing SMAs from direct involvement in the Complaint System removes the staff member with the greatest MSFW expertise and resources from the complaint-taking process, the Department notes that the existing regulations require that all Complaint System representatives—SMAs or otherwise—be trained on handling MSFW complaints. Accordingly, the Department believes that the existing regulations provide for sufficient expertise among non-SMA representatives to process MSFW complaints. Additionally, the Department notes that a SMA’s expertise is not lost by removing the SMA from direct involvement in the Complaint System. Monitoring activities allow for SMAs to share and apply their expertise throughout the entire Complaint System, rather than on a complaint-by-complaint basis. One such example is mentioned in the comments: two one-stop center employees stated that their Complaint Service Representatives receive annual training by the SMA on the Complaint System. Removing the SMA from direct involvement in the System will, the Department believes, allow SMAs to focus their expertise on monitoring activities that impact the Complaint

System and MSFWs much more broadly.

Regarding the concern that removing the SMA from conducting monthly follow-up on MSFW complaints would decentralize the Complaint System follow-up process, the Department notes that existing regulations already require SWAs to have trained Complaint System Representatives at each ES office and that, in practice, many SWAs already have trained, non-SMA Complaint System Representatives. Regarding the concern that removing the SMA would require additional time, effort, coordination, and communication challenges with enforcement agencies, the Department respectfully disagrees. The Department believes that the Complaint System Representatives are best positioned to follow up on the complaints they process—both with the enforcement agencies to which they have made referrals and with the complainant with whom they have already communicated directly. Additionally, the Department believes there are distinct benefits in having staff other than the SMA trained in processing MSFW-related complaints, most notably the increased staff capacity to process MSFW-related complaints quickly and efficiently.

Regarding the recommendation that incoming ES complaints should still go to the SMA first, the Department notes that the SMA’s primary role in the Complaint System is to monitor and report on its compliance, advocate for improvements to the system, and liaise among partners to support effective functioning of the system. The proposed amendments are meant to ensure separation of duties between SMAs and other ES staff roles. The Department believes that it cannot ensure full separation of duties by requiring SMAs to maintain direct responsibility for handling ES complaints. The Department understands the concern that non-SMA Complaint System Representatives may lack confidence to sufficiently address complaints alleging “within-agency” violations of the ES regulations, such as violations by their supervisors, but notes that such issues may be addressed through training, including training by the SMA. SMAs will remain available to advise Complaint System Representatives and to report any patterns of unaddressed complaints directly to SWA leadership. Therefore, the Department believes that the benefits of ensuring full separation of duties for SMAs outweigh the concerns raised. The Department declines to adopt this recommendation.

Section 658.411 Action on Complaints

Section 658.411 describes the actions that SWAs and ES Offices must take in receiving and processing complaints filed in the Complaint System. The Department proposed several changes to this section, including broadening the scope of contact methods complainants may provide when filing complaints to include “any other helpful means”; removing language requiring SMAs to taking direct actions—such as making determinations and referrals—on complaints; broadening § 658.411(c) to apply to all complaints alleging discrimination and reprisal; and requiring SWAs and ES offices to refer discrimination and reprisal complaints to their State-level E.O. Officer. The Department also proposed several technical, clarifying, and conforming amendments. For the reasons discussed in the NPRM and below, the Department adopts § 658.411 as proposed.

Comment: A State government agency commended the Department for broadening the scope of contact methods complainants may provide when filing complaints to include social media and other applications. Another State government agency agreed with removing the SMA from taking direct actions on complaints, stating that SMAs need not play a prominent role in the Complaint System given the many entities already involved in capturing and responding to complaints, and noting that SMAs provide great value—as part of their monitoring duties—in reviewing complaints to ensure they are logged and addressed appropriately. A farmworker advocacy organization recommended that the Department further amend § 658.411 to require that, upon receipt of complaints, SWAs and ES offices immediately advise complainants of their option to work with an attorney to resolve their claims and provide complainants contact information for legal services.

The Department received several comments specific to § 658.411(c). A State government agency stated that it agreed with the intent to simplify the process for handling discrimination- and reprisal-related complaints under § 658.411(c) but that the revisions, as proposed, do not clarify the complaint process. A farmworker advocacy organization supported the increased role of State-level E.O. Officers in addressing complaints related to discrimination and retaliation, but expressed concern that State-level E.O. Officers may lack knowledge of certain farmworker-related laws, such as the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) and the

H-2A regulations. The organization recommended that the regulations require State-level E.O. Officers to receive training in all of these relevant areas.

Three commenters opposed the proposed changes to § 658.411(c). Two one-stop center employees stated that the section needs more clarification on the actions for complaints received from different sectors, such as MSFW complaints, Wagner-Peyser funded service complaints, and universal public complaints regarding work situations that are not serviced by the public workforce system. Additionally, a State government agency stated that referring all discrimination- and reprisal-related complaints to the State-level E.O. Officer adds another level of delay to the complaint referral process, which may bottleneck the complaint process and slow down an investigation and is contrary to the Department’s efforts to eliminate delay elsewhere in the complaint process (*i.e.*, by removing the SMA from the process). Rather than refer the complaints only to State-level E.O. Officers, the agency recommended that ES staff include the State-level E.O. Officer when referring complaints to the EEOC and other relevant agencies. Additionally, the agency recommended removing the language that requires ES staff to know the types of nondiscrimination law complaints. The agency also described confusion within the one-stop system regarding tracking and handling MSFW, Title I, and Title III one-stop operation complaints, and requested that the Department provide technical assistance on this topic.

Response: Regarding the recommendation that SWAs and ES offices advise complainants of their option to work with an attorney to resolve to resolve their claims, the Department notes that existing regulations at § 658.400 already provide that a complainant may designate an individual to act as their representative before the Complaint System, and ETA Form 8429 (“Complaint/Apparent Violation Form”) notifies complainants of this option. Additionally, for complaints alleging violations of employment-related laws, existing regulations at § 658.411 already provide that complaint representatives must refer non-MSFW complaints involving employment-related laws, as well as MSFW complaints involving employment-related laws that are not informally resolved, to appropriate organizations, including legal aid or other consumer advocate organizations, as appropriate, for assistance. Regarding the related recommendation that SWAs and ES offices provide complainants

contact information for legal services, the Department declines to adopt this recommendation as a requirement. The Department notes that SWAs must already provide information on organizations servicing MSFWs as part of their outreach responsibilities at § 653.107. Such organizations may include, for example, grantees of the Legal Services Corporation, a non-profit corporation established by Congress that provides grants to local organizations to provide legal services for agricultural workers and others who would be otherwise unable to afford adequate legal counsel. As to the Complaint System specifically, the Department does not wish to create the appearance of SWAs endorsing any legal services organization over others by requiring that SWAs affirmatively provide contact information for certain legal services organizations in the complaint process, but it does not prohibit SWAs from providing such contact information at their discretion.

The Department believes that the existing regulations sufficiently notify complainants of their options regarding legal representation. The Department is concerned that adding further requirements for SWAs could mislead complainants to think that legal representation is required to file a complaint with the SWA and would not comport with the SWA’s role as neutral processor in the Complaint System. Accordingly, the Department declines to adopt these recommendations.

Regarding the concern that State-level E.O. Officers may lack the training needed to recognize retaliation under farmworker-related laws, such as MSPA and the H-2A regulations, and the related recommendation that State-level E.O. Officers receive training in this regard, the Department notes that the Wagner-Peyser regulations do not govern requirements for State-level E.O. Officers; these requirements, including the requirement that E.O. Officers and their staff be afforded the opportunity to receive necessary and appropriate training, are found at 29 CFR 38.28 through 38.33. As the operative regulations for the recommended training are outside the scope of this rulemaking, the Department declines to adopt this recommendation.

Regarding the concern that referring all discrimination- and reprisal-related complaints to the State-level E.O. Officer adds another level of delay to the complaint referral process, and the related recommendation that the Department instead require ES staff include the State-level E.O. Officer when referring complaints to the EEOC and other relevant agencies, the

Department declines to adopt this recommendation. The Department believes that its proposed changes simplify, streamline, and prevent delays by the Complaint System in the referral process by allowing complaint representatives to promptly refer discrimination and reprisal-related complaints to the State-Level E.O. Officer, who is best equipped and positioned to direct such complaints to appropriate enforcement agencies. Because the State-level E.O. Officer is responsible for State Program-wide coordination of compliance with the equal opportunity and nondiscrimination requirements in WIOA, it is appropriate for the State-level E.O. Officer to receive all discrimination-related complaints. Additionally, the proposed changes simplify the referral process so that referrals may occur more quickly and reliably to one identified State-level E.O. Officer, instead of requiring complaint representatives to identify one of several referral options. The State-level E.O. Officer is best suited to determine which nondiscrimination laws are at issue. The proposed changes therefore improve the effectiveness and accuracy of discrimination complaint processing to the benefit of complainants.

Regarding several commenters' general concern that the proposed changes to § 658.411(c) do not clarify the complaint process as it relates to discrimination and reprisal-related complaints, and that additional clarification is needed on processing complaints received from different sectors (e.g., MSFW complaints, Wagner-Peyser funded service complaints, and complaints not serviced by the public workforce system), the Department notes that the proposed changes purposefully simplify the process so that complaint representatives must immediately refer all discrimination-related complaints to the State-level E.O. Officer. As previously mentioned, the State-level E.O. Officer is best suited to make determinations on applicable nondiscrimination laws. The SWA complaint representative will not need to make determinations regarding the type of alleged discrimination and applicable laws.

Regarding the comment that reported confusion within the one-stop system regarding tracking and handling MSFW, Title I, and Title III one-stop operation complaints, and requested the Department provide technical assistance on this topic, the Department plans to provide further technical assistance. The Department notes that the existing

regulations at § 658.400(b) state that complaints alleging violations under WIOA title I programs are not covered by this subpart and must be referred to the appropriate administering agency which would follow the procedures set forth in the respective regulations. Section 683.600 describes local area, State, and direct recipient grievance procedures under WIOA title I.

Regarding the recommendation to remove language requiring ES staff to know the types of nondiscrimination laws at issue, the Department believes that the proposed changes are in line with this recommendation, as sending all discrimination complaints to the State-level E.O. Officer recognizes that State-Level E.O. Officers—and not complaint representatives—are best positioned to determine the applicable nondiscrimination laws and the agency to which complaints should be referred. Additionally, the proposed changes provide examples of the types of discrimination complaints that SWA staff may receive (e.g., EEOC and DOL Civil Rights Center (CRC) complaints, and complaints under the Immigration and Nationality Act), but do not require SWA staff to know all nondiscrimination laws that may be at issue.

The Department appreciates commenters' concerns and recommendations. The Department believes that the proposed changes provide a straightforward, streamlined process for handling discrimination and reprisal-related complaints and—by utilizing the State-level E.O. Officer—ensure that such complaints are promptly and properly referred to the appropriate enforcement agency.

Section 658.419 Apparent Violations

The Department proposed several clarifying revisions to § 658.419(a). First, the Department proposed to update § 658.419(a) to replace the words “a SWA, an ES office employee, or outreach staff” with “an ES staff member” to conform with proposed revisions to ES staff at § 651.10. It is not necessary to specifically refer to “outreach staff” in this section, because the definition of *outreach staff* means ES staff with the responsibilities described in § 653.107(b). This change will make § 658.419 more clear because the regulatory text will use the term *ES staff* uniformly.

The Department also proposed changing the second reference to a “suspected violation” in § 658.419(a) to “apparent violation” for clarity. In addition, the Department proposed adding a sentence to § 658.419(a) to clarify that the apparent violation must

be documented in the Complaint System log as described at § 658.410.

Finally, the Department proposed to add a sentence at the end of § 658.419(a) to clarify that when an apparent violation involves alleged violations of nondiscrimination laws, it must be processed according to the procedures described in § 658.411(c)—that is, it must be logged and immediately referred to the State-level E.O. Officer.

The Department did not receive any comments on this section. However, the Department is making additional changes to § 658.419 to be consistent with the definition of apparent violation that this final rule adopts in § 651.10, which refers to suspected violations that an ES staff member observes, has reason to believe, or which the staff member is in receipt of information regarding. The final rule also revises the existing regulatory text “except as provided at § 653.503 of this chapter (field checks) or § 658.411 (complaints)” to state more clearly “except as part of a field check under provided at § 653.503 of this chapter.” This phrasing is meant to more clearly state that the apparent violations processed as directed by § 658.419 are those that an ES staff observes, has reason to believe, or about which they receive information other than through field checks. The definition of apparent violations adopted by this final rule makes clear that the term does not include complaints.

Furthermore, the final rule retains the language proposed in the NPRM at § 658.419 that clarifies the ES Office Manager must document apparent violations in the Complaint System log as described at § 658.410, with the slight revision that the ES Office Manager must ensure that they are documented in the log. Finally, the final rule adopts the proposed text that apparent violations of nondiscrimination laws must be processed according to the procedures described in § 658.411(c), but for clarity moves this text into a separate paragraph (d) added at the end of § 658.419.

Section 658.420 Responsibilities of the Employment and Training Administration Regional Office

The Department proposed several revisions to § 658.420. First, the Department proposed to revise § 658.420(b)(1) to provide that if an ETA regional office receives a complaint alleging violations of nondiscrimination laws, then the complaint must be logged and immediately referred to the appropriate State-level E.O. Officer(s). This revision simplifies the process for referring nondiscrimination complaints

and provides clear instruction to ETA regional staff and task State-level E.O. Officers, who have appropriate expertise in determining how nondiscrimination complaints should be handled and by whom.

Second, the Department proposed removing existing § 658.420(b)(2), which addresses complaints alleging discrimination on the basis of genetic information, because such complaints would fall under the simplified procedures set forth in proposed § 658.420(b)(1). Third, the Department proposed making several revisions to conform with this deletion—namely, to move the text in existing § 658.420(c) to § 658.420(b) and remove all references to paragraph (b)(2) in this section.

Finally, the Department proposed revising § 658.420(c) to clarify that when an ETA regional office receives an employment-related law complaint under this subsection, it should process the complaint in accordance with § 658.422. The existing regulation incorrectly references § 658.411, which provides complaint processing procedures for ES offices and SWAs (and not ETA regional offices).

The Department did not receive comments on this section and finalizes these revisions as proposed.

Section 658.422 Processing of Employment-Related Law Complaints by the Regional Administrator

The Department proposed several revisions to § 658.422. First, the Department proposed to revise paragraph (a) to clarify that this section applies to all “employment-related law” complaints submitted directly to the RA or their representative. Second, the Department proposed adding a sentence to the end of paragraphs (b) and (c) to conform with the proposed revisions to § 658.420(b)(1). In particular, proposed paragraphs (b) and (c) each include an additional sentence to specify that when a complaint described in the paragraph alleges a violation of nondiscrimination laws or reprisal for protected activity, then it must be referred to the appropriate State-level E.O. Officer in accordance with § 658.420(b)(1). The Department did not receive comments on this section and finalizes these revisions as proposed.

Section 658.427 Severability

Given the numerous and varied changes the Department proposed and is adopting, the Department intends this rule to be severable and is including a severability provision in parts 652, 653, and 658 in this final rule. That intent was reflected in the structure of and descriptions in the proposed rule. The

inclusion of severability provisions in this final rule confirms the Department’s belief that the severance of any affected provision will not impair the function of the regulation as a whole and that the Department would have proposed and implemented the remaining regulatory provisions even without any others. To the extent that a court holds any provision, or any portion of any provision, of part 658 invalid, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision or subprovision will be severable from this part and will not affect the remainder thereof.

2. Subpart G—Review and Assessment of State Workforce Agency Compliance With Employment Service Regulations

Section 658.602 Employment and Training Administration National Office Responsibility

The Department proposed amending § 658.602(g) to refer to § 653.108(a) instead of § 653.108(b). This is necessary to correct the inaccurate citation to § 653.108(b). The Department proposed amending the introductory text of § 658.602(n) to replace the phrase “in the course of” with the word “during”. Additionally, the Department proposed amending § 658.602(n)(1) to replace the phrase “outreach workers” with “outreach staff” because outreach staff is a defined term in § 651.10. The Department also proposed amending § 658.602(n)(2) to remove the word “random” from the requirement for the NMA to participate in field check(s) of migrant camps or work site(s) where MSFWs have been placed. The proposed revision would clarify that the selection of migrant camps or work sites for which the NMA will participate in field checks does not need to be random, and may be targeted, where necessary, to respond to known or suspected compliance issues, thereby improving MSFW worker protection. Finally, the Department proposed amending § 658.602(o) to remove “(8)” from the reference to paragraph (f)(8) as a technical edit. Paragraph (f) of § 658.602 does not have a subordinate paragraph (f)(8). The Department did not receive any comments on this section and is finalizing these revisions as proposed.

Section 658.603 Employment and Training Administration Regional Office Responsibility

The Department proposed amending § 658.603(d)(7) to replace uses of “job

order” with “clearance order.” The Department also proposed removing the word “random” from the requirement for the RA to conduct field checks. Finally, the Department proposed adding the word “and” before “working and housing conditions” to make clear that this is a single term that follows wages and hours in the list of items that must be specified on a clearance order.

Paragraph (i) of § 658.603 addresses RMA training. The Department proposed amending § 658.603(i) to remove the requirement that the RMA participate in training sessions approved by the National Office within the first 3 months of their tenure and replacing it with a requirement that would require the RMA to participate in training sessions offered by the National Office and additional training sessions necessary to maintain competency and enhance their understanding of issues farmworkers face (including trainings offered by Occupational Safety and Health Administration (OSHA), WHD, EEOC, CRC, and other organizations offering farmworker-related information). The Department also proposed amending § 658.603(p)(1) to replace “workers” with “staff.” Additionally, the Department proposed amending § 658.603(p)(2) to remove the word “random” so that the RMA understands that clearance orders selected for a field check do not need to be selected at random. The Department did not receive any comments on this section and is finalizing these revisions as proposed.

3. Subpart H—Federal Application of Remedial Action to State Workforce Agencies

Section 658.702 Assessment and Evaluation of Program Performance Data

The Department proposed amending § 658.702(f)(2) to add references to the “RMA” in two places to clarify that the RA must notify both the RMA and the NMA when findings and noncompliance involve services to MSFWs or the Complaint System. Additionally, this proposed change would require the Final Notification to be sent to the RMA, as well as the NMA. These changes are necessary for the RMA to be aware of all ES issues involving MSFWs and the Complaint System, which the RMA is responsible to monitor in their assigned region. The Department did not receive comments on this section and finalizes these revisions as proposed.

Section 658.704 Remedial Actions

The Department proposed amending § 658.704(f)(2) to require that copies of

the RA's notification to the SWA of decertification proceedings must be sent to the RMA and the NMA. The Department also proposed amending § 658.707(a), which addresses the circumstances in which a SWA may request a hearing, to specify that any SWA that has received a Notice of Remedial Action under § 658.707(a) of this subpart may also request a hearing, and that the SWA may do so by filing a written request with the RA within 20 business days of the SWA's receipt of the notice. Finally, the Department proposed adding a reference to the RA in § 658.707(b), because § 658.704(c) directs the SWA to send its written request to the RA. The Department did not receive any comments on this section and adopts these revisions as proposed.

VI. Rulemaking Analyses and Notices

A. Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 14094 (Modernizing Regulatory Review) and Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996

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. See 58 FR 51735 (Oct. 4, 1993). Section 1(b) of E.O. 14094 amends sec. 3(f) of E.O. 12866 to define a "significant regulatory action" as an action that is likely to result in a rule that may: (1) have an annual effect on the economy of \$200 million or more (adjusted every 3 years by the Administrator of 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) create a serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the E.O. See 88 FR 21879 (Apr. 11, 2023). OIRA has determined that this final rule is a significant regulatory action, although not a significant regulatory action under sec. 3(f)(1) of E.O. 12866. Accordingly, OMB has reviewed this final 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.

The Department anticipates that the final rule will result in costs, transfer payments, and benefits for State governments and agricultural employers. The costs of the final rule will include rule familiarization and additional information collection for State governments, as well as transition costs such as recruitment, training, and technology expenses for the three States (*i.e.*, Delaware, Indiana, and Missouri) that currently use the staffing flexibility provided in the 2020 Final Rule and will need to transition to State merit staff for the provision of all Wagner-Peyser Act labor exchange services.

The transfer payments will include the changes in wages, fringe benefits, and overhead costs for the staff providing ES services in the three States that currently use the staffing flexibility provided in the 2020 Final Rule: Delaware, Indiana, and Missouri.

The benefits of the merit-staffing provisions in the final rule will include the ability for States to shift staff resources during future surges in UI claims when time-limited legislative flexibilities in the delivery of UI services are not available. The Department is also amending the regulations that govern labor exchange services provided to MSFWs, the Monitor Advocate System, and the Complaint System. These amendments will remove redundancies, clarify requirements, and improve equity and inclusion for MSFWs in the ES system.

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, also known as the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA has designated this rule as not a "major rule," as defined by 5 U.S.C. 804(2).

1. Public Comments

a. Public Comments on Rule Familiarization Costs

In the NPRM, the Department anticipated that it would take a Human Resources Manager an average of 1 hour to review the rule and that the total one-time rule familiarization cost for all 57 jurisdictions (the 50 States, the District of Columbia, Puerto Rico, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, the Republic of Palau, and the U.S. Virgin Islands) would be \$4,439 (2020\$).

Comment: A State government agency commented that rule familiarization estimate in the NPRM is too low because, in addition to a Human Resources Manager, other staff members would need to review the changes as well.

Response: The Department agrees that additional State staff may review the rule and that their fully loaded wage rates may be higher or lower than \$82.13 per hour (2022\$).¹⁴ The 1-hour time estimate and the \$82.13 hourly wage estimate are intended to be averages across all 57 jurisdictions. In some States, the combined time for all reviewers to read the rule may be more than 1 hour, while in other States, the combined time may be less than 1 hour. Similarly, the average fully loaded wage rate of the employees who familiarize themselves with the rule may be higher than \$82.13 per hour in some States and lower than \$82.13 per hour in other States. In the absence of supporting data from the commenter, the Department maintained its 1-hour time estimate and the \$82.13 fully loaded wage rate in the final rule.

b. Public Comments on Transition Costs

The Department had insufficient data to provide estimates in the NPRM of the potential one-time transition costs (*e.g.*, recruitment, training, technology expenses) States might incur, so the Department sought additional input regarding potential transition costs.

Comment: Several commenters argued that the NPRM does not fully anticipate costs for State governments. A number of commenters, including multiple form letter campaigns, a Colorado State elected official, a Colorado State government agency, and a local government, wrote that the proposed merit-staffing requirement would cost millions of dollars for States. A Colorado State government agency estimated that the proposed rule would result in over \$7 million in transition

¹⁴ In the NPRM, this fully loaded hourly wage estimate was \$77.88 in 2020 dollars.

costs for Colorado and provided a specific breakdown of these costs. A couple of State government agencies wrote that the proposed rule does not take into account the costs related to cross-training ES staff for the UI program. A Colorado local government wrote that under the proposed rule, half of PY 2023 funds would need to be utilized to transition and hire new State level staff. A Michigan advocacy organization wrote that local ES program support allows for efficient “braided” funding and, in contrast, the proposed rule would create siloed services that would increase overall labor costs for States.

Some commenters also argued that the proposed rule would result in a number of job losses for local staff in ES programs. In particular, several commenters, including a Colorado local government, a one-stop operator, and a trade association, stated that the proposed rule would result in job losses for local staff and provided data on expected employment reductions to support their claim. Similarly, Massachusetts and Colorado State government agencies commented that the proposed rule would result in job losses, given that State merit staff are more costly than local staff. A trade association wrote that their local workforce development board would not be able to move forward with programming for the upcoming year due to anticipated job losses as a result of the proposed rule. A Colorado State government agency and other commenters wrote that, in their region, TAA case managers are provided by local staff, and under the proposed rule these staff members would need to be rehired and trained.

An association of workforce boards wrote that the proposed rule would result in job centers closing and programs ending in States that operate their ES program using flexible staffing models, which would disproportionately impact rural areas as well as those facing barriers to employment. Some commenters stated that the proposed rule would result in service disruptions that would result in States incurring costs due to negative customer experiences, which would erode trust in the public workforce system. A State government agency wrote that the proposed rule would impose resource costs on States, while the national PY 2022 ES grant funding saw a non-adjusted increase of just 0.6 percent and the State saw a non-adjusted decline of 1.6 percent in its PY 2022 ES grants.

Response: The Department appreciates commenters’ feedback on

potential transition costs. After careful consideration of the comments received during the public comment period and reassessment of the NPRM, the Department is permitting the three States with longstanding reliance interests on using alternative staffing models, Colorado, Massachusetts, and Michigan, to continue using their alternative staffing models. The Department acknowledges that three other States (*i.e.*, Delaware, Indiana, and Missouri) currently using the staffing flexibility granted under the 2020 Final Rule will incur transition costs. Without pertinent data, the Department is unable to estimate the potential transition costs in this final rule. Recognizing that these States will need time to adjust their staffing models, the Department is providing 24 months of transition time for all States to comply with this final rule.

c. Public Comments on Transfer Payments

In the NPRM, the Department anticipated that four States (*i.e.*, Colorado, Delaware, Massachusetts, and Michigan) would need to transition to State merit staff for the provision of all labor exchange services. The Department estimated that Delaware, Massachusetts, and Michigan would have a combined total of \$10.1 million (2020\$) in annualized transfer payments over the 10-year analysis period.

Comment: Some commenters from Michigan wrote that they believe transfer payments estimated in the NPRM are too low. Specifically, they stated that the estimate of 192 full-time equivalents (FTEs) non-State-merit staff providing ES services is too low because Michigan’s Wagner-Peyser Act-funded staffing is 400, equating to 220 FTEs. These commenters also asked where the funding for transfer payments would come from and, if there is not additional funding available, how the Department would close the gap.

Response: Because the Department is allowing Colorado, Massachusetts, and Michigan to administer ES services using their longstanding alternative staffing model, the Department has not sought updated data from Michigan to estimate the transfer payments associated with this final rule.

d. Public Comments on Regulatory Alternatives

In the NPRM, the Department analyzed two regulatory alternatives. Under the first alternative, the Department would return to the pre-2020 Wagner-Peyser Act regulations, reinstituting the State merit-staffing requirement for all States except for

three States: Colorado, Massachusetts, and Michigan. Under the second alternative, the Department would require all States to come into compliance with the merit-staffing requirement within 30 or 60 days of issuance of the final rule rather than within 18 months from the effective date of the final rule.

Comment: Several Michigan, Colorado, and Massachusetts commenters, including State and local workforce development boards, one-stop center staff, private citizens, State and local governments, and a Colorado State elected official, urged the Department to adopt Alternative 1 as discussed in the NPRM, which would allow Colorado, Michigan, and Massachusetts to continue operating Wagner-Peyser Act programs with flexible staffing models. The commenters reasoned that this would allow their State to continue to operate what they described as innovative, streamlined, responsive, and effective ES programs. A Massachusetts local workforce development board and a Massachusetts local elected official argued that Alternative 1 was the best way to avoid service interruptions for job seekers and businesses.

To support their request for the Department to select Alternative 1, a Colorado private citizen provided figures from their local one-stop center to demonstrate the “local return on investment” and economic impact of Wagner-Peyser Act funding, including the estimation that every \$1 of Wagner-Peyser Act funds received translates to \$44.80 in value for the community.

Some commenters, including one-stop center employees, a Colorado local workforce development board, and a Colorado State government agency, critiqued the Department’s mention of alignment with WIOA, and preference for alignment between ES and UI, when presenting Alternative 1 in the NPRM. A one-stop center employee asserted that Alternative 1 prioritizes UI administration over ES services despite WIOA identifying priority populations for ES service delivery. A Colorado local workforce development board argued that there was no justification for the Department’s claim and provided evidence from its local programs, which it said demonstrates the benefits of alignment between Wagner-Peyser Act ES and WIOA title I services. The commenter said the proposal would result in decreased functionality of ES and argued that this adverse outcome outweighs the benefits of staffing UI during relatively shorter periods of surge claims.

A Colorado State workforce development board stated that prioritizing alignment of ES and UI so that States can provide surge capacity was not sufficient justification for the Department to discard Alternative 1 because States using flexible staffing models can provide surge capacity for UI administration. The commenter said Colorado's handling of the UI surge during the pandemic affirms county merit staff's ability to assist during UI surges. A Massachusetts local workforce development board reacted similarly to the NPRM's discussion of Alternative 1 and program alignment priorities, arguing that one-stop center staff in Massachusetts performed ably to support the UI surge during the pandemic. The commenter said the flexible staffing arrangements in Massachusetts proved useful during the pandemic, as well as during other unemployment surges throughout history, and expressed concern about losing the ability to "manage the next crisis locally."

A Colorado State government agency said the Department's discussion of Alternative 1 presented a false choice and argued that no studies exist over the past 14 years that prove the State merit-staffing model works better than ES staffed by county merit staff. A Colorado local workforce development board similarly stated that the Department "dismissed" Alternative 1 with very little justification and asserted that the Department has not provided recent studies or data to support the notion that flexible ES staffing model States perform worse than States that use only State merit staff to provide ES services. A Colorado one-stop center employee requested the Department adopt Alternative 1 and further investigate how ES staff can support UI services.

Also urging the Department to adopt Alternative 1, a Massachusetts local workforce development board discussed equity concerns with the proposal's prioritization of UI services for the recently unemployed over the needs of the longer-term unemployed and low-income workers who may need ES services. The commenter discussed historical inequities and current demographic makeups of these two groups and argued that the UI population is "significantly less diverse" than the rest of the job seeking population around Boston.

A Colorado State workforce development board, a Colorado State government agency, and other commenters urged the Department to adopt Alternative 1 because it would allow for the collection of evaluative evidence, prevent transfer payments and

system disruptions, and maintain the ability of States with existing State merit ES staff to cross-train such workers to assist with UI surges. An anonymous commenter expressed concern about "eliminating Alternative 1" because ending staffing flexibility will result in "bifurcated" supervision for Wagner-Peyser Act workers and inconsistent service delivery. Also urging the Department to adopt Alternative 1, a Colorado one-stop operator commented that, if the Department decides against adopting Alternative 1, Congress should enshrine ES staffing flexibility into Federal law.

A Michigan State government agency suggested that, in the absence of additional analysis, the Department should implement the final rule without making a distinction between State and local merit staff, a less disruptive alternative that would allow Michigan to continue to offer ES services at current levels with qualified merit staff. The commenter argued that the Intergovernmental Personnel Act does not make a distinction between State and local merit staff, asserting that Michigan local merit staff are recruited, selected, advanced, and compensated in a manner consistent with State merit staff. This commenter opposed the proposal, alleging that it would result in fewer staff, less responsive customer service, and fewer ES locations across Michigan. The commenter requested that the Department conduct a specific, comprehensive, and independent analysis using up-to-date employment program, performance, and economic indicators to justify any changes to longstanding, successful delivery models like the one used in Michigan. The commenter said it had identified several of the proposal's anticipated adverse impacts during the current comment period and stated that the Department would "confirm and expand" upon these findings if it conducted an analysis.

A State government agency and a Massachusetts local workforce development board supported an ongoing exemption from the State merit-staffing requirement for the original demonstration States (Colorado, Massachusetts, and Michigan) but suggested that no additional States should receive such an exemption.

Response: After careful consideration of the comments received during the public comment period and reassessment of the NPRM, the Department has decided to permit three States with strong reliance interests—Colorado, Massachusetts, and Michigan—to continue using their approved longstanding staffing model to

deliver ES services. In the 1990s, as part of a demonstration, the Department permitted Colorado and Michigan to use a combination of local and State merit-staffing and permitted Massachusetts to use non-merit staff in four of sixteen local areas for ES service delivery. During the comment period, these three States provided information about the service disruption that would result from having to upend their longstanding service delivery models. However, the initial justifications and data presented do not provide clear evidence of causation. Without evidence that alternative staffing models directly cause higher employment outcomes, balanced against widespread success in delivering services while maintaining State merit staff for ES, and further balanced by the need for ES State merit staff to be available for surges in UI claims and appeals, the Department is generally adopting the proposed requirement that States use State merit staff to provide ES services. The Department has determined that reinstating the requirement to provide ES services using State merit staff will help to allow the States to provide quality and consistent ES services in an accountable and transparent manner as we undertake an evaluation to determine whether alternative staffing models are empirically supported. All other States will have 24 months to comply with the rule's requirement to use State merit staff to provide ES services.

2. Costs

The Department anticipates that the rule will result in costs related to rule familiarization, staff transition, and information collection.

a. Rule Familiarization Costs

Regulatory familiarization costs represent direct costs to States associated with reviewing the new regulation. The Department's analysis¹⁵ anticipates that the changes introduced by the rule will be reviewed by Human Resources Managers (SOC code 11–3121) employed by SWAs. The Department anticipates that it will take a Human Resources Manager an average of 1 hour to review the rule.

The U.S. Bureau of Labor Statistics (BLS) Occupational Employment and Wage Statistics data show that the median hourly wage of State government Human Resources Managers

¹⁵ This analysis uses codes from the Standard Occupational Classification (SOC) system and the North American Industry Classification System (NAICS).

is \$45.88.¹⁶ The Department used a 62-percent benefits rate¹⁷ and a 17-percent overhead rate,¹⁸ so the fully loaded hourly wage is \$82.13 [= \$45.88 + (\$45.88 × 62%) + (\$45.88 × 17%)]. Therefore, the one-time rule familiarization cost for all 57 jurisdictions (the 50 States, the District of Columbia, Puerto Rico, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, the Republic of Palau, and the U.S. Virgin Islands) is estimated to be \$4,681 (= \$82.13 × 1 hour × 57 jurisdictions).

b. Transition Costs

Three States would potentially incur one-time costs associated with this rule's merit-staffing requirement. Delaware currently has some non-State-merit staff who provide labor exchange services, as explained in the NPRM. Additionally, based on comments received and their State plans, Indiana and Missouri also have non-State-merit staff providing ES services. These three States may incur transition expenses, such as recruitment, training, or technology costs, as well as costs related to the State budgeting process. Moreover, job seekers and employers in these States may experience nonquantifiable transition costs associated with service interruptions during the time period in which the States are making staff changes to comply with the provisions of this rule.

In its comments on the NPRM, Delaware stated that “the proposed rule change will take away funding for 13 total contractual staff.” The Delaware Department of Labor explained that its Division of Employment and Training has 8 FTE Wagner-Peyser contractual staff funded at 100 percent, and 5 contractual FTEs partially charged to Wagner-Peyser who are assigned to provide ES services. The State anticipates that the decrease in staffing would have a negative impact on the quality and delivery of ES services, and that it would cause an added workload on merit staff, potentially adversely

affecting staff morale. Delaware explained the steps it would need to take to obtain additional State FTEs, estimating that the process would take at least 24 months and that there is no certainty that the positions would be approved by Delaware's Joint Finance Committee, its Governor, and OMB.

In its PY 2022 State plan, Indiana indicated that it would evaluate potential changes to its staffing models over the next several years in light of the flexibility provided in the 2020 Final Rule. In its comments on the NPRM, the Indiana Department of Workforce Development stated that one of the primary ways Indiana was able to respond to changing conditions during the COVID-19 pandemic was with the staffing flexibility provided in the 2020 Final Rule and the temporarily staffing flexibility provided by the CARES Act. Indiana explained that the staffing flexibility allowed it “to retain temporary, intermittent, and contractor staff to augment existing State and local staff to better and more quickly scale up services to respond to client needs.” Indiana expressed opposition to the proposed State merit-staffing requirement, asserting that it would result in significant inefficiencies because Indiana's AJCs would need to be staffed with a full accompaniment of both local workforce development board staff and State ES staff, a level that would be unnecessary in some AJCs “as the populations simply do not require this many staff members for the possible client base.”

In its PY 2022 State plan, Missouri stated that Wagner-Peyser Act labor exchange services are “provided solely by non-merit State employees.” Missouri explained that, in 2018, the State legislature amended the State personnel law to remove merit status for all employees except those who are required to be merit by “federal law or regulations for grant-in-aid programs.” All employees in Missouri are at-will except when required by Federal law. Following the Department's publication of the 2020 Final Rule, Missouri's Office of Workforce Development removed the merit status of employees funded under the Wagner-Peyser Act to comply with State law. According to Missouri's State plan, the change from merit status to at-will status became effective on July 1, 2021. In its comments on the NPRM, Missouri's Office of Workforce Development expressed opposition to the merit-staffing requirement and urged the Department to preserve the longstanding staffing flexibility afforded to Colorado, Michigan, and Massachusetts and to grandfather in Missouri. Missouri asserted that “the

back-and-forth decision to allow and then disallow Wagner-Peyser Act flexibility would cause unnecessary disruptions for service delivery.” Missouri also claimed that the merit status requirement would place an unnecessary burden on local workforce development boards that “have planned for, budgeted for, and implemented” ES services.

In the NPRM, the Department sought additional input about transition costs, but did not receive pertinent data for use in the final rule. The comments from Delaware, Indiana, and Missouri did not include estimates of their potential transition costs. Therefore, the Department is unable to quantify the transition costs that those three States will incur but does not anticipate that the transition costs will be large enough for this rule to be deemed a significant regulatory action under sec. 3(f)(1) of E.O. 12866.

c. Information Collection Costs

Information collection costs represent direct costs to States associated with the information collection requests (ICRs) under this rule. Five ICRs are herein discussed.

The first ICR pertains to the requirement that SWA Wagner-Peyser programs document Participant Individual Record Layout (PIRL) data element 413 for all reportable individuals. The Department anticipates that this provision will entail three costs: (1) computer programming, (2) additional time for ES staff to help individuals register for services, and (3) additional time for SMAs to check the accuracy of the MSFW coding. SWAs will need to reprogram their ES registration systems to ask MSFW status (PIRL 413) questions earlier in the registration process. The Department anticipates that reprogramming will cost an average of \$4,000 per jurisdiction,¹⁹ so the total one-time cost for reprogramming is estimated at \$228,000 (= \$4,000 × 57 jurisdictions). For the additional annual burden on ES staff, the Department anticipates that it will take an ES staff member an average of 2 minutes per reportable individual to ask the additional MSFW questions and record the answers. To estimate this cost, the Department used the median hourly wage of \$27.05 for educational, guidance, and career counselors and advisors (SOC code 21-1012) employed by State governments (NAICS 999200).²⁰ The Department used a 62-

¹⁶ BLS, “Occupational Employment and Wage Statistics, National Industry-Specific Occupational Employment and Wage Estimates, NAICS 999200,” SOC Code 11-3121, May 2022, https://www.bls.gov/oes/current/naics4_999200.htm (last visited May 16, 2023).

¹⁷ BLS, “National Compensation Survey, Employer Costs for Employee Compensation,” <https://www.bls.gov/ncs/data.htm> (last visited May 16, 2023). For State and local government workers, wages and salaries averaged \$34.88 per hour worked in 2022, while benefit costs averaged \$21.51, which is a benefits rate of 62 percent.

¹⁸ Cody Rice, U.S. Environmental Protection Agency, “Wage Rates for Economic Analyses of the Toxics Release Inventory Program,” June 10, 2002, <https://www.regulations.gov/document/EPA-HQ-OPPT-2014-0650-0005> (last visited May 16, 2023).

¹⁹ Anecdotal evidence from States indicates a range of \$2,000 to \$6,000 to add one yes/no question to an existing data collection.

²⁰ BLS, “Occupational Employment and Wage Statistics, National Industry-Specific Occupational

percent benefits rate and a 17-percent overhead rate, so the fully loaded hourly wage is \$48.42 [= \$27.05 + (\$27.05 × 62%) + (\$27.05 × 17%)]. Assuming ES staff assist in registering half of the 9.4 million reportable individuals (based on the average for Program Years 2018–2021), the annual cost is estimated at \$7,609,895 (= 9,429,858 reportable individuals × 50% × 2 minutes × \$48.42 per hour). For the annual burden on SMAs, the Department anticipates that it will take an SMA 1 hour per quarter to check the accuracy of the MSFW coding. To estimate this cost, the Department used the median hourly wage of \$38.48 for social and community service managers (SOC code 11–9151) employed by State governments (NAICS 999200).²¹ The Department used a 62-percent benefits rate and a 17-percent overhead rate, so the fully loaded hourly wage is \$68.88 [= \$38.48 + (\$38.48 × 62%) + (\$38.48 × 17%)]. Therefore, the annual cost is estimated at \$15,705 (= 57 SMAs × 4 hours per year × \$68.88 per hour).

The second ICR pertains to the requirement that SWA applicant-holding offices provide workers referred on clearance orders with a checklist summarizing wages, working conditions, and other material specifications in the clearance order. The Department anticipates that it will take an ES staff member an average of 35 minutes to read the clearance order, create a checklist, and provide the checklist to applicants. To estimate this cost, the Department used a fully loaded hourly wage of \$48.42 for educational, guidance, and career counselors and advisors (SOC code 21–1012) employed by State governments (NAICS 999200). Assuming 14,580 clearance orders per year (based on the number of clearance orders reported by SWAs in Program Year 2019), the annual cost is estimated at \$411,812 (= 14,580 clearance orders × 35 minutes × \$48.42 per hour).

The third ICR pertains to the changes associated with the Migrant and Seasonal Farmworker Monitoring Report and Complaint/Apparent Violation Form. The Department anticipates that this provision will entail two costs: (1) time for ES Managers to update a central complaint log, and (2) additional time for SMAs to complete the Annual Summary due to content changes. For the annual burden

on ES Managers, the Department anticipates that it will take an ES Manager 8 hours per year to update the central complaint log. To estimate this cost, the Department used a fully loaded median hourly wage of \$68.88 for social and community service managers (SOC code 11–9151) employed by State governments (NAICS 999200). Assuming that there are approximately 2,400 ES Managers (based on the approximate number of one-stop centers), the annual cost is estimated at \$1,322,496 (= 2,400 ES Managers × 8 hours per year × \$68.88 per hour). For the annual burden on SMAs, the Department anticipates that it will take an SMA an additional 3 hours per year to complete the Annual Summary due to content changes. To estimate this cost, the Department used a fully loaded median hourly wage of \$68.88 for social and community service managers (SOC code 11–9151) employed by State governments (NAICS 999200). Therefore, the annual cost is estimated at \$11,778 (= 57 SMAs × 3 hours per year × \$68.88 per hour).

The fourth ICR pertains to this rule's merit-staffing requirement. The Department will require States to describe in their Unified or Combined State Plans how the State will staff labor exchange services under the Wagner-Peyser Act using State merit staff. The Department does not anticipate additional costs related to this requirement given that States must already describe in their Unified or Combined State Plans how ES labor exchange services will be delivered.

The fifth ICR pertains to the forthcoming evaluation of three States: Colorado, Massachusetts, and Michigan. The Department will develop an evaluation to examine various staffing models and methods of delivering labor exchange services, to determine whether such models are empirically supported. The pertinent estimates will be included in a future ICR.

In total for the first three ICRs described above, the rule is expected to have first-year IC costs of \$9.6 million (2022\$). Over the 10-year analysis period, the annualized costs are estimated at \$9.4 million at a discount rate of 7 percent (2022\$).

3. Transfer Payments

According to OMB Circular A–4, transfer payments are monetary payments from one group to another that do not affect the total resources available to society. The transfer payments for this rule are the transfer payments associated with employee wages, fringe benefits, and overhead costs.

This final rule permits three States—Colorado, Massachusetts, and Michigan—to use their longstanding alternative staffing model to deliver ES services. The requirement to use State merit staff applies to the other 54 States and jurisdictions; therefore, the three States (*i.e.*, Delaware, Indiana, and Missouri) that implemented the staffing flexibility provided by the 2020 Final Rule will need to adjust their staffing arrangements and may incur additional wage costs. For purposes of E.O. 12866, these additional wage costs are categorized as transfer payments from States to employees.

The Delaware Department of Labor stated in its comments on the NPRM that “the proposed rule change will take away funding for 13 total contractual staff.” Delaware did not provide position titles or salary information in its comments. Therefore, the Department is unable to estimate the transfer payments for Delaware due to a lack of data.

In their comments on the NPRM, the Indiana Department of Workforce Development and the Missouri Office of Workforce Development expressed opposition to the proposal but did not provide information about the number, position titles, or annual salaries of the non-State-merit staff dedicated to delivering ES services. Therefore, the Department is unable to estimate the transfer payments for Indiana and Missouri due to a lack of data.

The Department does not anticipate that the transfer payments for Delaware, Indiana, and Missouri will be large enough for this rule to be deemed a significant regulatory action under sec. 3(f)(1) of E.O. 12866.

4. Nonquantifiable Benefits

The Department is requiring that States use only State merit staff to deliver ES labor exchange services, with exceptions for three States. The COVID–19 pandemic placed an enormous burden on State UI programs due to the significant increase in UI claims from the massive number of unemployed workers. The number of continued claims rose from fewer than 2 million before the pandemic to more than 20 million in the week ended May 9, 2020. It became evident to the Department that, during a crisis that displaces a large number of workers in a short time, it could become imperative for States to shift staff resources from ES services to support urgent UI services. Being able to do so, however, requires that ES labor exchange services be provided only by State merit staff because certain UI services are required to be delivered solely by State merit staff pursuant to

Employment and Wage Estimates, NAICS 999200, SOC 21–1012.” https://www.bls.gov/oes/current/naics4_999200.htm.

²¹ BLS, “Occupational Employment and Wage Statistics, National Industry-Specific Occupational Employment and Wage Estimates, NAICS 999200, SOC 11–9151.” https://www.bls.gov/oes/current/naics4_999200.htm.

sec. 303(a)(1) of the SSA. Requiring labor exchange services to be provided by State merit staff will help ensure that States have the flexibility to shift staff resources during future surges in UI claims where time-limited legislative flexibilities to UI services are not available. Further, this ensures that UI services will be performed by qualified staff who are familiar with the requirements of the program during such future occurrences, ensuring the program’s integrity.

The benefits of requiring States to use only State merit staff to deliver ES labor exchange services are not entirely quantifiable. Yet, in addition to States benefiting from the availability of State merit staff to assist with a surge in UI claims, benefits also accrue to individuals accessing labor exchange services delivered by State merit personnel. State merit-staffed employees are accountable only to their State government, are hired through objective, transparent standards, and must deliver

services to all customers of the ES system according to established standards. In exercising its discretion under sec. 3(a) of the Wagner-Peyser Act to establish minimum levels of efficiency and promote the uniform administration of labor exchange services by requiring the use of State merit staff to deliver labor exchange services, the Department has determined that alignment of ES and UI staffing is needed to ensure that quality services are delivered by States effectively and equitably to UI beneficiaries and other ES customers.

The Department is also amending the regulations governing ES labor exchange services provided to MSFWs, the Monitor Advocate System, and the Complaint System. These amendments remove redundancies, clarify requirements, and enhance equity and inclusion for farmworkers in the ES system. The requirement that States use State merit staff to provide services to MSFWs benefits MSFWs, who are

particularly vulnerable to employment-related abuses. Outreach and SMA staff receive centralized training and management from the State to ensure they are equipped to assess and respond to farmworker needs, including responding to complaints and apparent violations in the field, which may include highly sensitive subject matter like human trafficking.

5. Summary

Exhibit 1 shows the annualized rule familiarization and IC costs at discount rates of 3 percent and 7 percent. The rule is expected to have first-year rule familiarization costs of \$4,681 and first-year IC costs of \$9.6 million (2022\$). Over the 10-year analysis period, the annualized rule familiarization costs are estimated at \$623 at a discount rate of 7 percent and the annualized IC costs are estimated at \$9.4 million at a discount rate of 7 percent (2022\$).

Exhibit 1: Summary of Monetized Costs			
Year	Rule Familiarization Costs	Information Collection Costs	Total Costs
1	\$ 4,681	\$ 9,599,686	\$ 9,604,367
2	\$ -	\$ 9,371,686	\$ 9,371,686
3	\$ -	\$ 9,371,686	\$ 9,371,686
4	\$ -	\$ 9,371,686	\$ 9,371,686
5	\$ -	\$ 9,371,686	\$ 9,371,686
6	\$ -	\$ 9,371,686	\$ 9,371,686
7	\$ -	\$ 9,371,686	\$ 9,371,686
8	\$ -	\$ 9,371,686	\$ 9,371,686
9	\$ -	\$ 9,371,686	\$ 9,371,686
10	\$ -	\$ 9,371,686	\$ 9,371,686
Annualized with 7% discounting	\$ 623	\$ 9,402,025	\$ 9,402,647
Annualized with 3% discounting	\$ 533	\$ 9,397,636	\$ 9,398,169

Due to data limitations, the Department is unable to quantify the transition costs or transfer payments that are likely to be incurred by Delaware, Indiana, and Missouri as they transition the delivery of all ES services to State merit staff. The Department does not anticipate that the transition costs or transfer payments will be large enough for this rule to be deemed a significant regulatory action under sec. 3(f)(1) of E.O. 12866.

6. Regulatory Alternatives

OMB Circular A–4 directs agencies to analyze alternatives if such alternatives best satisfy the philosophy and principles of E.O. 12866. Accordingly,

the Department considered the following regulatory alternatives.

a. Alternative 1

Under this alternative, the Department would require all States and jurisdictions to use State merit staff to provide ES services, including Colorado, Massachusetts, and Michigan. In other words, under this alternative, the Department would adopt the proposal described in the NPRM. After careful consideration, the Department is not pursuing this alternative. The Department recognizes the strong reliance interests of Colorado, Massachusetts, and Michigan and is therefore permitting these three States to

continue using their approved longstanding staffing model to deliver ES services. These three States must participate in evaluations of ES service delivery to be conducted by the Department.

b. Alternative 2

Under this alternative, the Department would require States to come into compliance with the requirement to use State merit staff within 30 or 60 days of issuance of the final rule. The Department is not pursuing this alternative because it could result in interruption to ES labor exchange services in the three States not already operating in compliance with

the rule: Delaware, Indiana, and Missouri. The Department recognizes that this rule may be a substantial change for those three States, and they may need time to make adjustments to personnel, contractual arrangements, and service provision. Under this alternative, with only 30 or 60 days to rapidly shift existing staff or hire new staff, Delaware, Indiana, and Missouri may find themselves in violation of contracts for services negotiated after the 2020 Final Rule. Accordingly, the Department is providing 24 months from the effective date of the final rule for States to comply with the State merit-staffing requirement rather than stipulating that the States comply immediately.

B. Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act of 1996, and Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking)

The Regulatory Flexibility Act (RFA), 5 U.S.C. chapter 6, requires the Department to evaluate the economic impact of this rule on small entities. The RFA defines small entities to include small businesses, small organizations, including not-for-profit organizations, and small governmental jurisdictions. The Department must determine whether the rule will impose a significant economic impact on a substantial number of such small entities. The Department concludes that this rule does not regulate any small entities directly, so any regulatory effect on small entities will be indirect. Accordingly, the Department has determined this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.

C. Paperwork Reduction Act of 1995

The purposes of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, include minimizing the paperwork burden on affected entities. The PRA requires certain actions before an agency can adopt or revise a collection of information, including publishing for public comment a summary of the collection of information and a brief description of the need for and proposed use of the information.

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to provide the public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the PRA. See 44 U.S.C. 3506(c)(2)(A). This

activity helps to ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

A Federal agency may not conduct or sponsor a collection of information unless it is approved by OMB under the PRA and it displays a currently valid OMB control number. The public is also not required to respond to a collection of information unless it displays a currently valid OMB control number. In addition, notwithstanding any other provisions of law, no person will be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number (44 U.S.C. 3512).

In accordance with the PRA, the Department has submitted four ICRs to OMB in concert with the publishing of this final rule.

The ICRs in this final rule are summarized as follows.

Agency: DOL-ETA.

Title of Collection: DOL-Only Performance Accountability, Information, and Reporting System for Reportable Individuals.

Type of Review: New Collection.

OMB Control Number: 1205-0NEW.

Description: The Department is requesting a new OMB control number for this collection. The request for a new control number is for administrative reasons only. The changes to §§ 653.103(a) and 653.109(a)(10) in this rulemaking described subsequently will eventually be included in OMB Control Number 1205-0521. The Department is anticipating that a few different upcoming rulemakings will impact the ICs contained in OMB Control Number 1205-0521. Once all outstanding actions are final and complete, the Department intends to submit a nonmaterial change request to transfer the burden from the new ICR to the existing OMB control number for the DOL-Only Performance Accountability, Information, and Reporting System (1205-0521) and proceed to discontinue the use of the new control number.

This final rule adds a requirement that SWA Wagner-Peyser programs must document PIRL data element 413 for reportable individuals. The DOL-only PIRL ETA 9172 already requires Wagner-Peyser programs to document data element 413 for participants. This change will help ES staff identify all individuals who engage in ES services

who are MSFWs and the degree of their engagement, so that SWAs, SMAs, and the Department may better assess whether all Wagner-Peyser services are provided to MSFWs on an equitable basis. Collecting data about participant and reportable individual characteristics, particularly related to populations that have been historically underserved, is an important tool for measuring progress in providing equal opportunity. The final rule also makes changes to the definitions of migrant farmworker and seasonal farmworker. The Department plans to submit a new ICR that will update ETA 9172 to indicate that Wagner-Peyser programs must document and keep records of PIRL data element 413 for reportable individuals and align the definitions of migrant farmworker and seasonal farmworker with revisions at § 651.10.

Affected Public: State Governments.

Obligation to Respond: Required to Obtain or Retain Benefits.

Estimated Total Annual Respondents: 22,687,331.

Estimated Total Annual Responses: 46,167,618.

Estimated Total Annual Burden Hours: 10,629,971.

Estimated Costs to Respondents or Recordkeepers: \$9,719,287.

Regulations Sections: §§ 653.103(a), 653.109(a)(10).

The preceding IC was the subject of a public comment, which the Department summarizes and responds to as follows.

Comment: A private citizen sought to call attention to what they described as “an apparent typographical error” in the NPRM’s PRA section on the DOL-Only Performance Accountability, Information, and Reporting System for Reportable Individuals IC. The commenter stated that the estimated total annual burden hours of 10,610,629,971 stood out as an erroneous figure because it is beyond the current government-wide cumulative paperwork burden (citing OMB’s figure of 10,521,540,269.2 hours), and because the supporting statement for the IC in question listed the total annual burden hours at 10,629,971 hours (citing Table 8). The commenter said it appears that the Department mistakenly added an extra “610” to that figure.

A State agency commented that, if the proposed requirement is adopted, it would cost \$30,000 to \$50,000 to update its IT systems to track the MSFW-status of reportable individuals, and it asked the Department to provide additional funding to cover these costs.

Response: The Department acknowledges that estimated total annual burden hours for this collection

is 10,629,971, not 10,610,629,971. The Department notes that it only received one comment indicating that the cost to update IT systems could be higher than the Department's estimate of \$4,000 per jurisdiction. The Department's estimate is based on anecdotal evidence from other States, which indicated the change could cost a one-time expense of \$2,000 to \$6,000. The Department notes that some States may have higher costs, while other States may have lower costs. The change to this collection does not establish a new data element. Instead, it only requires States to make the existing data element 413, which is already required for participants, applicable to reportable individuals. The Department expects the burden to be minimal and will finalize the collection as proposed.

Agency: DOL-ETA.

Title of Collection: Clearance Order Checklists.

Type of Review: New Collection.

OMB Control Number: 1205-0NEW.

Description: In the NPRM, the Department proposed to add a new IC to address the requirements at 20 CFR 653.501(d)(6), which requires SWAs to provide farmworkers with "checklists showing wage payment schedules, working conditions, and other material specifications of the clearance order," and 20 CFR 653.501(d)(10), which requires SWA applicant-holding offices to provide workers referred on clearance orders with a checklist summarizing wages, working conditions, and other material specifications in the clearance order. The Department proposed to include a new Agricultural Clearance Order Form, ETA Form 790B, and to withdraw OMB Control Number 1205-0134, which at the time of the NPRM was an expired ICR for which a submission requesting reinstatement was pending at OMB. Since the publication of the NPRM, OMB approved OMB Control Number 1205-0134, and therefore there is no need to withdraw OMB Control Number 1205-0134 or to create a new OMB Control Number for Form ETA-790B. For this reason, the Department declines to finalize the new collection for Form ETA-790B; however, the Department will finalize the collection for the checklist requirements and will revise the title of the new collection to be *Clearance Order Checklists*. The Department has also revised the burden estimates to only include information for the checklist requirements.

Affected Public: State Governments, Private Sector: Business or other for-profits, not-for-profit institutions, and farms.

Obligation to Respond: Required to Obtain or Retain Benefits.

Estimated Total Annual Respondents: 24,030.

Estimated Total Annual Responses: 24,030.

Estimated Total Annual Burden Hours: 13,937.

Estimated Total Annual Other Burden Costs: \$0.

Regulations Sections: § 653.501(d)(6) and (10).

Agency: DOL-ETA.

Title of Collection: Migrant and Seasonal Farmworker Monitoring Report and Complaint/Apparent Violation Form.

Type of Review: Revision.

OMB Control Number: 1205-0039.

Description: The final rule requires four areas to be changed in this ICR. First, there are several changes to the required content of the SMA's Annual Summary, described at § 653.108, including a summary of how the SMA is working with the State-level E.O. Officer, an assurance that the SMA is a senior-level official who reports directly to the State Administrator or their designee, an evaluation of SMA staffing levels, a summary and analysis of outreach efforts, and other minor edits to language used to describe content in the summary. To implement these changes, the Department also is revising the ETA Form 5148 to include the content. Second, the Department is making two non-substantive corrections to the ETA Form 5148: (1) adding transportation to the types of apparent violations reported in part 1, section E, item 3; and (2) revising part 3, items 2 and 3 so that the field check requirements conform to the existing regulation at § 653.501. The Department is adding transportation to the types of apparent violations because the types of apparent violations listed on the form are intended to exactly mirror the types of complaints reported in section D, item 2. Transportation was inadvertently omitted from the prior ICR revision. Third, the Department is adding a new IC to conform with the change to § 653.107(b)(8), which requires that ES Office Managers maintain MSFW outreach logs on file for at least 3 years, to comply with 2 CFR 200.334. Fourth, the Department is adding an IC to this ICR to explain the recordkeeping requirements established at § 658.410(c) regarding maintaining a central complaint log. The Department is not establishing a required form, but rather describing the minimum contents that must be included in any complaint logs SWAs create. In addition, the Department is revising the ETA Form 5148 to conform with revisions to the minimum level of service indicators to request information regarding outreach

contacts per quarter as opposed to per week as currently required under § 653.109(h).

Affected Public: State Governments.
Obligation to Respond: Required to Obtain or Retain Benefits.

Estimated Total Annual Respondents: 5,536.

Estimated Total Annual Responses: 11,450.

Estimated Total Annual Burden Hours: 29,440.

Estimated Total Annual Other Burden Costs: \$0.

Regulations Sections: 2 CFR 200.334; 20 CFR 653.107(b)(8), 653.108, 653.109(h), and 658.410(c).

Agency: DOL-ETA.

Title of Collection: Wagner-Peyser Employment Service Required Elements for the Unified or Combined State Plan.

Type of Review: New Collection.

OMB Control Number: 1205-0NEW.

Description: The Department is requesting a new OMB control number for this collection. The request for a new control number is for administrative reasons only. The changes in this rulemaking described subsequently will eventually be included in OMB Control Number 1205-0522 (expires Mar. 31, 2026). After this rule is published and before the expiration of OMB Control Number 1205-0522, the Department intends to submit a nonmaterial change request to transfer the burden from the new ICR to the existing OMB control number for the Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications under the Workforce Innovation and Opportunity Act (1205-0522) and proceed to discontinue the use of the new control number.

The final rule requires all States to provide Wagner-Peyser Act ES services through State merit staff, except for three States that the Department is permitting to use their approved longstanding alternative staffing models. The Department is creating a new ICR to require Unified or Combined State Plans to describe how the State will staff labor exchange services under the Wagner-Peyser Act using State merit staff. Similarly, the Department is reinstituting the SWA's requirement to provide assurances that it will use State merit staff to deliver ES services. The final rule also provides several clarifications regarding outreach and significant MSFW one-stop center staffing, including changes to the content of the AOP. The changes will require revision to the AOP instructions. The AOP instructions in the final submission to OMB reflect one change from the NPRM related to outreach staffing levels that the Department is

making in § 653.107(a)(4) and (d)(2) in this final rule.

Affected Public: State Governments.

Obligation to Respond: Required to Obtain or Retain Benefits.

Estimated Total Annual Respondents: 57 (every 2 years).

Estimated Total Annual Responses: 38 (every 2 years).

Estimated Total Annual Burden Hours: 8,136 (every 2 years).

Estimated Total Annual Other Burden Costs: \$0 (every 2 years).

Regulations Sections: §§ 652.215; 653.107(a)(1), (a)(4), (b)(11), and (d)(2)(ii) through (v).

Interested parties may obtain a copy free of charge of one or more of the ICRs submitted to OMB on the OIRA website at <https://www.reginfo.gov/public/do/PRAMain>. From that page, select Department of Labor from the “Currently under Review” dropdown menu, click the “Submit” button, and find the applicable control number among the ICRs displayed.

D. Executive Order 13132 (Federalism)

E.O. 13132 requires Federal agencies to ensure that the principles of Federalism animating our Constitution guide the executive departments and agencies in the formulation and implementation of policies, and to further the policies of the Unfunded Mandates Reform Act of 1995 (UMRA). Further, agencies must strictly adhere to constitutional principles. Agencies must closely examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and they must carefully assess the necessity for any such action. To the extent practicable, State and local officials must be consulted before any such action is implemented. Section 3(b) of the E.O. further provides that Federal agencies must implement regulations that have a substantial direct effect only if statutory authority permits the regulation and it is of national significance. The Department has reviewed the final rule in light of these requirements and has concluded that it is properly premised on the statutory authority given to the Secretary to set standards under the Wagner-Peyser Act.

Accordingly, the Department has reviewed this final rule and has concluded that the rulemaking has no substantial direct effects on States, the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government as described by E.O. 13132. Therefore, the Department has concluded that this final rule does

not have a sufficient Federalism implication to require further agency action or analysis.

E. Unfunded Mandates Reform Act of 1995

Title II of UMRA, Public Law 104–4, requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a final agency rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. This final rule does not exceed the \$100 million expenditure in any one year when adjusted for inflation. Therefore, the requirements of title II of UMRA do not apply, and the Department has not prepared a statement under UMRA.

Comment: Some commenters, including a State workforce development board, a professional association, and an association of State elected officials, argued that the proposal would create an unfunded Federal mandate because States’ costs would increase due to the loss of flexibility and the need to recruit State merit staff and cross-train workers to support UI adjudication. A professional association, an association of workforce boards, and a State workforce development board similarly argued that the proposal would create an unfunded Federal mandate because it would force States to make additional long-term investments to employ State merit staff.

Response: The regulation contains no unfunded mandates as defined in 2 U.S.C. 658. The Department has detailed the cost burden associated with this final rule in section VI. Wagner-Peyser Employment Service grant funding is provided annually to deliver employment services, and that funding will be used to cover the cost of implementing this rule. Under UMRA, a Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or imposes a duty upon the private sector that is not voluntary. The Wagner-Peyser act, as amended by WIOA, authorizes ES activities. These program requirements are supported by Federal formula grant funds, and, accordingly, are not considered unfunded mandates.

F. Executive Order 13175 (Indian Tribal Governments)

The Department has reviewed this final rule under the terms of E.O. 13175 and DOL’s Tribal Consultation Policy and has concluded that the changes to

regulatory text would not have tribal implications. These changes do not have substantial direct effects on one or more Indian tribes, the relationship between the Federal government and Indian tribes, nor the distribution of power and responsibilities between the Federal government and Tribal Governments.

G. Plain Language

E.O. 12866, E.O. 13563, and the Presidential Memorandum of June 1, 1998 (Plain Language in Government Writing), direct executive departments and agencies to use plain language in all rulemaking documents published in the **Federal Register**. The goal is to make the government more responsive, accessible, and understandable in its communications with the public. Accordingly, the Department drafted this final rule in plain language.

List of Subjects

20 CFR Part 651

Employment, Grant programs—labor.

20 CFR Part 652

Employment, Grant programs—labor, Reporting and recordkeeping requirements.

20 CFR Part 653

Agriculture, Employment, Equal employment opportunity, Grant programs—labor, Migrant labor, Reporting and recordkeeping requirements.

20 CFR Part 658

Administrative practice and procedure, Employment, Grant programs—labor, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, the Department of Labor amends 20 CFR parts 651, 652, 653, and 658 as follows:

PART 651—GENERAL PROVISIONS GOVERNING THE WAGNER-PEYSER ACT EMPLOYMENT SERVICE

■ 1. The authority citation for part 651 is revised to read as follows:

Authority: 29 U.S.C. 49a and 49k; 38 U.S.C. 101, chapters 41 and 42; Secs. 3, 189 and 503, Pub. L. 113–128, 128 Stat. 1425 (Jul. 22, 2014).

■ 2. Amend § 651.10 by:

- a. Revising the introductory text;
- b. Adding in alphabetical order a definition for “Apparent violation”;
- c. Revising the definitions of “Applicant holding office,” “Bona fide occupational qualification (BFOQ),” “Career services,” “Clearance order,” “Complaint System Representative,”

“Decertification,” “Employment and Training Administration (ETA),” “Employment Service (ES) office,” “Employment Service (ES) Office Manager,” “Employment Service (ES) staff,” “Field checks,” “Field visits,” “Hearing Officer,” “Interstate clearance order,” “Intrastate clearance order,” and “Migrant farmworker”;

■ d. Removing the definition of “Migrant food processing worker”;

■ e. Revising the definitions of “Occupational Information Network (O*NET),” “O*NET–SOC,” “Outreach staff,” “Participant,” “Placement,” “Reportable individual,” “Respondent,” “Seasonal farmworker,” “Significant MSFW one-stop centers,” and “Significant MSFW States”;

■ f. Removing the definitions of “Significant multilingual MSFW one-stop centers” and “State Workforce Agency (SWA) official”; and

■ g. Revising the definition of “Wagner-Peyser Act Employment Service (ES) also known as Employment Service (ES).”

The addition and revisions read as follows:

§ 651.10 Definitions of terms used in this part and parts 652, 653, 654, and 658 of this chapter.

In addition to the definitions set forth in sec. 3 of the Workforce Innovation and Opportunity Act (WIOA), codified at 29 U.S.C. 3101 *et seq.*, the following definitions apply to the regulations in parts 652, 653, 654, and 658 of this chapter:

* * * * *

Apparent violation means a suspected violation of employment-related laws or employment service (ES) regulations by an employer, which an ES staff member observes, has reason to believe, or regarding which an ES staff member receives information (other than a *complaint* as defined in this part).

Applicant holding office means an ES office that is in receipt of a clearance order and has access to U.S. workers who may be willing and available to perform farmwork on less than year-round basis.

* * * * *

Bona fide occupational qualification (BFOQ) means that an employment decision or request based on age, sex, national origin, or religion is based on a finding that such characteristic is necessary to the individual’s ability to perform the job in question. Since a BFOQ is an exception to the general prohibition against discrimination on the basis of age, sex, national origin, or religion, it must be interpreted narrowly in accordance with the Equal Employment Opportunity Commission

regulations set forth at 29 CFR parts 1604, 1605, 1606, and 1625.

Career services means the services described in sec. 134(c)(2) of WIOA and § 678.430 of this chapter.

Clearance order means a job order that is processed through the clearance system under the Agricultural Recruitment System (ARS) at part 653, subpart F, of this chapter.

* * * * *

Complaint System Representative means a trained ES staff individual who is responsible for processing complaints.

Decertification means the rescission by the Secretary of Labor (Secretary) of the year-end certification made under sec. 7 of the Wagner-Peyser Act to the Secretary of the Treasury that the State agency may receive funds authorized by the Wagner-Peyser Act.

* * * * *

Employment and Training Administration (ETA) means the component of the Department that administers Federal government job training and worker dislocation programs, Federal grants to States for public ES programs, and unemployment insurance benefits. These services are provided primarily through State and local workforce development systems.

* * * * *

Employment Service (ES) office means a site that provides ES services as a one-stop partner program. A site must be colocated in a one-stop center consistent with the requirements of §§ 678.305 through 678.315 of this chapter.

Employment Service (ES) Office Manager means the ES staff person in charge of ES services provided in a one-stop center.

* * * * *

Employment Service (ES) staff means individuals who are funded, in whole or in part, by Wagner-Peyser Act funds to carry out activities authorized under the Wagner-Peyser Act.

* * * * *

Field checks means unannounced appearances by ES staff and/or other State or Federal staff at agricultural worksites to which ES placements have been made through the intrastate or interstate clearance system to ensure that conditions are as stated on the clearance order and that the employer is not violating an employment-related law.

Field visits means announced appearances by State Monitor Advocates, Regional Monitor Advocates, the National Monitor Advocate (or National Monitor Advocate staff), or outreach staff to the working, living, and gathering areas of migrant and seasonal

farmworkers (MSFWs), to perform the duties described at §§ 653.107(b) (outreach staff), 653.108(o) and (q) (State Monitor Advocates), 658.602(n) (National Monitor Advocates and National Monitor Advocate staff), and 658.603(p) (Regional Monitor Advocates). Monitor Advocates or outreach staff must keep records of each such visit.

* * * * *

Hearing Officer means a Department Administrative Law Judge, designated to preside at Department administrative hearings.

* * * * *

Interstate clearance order means an agricultural clearance order for temporary employment (employment on a less than year-round basis) describing one or more hard-to-fill job openings, which an ES office uses to request recruitment assistance from other ES offices in a different State.

Intrastate clearance order means an agricultural clearance order for temporary employment (employment on a less than year-round basis) describing one or more hard-to-fill job openings, which an ES office uses to request recruitment assistance from all other ES offices within the State.

* * * * *

Migrant farmworker means a seasonal farmworker (as defined in this section) who travels to the job site so that the farmworker is not reasonably able to return to their permanent residence within the same day.

* * * * *

*Occupational Information Network (O*NET)* means the online reference database which contains detailed descriptions of U.S. occupations, distinguishing characteristics, classification codes, and information on tasks, knowledge, skills, abilities, and work activities as well as information on interests, work styles, and work values.

* * * * *

*O*NET–SOC* means the occupational codes and titles used in the O*NET system, based on and grounded in the Standard Occupational Classification (SOC), which are the titles and codes utilized by Federal statistical agencies to classify workers into occupational categories for the purpose of collecting, calculating, and disseminating data. The SOC system is issued by the Office of Management and Budget and the Department is authorized to develop additional detailed O*NET occupations within existing SOC categories. The Department uses O*NET–SOC titles and codes for the purposes of collecting descriptive occupational information and for State reporting of data on

training, credential attainment, and placement in employment by occupation.

* * * * *

Outreach staff means ES staff with the responsibilities described in § 653.107(b) of this chapter. State Monitor Advocates are not considered outreach staff.

Participant means a reportable individual who has received services other than the services described in § 677.150(a)(3) of this chapter, after satisfying all applicable programmatic requirements for the provision of services, such as eligibility determination. (See § 677.150(a) of this chapter.)

(1) The following individuals are not participants, subject to § 677.150(a)(3)(ii) and (iii) of this chapter:

(i) Individuals who only use the self-service system; and

(ii) Individuals who receive information-only services or activities.

(2) ES participants must be included in the program's performance calculations.

Placement means the hiring by a public or private employer of an individual referred by the ES office for a job or an interview, provided that the ES office completed all the following steps:

(1) Prepared a job order form prior to referral, except in the case of a job development contact on behalf of a specific participant;

(2) Made prior arrangements with the employer for the referral of an individual or individuals;

(3) Referred an individual who had not been specifically designated by the employer, except for referrals on agricultural job orders for a specific crew leader or worker;

(4) Verified from a reliable source, preferably the employer, that the individual had entered on a job; and

(5) Appropriately recorded the placement.

* * * * *

Reportable individual means an individual who has taken action that demonstrates an intent to use ES services and who meets specific reporting criteria of the Wagner-Peyser Act (see § 677.150(b) of this chapter), including:

(1) Individuals who provide identifying information;

(2) Individuals who only use the self-service system; or

(3) Individuals who only receive information-only services or activities.

Respondent means the individual or entity alleged to have committed the

violation described in the complaint, such as the employer, service provider, or State agency.

Seasonal farmworker means an individual who is employed, or was employed in the past 12 months, in farmwork (as defined in this section) of a seasonal or other temporary nature and is not required to be absent overnight from their permanent place of residence. Labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. Workers who move from one seasonal activity to another, while employed in farmwork, are employed on a seasonal basis even though they may continue to be employed during a major portion of the year. Workers are employed on a temporary basis where they are employed for a limited time only or their performance is contemplated for a particular piece of work, usually of short duration. Generally, employment which is contemplated to continue indefinitely is not temporary.

* * * * *

Significant MSFW one-stop centers are those designated by the Department and include those ES offices where MSFWs account for 10 percent or more of annual participants or reportable individuals in ES and those local ES offices that the OWI Administrator determines must be included due to special circumstances such as an estimated large number of MSFWs in the service area. In no event may the number of significant MSFW one-stop centers be less than 100 centers on a nationwide basis.

Significant MSFW States are those States designated by the Department and must include the 20 States with the highest estimated number of MSFWs.

* * * * *

State Workforce Agency (SWA) official means an individual employed by the State Workforce Agency or any of its subdivisions.

* * * * *

Wagner-Peyser Act Employment Service (ES) also known as Employment Service (ES) means the national system of public ES offices described under the Wagner-Peyser Act. ES services are delivered through a nationwide system of one-stop centers, managed by SWAs and the various local offices of the SWAs, and funded by the United States Department of Labor.

* * * * *

PART 652—ESTABLISHMENT AND FUNCTIONING OF STATE EMPLOYMENT SERVICE

■ 3. The authority citation for part 652 is revised to read as follows:

Authority: 29 U.S.C. chapter 4B; 38 U.S.C. chapters 41 and 42; Secs. 189 and 503, Public Law 113–128, 128 Stat. 1425 (Jul. 22, 2014).

■ 4. Amend § 652.8 by revising paragraphs (h), introductory text of paragraph (j), and (j)(2) and (3) to read as follows:

§ 652.8 Administrative provisions.

* * * * *

(h) *Other violations.* Violations or alleged violations of the Wagner-Peyser Act, regulations, or grant terms and conditions except those pertaining to audits or discrimination must be determined and processed in accordance with part 658, subpart H, of this chapter.

* * * * *

(j) *Nondiscrimination requirements.* States must:

* * * * *

(2) Assure that discriminatory job orders will not be accepted, except where the stated requirement is a bona fide occupational qualification (BFOQ). See generally 42 U.S.C. 2000e–2(e) and 29 CFR parts 1604, 1605, 1606, and 1625.

(3) Assure that ES offices are in compliance with the veteran referral and job listing requirements at 41 CFR 60–300.84.

* * * * *

■ 5. Add § 652.10 to read as follows:

§ 652.10 Severability.

Should a court hold any portion of any provision of this part to be invalid, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision or subprovision will be severable from this part and will not affect the remainder thereof.

■ 6. Revise the heading to subpart C to read as follows:

Subpart C—Employment Service Services in a One-Stop Delivery System Environment

■ 7. Amend § 652.204 by revising the section heading to read as follows:

§ 652.204 Must funds authorized under the Wagner-Peyser Act Governor's Reserve flow through the one-stop delivery system?

* * * * *

■ 8. Amend § 652.205 by revising paragraph (b)(3) to read as follows:

§ 652.205 May funds authorized under the Wagner-Peyser Act be used to supplement funding for labor exchange programs authorized under separate legislation?

* * * * *

(b) * * *

(3) The activity provides services that are coordinated with ES services; and

* * * * *

■ 9. Amend § 652.207 by revising the section heading and paragraph (a) to read as follows:

§ 652.207 How does a State meet the requirement for universal access to Employment Service services?

(a) A State has discretion in how it meets the requirement for universal access to ES services. In exercising this discretion, a State must meet the Wagner-Peyser Act's requirements.

* * * * *

■ 10. Revise § 652.215 to read as follows:

§ 652.215 What staffing models must be used to deliver services in the Employment Service?

(a) Except as provided in paragraph (b) of this section, the Secretary requires that States deliver the labor exchange services described in § 652.3 using State merit-staff employees employed according to the merit-system principles described in 5 CFR part 900, subpart F—Standards for a Merit System of Personnel Administration. This requirement also applies to the provision of services and activities under parts 653 and 658 of this chapter.

(b) States authorized prior to February 5, 2020, to use a staffing model other than that described in paragraph (a) of this section to deliver ES services may use the staffing model consistent with the model previously authorized for the State. These States may use merit-staffing flexibility only to the same extent that the Department had authorized it prior to February 5, 2020.

(c) States using staffing models under paragraph (b) of this section are required to participate in evaluations of their delivery of ES services conducted by the Department.

(d) All States must comply with the requirements in this section no later than January 22, 2026.

PART 653—SERVICES OF THE WAGNER-PEYSER ACT EMPLOYMENT SERVICE SYSTEM

■ 11. The authority citation for part 653 continues to read as follows:

Authority: Secs. 167, 189, 503, Public Law 113–128, 128 Stat. 1425 (Jul. 22, 2014); 29 U.S.C. chapter 4B; 38 U.S.C. part III, chapters 41 and 42.

■ 12. Amend § 653.100 by revising paragraph (a) to read as follows:

§ 653.100 Purpose and scope of subpart.

(a) This subpart sets forth the principal regulations of the Wagner-Peyser Act Employment Service (ES) concerning the provision of services for MSFWs consistent with the requirement that all services of the workforce development system be available to all job seekers in an equitable and nondiscriminatory fashion. This includes ensuring MSFWs have access to these services in a way that meets their unique needs. MSFWs must receive services on a basis which is qualitatively equivalent and quantitatively proportionate to services provided to non-MSFWs.

* * * * *

■ 13. Revise § 653.101 to read as follows:

§ 653.101 Provision of services to migrant and seasonal farmworkers.

SWAs must ensure that ES staff at one-stop centers offer MSFWs the full range of career and supportive services, benefits and protections, and job and training referral services as are provided to non-MSFWs. SWAs must ensure ES staff at the one-stop centers tailor such ES services in a way that accounts for individual MSFW preferences, needs, skills, and the availability of job and training opportunities, so that MSFWs are reasonably able to participate in the ES.

■ 14. Amend § 653.102 by revising the third sentence and removing the fourth sentence to read as follows:

§ 653.102 Job information.

* * * SWAs must ensure ES staff at one-stop centers provide assistance to MSFWs to access job order information easily and efficiently.

■ 15. Amend § 653.103 by revising paragraphs (a) through (c) to read as follows:

§ 653.103 Process for migrant and seasonal farmworkers to participate in workforce development activities.

(a) Each ES office must determine whether participants and reportable individuals are MSFWs as defined at § 651.10 of this chapter.

(b) SWAs must comply with the language access and assistance requirements at 29 CFR 38.9 with regard to all individuals with limited English proficiency (LEP), including MSFWs who are limited English proficient individuals, as defined at 29 CFR 38.4(hh). This includes ensuring ES staff comply with these language access and assistance requirements.

(c) One-stop centers must provide MSFWs a list of available career and supportive services.

* * * * *

■ 16. Amend § 653.107 by:

■ a. Revising the section heading and paragraphs (a)(1), (a)(2)(i) and (ii), and (3);

■ b. Revising paragraphs (a)(4), the first sentence of (a)(5), introductory text of paragraph (b), (b)(1), (b)(3), introductory text of (b)(4), (b)(4)(i) and (vi), (b)(6), (b)(7), the second sentence of (b)(8), and paragraphs (b)(11), (d)(2)(ii) through (v), and (d)(4) and (5).

The revisions and additions read as follows:

§ 653.107 Outreach responsibilities and Agricultural Outreach Plan.

(a) * * *

(1) Each SWA must ensure outreach staff conduct outreach as described in paragraph (b) of this section on an ongoing basis. State Administrators must ensure State Monitor Advocates (SMAs) and outreach staff coordinate activities with WIOA title I sec. 167 grantees as well as with public and private community service agencies and MSFW groups. WIOA title I sec. 167 grantees' activities involving MSFWs does not substitute for SWA outreach responsibilities.

(2) * * *

(i) Communicate the full range of workforce development services to MSFWs; and

(ii) Conduct thorough outreach efforts with extensive follow-up activities identified at paragraph (b)(5) of this section.

(3) When hiring or assigning outreach staff, SWAs must ensure hiring officials:

(i) Seek and put a strong emphasis on hiring and assigning qualified candidates who speak the language of a significant proportion of the State MSFW population; and

(A) Who are from MSFW backgrounds; or

(B) Who have substantial work experience in farmworker activities.

(ii) Inform farmworker organizations and other organizations with expertise concerning MSFWs of job openings and encourage them to refer qualified applicants to apply.

(4) Each SWA must ensure that there are an adequate number of outreach staff employed in the State to conduct MSFW outreach in each service area of the State and to contact a majority of MSFWs in the State annually. In the 20 States with the highest estimated year-round MSFW activity, as identified by the Department, there must be full-time, year-round outreach staff to conduct outreach duties. Full-time means each

individual outreach staff person must spend 100 percent of their time on the outreach responsibilities described in paragraph (b) of this section. For the remainder of the States, there must be year-round part-time outreach staff, and during periods of the highest MSFW activity, there must be full-time outreach staff. These staffing levels must align with and be supported by information about the estimated number of farmworkers in the State and the farmworker activity in the State as demonstrated in the State's Agricultural Outreach Plan (AOP) pursuant to paragraph (d) of this section. All outreach staff must be multilingual, if warranted by the characteristics of the MSFW population in the State, and must spend a majority of their time in the field.

(5) The SWA must publicize the availability of ES services through such means as newspaper and electronic media publicity. * * *

* * * * *

(b) *Outreach staff responsibilities.* Outreach staff must locate and contact MSFWs who are not being reached by the normal intake activities conducted by the ES offices. Outreach staff responsibilities include the activities identified in paragraphs (b)(1) through (11) of this section.

(1) Outreach staff must explain to MSFWs at their working, living, or gathering areas (including day-haul sites), by means of written and oral presentations either spontaneous or recorded, the following:

* * * * *

(3) After making the presentation, outreach staff must urge the MSFWs to go to the local one-stop center to obtain the full range of employment and training services.

(4) If an MSFW cannot or does not wish to visit the local one-stop center, outreach staff must offer to provide on-site the following:

(i) Assistance in the preparation of applications for ES services;

* * * * *

(vi) As needed, assistance in making appointments and arranging transportation for individual MSFW(s) or members of their family to and from local one-stop centers or other appropriate agencies.

* * * * *

(6) Outreach staff must be alert to observe the working and living conditions of MSFWs and if an outreach staff member observes or receives information about apparent violations, the outreach staff member must document and refer the information to

the appropriate ES Office Manager (as described in § 658.419 of this chapter).

(7) Outreach staff must be trained in one-stop center procedures and in the services, benefits, and protections afforded MSFWs by the ES, including training on protecting farmworkers against sexual harassment, sexual coercion, assault, and human trafficking. Such trainings are intended to help outreach staff identify when such issues may be occurring in the fields and how to document and refer the cases to the appropriate enforcement agencies. Outreach staff also must be trained in the Complaint System procedures at part 658, subpart E, of this chapter and be aware of the local, State, regional, and national enforcement agencies that would be appropriate to receive referrals. The program for such training must be formulated by the State Administrator, pursuant to uniform guidelines developed by ETA. The SMA must be given an opportunity to review and comment on the State's program.

(8) * * * These records must include a daily log, a copy of which must be sent monthly to the ES Office Manager and maintained on file for at least 3 years. * * *

* * * * *

(11) Outreach staff in significant MSFW one-stop centers must conduct especially vigorous outreach in their service areas. Outreach activities must align with and be supported by information provided in the State's AOP pursuant to paragraph (d) of this section.

* * * * *

(d) * * *

(2) * * *

(ii) Explain the materials, tools, and resources the State will use for outreach;

(iii) Describe the SWA's proposed outreach activities to contact MSFWs who are not being reached by the normal intake activities conducted by the one-stop centers. The description must identify the number of full-time and part-time outreach staff positions in the State and must demonstrate that there are sufficient outreach staff to conduct MSFW outreach in each service area of the State to contact a majority of MSFWs in the State annually;

(iv) Describe the activities planned for providing the full range of ES services to the agricultural community, including both MSFWs and agricultural employers, through the one-stop centers; and

(v) Include a description of how the SWA intends to provide ES staff in significant MSFW one-stop centers in accordance with § 653.111.

* * * * *

(4) The AOP must be submitted in accordance with paragraph (d)(1) of this section and planning guidance issued by the Department.

(5) The Annual Summaries required at § 653.108(u) must update the Department on the SWA's progress toward meeting the objectives set forth in the AOP.

■ 17. Revise § 653.108 to read as follows:

§ 653.108 State Workforce Agency and State Monitor Advocate responsibilities.

(a) State Administrators must ensure their SWAs monitor their own compliance with ES regulations in serving MSFWs on an ongoing basis. The State Administrator has overall responsibility for SWA self-monitoring. The State Administrator and ES staff must not retaliate against staff, including the SMA, for self-monitoring or raising any issues or concerns regarding noncompliance with the ES regulations.

(b) The State Administrator must appoint an SMA who must be a SWA official. The State Administrator must inform farmworker organizations and other organizations with expertise concerning MSFWs of the opening and encourage them to refer qualified applicants to apply. Among qualified candidates, the SWAs must seek and put a strong emphasis on hiring persons:

(1) Who are from MSFW backgrounds;

or

(2) Who speak the language of a significant proportion of the State MSFW population; or

(3) Who have substantial work experience in farmworker activities.

(c) The SMA must be an individual who:

(1) Is a senior-level ES staff employee;

(2) Reports directly to the State Administrator or State Administrator's designee, such as a director or other appropriately titled official in the State Administrator's office, who has the authority to act on behalf of the State Administrator, except that if a designee is selected, they must not be the individual who has direct program oversight of the ES; and

(3) Has the knowledge, skills, and abilities necessary to fulfill the responsibilities as described in this subpart.

(d) The SMA must have sufficient authority, staff, resources, and access to top management to monitor compliance with the ES regulations. Staff assigned to the SMA are intended to help the SMA carry out the duties set forth in this section and must not perform work that conflicts with any of the SMA's duties, such as outreach responsibilities

required by § 653.107, ARS processing under subpart F of this part, and complaint processing under subpart E of part 658. The number of ES staff positions assigned to the SMA must be determined by reference to the number of MSFWs in the State, (as measured at the time of the peak MSFW population), and the need for monitoring activity in the State.

(e) The SMA must devote full-time staffing to the SMA functions described in this section. No State may dedicate less than full-time staffing for the SMA position, unless the Regional Administrator, with input from the Regional Monitor Advocate, provides written approval. Any State that proposes less than full-time dedication must demonstrate to the Regional Administrator and Regional Monitor Advocate that all SMA functions can be effectively performed with part-time staffing. The SMA must not perform work that conflicts with any of the SMA's duties, such as outreach responsibilities required by § 653.107, ARS processing under subpart F of this part, and complaint processing under subpart E of part 658.

(f) All SMAs and their staff must attend training session(s) offered by the Regional Monitor Advocate(s) and National Monitor Advocate and their staff and those necessary to maintain competency and enhance the SMA's understanding of the unique needs of farmworkers. Such trainings must include those identified by the SMA's Regional Monitor Advocate and may include those offered by the Occupational Safety and Health Administration, the Department's Wage and Hour Division, U.S. Equal Employment Opportunity Commission, the Immigrant and Employee Rights Section of the Department of Justice's Civil Rights Division, the Department's Civil Rights Center, and other organizations offering farmworker-related information.

(g) The SMA must provide any relevant documentation requested from the SWA by the Regional Monitor Advocate or the National Monitor Advocate.

(h) The SMA must:

(1) Conduct an ongoing review of the delivery of services and protections afforded by the ES regulations to MSFWs by the SWA and ES offices. This includes:

(i) Monitoring compliance with § 653.111;

(ii) Monitoring the ES services that the SWA and one-stop centers provide to MSFWs to assess whether they are qualitatively equivalent and quantitatively proportionate to the

services that the SWA and one-stop centers provide to non-MSFWs; and

(iii) Reviewing the appropriateness of informal resolution of complaints and apparent violations as documented in the complaint logs.

(2) Without delay, must advise the SWA and ES offices of problems, deficiencies, or improper practices in the delivery of services and protections afforded by these regulations and, if warranted, specify the corrective action(s) necessary to address these deficiencies. When the SMA finds corrective action(s) necessary, the ES Office Manager or other appropriate ES staff must develop a corrective action plan in accordance with the requirements identified at paragraph (h)(3)(v) of this section. The SMA also must advise the SWA on means to improve the delivery of services.

(3) Participate in on-site reviews of one-stop centers on a regular basis (regardless of whether or not they are designated significant MSFW one-stop centers) using the procedures set forth in paragraphs (h)(3)(i) through (vii) of this section.

(i) Before beginning an onsite review, the SMA or review staff must study:

(A) Program performance data;

(B) Reports of previous reviews;

(C) Corrective action plans developed as a result of previous reviews;

(D) Complaint logs, as required by the regulations under part 658 of this chapter, including logs documenting the informal resolution of complaints and apparent violations; and

(E) Complaints elevated from the office or concerning the office.

(ii) The SMA must ensure that the onsite review format, developed by ETA, is used as a guideline for onsite reviews.

(iii) Upon completion of an onsite monitoring review, the SMA must hold one or more wrap-up sessions with the ES Office Manager and staff to discuss any findings and offer initial recommendations and appropriate technical assistance.

(iv) After each review, the SMA must conduct an in-depth analysis of the review data. The conclusions, including findings and areas of concern and recommendations of the SMA, must be put in writing and must be sent directly to the State Administrator, to the official of the SWA with authority over the ES office, and other appropriate SWA officials.

(v) If the review results in any findings of noncompliance with the regulations under this chapter, the SMA's report must include the necessary corrective action(s). To resolve the findings, the ES Office

Manager or other appropriate ES staff must develop and propose a written corrective action plan. The plan must be approved or revised by SWA officials and the SMA. The plan must include the actions required to correct any compliance issues within 30 business days or, if the plan allows for more than 30 business days for full compliance, the length of and the reasons for the extended period and the major interim steps to correct the compliance issues must be specifically stated. SWAs are responsible for assuring and documenting that the ES office is in compliance within the time period designated in the plan.

(vi) SWAs must submit to the appropriate ETA regional office copies of the onsite review reports and corrective action plans for ES offices.

(vii) The SMA may delegate the review described in paragraph (h)(3) of this section to the SMA's staff, if the SMA finds such delegation necessary. In such event, the SMA is responsible for and must approve the written report of the review.

(4) Ensure all significant MSFW one-stop centers not reviewed onsite by Federal staff are reviewed at least once per year by the SMA or their staff, and that, if necessary, those ES offices in which significant problems are revealed by required reports, management information, the Complaint System, or other means are reviewed as soon as possible.

(5) Review and approve the SWA's AOP.

(6) On a regular basis, review outreach staff's daily logs and other reports including those showing or reflecting the outreach staff's activities.

(7) Write and submit annual summaries to the State Administrator with a copy to the Regional Administrator and the National Monitor Advocate.

(i) The SMA must participate in Federal reviews conducted pursuant to part 658, subpart G, of this chapter, as requested by the Regional or National Monitor Advocate.

(j) The SMA must monitor the performance of the Complaint System, as set forth at §§ 658.400 and 658.401 of this chapter. The SMA must review the ES office's informal resolution of complaints relating to MSFWs and must ensure that the ES Office Manager transmits copies of the Complaint System logs pursuant to part 658, subpart E, of this chapter to the SWA.

(k) The SMA must serve as an advocate to improve services for MSFWs.

(l) The SMA must establish an ongoing liaison with WIOA sec. 167

National Farmworker Jobs Program (NFJP) grantees and other organizations serving farmworkers, employers, and employer organizations in the State.

(m) The SMA must establish an ongoing liaison with the State-level Equal Opportunity (E.O.) Officer.

(n) The SMA must meet (either in person or by alternative means), at minimum, quarterly, with representatives of the organizations pursuant to paragraphs (l) and (m) of this section, to receive input on improving coordination with ES offices or improving the coordination of services to MSFWs. To foster such collaboration, the SMAs must communicate freely with these organizations. The SMA must also establish Memorandums of Understanding (MOUs) with the NFJP grantees and may establish MOUs with other organizations serving farmworkers as appropriate.

(o) The SMA must conduct frequent field visits to the working, living, and gathering areas of MSFWs, and must discuss the SWA's provision of ES services and other employment-related programs with MSFWs, crew leaders, and employers. Records must be kept of each such field visit.

(p) The SMA must participate in the appropriate regional public meeting(s) held by the Department of Labor Regional Farm Labor Coordinated Enforcement Committee, other Occupational Safety and Health Administration and Wage and Hour Division task forces, and other committees as appropriate.

(q) The SMA must ensure that outreach efforts in all significant MSFW one-stop centers are reviewed at least yearly. This review will include accompanying at least one outreach staff from each significant MSFW one-stop center on field visits to MSFWs' working, living, and/or gathering areas. The SMA must review findings from these reviews with the ES Office Managers.

(r) The SMA must review on at least a quarterly basis all statistical and other MSFW-related data reported by ES offices in order:

(1) To determine the extent to which the SWA has complied with the ES regulations; and

(2) To identify the areas of non-compliance.

(s) The SMA must have full access to all statistical and other MSFW-related information gathered by SWAs and ES offices and may interview ES staff with respect to reporting methods. After each review, the SMA must consult, as necessary, with the SWA and ES offices

and provide technical assistance to ensure accurate reporting.

(t) The SMA must review and comment on proposed State ES directives, manuals, and operating instructions relating to MSFWs and must ensure:

(1) That they accurately reflect the requirements of the regulations; and

(2) That they are clear and workable. The SMA also must explain and make available at the requestor's cost, pertinent directives and procedures to employers, employer organizations, farmworkers, farmworker organizations, and other parties expressing an interest in a readily identifiable directive or procedure issued and receive suggestions on how these documents can be improved.

(u) The SMA must prepare for the State Administrator, the Regional Monitor Advocate, and the National Monitor Advocate an Annual Summary describing how the State provided ES services to MSFWs within the State based on statistical data, reviews, and other activities as required in this chapter. The summary must include:

(1) A description of the activities undertaken during the program year by the SMA pertaining to their responsibilities set forth in this section and other applicable regulations in this chapter.

(2) An assurance that the SMA is a senior-level official who reports directly to the State Administrator or the State Administrator's designee as described at paragraph (c) of this section.

(3) An evaluation of SMA staffing levels, including:

(i) An assurance the SMA devotes all of their time to Monitor Advocate functions or, if the SMA conducts their functions on a part-time basis, an assessment of whether all SMA functions are able to be effectively performed on a part-time basis; and

(ii) An assessment of whether the performance of SMA functions requires increased time by the SMA (if part-time) or an increase in the number of ES staff assigned to assist the SMA in the performance of SMA functions, or both.

(4) A summary of the monitoring reviews conducted by the SMA, including:

(i) A description of any problems, deficiencies, or improper practices the SMA identified in the delivery of services;

(ii) A summary of the actions taken by the SWA to resolve the problems, deficiencies, or improper practices described in its service delivery; and

(iii) A summary of any technical assistance the SMA provided for the SWA, ES offices, and outreach staff.

(5) A summary and analysis of the outreach efforts undertaken by all significant and non-significant MSFW one-stop centers, as well as the results of those efforts, and an analysis of whether the outreach levels and results were adequate.

(6) A summary of the State's actions taken under the Complaint System described in part 658, subpart E, of this chapter, identifying any challenges, complaint trends, findings from reviews of the Complaint System, trainings offered throughout the year, and steps taken to inform MSFWs and employers, and farmworker advocacy groups about the Complaint System.

(7) A summary of how the SMA is working with WIOA sec. 167 NFJP grantees, the State-level E.O. Officer, and other organizations serving farmworkers, employers, and employer organizations in the State, and an assurance that the SMA is meeting at least quarterly with these individuals and representatives of these organizations.

(8) A summary of the statistical and other MSFW-related data and reports gathered by SWAs and ES offices for the year, including an overview of the SMA's involvement in the SWA's reporting systems.

(9) A summary of the training conducted for ES staff on techniques for accurately reporting data.

(10) A summary of activities related to the AOP and an explanation of whether those activities helped the State reach the objectives described in the AOP. At the end of the 4-year AOP cycle, the summary must include a synopsis of the SWA's achievements over the previous 4 years to accomplish the objectives set forth in the AOP, and a description of the objectives which were not achieved and the steps the SWA will take to address those deficiencies.

(11) For significant MSFW one-stop centers, a summary of the State's efforts to comply with § 653.111.

■ 18. Amend § 653.109 by:

■ a. Revising paragraph (b)(9);

■ b. Redesignating paragraph (b)(10) as paragraph (b)(11);

■ c. Adding a new paragraph (b)(10); and

■ d. Revising paragraphs (g), (h) introductory text, and (h)(1).

The revision and additions read as follows:

§ 653.109 Data collection and performance accountability measures.

* * * * *

(b) * * *

(9) Agricultural clearance orders (including field checks), MSFW

complaints and apparent violations, and monitoring activities;

(10) The number of reportable individuals and participants who are MSFWs; and

* * * * *

(g) Meet equity indicators that address ES controllable services and include, at a minimum, individuals referred to a job, receiving job development, and referred to supportive or career services.

(h) Meet minimum levels of service in significant MSFW States. That is, only significant MSFW States will be required to meet minimum levels of service to MSFWs. Minimum level of service indicators must include, at a minimum, individuals placed in a job, individuals placed long-term (150 days or more) in a non-agricultural job, a review of significant MSFW one-stop centers, field checks conducted, outreach contacts per quarter, and processing of complaints. The determination of the minimum service levels required of significant MSFW States must be based on the following:

(1) Past SWA performance in serving MSFWs, as reflected in on-site reviews and data collected under paragraph (b) of this section.

* * * * *

■ 19. Amend § 653.110 by revising paragraph (b) to read as follows:

§ 653.110 Disclosure of data.

* * * * *

(b) If a request for data held by a SWA is made to the ETA national or regional office, ETA must forward the request to the SWA for response.

* * * * *

■ 20. Amend § 653.111 by revising the section heading and paragraphs (a) and (b) to read as follows:

§ 653.111 State Workforce Agency staffing requirements for significant MSFW one-stop centers.

(a) The SWA must staff significant MSFW one-stop centers in a manner facilitating the delivery of ES services tailored to the unique needs of MSFWs. This includes recruiting qualified candidates who meet the criteria in § 653.107(a)(3).

(b) The SMA, Regional Monitor Advocate, or the National Monitor Advocate, as part of their regular reviews of SWA compliance with these regulations, must monitor the extent to which the SWA has complied with its obligations under paragraph (a) of this section.

* * * * *

■ 21. Amend § 653.501 by:

■ a. Revising the introductory text of paragraph (a) and paragraph (a)(1);

■ b. Revising paragraph (c)(3) introductory text; and

■ c. Revising the first sentence in the introductory text of paragraph (d)(1) and paragraphs (d)(3), (6), (10), and (11).

The revisions and additions read as follows:

§ 653.501 Requirements for processing clearance orders.

(a) *Assessment of need.* No ES staff may place a job order seeking workers to perform farmwork into intrastate or interstate clearance unless:

(1) The ES office and employer have attempted and have not been able to obtain sufficient workers within the local labor market area; or

* * * * *

(c) * * *

(3) SWAs must ensure that the employer makes the following assurances in the clearance order:

* * * * *

(d) * * *

(1) The order-holding ES office must transmit an electronic copy of the approved clearance order to its SWA.

* * *

* * * * *

(3) The approval process described in this paragraph (d)(3) does not apply to clearance orders that are attached to applications for foreign temporary agricultural workers pursuant to part 655, subpart B, of this chapter; such clearance orders must be sent to the processing center as directed by ETA in guidance. For noncriteria clearance orders (orders that are not attached to applications under part 655, subpart B, of this chapter), the ETA regional office must review and approve the order within 10 business days of its receipt of the order, and the Regional Administrator or their designee must approve the areas of supply to which the order will be extended. Any denial by the Regional Administrator or their designee must be in writing and state the reasons for the denial.

* * * * *

(6) ES staff must assist all farmworkers to understand the terms and conditions of employment set forth in intrastate and interstate clearance orders and must provide such workers with checklists showing wage payment schedules, working conditions, and other material specifications of the clearance order.

* * * * *

(10) Applicant-holding offices must provide workers referred on clearance orders with a checklist summarizing wages, working conditions and other material specifications in the clearance order. The checklist must include

language notifying the worker that a copy of the original clearance order is available upon request.

(11) The applicant-holding office must give each referred worker a copy of the list of worker's rights described in Departmental guidance.

* * * * *

■ 22. Amend § 653.502 by revising paragraph (d) to read as follows:

§ 653.502 Conditional access to the Agricultural Recruitment System.

* * * * *

(d) *Notice of denial.* If the Regional Administrator denies the request for conditional access to the intrastate or interstate clearance system they must provide written notice to the employer, the appropriate SWA, and the ES office, stating the reasons for the denial.

* * * * *

■ 23. Amend § 653.503 by revising paragraphs (a) and (b) to read as follows:

§ 653.503 Field checks.

(a) If a worker is placed on a clearance order, the SWA must notify the employer in writing that the SWA, through its ES offices, and/or Federal staff, must conduct unannounced field checks to determine and document whether wages, hours, transportation, and working and housing conditions are being provided as specified in the clearance order.

(b) Where the SWA has made placements on 10 or more agricultural clearance orders (pursuant to this subpart) during the quarter, the SWA must conduct field checks on at least 25 percent of the total of such orders. Where the SWA has made placements on nine or fewer job orders during the quarter (but at least one job order), the SWA must conduct field checks on 100 percent of all such orders. This requirement must be met on a quarterly basis.

* * * * *

■ 24. Add § 653.504 to read as follows:

§ 653.504 Severability.

Should a court hold any portion of any provision of this part to be invalid, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision or subprovision will be severable from this part and will not affect the remainder thereof.

PART 658—ADMINISTRATIVE PROVISIONS GOVERNING THE WAGNER-PEYSER ACT EMPLOYMENT SERVICE

- 25. Revise the authority citation for part 658 to read as follows:

Authority: Pub. L. 113–128, 128 Stat. 1425 (July 22, 2014); 29 U.S.C. chapter 4B.

- 26. Amend § 658.400 by revising the second sentence of paragraph (a) and paragraph (d) to read as follows:

§ 658.400 Purpose and scope of subpart.

(a) * * * Specifically, the Complaint System processes complaints against an employer about the specific job to which the applicant was referred through the ES and complaints involving the failure to comply with the ES regulations under parts 651, 652, 653, and 654 of this chapter and this part. * * *

(d) A complainant may designate an individual to act as their representative.

- 27. Amend § 658.410 by:

- a. Revising paragraphs (c), (g), (h), (k), and (m);
- b. Removing paragraph (n); and
- c. Redesignating (o) as paragraph (n) and revising the newly redesignated paragraph (n)..

The revisions and redesignation read as follows:

§ 658.410 Establishment of local and State complaint systems.

(c) SWAs must ensure centralized control procedures are established for the processing of complaints and apparent violations. The ES Office Manager and the State Administrator must ensure a central complaint log is maintained, listing all complaints taken by the ES office or the SWA and apparent violations identified by ES staff, and specifying for each complaint or apparent violation:

- (1) The name of the complainant (for complaints);
- (2) The name of the respondent (employer or State agency);
- (3) The date the complaint is filed or the apparent violation was identified;
- (4) Whether the complaint is made by or on behalf of a migrant and seasonal farmworker (MSFW) or whether the apparent violation affects an MSFW;
- (5) Whether the complaint or apparent violation concerns an employment-related law or the ES regulations; and
- (6) The actions taken (including any documents the SWA sent or received and the date the SWA took such action(s)), and whether the complaint or

apparent violation has been resolved, including informally.

* * * * *

(g) All complaints filed through the ES office must be processed by a trained Complaint System Representative.

(h) All complaints received by a SWA must be assigned to a trained Complaint System Representative designated by the State Administrator. Complaints must not be assigned to the State Monitor Advocate (SMA).

* * * * *

(k) The appropriate ES staff processing a complaint must offer to assist the complainant through the provision of appropriate services.

* * * * *

(m) Follow-up on unresolved complaints. When an MSFW submits a complaint, the Complaint System Representative must follow up monthly on the processing of the complaint and must inform the complainant of the status of the complaint. No follow-up with the complainant is required for non-MSFW complaints.

(n) A complainant may designate an individual to act as their representative throughout the filing and processing of a complaint.

- 28. Amend § 658.411 by:

- a. Revising paragraphs (a)(2)(i) and (ii), (a)(3), the first sentence of paragraph (a)(4), and paragraphs (b)(1) introductory text, (b)(1)(i), and (b)(1)(ii)(A), (B), (D), and (E);
- b. Adding paragraph (b)(1)(ii)(F); and
- c. Revising paragraphs (c), (d)(1) introductory text, (d)(1)(i), (d)(1)(ii)(A), (B), (C), and (D), (d)(1)(iii) and (iv), the introductory text of (d)(3), (d)(4), the introductory text of (d)(5)(i), (d)(5)(ii), (d)(5)(iii)(G), and (d)(6).

The revisions and addition read as follows:

§ 658.411 Action on complaints.

(a) * * *

(2) * * *

(i) Make every effort to obtain all the information they perceive to be necessary to investigate the complaint;

(ii) Request that the complainant indicate all of the physical addresses, email addresses, telephone numbers, and any other helpful means by which they might be contacted during the investigation of the complaint; and

* * * * *

(3) The staff must ensure the complainant (or their representative) submits the complaint on the Complaint/Referral Form or another complaint form prescribed or approved by the Department or submits complaint information which satisfies paragraph (a)(4) of this section. The Complaint/

Referral Form must be used for all complaints, including complaints about unlawful discrimination, except as provided in paragraph (a)(4) of this section. The staff must offer to assist the complainant in filling out the form and submitting all necessary information and must do so if the complainant desires such assistance. If the complainant also represents several other complainants, all such complainants must be named. The complainant, or their representative, must sign the completed form in writing or electronically. The identity of the complainant(s) and any persons who furnish information relating to, or assisting in, an investigation of a complaint must be kept confidential to the maximum extent possible, consistent with applicable law and a fair determination of the complaint. A copy of the completed complaint submission must be given to the complainant(s), and the complaint form must be given to the appropriate Complaint System Representative described in § 658.410(g).

(4) Any complaint in a reasonable form (letter or email) which is signed by the complainant, or their representative, and includes sufficient information to initiate an investigation must be treated as if it were a properly completed Complaint/Referral Form filed in person. * * *

(b) * * *

(1) When a complaint is filed regarding an employment-related law with an ES office or a SWA, and paragraph (c) of this section does not apply, the office must determine if the complainant is an MSFW.

(i) If the complainant is a non-MSFW, the office must immediately refer the complainant to the appropriate enforcement agency, another public agency, a legal aid organization, and/or a consumer advocate organization, as appropriate, for assistance. Upon completing the referral, the local or State representative is not required to follow up with the complainant.

(ii) * * *

(A) Take from the MSFW or their representative, in writing (hard copy or electronic), the complaint(s) describing the alleged violation(s) of the employment-related law(s); and

(B) Attempt to resolve the issue informally at the local level, except in cases where the complaint was submitted to the SWA and the Complaint System Representative determines that they must take immediate action or in cases where informal resolution at the local level would be detrimental to the complainant(s). In cases where informal

resolution at the local level would be detrimental to the complainant(s), the Complaint System Representative must immediately refer the complaint to the appropriate enforcement agency. Concurrently, the Complaint System Representative must offer to refer the MSFW to other ES services should the MSFW be interested.

* * * * *

(D) If the ES office or SWA Complaint System Representative determines that the complaint must be referred to a State or Federal agency, they must refer the complaint immediately to the appropriate enforcement agency for prompt action.

(E) If the complaint was referred under paragraph (b)(1)(ii)(D) of this section, the representative must notify the complainant of the enforcement agency to which the complaint was referred.

(F) When a complaint alleges an employer in a different State from where the complaint is filed has violated an employment-related law:

(1) The ES office or SWA receiving the complaint must ensure the Complaint/Referral Form is adequately completed and then immediately send a copy of the Complaint/Referral Form and copies of any relevant documents to the SWA in the other State. Copies of the referral letter must be sent to the complainant, and copies of the complaint and referral letter must be sent to the ETA Regional Office(s) with jurisdiction over the transferring and receiving State agencies. All such copies must be sent via hard copy or electronic mail.

(2) The SWA receiving the complaint must process the complaint as if it had been initially filed with that SWA.

(3) The ETA Regional Office with jurisdiction over the receiving SWA must follow up with it to ensure the complaint is processed in accordance with these regulations.

* * * * *

(c) *Complaints alleging unlawful discrimination or reprisal for protected activity.* All complaints received under this subpart by an ES office or a SWA alleging unlawful discrimination or reprisal for protected activity in violation of nondiscrimination laws, such as those enforced by the Equal Employment Opportunity Commission (EEOC) or the Department of Labor's Civil Rights Center (CRC), or in violation of the Immigration and Nationality Act's anti-discrimination provision found at 8 U.S.C. 1324b, must be logged and immediately referred to the State-level E.O. Officer. The Complaint System Representative must

notify the complainant of the referral in writing.

(d) * * *

(1) When an ES complaint is filed with an ES office or a SWA, and paragraph (c) of this section does not apply, the following procedures apply:

(i) When an ES complaint is filed against an employer, the proper office to process the complaint is the ES office serving the area in which the employer is located.

(ii) * * *

(A) The ES office or SWA receiving the complaint must ensure the Complaint/Referral Form is adequately completed, and then immediately send a copy of the Complaint/Referral Form and copies of any relevant documents to the SWA in the other State. Copies of the referral letter must be sent to the complainant, and copies of the complaint and referral letter must be sent to the ETA Regional Office(s) with jurisdiction over the transferring and receiving State agencies. All such copies must be sent via hard copy or electronic mail.

(B) The SWA receiving the complaint must process the complaint as if it had been initially filed with that SWA.

(C) The ETA Regional Office with jurisdiction over the receiving SWA must follow up with it to ensure the complaint is processed in accordance with these regulations.

(D) If the complaint is against more than one SWA, the complaint must so clearly state. Additionally, the complaints must be processed as separate complaints and must be processed according to procedures in this paragraph (d).

(iii) When an ES complaint is filed against an ES office, the proper office to process the complaint is the ES office serving the area in which the alleged violation occurred.

(iv) When an ES complaint is filed against more than one ES offices and is in regard to an alleged agency-wide violation, the SWA representative or their designee must process the complaint.

* * * * *

(3) When a non-MSFW or their representative files a complaint regarding the ES regulations with a SWA, or when a non-MSFW complaint is referred from an ES office the following procedures apply:

* * * * *

(4)(i) When a MSFW or their representative files a complaint regarding the ES regulations directly with a SWA, or when a MSFW complaint is referred from an ES office, the Complaint System Representative

must investigate and attempt to resolve the complaint immediately upon receipt and may, if necessary, conduct a further investigation.

(ii) If resolution at the SWA level has not been accomplished within 20 business days after the complaint was received by the SWA (or after all necessary information has been submitted to the SWA pursuant to paragraph (a)(4) of this section), the Complaint System Representative must make a written determination regarding the complaint and must send electronic copies to the complainant and the respondent. The determination must follow the procedures set forth in paragraph (d)(5) of this section.

(5)(i) All written determinations by the SWA on complaints under the ES regulations must be sent by certified mail (or another legally viable method) and a copy of the determination may be sent via electronic mail. The determination must include all the following:

(ii) If the SWA determines that the employer has not violated the ES regulations, the SWA must offer to the complainant the opportunity to request, in writing, a hearing within 20 business days after the certified date of receipt of the notification.

(iii) * * *

(G) With the consent of the SWA and of the State hearing official, the party who requested the hearing may withdraw the request for the hearing in writing before the hearing.

* * * * *

(6) A complaint regarding the ES regulations must be processed to resolution by these regulations only if it is made within 2 years of the alleged occurrence.

* * * * *

■ 29. Amend § 658.417 by revising paragraph (b) to read as follows:

§ 658.417 State hearings.

* * * * *

(b) The State hearing official may decide to conduct hearings on more than one complaint concurrently if they determine that the issues are related or that the complaints will be processed more expeditiously if conducted together.

* * * * *

■ 30. Amend § 658.419 by:

■ a. Revising paragraph (a); and

■ b. Adding paragraph (d).

The revisions and addition read as follows:

§ 658.419 Apparent violations.

(a) If an ES staff member observes, has reason to believe, or is in receipt of

information regarding an apparent violation, except as part of a field check under § 653.503 of this chapter, the staff member must document the apparent violation and refer it to the ES Office Manager, who must ensure the apparent violation is documented in the Complaint System log, as described at § 658.410.

* * * * *

(d) Apparent violations of nondiscrimination laws must be processed according to the procedures described in § 658.411(c).

■ 31. Amend § 658.420 by revising paragraphs (b) and (c) to read as follows:

§ 658.420 Responsibilities of the Employment and Training Administration regional office.

* * * * *

(b) The Regional Administrator must designate Department of Labor officials to process ES regulation-related complaints as follows:

(1) All complaints received at the ETA regional office under this subpart that allege unlawful discrimination or reprisal for protected activity in violation of nondiscrimination laws, such as those enforced by the EEOC or CRC, or in violation of the Immigration and Nationality Act's anti-discrimination provision found at 8 U.S.C. 1324b, must be logged and immediately referred to the appropriate State-level E.O. Officer(s).

(2) All complaints other than those described in paragraph (b)(1) of this section must be assigned to a regional office official designated by the Regional Administrator, provided that the regional office official designated to process MSFW complaints must be the Regional Monitor Advocate (RMA).

(c) Except for those complaints under paragraph (b)(1) of this section, the Regional Administrator must designate Department of Labor officials to process employment-related law complaints in accordance with § 658.422, provided that the regional official designated to process MSFW employment-related law complaints must be the RMA. The RMA must follow up monthly on all complaints filed by MSFWs including complaints under paragraph (b)(1) of this section.

* * * * *

■ 32. Amend § 658.421 by revising the section heading, the first sentence of paragraph (a)(1), introductory text of (a)(2), the first sentences of paragraphs (a)(2)(i) and (b), and paragraphs (c) and (d) to read as follows:

§ 658.421 Processing of Wagner-Peyser Act Employment Service regulation-related complaints.

(a) Except as provided below in paragraph (a)(2) of this section, no complaint alleging a violation of the ES regulations may be processed at the ETA regional office level until the complainant has exhausted the SWA administrative remedies set forth at §§ 658.411 through 658.418. * * *

(2) If a complaint is submitted directly to the Regional Administrator and if they determine that the nature and scope of a complaint described in paragraph (a) of this section is such that the time required to exhaust the administrative procedures at the SWA level would adversely affect a significant number of individuals, the RA must accept the complaint and take the following action:

(i) If the complaint is filed against an employer, the regional office must process the complaint in a manner consistent with the requirements imposed upon State agencies by §§ 658.411 and 658.418. * * *

* * * * *

(b) The ETA regional office is responsible for processing appeals of determinations made on complaints at the SWA level. * * *

(c)(1) Once the Regional Administrator receives a timely appeal, they must request the complete SWA file, including the original Complaint/Referral Form from the appropriate SWA.

(2) The Regional Administrator must review the file in the case and must determine within 10 business days whether any further investigation or action is appropriate; however, if the Regional Administrator determines that they need to request legal advice from the Office of the Solicitor at the U.S. Department of Labor, then the Regional Administrator is allowed 20 business days to make this determination.

(d) If the Regional Administrator determines that no further action is warranted, the Regional Administrator will send their determination in writing to the appellant within 5 days of the determination, with a notification that the appellant may request a hearing before a Department of Labor Administrative Law Judge (ALJ) by filing a hearing request in writing with the Regional Administrator within 20 working days of the appellant's receipt of the notification.

* * * * *

■ 33. Amend § 658.422 by revising the section heading and paragraphs (a) through (c) to read as follows:

§ 658.422 Processing of employment-related law complaints by the Regional Administrator.

(a) This section applies to all complaints submitted directly to the Regional Administrator or their representative.

(b) Each complaint filed by an MSFW alleging violation(s) of employment-related laws must be taken in writing, logged, and referred to the appropriate enforcement agency for prompt action. If such a complaint alleges a violation of nondiscrimination laws or reprisal for protected activity, it must be referred to the appropriate State-level E.O. Officer in accordance with § 658.420(b)(1).

(c) Each complaint submitted by a non-MSFW alleging violation(s) of employment-related laws must be logged and referred to the appropriate enforcement agency for prompt action. If such a complaint alleges a violation of nondiscrimination laws or reprisal for protected activity, it must be referred to the appropriate State-level E.O. Officer in accordance with § 658.420(b)(1).

* * * * *

■ 34. Amend § 658.424 by revising paragraph (d) to read as follows:

§ 658.424 Proceedings before the Office of Administrative Law Judges.

* * * * *

(d) The ALJ may decide to consolidate cases and conduct hearings on more than one complaint concurrently if they determine that the issues are related or that the complaints will be processed more expeditiously.

* * * * *

■ 35. Amend § 658.425 by revising paragraph (a)(1) to read as follows:

§ 658.425 Decision of Department of Labor Administrative Law Judge.

(a) * * *

(1) Rule that they lack jurisdiction over the case:

* * * * *

■ 36. Add § 658.427 to read as follows:

§ 658.427 Severability.

Should a court hold any portion of any provision of this part to be invalid, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision or subprovision will be severable from this part and will not affect the remainder thereof.

■ 37. Amend § 658.602 by revising paragraphs (f)(2) through (4), (g), (j) introductory text, (j)(8), (l) through (n), (o) introductory text paragraph, (p) through (r), (s) introductory text

paragraph, and (s)(2) and (3) to read as follows:

§ 658.602 Employment and Training Administration National Office responsibility.

* * * * *

(f) * * *

(2) Review the performance of SWAs in providing the full range of ES services to MSFWs;

(3) Take steps to resolve or refer ES-related problems of MSFWs which come to their attention;

(4) Take steps to refer non-ES-related problems of MSFWs which come to their attention;

* * * * *

(g) The NMA must be appointed by the Office of Workforce Investment Administrator (Administrator) after informing farmworker organizations and other organizations with expertise concerning MSFWs of the opening and encouraging them to refer qualified applicants to apply through the Federal merit system. Among qualified candidates, determined through merit systems procedures, individuals must be sought who meet the criteria used in the selection of the SMAs, as provided in SWA self-monitoring requirements at § 653.108(a) of this chapter.

* * * * *

(j) The NMA must monitor and assess SWA compliance with ES regulations affecting MSFWs on a continuing basis. Their assessment must consider:

* * * * *

(8) Their personal observations from visits to SWAs, ES offices, agricultural work sites, and migrant camps. In the Annual Report, the NMA must include both a quantitative and qualitative analysis of their findings and the implementation of their recommendations by State and Federal officials, and must address the information obtained from all of the foregoing sources.

* * * * *

(l) If the NMA finds the effectiveness of any RMA has been substantially impeded by the Regional Administrator or other regional office official, they must, if unable to resolve such problems informally, report and recommend appropriate actions directly to the OWI Administrator. If the NMA receives information that the effectiveness of any SMA has been substantially impeded by the State Administrator, a State or Federal ES official, or other ES staff, they must, in the absence of a satisfactory informal resolution at the regional level, report and recommend appropriate actions directly to the OWI Administrator.

(m) The NMA must be informed of all proposed changes in policy and practice within the ES, including ES regulations, which may affect the delivery of services to MSFWs. The NMA must advise the OWI Administrator concerning all such proposed changes which may adversely affect MSFWs. The NMA must propose directly to the OWI Administrator changes in ES policy and administration which may substantially improve the delivery of services to MSFWs. They also must recommend changes in the funding of SWAs and/or adjustment or reallocation of the discretionary portions of funding formulae.

(n) The NMA must participate in the review and assessment activities required in this section and §§ 658.700 through 658.711. As part of such participation, the NMA, or if they are unable to participate, an RMA must accompany the National Office review team on National Office on-site reviews. The NMA must engage in the following activities during each State on-site review:

(1) They must accompany selected outreach staff on their field visits.

(2) They must participate in field check(s) of migrant camps or work site(s) where MSFWs have been placed on inter or intrastate clearance orders.

(3) They must contact local WIOA sec. 167 National Farmworker Jobs Program grantees or other farmworker organizations as part of the on-site review and discuss with representatives of these organizations current trends and any other pertinent information concerning MSFWs.

(4) They must meet with the SMA and discuss the full range of the ES services to MSFWs, including monitoring and the Complaint System.

(o) In addition to the duties specified in paragraph (f) of this section, the NMA each year during the harvest season must visit the four States with the highest level of MSFW activity during the prior fiscal year, if they are not scheduled for a National Office on-site review during the current fiscal year, and must:

* * * * *

(p) The NMA must perform duties specified in §§ 658.700 through 765.711. As part of this function, they must monitor the performance of regional offices in imposing corrective action. The NMA must report any deficiencies in performance to the Administrator.

(q) The NMA must establish routine and regular contacts with WIOA sec. 167 National Farmworker Jobs Program grantees, other farmworker organizations and agricultural

employers and/or employer organizations. The NMA must attend conferences or meetings of these groups wherever possible and must report to the Administrator and the National Farm Labor Coordinated Enforcement Committee on these contacts when appropriate. The NMA must include in the Annual Report recommendations about how the Department might better coordinate ES and WIOA sec. 167 National Farmworker Jobs Program services as they pertain to MSFWs.

(r) In the event that any SMA or RMA, enforcement agency, or MSFW group refers a matter to the NMA which requires emergency action, the NMA must assist them in obtaining action by appropriate agencies and staff, inform the originating party of the action taken, and, upon request, provide written confirmation.

(s) Through all the mechanisms provided in this subpart, the NMA must aggressively seek to ascertain and remedy, if possible, systemic deficiencies in the provisions of ES services and protections afforded by these regulations to MSFWs. The NMA must:

* * * * *

(2) Provide technical assistance to ETA regional office and ES staff for administering the Complaint System, and any other ES services as appropriate.

(3) Recommend to the Regional Administrator specific instructions for action by regional office staff to correct any ES-related systemic deficiencies. Prior to any ETA review of regional office operations concerning ES services to MSFWs, the NMA must provide to the Regional Administrator a brief summary of ES-related services to MSFWs in that region and their recommendations for incorporation in the regional review materials as the Regional Administrator and ETA reviewing organization deem appropriate.

* * * * *

■ 38. Amend § 658.603 by revising paragraphs (d)(7), (f)(1) through (3), (g), (i), introductory text of paragraph (k), (k)(7) and (8), (m), (n)(2) and (3), (o)(1), (p), (q), and (s) through (v) to read as follows:

§ 658.603 Employment and Training Administration regional office responsibility.

* * * * *

(d) * * *

(7) Unannounced field checks of a sample of agricultural work sites to which ES placements have been made through the clearance system to

determine and document whether wages, hours, and working and housing conditions are as specified on the clearance order. If regional office staff find reason to believe that conditions vary from clearance order specifications, findings must be documented on the Complaint/Apparent Violation Referral Form and provided to the State Workforce Agency to be processed as an apparent violation under § 658.419.

* * * * *

(f) * * *

(1) Review the effective functioning of the SMAs in their region;

(2) Review the performance of SWAs in providing the full range of ES services to MSFWs;

(3) Take steps to resolve ES-related problems of MSFWs which come to their attention;

* * * * *

(g) The RMA must be appointed by the Regional Administrator after informing farmworker organizations and other organizations in the region with expertise concerning MSFWs of the opening and encouraging them to refer qualified applicants to apply through the Federal merit system. The RMA must have direct personal access to the Regional Administrator wherever they find it necessary. Among qualified candidates, individuals must be sought who meet the criteria used in the selection of the SMAs, as provided in § 653.108(b) of this chapter.

* * * * *

(i) The RMA must participate in training sessions including those offered by the National Office and those necessary to maintain competency and enhance their understanding of issues farmworkers face (including trainings offered by OSHA, WHD, EEOC, CRC, and other organizations offering farmworker-related information).

* * * * *

(k) At the ETA regional level, the RMA must have primary responsibility for ensuring SWA compliance with ES regulations as it pertains to services to MSFWs as monitored by the regional office. They must independently assess on a continuing basis the provision of ES services to MSFWs, seeking out and using:

* * * * *

(7) Any other pertinent information which comes to their attention from any possible source.

(8) In addition, the RMA must consider their personal observations from visits to ES offices, agricultural work sites, and migrant camps.

* * * * *

(m) The Regional Administrator's quarterly report to the National Office

must include the RMA's summary of their independent assessment as required in paragraph (f)(5) of this section. The fourth quarter summary must include an Annual Summary from the region. The summary also must include both a quantitative and a qualitative analysis of their reviews and must address all the matters with respect to which they have responsibilities under these regulations.

(n) * * *

(2) Is being impeded in fulfilling their duties; or

(3) Is making recommendations that are being consistently ignored by SWA officials. If the RMA believes that the effectiveness of any SMA has been substantially impeded by the State Administrator, other State agency officials, any Federal officials, or other ES staff, the RMA must report and recommend appropriate actions to the Regional Administrator. Copies of the recommendations must be provided to the NMA electronically or in hard copy.

(o)(1) The RMA must be informed of all proposed changes in policy and practice within the ES, including ES regulations, which may affect the delivery of services to MSFWs. They must advise the Regional Administrator on all such proposed changes which, in their opinion, may adversely affect MSFWs or which may substantially improve the delivery of services to MSFWs.

* * * * *

(p) The RMA must participate in the review and assessment activities required in this section and §§ 658.700 through 658.711. The RMA, an assistant, or another RMA must participate in National Office and regional office on-site statewide reviews of ES services to MSFWs in States in the region. The RMA must engage in the following activities in the course of participating in an on-site SWA review:

(1) Accompany selected outreach staff on their field visits;

(2) Participate in a field check of migrant camps or work sites where MSFWs have been placed on intrastate or interstate clearance orders;

(3) Contact local WIOA sec. 167 National Farmworker Jobs Program grantees or other farmworker organizations as part of the on-site review, and must discuss with representatives of these organizations perceived trends, and/or other relevant information concerning MSFWs in the area; and

(4) Meet with the SMA and discuss the full range of the ES services to MSFWs, including monitoring and the Complaint System.

(q) During the calendar quarter preceding the time of peak MSFW activity in each State, the RMA must meet with the SMA and must review in detail the State Workforce Agency's capability for providing the full range of services to MSFWs as required by ES regulations, during the upcoming harvest season. The RMA must offer technical assistance and recommend to the SWA and/or the Regional Administrator any changes in State policy or practice that the RMA finds necessary.

* * * * *

(s) The RMA must initiate and maintain regular and personal contacts, including informal contacts in addition to those specifically required by these regulations, with SMAs in the region. In addition, the RMA must have personal and regular contact with the NMA. The RMA also must establish routine and regular contacts with WIOA sec. 167 National Farmworker Jobs Program grantees, other farmworker organizations and agricultural employers and/or employer organizations in the RMA's region. The RMA must attend conferences or meetings of these groups wherever possible and must report to the Regional Administrator and the Regional Farm Labor Coordinated Enforcement Committee on these contacts when appropriate. The RMA also must make recommendations as to how the Department might better coordinate ES and WIOA sec. 167 National Farmworker Jobs Program services to MSFWs.

(t) The RMA must attend MSFW-related public meeting(s) conducted in the region, as appropriate. Following such meetings or hearings, the RMA must take such steps or make such recommendations to the Regional Administrator, as the RMA deems necessary to remedy problem(s) or condition(s) identified or described therein.

(u) The RMA must attempt to achieve regional solutions to any problems, deficiencies, or improper practices concerning services to MSFWs which are regional in scope. Further, the RMA must recommend policies, offer technical assistance, or take any other necessary steps as they deem desirable or appropriate on a regional, rather than State-by-State, basis to promote region-wide improvement in the delivery of ES services to MSFWs. The RMA must facilitate region-wide coordination and communication regarding provision of ES services to MSFWs among SMAs, State Administrators, and Federal ETA officials to the greatest extent possible.

In the event that any SWA or other RMA, enforcement agency, or MSFW group refers a matter to the RMA which requires emergency action, the RMA must assist them in obtaining action by appropriate agencies and staff, inform the originating party of the action taken, and, upon request, provide written confirmation.

(v) The RMA must initiate and maintain such contacts as they deem necessary with RMAs in other regions to seek to resolve problems concerning MSFWs who work, live, or travel through the region. The RMA must recommend to the Regional Administrator and/or the National Office inter-regional cooperation on any particular matter, problem, or policy with respect to which inter-regional action is desirable.

* * * * *

■ 39. Amend § 658.604 by revising paragraph (c)(3)(i) to read as follows:

§ 658.604 Assessment and evaluation of program performance data.

* * * * *

(c) * * *

(3) * * *

(i) Generally, for example, a SWA has direct and substantial control over the delivery of ES services such as referrals to jobs, job development contacts, counseling, referrals to career and supportive services, and the conduct of field checks.

* * * * *

■ 40. Amend § 658.702 by revising paragraphs (a), (d), (e), (f)(2), and (h)(5) to read as follows:

§ 658.702 Initial action by the Regional Administrator.

(a) The ETA Regional Administrator is responsible for ensuring that all SWAs in their region are in compliance with ES regulations.

* * * * *

(d) If the Regional Administrator determines that there is no probable cause to believe that a SWA has violated ES regulations, they must retain all reports and supporting information in Department files. In all cases where the Regional Administrator has insufficient information to make a probable cause determination, they must so notify the Administrator in writing and the time for the investigation must be extended 20 additional business days.

(e) If the Regional Administrator determines there is probable cause to believe a SWA has violated ES regulations, they must issue a Notice of Initial Findings of Non-compliance by registered mail (or other legally viable means) to the offending SWA. The

notice will specify the nature of the violation, cite the regulations involved, and indicate corrective action which may be imposed in accordance with paragraphs (g) and (h) of this section. If the non-compliance involves services to MSFWs or the Complaint System, a copy of said notice must be sent to the NMA.

(f) * * *

(2) After the period elapses, the Regional Administrator must prepare within 20 business days, written final findings which specify whether the SWA has violated ES regulations. If in the final findings the Regional Administrator determines the SWA has not violated ES regulations, the Regional Administrator must notify the State Administrator of this finding and retain supporting documents in their files. If the final finding involves services to MSFWs or the Complaint System, the Regional Administrator also must notify the RMA and the NMA. If the Regional Administrator determines a SWA has violated ES regulations, the Regional Administrator must prepare a Final Notice of Noncompliance which must specify the violation(s) and cite the regulations involved. The Final Notice of Noncompliance must be sent to the SWA by registered mail or other legally viable means. If the noncompliance involves services to MSFWs or the Complaint System, a copy of the Final Notice must be sent to the RMA and the NMA.

* * * * *

(h) * * *

(5) If, as a result of this review, the Regional Administrator determines the SWA has taken corrective action but is unable to determine if the violation has been corrected due to seasonality or other factors, the Regional Administrator must notify in writing the SWA and the Administrator of their findings. The Regional Administrator must conduct further follow-up at an appropriate time to make a final determination if the violation has been corrected. If the Regional Administrator's follow-up reveals that violations have not been corrected, the Regional Administrator must apply remedial actions to the SWA pursuant to § 658.704.

* * * * *

■ 41. Amend § 658.704 by revising the fifth sentence of paragraph (d) and the fourth sentence of (f)(2) to read as follows:

§ 658.704 Remedial actions.

* * * * *

(d) * * * The Regional Administrator must notify the SWA of their findings.

* * * * *

(f) * * *

(2) * * * Two must be sent to the ETA National Office, one must be sent to the Solicitor of Labor, Attention: Associate Solicitor for Employment and Training, and, if the case involves violations of regulations governing services to MSFWs or the Complaint System, copies must be sent to the RMA and the NMA. * * *

■ 42. Amend § 658.705 by revising the introductory text of paragraphs (b) and (b)(3) and paragraphs (c) through (f) to read as follows:

§ 658.705 Decision to decertify.

* * * * *

(b) The Assistant Secretary must grant the request for decertification unless they make a finding that:

* * * * *

(3) The Assistant Secretary has reason to believe the SWA will achieve compliance within 80 business days unless exceptional circumstances necessitate more time, pursuant to the remedial action already applied or to be applied. (In the event the Assistant Secretary does not have sufficient information to act upon the request, they may postpone the determination for up to an additional 20 business days to obtain any available additional information.) In making a determination whether violations are "serious" or "continual," as required by paragraph (b)(1) of this section, the Assistant Secretary must consider:

* * * * *

(c) If the Assistant Secretary denies a request for decertification, they must write a complete report documenting their findings and, if appropriate, instructing an alternate remedial action or actions be applied. Electronic copies of the report must be sent to the Regional Administrator. Notice of the Assistant Secretary's decision must be published promptly in the **Federal Register** and the report of the Assistant Secretary must be made available for public inspection and copying.

(d) If the Assistant Secretary decides decertification is appropriate, they must submit the case to the Secretary providing written explanation for their recommendation of decertification.

(e) Within 30 business days after receiving the Assistant Secretary's report, the Secretary must determine whether to decertify the SWA. The Secretary must grant the request for decertification unless they make one of the three findings set forth in paragraph

(b) of this section. If the Secretary decides not to decertify, they must then instruct that remedial action be continued or that alternate actions be applied. The Secretary must write a report explaining their reasons for not decertifying the SWA and copies (hard copy and electronic) will be sent to the SWA. Notice of the Secretary's decision must be published promptly in the **Federal Register**, and the report of the Secretary must be made available for public inspection and copy.

(f) Where either the Assistant Secretary or the Secretary denies a request for decertification and orders further remedial action, the Regional Administrator must continue to monitor the SWA's compliance. If the SWA achieves compliance within the time established pursuant to paragraph (b) of this section, the Regional Administrator must terminate the remedial actions. If the SWA fails to achieve full compliance within that time period after the Secretary's decision not to decertify, the Regional Administrator must submit a report of their findings to the Assistant Secretary who must reconsider the

request for decertification pursuant to the requirements of paragraph (b) of this section.

■ 43. Amend § 658.706 to read as follows:

§ 658.706 Notice of decertification.

If the Secretary decides to decertify a SWA, they must send a Notice of Decertification to the SWA stating the reasons for this action and providing a 10-business-day period during which the SWA may request an administrative hearing in writing to the Secretary. The document must be published promptly in the **Federal Register**.

■ 44. Amend § 658.707 by revising paragraphs (a) and (b) to read as follows:

§ 658.707 Requests for hearings.

(a) Any SWA which received a Notice of Decertification under § 658.706 or a notice of disallowance under § 658.702(g) may request a hearing on the issue by filing a written request for hearing with the Secretary within 10 business days of receipt of the notice. Additionally, any SWA that has received a Notice of Remedial Action

under § 658.704(c) may request a hearing by filing a written request with the Regional Administrator within 20 business days of the SWA's receipt of the notice. This request must state the reasons the SWA believes the basis of the decision to be wrong, and it must be signed by the State Administrator (electronic signatures may be accepted).

(b) When the Secretary or Regional Administrator receives a request for a hearing from a SWA, they must send copies of a file containing all materials and correspondence relevant to the case to the Assistant Secretary, the Regional Administrator, the Solicitor of Labor, and the Department of Labor Chief Administrative Law Judge. When the case involves violations of regulations governing services to MSFWs or the Complaint System, a copy must be sent to the NMA.

* * * * *

Laura P. Watson,

Deputy Assistant Secretary for Employment and Training, Labor.

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Part IV

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 679

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Halibut Abundance-Based Management of Amendment 80 Prohibited Species Catch Limit; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket Number: 231114–0267]

RIN 0648–BL42

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Halibut Abundance-Based Management of Amendment 80 Prohibited Species Catch Limit

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement Amendment 123 to the Fishery Management Plan (FMP) for Groundfish of the Bering Sea and Aleutian Islands (BSAI) Management Area (BSAI FMP). This final rule amends the regulations governing limits on Pacific halibut (*Hippoglossus stenolepis*) (halibut) prohibited species catch (PSC) to link the halibut PSC limit for the Amendment 80 commercial groundfish trawl fleet in the BSAI groundfish fisheries to halibut abundance. This final rule is necessary to comply with the obligation in the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) that FMPs minimize bycatch to the extent practicable. It is also consistent with the Magnuson-Stevens Act's National Standards. This final rule is expected to minimize halibut mortality, and it may result in additional harvest opportunities in the commercial halibut fishery, as well as to the subsistence and recreational fisheries. This final rule is intended to promote the goals and objectives of the Magnuson-Stevens Act, other applicable laws, and Amendment 123 to the BSAI FMP.

DATES: This rule is effective January 1, 2024.

ADDRESSES: Electronic copies of the Environmental Impact Statement (EIS) and the Social Impact Assessment (SIA) (collectively referred to as the “Analysis”) and the Record of Decision (ROD) prepared for this final rule may be obtained from <https://www.regulations.gov> or from the NMFS Alaska Region website at <https://www.fisheries.noaa.gov/region/alaska>.

Electronic copies of Tribal consultation and listening summaries prepared for this action may be obtained from the NMFS Alaska Region website

at: <https://www.fisheries.noaa.gov/alaska/consultations/alaska-fisheries-tribal-consultation-documents-and-workgroup>.

Electronic copies of North Pacific Fishery Management Council (Council) documents referenced in this final rule are available on the Council website at <https://npfmc.org>.

Electronic copies of International Pacific Halibut Commission (IPHC) documents referenced in this final rule are available on the IPHC website at <https://iphc.int>.

FOR FURTHER INFORMATION CONTACT: Gretchen Harrington, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS published a Notice of Availability (NOA) for Amendment 123 in the **Federal Register** on November 9, 2022 (87 FR 67665), with public comments invited through January 9, 2023. On December 9, 2022, upon realization that supporting documents were not publicly available, NMFS extended the comment period on the NOA for the FMP amendment to February 7, 2023, with a document (87 FR 75569, December 9, 2022) to allow a 60-day public comment period on the proposed action with all supporting documents available. NMFS published a proposed rule to implement Amendment 123 in the **Federal Register** on December 9, 2022 (87 FR 75570) with public comment invited through January 23, 2023. NMFS received 69 comment letters on the proposed Amendment 123 and the proposed rule. Amendment 123 was approved on March 7, 2023. A summary of the comments and NMFS's responses are provided under the heading “Comments and Responses” below. Regulations governing U.S. fisheries and implementing the Magnuson-Stevens Act are located at 50 CFR parts 600 and 679.

Background

The following background sections describe the Amendment 80 Sector and associated fisheries, halibut PSC management in the BSAI groundfish fisheries, BSAI Amendment 123, and the halibut abundance indices used to set halibut PSC limits for the Amendment 80 sector and this final rule. A detailed review of the provisions of Amendments 123, the proposed regulations to implement Amendment 123, and the rationale for this action is provided in the preamble to the proposed rule and is briefly summarized in this final rule. This preamble uses specific terms (e.g., Amendment 80 sector, directed fishing) that are described in regulation and in the preamble to the proposed rule.

Additional information is provided in the preamble of the proposed rule, the Analysis, and the ROD, and we refer the reader to those documents for additional detail.

Halibut PSC Management in the BSAI Groundfish Fisheries

Halibut is an iconic, highly valued fish among commercial, recreational, charter, and subsistence fishermen. For the commercial fisheries that do not directly target halibut, NMFS regulates their PSC or bycatch of halibut. Every FMP must minimize bycatch (16 U.S.C. 1853(a)(11)), to the extent practicable. The groundfish fisheries cannot be prosecuted without some level of halibut bycatch because of spatiotemporal overlap of groundfish and halibut. Regulations require the operator of any vessel fishing for groundfish in the BSAI to minimize the catch of prohibited species (§ 679.21(a)(2)(i)).

Although halibut PSC results from all types of gear (i.e., trawl, hook-and-line, pot, and jig gear), halibut PSC primarily occurs in the trawl and hook-and-line groundfish fisheries. NMFS minimizes halibut bycatch to the extent practicable in the BSAI by: (1) establishing halibut PSC limits for trawl and non-trawl fisheries; (2) apportioning those halibut PSC limits to groundfish sectors, fishery categories, and seasons; and (3) managing groundfish fisheries to prevent PSC from exceeding the established limits. The following sections provide additional information on the process NMFS uses to establish, apportion, and manage halibut PSC limits in the BSAI.

Halibut PSC limits in the groundfish fisheries provide a constraint on halibut PSC mortality and promote conservation of the halibut resource. Groundfish fishing is prohibited once a halibut PSC limit has been reached for a particular sector or season.

The Council and NMFS have taken a number of management actions to minimize halibut bycatch to the extent practicable in the BSAI groundfish fisheries. Most recently, the Council adopted, and NMFS approved, Amendment 111 to the FMP in 2016 (81 FR 24714, April 27, 2016). That amendment established the current halibut PSC limits for BSAI groundfish fisheries, which were considered to be an effective means to minimize bycatch to the extent practicable at that time. The current total annual halibut PSC limit for BSAI groundfish fisheries is 3,515 metric tons (mt); from that total, 1,745 mt are apportioned to the Amendment 80 sector, which is composed of non-pollock trawl vessels.

The BSAI trawl limited access sector, which is composed of all other trawl catcher/processor and trawl catcher vessels, is apportioned 745 mt. The BSAI non-trawl sector, which includes primarily hook-and-line catcher/processors, is apportioned 710 mt. The remaining 315 mt are apportioned to the Community Development Quota (CDQ) program, which is composed of vessels fishing for CDQ groups.

The Amendment 80 Sector and Associated Fisheries

Fishing under the Amendment 80 Program began in 2008 (72 FR 52668, September 14, 2007). The Amendment 80 sector is comprised of trawl vessels, mostly owned by entities in the Seattle, Washington area, that participate in the BSAI groundfish fisheries other than the Bering Sea pollock fishery. The Amendment 80 species are identified in regulation (§ 679.2) as the following 6 species: BSAI Atka mackerel, Aleutian Islands Pacific ocean perch, BSAI flathead sole, BSAI Pacific cod, BSAI rock sole, and BSAI yellowfin sole. The Amendment 80 Program allocates a portion of the total allowable catch (TAC) limits of these species between the Amendment 80 sector and other fishery participants. The Amendment 80 Program also apportions crab and halibut PSC limits to constrain bycatch of these species while Amendment 80 vessels harvest groundfish.

At its inception, the Amendment 80 Program allocated quota share (QS) for the six specified species based on the historical catch of these species by Amendment 80 vessels. The Amendment 80 Program allows and facilitates the formation of Amendment 80 cooperatives among QS holders who receive an exclusive harvest privilege. This exclusive harvest privilege allows Amendment 80 cooperative participants to collaboratively manage their fishing operations and more efficiently harvest groundfish allocations while staying under PSC limits.

As specified in Section 3.7.5.2 of the FMP and at § 679.21, NMFS annually establishes a halibut PSC limit of 1,745 mt for the Amendment 80 sector. This halibut PSC limit is apportioned between the Amendment 80 cooperative(s) and the Amendment 80 limited access fishery according to the process specified at § 679.91. Amendment 80 cooperatives are responsible for coordinating members' fishing activities to ensure the halibut PSC limit apportioned to the cooperative is not exceeded. Federal regulations at § 679.91(h)(3)(xvi) prohibit each Amendment 80 cooperative from exceeding the halibut

PSC limit specified on its annual Amendment 80 Cooperative Quota (CQ) permit.

Of the four BSAI groundfish fishery sectors, the Amendment 80 sector receives the largest proportion of halibut PSC limits in the BSAI (roughly 50 percent). Therefore, the Council recommended, and NMFS agrees, that Amendment 123 and this final rule should focus on the halibut PSC limit for the Amendment 80 sector. Several reasons drove this decision, as discussed below.

When the Council took final action on Amendment 111 in December 2015 to reduce the PSC limits for all fishing sectors in the BSAI, the Council considered the methods available to the fisheries and the practicability of reducing halibut bycatch and mortality at that time. The preamble to the proposed rule to implement Amendment 111 noted that the Council and NMFS believed that more stringent PSC limit reductions than those proposed as part of Amendment 111 were not practicable for the groundfish sectors at that time. However, at the same meeting, the Council noted that additional halibut bycatch reduction would be needed in the future and initiated an analysis of the means to link halibut PSC limits to halibut abundance, thereby indicating that additional efforts would be required beyond those established by Amendment 111, and utilized by the fisheries, to reduce halibut bycatch and mortality. From 2015 (when the Council requested the Amendment 80 sector to proactively reduce halibut mortality ahead of Amendment 111's regulatory PSC limit reductions expected to be implemented in 2016) through 2020, the Amendment 80 sector reduced its halibut mortality to levels well below the PSC limit of 1,745 mt established under Amendment 111. Those reductions resulted in halibut mortality levels close to or below the PSC limits that are implemented by this rule based on halibut abundance estimates derived from current survey indices described below (see Section 3.4.1 of the Analysis).

Amendment 123

The Council recommended Amendment 123 in December 2021 to link the halibut PSC limit for the Amendment 80 sector to halibut abundance. In recommending Amendment 123, the Council intended to minimize halibut PSC to the extent practicable as required by section 303(a)(11) and National Standard 9 of the Magnuson-Stevens Act and to continue achieving optimum yield in

the BSAI groundfish fisheries on a continuing basis under National Standard 1. The Council then weighed and balanced the Magnuson-Stevens Act's legal requirements and considerations, including the ten National Standards. Based on public comment, the EIS prepared pursuant to the National Environmental Policy Act (NEPA), and analyses under E.O.s and related laws, the Council recommended Amendment 123 to NMFS.

This final rule implements Amendment 123 and requires the Amendment 80 sector to reduce halibut mortality at times of low halibut abundance. Achievement of these objectives will conserve the halibut resource by improving bycatch management and could result in additional harvest opportunities in the directed commercial, subsistence, and recreational halibut fisheries. The implementation of Amendment 123 and this final rule changes the annual process to determine the halibut PSC limit for the Amendment 80 sector to a PSC limit based on two indices of halibut abundance. An index of abundance is a relative measure of the abundance of the halibut population (or subpopulation—e.g., size) calculated using an accepted scientific data collection method (e.g., survey with standardized stations and bait) and calculation method for the indices.

This action specifies halibut PSC limits for the Amendment 80 sector based on fishery-independent indices of halibut abundance derived from scientific survey data. The two survey indices recommended by the Council and implemented in this final rule are the International Pacific Halibut Commission (IPHC) setline survey index in Area 4ABCDE and the NMFS Alaska Fisheries Science Center (AFSC) Eastern Bering Sea (EBS) shelf trawl survey index. Throughout this preamble, the IPHC setline survey index in Area 4ABCDE is referred to as the IPHC index, and the NMFS EBS shelf trawl survey index is referred to as the NMFS EBS index. The Council, its Scientific and Statistical Committee (SSC), and NMFS reviewed and recommended use of the IPHC index and the NMFS EBS index for this action, taking into account and noting limitations, assumptions, collection methods, and uncertainties in the Analysis. All information on the data and analysis is available to the public through meetings of the IPHC, the Council, or online (see **ADDRESSES**).

Each year, the IPHC will calculate an index of halibut biomass in Area 4ABCDE, which it will provide to NMFS. NMFS will categorize the resulting index into one of four

abundance index ranges: very low, low, medium, or high. Similarly, the AFSC will use the most recent results from the EBS shelf trawl survey to calculate an index of halibut biomass and NMFS will categorize the resulting index into one of two ranges: low or high. The value at the intercept of those separate indices in table 58 to part 679 will be the Amendment 80 sector's halibut PSC limit for the following calendar year. NMFS has requested that the IPHC and AFSC provide the most recent annual index of halibut abundance, including a summary of the methods, data, and analysis used to calculate the index, to the Regional Administrator by December 1 (for the IPHC index), and October 1 (for the NMFS EBS index) of each year. NMFS will provide this information to the Council and the public at the Council's regularly scheduled meetings.

The Council and NMFS also considered that there has been relative stability of the halibut abundance indices in recent years and concluded that if there were sampling changes, or that no sampling occurred in a given year, the abundance value produced by the IPHC model would still be robust and could be used for abundance-based management of halibut prohibited species catch limits. As indicated in Section 2.7 of the Analysis, the Council clarified that the most recent survey data available should be used to set annual PSC limits in the absence of one or more years of survey data.

NMFS EBS Index

Annually, NMFS uses data from the EBS shelf bottom trawl survey (EBS survey) to estimate halibut biomass (mt) in the EBS (NMFS EBS index). The NMFS EBS index is calculated from halibut catch at the EBS survey stations and accounts for the total survey area. The EBS survey is conducted during the summer (May through August), and the processed data are made available during the fall, at which time the NMFS EBS index can be calculated. Results of the EBS survey provide up-to-date estimates of biomass, abundance, distribution, and population structure of groundfish populations in support of stock assessment and ecosystem forecast models that form the basis for groundfish and crab harvest advice. The EBS survey has been conducted annually since 1982 (with one exception in 2020) and has included the current number of stations (376) since 1987. Results from this survey are used to calculate a relative abundance (catch per unit effort) and size and/or age composition for halibut and many groundfish and crab species. Data

collected on the survey are also used to improve understanding of life history of the fish and invertebrate species, as well as the ecological and physical factors affecting their distribution and abundance. In absence of a survey, NMFS will use the halibut abundance index calculated from the most recent EBS survey.

IPHC Index

The IPHC has collected and analyzed data through a robust scientific process (*i.e.*, performed stock assessments) to determine the abundance of halibut coastwide from California to the Bering Sea. Each proposed survey undergoes scientific review and public inspection through a variety of channels.

The IPHC analyzes and combines data from the IPHC's Fishery-Independent Setline Survey (FISS), NMFS Eastern and Northern Bering Sea trawl survey, and Alaska Department of Fish and Game (ADF&G) Norton Sound trawl survey using a space-time model to create relative indices of halibut abundance and biomass in different units (*e.g.*, numbers or weight) for use in the annual halibut stock assessment. The EBS shelf survey has different size-selectivity than setline gear. To address this, the EBS shelf trawl survey is calibrated to the setline survey selectivity before it is incorporated into the calculation of the setline survey indices. Therefore, the setline survey does not index smaller halibut (mostly under 26 inches (66 cm) in fish length, called U26). Three important indices created annually include (1) a relative index of halibut abundance expressed as a number of fish that is used in the halibut stock assessment; (2) a relative index of halibut biomass for all sizes of fish expressed as weight per unit effort (WPUE) in each IPHC Regulatory Area, including areas 4A, 4B, and 4CDE, which is also referred to as the IPHC index that is used in table 58 to part 679 for the purpose of annually establishing Amendment 80 halibut PSC limits; and (3) a relative index of halibut biomass in each IPHC Regulatory Area for fish over 32 inches (O32) in length overall that is used by the IPHC in the annual process to establish halibut mortality limits in each IPHC Regulatory Area.

The IPHC uses a scientific approach to survey data analysis in the space-time model that has been peer reviewed by the IPHC's Scientific Review Board (SRB). Similar space-time models are used to create the indices of abundance from NMFS Bering Sea trawl survey for the Pacific cod and Walleye pollock stock assessments. The IPHC index was selected by the Council as one dimension of table 58 to part 679.

The space-time modeling approach incorporates information from nearby observations in space and time to improve the prediction of WPUE at a particular sampling station. Such an approach allows the IPHC to annually generate an index of halibut abundance and estimate biomass (with associated variance estimates) even when FISS sampling coverage is not complete in all geographic areas. This means that for areas which are not sampled directly by the FISS in a given year, a statistically valid index of abundance is available, although the quantified uncertainty around the index would likely increase.

When assessing the robustness of the IPHC index during the development of Amendment 123, NMFS, the Council, and its SSC examined what would happen if there were changes in the surveys, including in a situation if no survey was to occur. They noted that the optimized use of the information from the sampled data reduces uncertainty and allows for the estimation of a consistent time-series over all years, even for areas that were not sampled in a particular year, with appropriate estimated uncertainty. Those estimates are the best scientific information available.

The survey coverage has varied over time and has been adjusted for both scientific reasons (*e.g.*, to enhance accuracy and precision) as well as to adjust for cost and logistical reasons. Annually, the FISS survey design represents a subset of the full survey design of 1890 stations coastwide. Station allocation among IPHC Areas, station density within Areas, and sampling effort (number of skates) per station in a given year are adjusted to meet the stated objectives to: (1) sample halibut for stock assessment and stock distribution estimation, (2) achieve long-term revenue neutrality, and (3) minimize removals, and assist others where feasible on a cost-recovery basis. The IPHC relies on its SRB to provide independent scientific peer review of the IPHC science process, including the annual FISS design development and refinement. The annual FISS design is routinely reviewed by the Commission and the public during the IPHC annual process.

Regulatory Changes Implemented by This Action

This final rule establishes a process to set the annual halibut PSC limit for the Amendment 80 sector. This rule specifies the following:

- The halibut PSC limit for the Amendment 80 sector is determined annually;

- Halibut biomass estimates derived from the most recent IPHC index and the NMFS EBS index are applied to a specified set of ranges for each index to establish the halibut PSC limit for the Amendment 80 sector for the following year;

- The halibut PSC limits range from 1,745 mt when abundance is characterized as “high” for the IPHC index, down to 1,134 mt (35 percent reduction) when abundance is characterized as “very low” for the IPHC index; and

- Each year the Amendment 80 sector halibut PSC limit is included in the annual harvest specifications for the BSAI.

This rule revises § 679.21(b)(1), which establishes halibut PSC limits for the Amendment 80 sector. This rule adds § 679.21(b)(1)(i)(A) through (C) to establish the process for determining the annual halibut PSC limits for the Amendment 80 sector, including Amendment 80 cooperatives and the Amendment 80 limited access fishery. This rule specifies that halibut indices derived from the most recent IPHC index and the NMFS EBS index be applied to a specified table of index ranges (table 58 to part 679). The value at the intercept of those indices within the table will be the halibut PSC limit for the Amendment 80 sector for the following year.

This rule also revises § 679.91, which establishes Amendment 80 Program annual harvester privileges and the process for assigning halibut PSC limits to the Amendment 80 sector, cooperatives, and limited access fishery. This rule revises § 679.91(d)(1), (d)(2)(i), and (d)(3) to clarify that the amount of halibut PSC limit for the Amendment 80 sector for each calendar year is specified and determined according to the procedure in § 679.21(b)(1)(i) by replacing the references to table 35 to part 679 in those paragraphs to this part that stipulates the annual fixed amount of 1,745 mt for the Amendment 80 sector as a whole.

This rule revises table 35 to part 679 (Apportionment of Crab PSC and Halibut PSC between the Amendment 80 and BSAI Trawl Limited Access Sectors) to indicate that the Amendment 80 sector halibut PSC limit will be determined annually, rather than set at a fixed amount.

This rule adds table 58 to part 679 (Amendment 80 Sector Annual BSAI Pacific Halibut PSC Limits) to establish the IPHC index and the NMFS EBS index ranges in a table with the corresponding PSC limit at the intercepts of each index range.

Comments and Responses

NMFS received 69 comment letters on the Amendment 123 Notice of Availability and proposed rule. NMFS responds to 91 substantive comments below.

NMFS received comment letters from 12 individuals, 3 fishermen, 1 guide service, 2 CDQ groups, 36 industry support businesses, 4 Amendment 80 companies, 7 industry associations, 2 non-governmental organizations (NGO), and 1 anonymous submission. Of the seven industry associations, one represents the Amendment 80 sector, one represents Bering Sea crabbers, three represent halibut and sablefish fishermen, one represents fishermen in the Homer, Alaska area, and one represents Prince William Sound and Central Gulf of Alaska fishermen. Of the 69 comment letters, 43 were opposed to the action and 26 were in support. Commenters who opposed the action were from the Amendment 80 sector, their industry association, members of the business community who provide support services to the Amendment 80 sector, and one CDQ group. Comment letters that voiced support for the action came from individuals, fishermen in halibut fisheries, an industry association representing crabbers, those who represent a wide range of fishermen in the Cordova area, a charter company, two NGOs, and the anonymous submission.

In responding to these comments, when NMFS refers to Amendment 123, unless otherwise noted, NMFS is referring to Amendment 123 and this final rule implementing Amendment 123. There were no public comments asserting that the proposed rule is not consistent with Amendment 123. Numerous comments address information included in the draft Analysis prepared for this action. Throughout the responses below, when NMFS refers to the “Analysis,” NMFS is referencing the EIS including the SIA prepared for this action. NMFS refers to the Draft Environmental Impact Statement as the “draft Analysis.”

Halibut Abundance Indices

Comment 1: The current fixed halibut PSC limit fails to respond to varying abundances of halibut. The Council recommended Amendment 123 to the Secretary of Commerce as a responsive process to establish annual halibut PSC limits for the Amendment 80 sector based on halibut abundance. A PSC limit that responds to halibut abundance will allow halibut PSC limits to rise and fall based on abundance indices calculated with inputs from the

IPHC fishery-independent setline survey and the annual NMFS trawl surveys in the BSAI area. We support NMFS implementing this action to reduce waste of the important halibut and bring the years-long process of crafting an equitable and scientifically supported abundance-based management plan to conclusion.

Response: NMFS acknowledges this comment. The need for an abundance-based management system is laid out in the preamble to the proposed rule.

Comment 2: In recommending the abundance indices included in Amendment 123, the Council contradicted recommendations from its own scientific peer-review body (*i.e.*, SSC) that specifically cautioned against the use of the recommended metrics in April 2021.

Response: In April 2021, the SSC expressed concern with the potential impact of year-to-year changes to survey or abundance estimation methods; however, the SSC did not call into question whether the indices were the best scientific information available. Instead, the SSC provided important insight into the various factors affecting, and affected by, use of the indices as proposed. The Council and NMFS considered the SSC’s recommendation of standardizing the indices of abundance as relative values rather than the absolute values included in this final rule as described in Section 2.8 of the Analysis. As with every scientific process, survey and abundance estimation methods are continuously reviewed and improved. Occasionally changes to survey and abundance estimation methods may affect the scale of an absolute value, whereas relative calculations (trends) are scaled such that changes are relative to the period being evaluated (*e.g.*, percent change).

The Council and NMFS acknowledged that there are tradeoffs with using absolute values versus using standardized relative values. We chose to use absolute values to improve transparency and public understanding because the alternative (standardized relative values) would make it more difficult for stakeholders to read reported survey indices in a given year and map those onto a table to anticipate the resulting Amendment 80 PSC limit. The absolute values for the abundance indices are dependent on the assumptions of the survey design and analysis, whereas a standardized relative index could show less year-to-year variability. The Council and NMFS recognized that, with absolute values, historical index values could change in the future because of potential improvements to index calculation

methods. For example, if there are improvements to understanding specific parameters used in calculating the index and those parameter values change (e.g., increased precision in quantifying area sampled results in an overall increase in area sampled, or improvements to the length to weight ratio) could change the calculation method and historical index values. But by using easily understood absolute values, this approach creates greater transparency to the public and meets the objectives for the program set by the Council, recognizing that survey values could change in the future. This is similar to how other PSC limits are set in the BSAI.

Comment 3: NMFS ignored the SSC advice regarding the use of absolute or relative indices of halibut abundance. The SSC stated that any change to the survey methods, area to which the survey applies, or methods and models used to convert the survey data into abundance values could result in changes in the Amendment 80 bycatch limits that result not from actual changes in halibut abundance but from changes in the survey design and methods used to calculate halibut abundance.

Response: Model methods and surveys are expected to change over time and rely on scientifically accepted and statistically robust methods that consider changes in bias and precision in estimates to provide the best scientific information available for estimating halibut abundance indices. The Council and NMFS considered the SSC advice and selected the absolute index values because the combination of those two values adequately met the purpose and need for the action, is based on sound scientific survey methodology, and is transparent to regulated entities and the public. Year-to-year changes in indices of abundance due to methodology changes would have to be substantial enough to cross the breakpoints specified in table 58 to part 679 to influence the PSC limit set for the Amendment 80 sector each year, and this is a possibility in the future as the indices adjust due to changes in halibut abundance. This method accomplishes the purpose and need for the action by tying PSC limits to halibut abundance using the best scientific information available provided by the survey indices. Should issues arise in the future, the Council and NMFS will review the PSC limits established by this action during the periodic Amendment 80 program review or at any time that the Council wishes to initiate an action to consider an alternative approach as part of its normal process.

Comment 4: NMFS's determination of the breakpoints in the lookup table to establish the halibut PSC limits that apply to the Amendment 80 sector is arbitrary, unexplained, and lacks a rational basis. The Analysis states that the breakpoints employed in these lookup tables were determined by visual inspection of relative trends in the survey indices historically.

Response: The breakpoints identifying the different abundance states for the two indices of halibut abundance included in table 58 to part 679 reflect the cumulative input and decisions made throughout the 8 years of development of this action. The purpose of this action is to link the halibut PSC limit for the Amendment 80 sector to halibut abundance. As explained in the Analysis and the proposed rule, the breakpoints in the lookup table span recent trends in indices of halibut abundances, and the PSC limits in table 58 to part 679 reflect the Council's decision to establish a PSC limit from 0 to 35 percent below the existing limit, depending upon abundance.

The Council recommended, and NMFS agrees, that the chosen breakpoints reasonably represent the desired abundance states (high, medium, low, very low) in light of observed past survey trends. Based on IPHC survey data, the period of 1997 through 2002 is categorized as high abundance; 2003 through 2016 as medium abundance; and 2017 to present as low abundance. The very low abundance state captures the potential situation where abundance indices drop below historical levels.

The breakpoints and accompanying PSC limits established by Amendment 123 were selected to balance the goals of linking halibut PSC to abundance, reducing bycatch, and avoiding burdens that would make the rule impracticable. Any impacts that might arise from setting the abundance breakpoints at the selected levels were also addressed in consideration of the PSC limits set under the different alternatives. A greater impact from setting a breakpoint at a higher or lower level would affect the practicability of a given PSC limit. For example, if the breakpoints were set even lower at the "very low" state, such that this state would only occur when halibut abundances were catastrophically low, a much higher reduction to the PSC limit might be appropriate.

The Council recommended, and NMFS agrees, that the breakpoints included in this action are appropriate to accomplish the action's objectives. These conclusions are the result of the extensive analysis, public input, and

consideration by the Council and NMFS that occurred during the development of this action.

Comment 5: NMFS's use of the IPHC index in this action would impermissibly delegate to the IPHC the critical responsibilities of (1) conducting a survey for determining the abundance of halibut and (2) establishing the IPHC index for the abundance of that halibut, which is then used directly, by regulation, to determine the annual halibut PSC limit for the Amendment 80 sector. NMFS has directly linked its halibut PSC management for the Amendment 80 sector to actions and decisions of the IPHC that cannot be reviewed or otherwise second-guessed by NMFS. NMFS therefore proposes to delegate to the IPHC its authority to undertake the discretionary non-ministerial function of assessing, analyzing, and determining the abundance of halibut in a manner that requires the exercise of judgment.

Response: The Council designed, and this final rule implements, an annual process for NMFS to determine Amendment 80 halibut PSC limits using halibut abundance indices provided by the IPHC and the AFSC. Each year, NMFS will rely on the IPHC index and the NMFS EBS index as the best available scientific information on halibut abundance.

In this action, NMFS relies on the IPHC to produce the IPHC index because the IPHC collects and analyzes scientific data necessary to estimate halibut abundance throughout its range. That is the IPHC's responsibility under Article III of the Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea (Convention). NMFS participates in the IPHC annual process; the Regional Administrator of NMFS's Alaska Region serves as one of three U.S. Commissioners to the IPHC and is a voting member of the North Pacific Fishery Management Council. Both indices used in this action were reviewed by the Council's SSC and recommended by the Council. By relying on the IPHC to provide this type of scientific information, NMFS is not delegating management authority for any aspect of the groundfish fisheries to the IPHC. NMFS manages, and will continue to manage, the BSAI groundfish fisheries. In furtherance of that effort, NMFS will use information analyzed by the IPHC. Specifically, NMFS will use the IPHC index for halibut abundance, in conjunction with the NMFS EBS index, to apply the appropriate PSC limit. The Council and NMFS determined the halibut PSC limits established by this action are

necessary to achieve the program goals. NMFS will publish the PSC limit in the annual harvest specifications. That is clearly a management action undertaken by NMFS, and not the IPHC.

The IPHC independently conducts halibut surveys, collects data, and carefully models halibut abundance. The IPHC would continue these activities to estimate halibut abundance, whether or not NMFS implements Amendment 123. This action relies on two indices of halibut abundance derived from fishery-independent surveys which NMFS will use to determine the annual halibut PSC limit for the Amendment 80 sector. The IPHC index and the NMFS EBS index are described above in the preamble to this final rule. The two abundance indices are in table 58 to part 679, which will be used by NMFS to determine the Amendment 80 sector's halibut PSC limit each year. This process incorporates the best available scientific information available from both IPHC and AFSC each year.

The Magnuson-Stevens Act's mandate is to base decision-making on the best scientific information available, not on scientific information generated only by NMFS. NMFS commonly relies on and incorporates data, derived products, and modeling output from other entities. For instance, NMFS uses the annual Chinook salmon abundance estimate from the State of Alaska, which uses an established 3-System Index of Chinook salmon abundance in western Alaska, to determine the Chinook salmon PSC limit and performance standard applicable to vessels participating in the Bering Sea pollock fishery.

Comment 6: The IPHC's annual abundance determinations will do the following: (1) bypass all U.S. laws that would otherwise be applicable if NMFS were making these determinations and any form of oversight by NMFS (or any other U.S. Government agency); and (2) not be subject to any of the standards for scientific integrity, such as peer review or a process for data review that would otherwise apply to the actions of U.S. agencies.

Response: NMFS disagrees. The IPHC promulgates regulations governing the halibut fishery under the Convention. The IPHC's regulations applicable to the United States are subject to approval by the Secretary of State with the concurrence of the Secretary of Commerce. The North Pacific Halibut Act (Halibut Act), 16 U.S.C. 773c(a)–(b), provides the Secretary of Commerce with general responsibility for carrying out the Convention and the Halibut Act, including the authority to adopt regulations necessary to carry out the

purposes and objectives of the Convention. The Halibut Act, 16 U.S.C. 773c(c), also provides the Council with authority to develop regulations, including limited access regulations, that are in addition to, and not in conflict with, IPHC regulations. Regulations the Council recommends may be implemented by NMFS only after approval by the Secretary of Commerce and in compliance with all applicable laws.

The IPHC's scientists produce halibut abundance indices through a robust process that involves the public and NMFS. IPHC scientists are highly-trained, independent specialists. Their work is regularly reviewed by the IPHC Scientific Review Board, and an external scientific review is periodically conducted. All findings of peer reviews are openly discussed in public meetings and published online (see **ADDRESSES**). Their models and abundance indices have been subject to peer review and will continue to be subject to peer review that is similar or identical to the peer review of data and models produced by NMFS staff or from other Federal agencies.

Based on advice from the SSC, the Council and NMFS concluded that the IPHC's annual setline indices are the best scientific information available to estimate the abundance of Pacific halibut. As with any Federal action, the best scientific information available might not stem from the work of a single agency or organization. Through the processes that have led to the development of Amendment 123 and this action, the public has had an opportunity to examine and assess the scientific underpinnings of the Federal action, and NMFS has fully considered associated public comments.

Comment 7: It is arbitrary and capricious to base halibut PSC limits on an abundance index that does not reflect or correlate with halibut encounter rates in the Amendment 80 sector. The Amendment 80 sector's halibut encounter rates are not significantly correlated with either of the halibut abundance indices used in the proposed action to set annual halibut PSC limits. The halibut encounter rates are highly variable year-to-year. The likelihood of the Amendment 80 sector foregoing considerable groundfish catch based on the PSC limits established in the proposed action is also likely to be highly variable year-to-year. In October 2019, the SSC emphasized that a result of the analysis is that the groundfish fleet's ability to avoid halibut bycatch is poorly related to indices of halibut abundance.

Response: The purpose of this action is to link the halibut PSC limit for the Amendment 80 sector to halibut abundance, which will ensure that the Amendment 80 sector's use of halibut PSC does not become a larger proportion of the overall halibut PSC in the BSAI in years of lower halibut abundance. The Council and NMFS considered a wide range of different abundance indices to use in the process for linking halibut abundance to halibut PSC limits during the development of this action. The SSC determined that the most scientifically appropriate indices for linking PSC limits to abundance are the NMFS EBS index and the IPHC index.

The Council and NMFS considered this issue extensively: Section 3.4.4 of the Analysis discusses a comparison of the Amendment 80 halibut encounter rates and mortality with survey trends (see **ADDRESSES**). Early in development of Amendment 123 (in October 2017), the Council reviewed a discussion paper that showed a high correlation between the NMFS EBS index of halibut biomass and the non-pelagic trawl (NPT) sector catch per unit effort (CPUE). However, over time, new information became available that changed our understanding of the correlation between the NMFS EBS index and the Amendment 80 encounter rates. As noted in Section 3.4.4 of the Analysis, there are many reasons why it would not be expected for Amendment 80 halibut PSC encounter rates to be consistently and positively correlated with fishery-independent indices of halibut biomass, including different temporal and spatial coverage, degree of halibut intermingling with target species, variable groundfish aggregation behavior across years, gear selectivity, and fishery behavior such as targeting of different species by the various fleets and companies within the sector.

The Analysis also recognizes that it is possible that higher encounter rates are at least partially attributable to environmental conditions (e.g., comingling of species in an ocean environment with less temperature variation that could help separate species and guide time and area targeting of individual species). Section 5.3.2.3.2 of the Analysis discusses potential impacts of changing environmental conditions on the practicability of the Amendment 80 sector to avoid bycatch, particularly as it relates to warmer Bering Sea water temperatures and spatial patterns of target fisheries.

Regardless of these uncertainties, the purpose of this action is to link the halibut PSC limit for the Amendment 80

sector to halibut abundance. The Council and NMFS believe that the use of the NMFS EBS and IPHC indices present the best means to accomplish this objective, taking into account the information described above. The Analysis thoroughly evaluates this dynamic, and this information was considered in the Council's and NMFS's decision-making, including the information raised by the SSC in October 2019 that the groundfish fleet's ability to avoid halibut is poorly related to indices of abundance. In short, the Council and NMFS considered the information in the decision-making process.

Magnuson-Stevens Act Compliance

Comment 8: The proposed action violates section 303(a) of the Magnuson-Stevens Act that requires an amendment be necessary and appropriate for the conservation and management of a fishery because (1) it is arbitrary to base halibut PSC limits for the Amendment 80 sector on a metric of abundance that is negatively correlated to halibut encounter rates in the fishery, and (2) the proposed action will not constrain halibut PSC in other fisheries.

Response: NMFS disagrees. The Council recommended and this final rule implements this action to link halibut PSC limits to levels of halibut abundance. The rationale for why it is appropriate to base halibut PSC limits for the Amendment 80 sector on the indices of halibut abundance included in this action is thoroughly discussed in the response to Comment 26. The Council and NMFS chose to focus this action on the Amendment 80 sector due to the high percentage of PSC assigned to this sector, as explained in Comment 13, and because other actions were underway or planned to address halibut bycatch in other fisheries, as explained in response to Comment 16.

Comment 9: NMFS has not demonstrated that this action is necessary or appropriate for the conservation and management of the Amendment 80 sector, and this Magnuson-Stevens Act requirement is not reflected in the purpose and need statement for this action.

Response: In section 3(5) of the Magnuson-Stevens Act, Congress defined "conservation and management" broadly. Minimizing halibut bycatch by a groundfish fishery to the extent practicable satisfies that definition, and is required and authorized by section 303 (see sections 303(a)(11) and (b)(3)). This action is a modification of an existing conservation and management measure necessary to limit the amount of halibut mortality

caused by the Amendment 80 sector fisheries. The principal purpose of this action is to link the halibut PSC limit for the Amendment 80 sector to halibut abundance to reduce halibut bycatch to the extent practicable under National Standard 9 and improve conservation of the halibut fishery by reducing halibut PSC limits at times of low halibut abundance.

The Amendment 80 sector is managed under the BSAI FMP. The Magnuson-Stevens Act requires NMFS to manage the BSAI groundfish fisheries to minimize all bycatch to the extent practicable. Bycatch minimization is a central policy and mandate of the Magnuson-Stevens Act as specified in section 301(a)(9), and section 303(a)(11)(A) and (b)(14). Through National Standard 9, Congress directed that all FMPs and regulations developed pursuant to such FMPs must be consistent with the requirement to minimize bycatch to the extent practicable.

Comment 10: NMFS failed to prepare a legally sufficient Fishery Impact Statement.

Response: NMFS disagrees. NMFS prepared a Fishery Impact Statement that addresses all required components as specified in Magnuson-Stevens Act section 303(a)(9) and is included in Section 7.3 of Analysis (see **ADDRESSES**).

Comment 11: NMFS and the Council failed to explain how biological constraints and human needs were balanced, or priorities were established, under the Magnuson-Stevens Act implementing regulations.

Response: NMFS disagrees. NMFS and the Council explained how biological constraints and human needs are balanced and how priorities were established throughout the preamble to the proposed rule, the Analysis, and ROD (see **ADDRESSES**). See Section 2.4 and Appendix 1 of the Analysis and the ROD for details on how NMFS and the Council explained the biological constraints and human needs were balanced and how priorities were established and evaluated during the decision-making process.

Comment 12: The proposed action cannot and will not prevent halibut PSC from becoming a larger proportion of total halibut removals in the BSAI because it does not constrain the PSC limits in any other BSAI groundfish fishery.

Response: NMFS agrees that this action does not modify PSC limits for other non-Amendment 80 BSAI groundfish fisheries and does not limit halibut catch or bycatch in the directed halibut fishery or other groundfish fisheries that contribute to the total

halibut removals in the BSAI. Other NMFS actions have done so or may do so in the future. This action is expected to ensure that the Amendment 80 sector's use of halibut PSC does not become a larger proportion of the overall halibut mortality in the BSAI in years of lower levels of halibut abundance. Amendment 80 PSC limits established in future years will be influenced by indices of halibut abundance according to the levels specified in table 58 to part 679. Therein, this action will reduce Amendment 80 halibut PSC in years of low halibut abundance, which is an improvement over the static PSC limit of 1,745 mt. This action focuses on the Amendment 80 fleet because of that sector's relatively large contribution to total halibut PSC in the BSAI management area.

The halibut PSC limits for all fisheries are specified according to regulations at § 679.21(b). Over the time period analyzed, the Amendment 80 sector accounted for 49.6 percent of the total PSC limits in the BSAI. The next closest fleet was the BSAI Trawl Limited Access Sector with 21.2 percent of the total PSC limit. See Table 1–1 of the Analysis. The Council and NMFS chose to focus this action on the Amendment 80 sector, because (1) at lower halibut abundance levels, the Amendment 80 sector's static PSC limit of 1,745 mt becomes a far larger proportion of the overall halibut removals in the BSAI than any other sector's PSC limit, as explained in response to Comment 12 and (2) other actions were underway or planned to address halibut bycatch in other fisheries or, the sectors not included in those actions receive a relatively small proportion of the halibut PSC limit. The current status of those actions is explained in response to Comment 16 below. The existing PSC limits for other fishery sectors will not increase; however, any sector can harvest halibut up to that sector's PSC limit in any given year and actual halibut bycatch can vary from year to year under the respective PSC limits. Accordingly, this action is expected to reduce halibut PSC at lower levels of halibut abundance for the Amendment 80 sector.

Comment 13: This action is not consistent with Magnuson-Stevens Act implementing regulations at § 600.305(b)(3) because the action is not expected to positively impact halibut stock conservation or result in an increased allocation to the directed halibut fleet in Area 4. The only stated objective of this action is to impose constraints and associated costs on the Amendment 80 sector by establishing

halibut PSC limits that are expected to constrain the fishery at times of low halibut abundance.

Response: NMFS disagrees. The regulatory guidelines for the Magnuson-Stevens Act's National Standards provide that each FMP should identify what the FMP is intended to accomplish. Among other things, those objectives should address the problems of a particular fishery and should be clearly stated, practicably attainable, and framed in understandable terms. The National Standard guidelines refer, at § 600.305(b)(3), to objectives of the FMP, which provide the context within which the Secretary of Commerce will judge the consistency of an FMP's conservation and management measures with the National Standards. The BSAI FMP objectives are found at Section 2.2.1 of the FMP and are not changed by this action.

Further, under the Magnuson-Stevens Act National Standard guidelines, fisheries management objectives should, among other things, be practicably attainable. This action is consistent with the BSAI FMP's objectives. Comments and responses below relating to National Standard 9 further address issues raised with the practicability of the PSC limits established by this action.

This action has clear, understandable, and attainable objectives. The Analysis and the proposed rule clearly state that the purpose of this action is to link the halibut PSC limit for the Amendment 80 sector to halibut abundance. This will change the previously static halibut PSC limit to one that may fluctuate annually in response to indices of halibut abundance. This approach will minimize bycatch to the extent practicable and prevent Amendment 80 PSC from becoming a significantly larger proportion of total halibut removals in the BSAI when halibut abundance decreases to specified thresholds. The achievement of the objective is measurable because the proposed Amendment 80 sector's annual PSC limits will be linked to a range of the halibut abundance levels depicted clearly in table 58 to part 679.

The BSAI FMP promotes conservation of the halibut resource by establishing halibut PSC limits in the groundfish fisheries. Reduction of halibut bycatch is a conservation benefit, as detailed on page 265 of the Analysis. As explained in response to Comment 53, NMFS must consider a range of economic and non-economic impacts including impacts to the halibut stock conservation and potential benefits to users of the halibut resource, including the directed halibut fleet in Area 4. Though NMFS must

consider these factors, it is not a requirement that a bycatch reduction measure result in measurable positive impacts to the overall bycatch stock or to the catch allocations of the directed halibut fishery. In Section 5 of the Analysis, NMFS extensively evaluated the potential impacts on the halibut stock and directed halibut fishery. In light of the numerous variables that affect halibut biomass, this action may contribute to improvements to the halibut biomass, but that is not an expected result. It is expected that the conservation benefits achieved by this measure are more likely to result in greater use by the directed fishery, rather than improvement of the overall stock, but the result may not be binary, and whether this expected result occurs does not affect the analysis for this action.

Imposing costs is not an objective of this action. NMFS would prefer that bycatch minimization occur with little cost. However, Congress recognized that imposing costs may be necessary and directed NMFS to minimize bycatch to the extent practicable. Practicability determinations are made on a case-by-case basis for each fishery given the circumstances at the time. Additional comments and responses regarding the economic impacts of this action are included under the "Economic Impacts" heading below.

Comment 14: To the extent the proposed action has an objective of either allocating halibut to the directed fishery or conserving halibut by reducing bycatch, the objective is not practicably attainable. It is not reasonably certain that (1) overall halibut bycatch will be reduced as a result of this action, (2) the IPHC will increase catch limits in Area (4, or 3) any increase in catch limits will result in an increased commercial catch in the directed halibut fishery. To the extent conservation is a goal of the proposed action, NMFS has concluded that the proposed action has little or no conservation benefit to the halibut stock.

Response: See the response to Comment 34 for a summary of the conservation benefits of this action. See the response to Comment 12 for a discussion of overall halibut bycatch. Allocation or re-allocation of halibut is not an objective of this action, as described in the responses to comments under the National Standard 4 heading. Management of the directed halibut fishery and expected impacts of this action are addressed in the responses to comments under the Directed Halibut Fishery heading.

Comment 15: NMFS premises the proposed action on the supposed need to achieve equity in the specific circumstance when "the IPHC setline survey results fall into the very low abundance state." But this is arbitrary because the proposed action addresses all abundance states and substantially reduces the Amendment 80 sector's halibut PSC limit under the status quo. The halibut stock has never been in a "very low" abundance state, which means the proposed action is chasing a phantom and doing so in an overly broad way by reducing the halibut PSC limit in all abundance states.

Response: The proposed action is based on Congress's direction to minimize bycatch to the extent practicable while ensuring that the action is consistent with all ten National Standards and other requirements of the Magnuson-Stevens Act. The result from linking halibut PSC limits to halibut abundance is a more equitable one than the current static PSC limit because, when abundance drops, a static level of halibut PSC represents a greater proportion of all halibut fishing mortality.

The Analysis considered various halibut abundance levels, not just those which have already been known to occur, in order to link Amendment 80 PSC limits to those various abundance levels. If the halibut stock never enters a very low level of abundance, the correlating PSC limit would not be imposed. However, including that limit in the event such a level occurs is reasonable. Including the very low abundance state ensures the Amendment 80 sector will minimize its halibut bycatch at all levels of halibut abundance and, if those abundance levels should drop to the very low state, the PSC limits become lower as well. At the Very Low/Low and Very Low/High index states, the proposed action would reduce the Amendment 80 halibut PSC limit by 35 percent from the current limit. Should the IPHC index fall into the very low abundance state, the Council and NMFS concluded that this halibut PSC limit reduction would be important to promote conservation and equitable use of the halibut stock and consistent with the abundance-based process for establishing directed halibut fishery catch limits. These measures are not overly broad; they apply in very specific conditions that will be known to the Amendment 80 sector before the fishing season begins. When abundance is categorized as high, the PSC limit will not be changed from current limits. See Comment 4 for discussion on the development of the breakpoints. In the period considered in the Analysis, the

annual Amendment 80 sector PSC limit would have been set at the maximum PSC limit of 1,745 mt in the years from 1998 through 2002 and 2008, had this action been in place. In years from 2003 through 2007 and 2009 through 2021, the Amendment 80 sector PSC limit would have been set at levels ranging from 1,309 mt to 1,571 mt representing a 10 percent to 25 percent reduction from the maximum PSC limit established by this action.

Comment 16: Unlike the approach taken with BSAI FMP Amendment 111, the proposed action is a fragmentary and not a comprehensive approach to halibut and groundfish management. Halibut is managed on a coastwide basis, and halibut bycatch occurs in multiple fisheries and sectors across that wide range. Yet, the proposed action would myopically regulate the halibut bycatch of just one fishery sector in one area, and any benefit that might result from the proposed action is itself uncertain because any reallocation of halibut to the directed fishery hinges entirely on future unknown actions of the IPHC. This is a fragmentary approach to fisheries management and in violation of § 600.305(b)(3).

Response: The BSAI FMP addresses halibut bycatch comprehensively, setting PSC limits for a variety of and sectors, as required by the Magnuson-Stevens Act and National Standard guidelines. This action adjusts the annual process to establish the Amendment 80 sector's PSC limit for halibut. The Council and NMFS recognize that there are ongoing and future plans to take or consider taking similar actions for other sectors, and that does not diminish or fragment the FMP's overall approach to bycatch management.

The Council established a comprehensive approach to halibut bycatch management, and it is routine for the Council to evaluate the scope of proposed adjustments based upon the problem statement and information available at the time. The scope of this action, which is applicable only to the Amendment 80 sector, was selected in February 2020 after considering the issues identified in the problem statement, the amount of halibut bycatch in each fishery sector, input at numerous public meetings, and other proposed actions that would reduce halibut PSC in other fishery sectors.

Other recent actions to reduce halibut bycatch in the BSAI include BSAI FMP Amendment 116 (83 FR 49994, October 4, 2018) and BSAI FMP Amendment 122 (88 FR 53704, August 8, 2023), which reduced halibut bycatch in the non-Amendment 80 trawl fishery

(commonly known as the trawl limited-access, or "TLAS", fishery) and Pacific cod trawl catcher vessel fishery, respectively. The Council decided, and NMFS agrees, that a step-wise approach by sector allows for a simplified and more efficient approach to adjusting halibut PSC management measures in the BSAI.

Comment 17: The Analysis reflects a carefully considered balance by the Council of competing considerations under the National Standards. In reaching its conclusion, the Council carefully weighed all the information before it, including the benefits to the directed fishery, the need for conservation of the halibut resource, the practicability of bycatch reductions, and the potential impacts to Amendment 80 if halibut PSC limits implemented by this action were to constrain the fishery in future years. Based on the sum total of that information, the Council struck a middle ground by rejecting alternatives that considered setting PSC limits at levels higher than and lower than the halibut PSC limits included in this action.

Response: NMFS acknowledges this comment.

Comment 18: NMFS should uphold and approve the careful balance the Council struck. As the proposed rule correctly recognizes, Amendment 123 is consistent with all the National Standards, but most relevantly National Standards 1, 4, 8, and 9. It is also consistent with long-neglected principles of environmental justice, Administration guidance, and other relevant legal and statutory principles.

Response: NMFS acknowledges this comment.

Comment 19: NMFS must inform the Council of its interpretation of the Magnuson-Stevens Act's National Standards as required by the Magnuson-Stevens Act implementing regulations at § 600.305(a)(2). The proposed action is a novel approach to fishery management and is particularly reliant upon interpretations of terms in the National Standards that are not defined in statute or regulation, such as, but not limited to, the terms "reasonably calculated to promote conservation" and "fair and equitable" in National Standard 4 and "minimize bycatch to the extent practicable" in National Standard 9. NMFS did not provide the Council with the Secretary of Commerce's interpretation of these or any National Standard terms during the deliberations that resulted in the proposed action. In fact, the Council received contrary guidance. Without clear and appropriate required guidance, the Council did not receive the information required to

lawfully develop and propose an action, as required by NMFS's regulations.

Response: NMFS disagrees. The Secretary of Commerce published guidelines to the ten National Standards at §§ 600.305 through 600.355. The regulation cited in the comment, § 600.305(a)(2), states the purpose of the guidelines and is satisfied by publication of the guidelines themselves. The phrases cited as undefined by the comment are not specialized terms of art, and separate regulatory action to interpret terms within the guidelines is not necessary prior to implementing this action. NMFS has not applied the National Standards in any novel way in this rulemaking. For more discussion of the National Standards, see Section 7.1 of the Analysis (see ADDRESSES) and the responses to comments under the National Standard headings below.

Comment 20: NMFS should disapprove Amendment 123 because: 1) it is not practicable under National Standard 9, consistent with its decision on Amendment 75 to the BSAI FMP (68 FR 52142, September 2, 2003); 2) NMFS did not prepare an adequate analysis, consistent with its decision on Amendment 23 to the Pacific Coast Groundfish FMP (76 FR 27508, May 11, 2011); and 3) the negative economic impacts of Amendment 123 on the Amendment 80 sector consistent with its decision on Amendment 18 (57 FR 23231, June 3, 1992).

Response: NMFS disagrees. The Secretary of Commerce reviews each FMP amendment independently for consistency with all applicable law at the time the Council transmits the amendment for review by to the Secretary of Commerce. A decision on a past amendment is not binding in perpetuity, particularly in the context of new circumstances and requirements; therefore, the Secretary of Commerce's decision to disapprove or partially approve Amendments 75, 23, and 18 are not relevant to this action.

National Standard 1

Comment 21: This action is not consistent with National Standard 1 because achieving optimum yield (OY) is not actually an objective of the proposed action and the action decreases the likelihood of achieving OY because halibut PSC limits included in this action at times of low halibut abundance are likely to constrain Amendment 80 fishing activity.

Response: NMFS disagrees. The Council and NMFS determined that Amendment 123 and this final rule are consistent with National Standard 1 because, under all the PSC limits

established by this action, the BSAI groundfish fisheries will achieve OY on a continuing basis as described in Section 5.3.2.3.1 of the Analysis (see ADDRESSES). National Standard 1 states that conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the OY from each fishery for the U.S. fishing industry. A potential result of this action is that the Amendment 80 sector's harvests of groundfish could be constrained at the low and very low states of halibut abundance; however, this does not materially compromise the ability of the BSAI groundfish fisheries to continue harvesting between 1.4 and 2.0 million mt of groundfish annually. The phrase "achieving, on a continuing basis" is defined in the national standard guidelines at § 600.310(e)(3)(i)(B). Achieving OY does not place a requirement that every individual regulatory action must result in reaching OY. Rather, this standard is applied to the FMP as a whole.

The purpose of this action is to link halibut PSC limit for Amendment 80 sector to halibut abundance to minimize bycatch to the extent practicable. The Council and NMFS recognized in the Purpose and Need statement (see Section 1.2 of the Analysis) that NMFS must ensure the BSAI groundfish fisheries will continue to achieve optimum yield as required by the Magnuson-Stevens Act. The Analysis demonstrates that, after NMFS implements this final rule, those fisheries will do so.

Comment 22: This action makes it less likely that the BSAI groundfish fisheries will continue to achieve OY on a continuing basis because there are reasonably foreseeable circumstances that were not considered by NMFS. In 2009 and 2010, the BSAI groundfish fisheries did not achieve OY because the total harvest was 1,335,116 mt and 1,354,662 mt, respectively, which is lower than the low range of OY at 1.4 million mt. The Amendment 80 sector fisheries harvest approximately 12 to 25 percent of the overall BSAI groundfish fisheries annually and generally at a higher percentage in years of low pollock abundance. This action is likely to constrain Amendment 80 sector harvests in years of low halibut abundance, and NMFS failed to consider the combined impacts of this action with the reasonably foreseeable event that pollock stocks could be low again in future years.

Response: Under National Standard 1 guidelines, OY is a long-term average amount of desired yield from a stock, stock complex, or fishery. This means that, even if a fishery were to fail to

reach harvest levels within the OY range for a few years over multiple decades of fishing, NMFS's management of that fishery would still be consistent with National Standard 1. The Analysis notes that the annual groundfish harvest can be highly variable across years for a variety of reasons (e.g., changing ocean conditions, variability in recruitment or prey field, fisheries interactions, etc.) and that may result in years where catch is not within the OY range. However, in light of the regulations explaining National Standard 1's terms and purpose, the failure to harvest groundfish within the OY range for two out of several years of fishing does not mean that NMFS's management of the fishery fails to comply with National Standard 1.

The Analysis notes that the Council considered 2016 through 2020 to be the appropriate time period over which to evaluate halibut PSC use because it reflects Amendment 80 sector operations under their Halibut Avoidance Plan and deck sorting along with other available tools to avoid halibut and reduce halibut mortality. The example in the Analysis of a year without Amendment 80 harvest is meant to illustrate the conclusion that possible Amendment 80 harvest reductions due to PSC constraints do not cause an inability to achieve OY on a continuing basis. See Section 5.3.2.3.1 of the Analysis for further discussion on OY.

Comment 23: NMFS's novel analytical approach to evaluating OY presumes that the Amendment 80 sector could be eliminated by the proposed action without running afoul of National Standard 1. There is nothing in the history of the development of OY for the BSAI groundfish fisheries that supports the notion that OY should be achieved by eliminating one of the fisheries.

Response: NMFS does not expect this action to eliminate the Amendment 80 sector. The hypothetical example of achieving OY without contribution by Amendment 80 was used to illustrate why NMFS expects that, after this action, the BSAI groundfish fisheries will continue to achieve OY. See Comments 21 and 22 above.

NMFS expects that the halibut PSC limits established in table 58 to part 679 may prevent the Amendment 80 sector from fully harvesting TACs in years with low halibut abundance; however, changes in fishing behavior and effective use of available bycatch reduction tools, including halibut excluders, halibut avoidance plans, and deck sorting, could help mitigate potential negative economic impacts.

National Standard 2

Comment 24: NMFS fails to consider the best scientific information available (contrary to National Standard 2) to assess reasonably foreseeable future environmental conditions that are likely to constrain harvests for the Amendment 80 sector in a manner that will result in a failure to achieve OY on a consistent basis. Such conditions include, but are not limited to, constraints on salmon bycatch that could limit the pollock fishery (a major contributor of the groundfish harvests), constraints due to low crab stock abundance that will likely result in tighter restrictions on crab PSC limits and/or new closed areas for Amendment 80 trawling, and increasing variability in oceanic and atmospheric conditions that scientists predict will shift flatfish and other Amendment 80 target species and result in more target species moving to areas where the Amendment 80 sector is not allowed to fish (e.g., the Northern Bering Sea Research Area).

Response: The Council and NMFS determined that Amendment 123 and this final rule are consistent with National Standard 2, as explained in Section 7.1 of the Analysis. National Standard 2 states that conservation and management measures shall be based upon the best scientific information available. NMFS used the best scientific information available to assess the likely impacts of this action and assessed future environmental conditions in this action. NMFS considered the cumulative effects of this action in the context of other reasonably foreseeable future actions in Section 5.8 of the Analysis. The Council is in the early stages of developing new potential actions to address bycatch of salmon and crab in BSAI groundfish fisheries, including the potential additional actions referenced in this comment; however, the Council has not yet made a recommendation to NMFS. Actions are considered reasonably foreseeable if some concrete step has been taken toward implementation, such as a Council recommendation or NMFS's publication of a proposed rule. Actions only "under consideration" are not generally included because they may change substantially before adoption or may not be adopted at all. They therefore cannot be reasonably described, predicted, or foreseen. See the response to Comment 64 for a discussion of NMFS's consideration of changes in oceanic and atmospheric conditions.

Comment 25: NMFS did not use the best available information to evaluate the effects of the action on the halibut

stock because many tables in the Analysis do not include data available from 2020 and 2021. By not including catch and revenue information from these years in the Analysis, NMFS has failed to consider the expanded harvest opportunities available in Area 4 to the directed halibut fleet in 2021 and 2022. In 2022, the Area 4 halibut fishery received the largest catch allocation in 10 years, and catch data, available on NMFS's website, show a trend of decreasing utilization in the Area 4 halibut fishery that is not considered at all in the Analysis or anywhere else in the record. NMFS also inconsistently picks and chooses when it will use certain datasets in both the Analysis and the proposed rule. This inconsistent use of data is arbitrary and represents a failure to use the best scientific information available.

Response: NMFS evaluated the data used in the Analysis. Some tables in the Analysis do not include data from 2020 through 2022 because it is likely that such data were significantly affected by the COVID-19 pandemic and, therefore, less illustrative of historical trends and future expectations. For example, allocation and utilization of halibut by the directed fishery may have been significantly affected by the pandemic. See Comments 27, 42, and 60 for further discussion about why these data sets were chosen.

Comment 26: The proposed action is arbitrary and capricious because it fails to address the likely redistribution of halibut and use the best available information from both the EBS and the northern Bering Sea trawl surveys to establish its abundance-based bycatch limit.

Response: NMFS disagrees. After substantive and lengthy consideration during the public Council process, the Council recommended and this action implements an annual process for determining the Amendment 80 sector halibut PSC limit that links the PSC limit to halibut abundance using two indices of halibut abundance. The two indices selected (IPHC index and the NMFS EBS index) were determined by the Council's SSC to be the best scientific information available. Data from the northern Bering Sea trawl survey is an input into the model used to generate the IPHC index, so the data are incorporated into the process for establishing the Amendment 80 halibut PSC limits implemented under this action; however, it was not selected as a primary index upon which to base the annual PSC limits. A summary of the NMFS EBS index and the IPHC index are provided above in the preamble to this final rule as well as a detailed

description is provided in Section 1.6 of Analysis.

Comment 27: By providing an "average" estimate of costs for the entire sector based on a limited set of years, not incorporating estimates of all direct and indirect costs, and not examining the true potential costs of the proposed action, NMFS presents an inaccurate assessment of the impacts that does not consider all of the best scientific information available and is otherwise arbitrary.

Response: NMFS disagrees. NMFS recognizes that the impacts of this action on the Amendment 80 sector and their efficiency and profitability will vary by year, depending on environmental conditions, economic conditions, and other variables. This variability is analyzed and accounted for in the development of this action. The Council and NMFS chose to use the 2016 through 2019 dataset because it is more likely to be predictive of potential future costs as explained in Section 5.3.2 of the Analysis.

National Standard 3

Comment 28: NMFS provides no rational explanation for how the halibut stock is managed as a unit throughout its range consistent with National Standard 3. National Standard 3 requires that stocks be managed as a unit throughout its range to the extent practicable. National Standard 3 also encourages NMFS to coordinate with other governments, agencies, and councils to develop an FMP for any stock overlapping jurisdictions.

Response: Management of the halibut stock is not regulated by the Magnuson-Stevens Act or its National Standards, including National Standard 3. The Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea and the Northern Pacific Halibut Act of 1982 established the governing body (IPHC) and processes for managing halibut throughout its range. Section 5(c) of the Halibut Act provides that the Council may develop regulations within U.S. waters over halibut provided that they are not in conflict with the IPHC's regulations and that they are approved by the Secretary of Commerce.

The IPHC manages Pacific halibut as a single stock between California and the upper reaches of its range in Alaska. This action does not change the direct management of the halibut stock in any way. Rather, this action modifies management of the BSAI groundfish fisheries and links the halibut PSC limit for the Amendment 80 sector to halibut abundance. As explained below, through the BSAI groundfish FMP,

NMFS manages groundfish stocks consistent with National Standard 3.

Comment 29: The proposed action would manage groundfish stocks very differently depending on who is fishing them in violation of National Standard 3. The BSAI yellowfin sole fishery would have more restrictive halibut PSC provisions when being fished by trawl vessels in the Amendment 80 sector than in the TLAS fishery.

Response: The Council and NMFS determined that Amendment 123 and this final rule are consistent with National Standard 3, as explained in Section 7.1 of the Analysis. National Standard 3 states that, to the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination (16 U.S.C. 1851(a)(3)). National Standard 3 guidelines explain how to structure appropriate management units for stocks and stock complexes (§ 600.320). The Guidelines state that the purpose of the standard is to induce a comprehensive approach to fishery management (§ 600.320(b)). The guidelines define "management unit" as "a fishery or that portion of a fishery identified in an FMP as relevant to the FMP's management objectives," and state that the choice of a management unit "depends on the focus of the FMP's objectives and may be organized around biological, geographic, economic, technical, social, or ecological perspectives" (§ 600.320(d)). National Standard 3 does not require an FMP to treat different sectors the same because they fish the same stock, and it does not preclude setting bycatch limits that differ by sector.

The BSAI halibut PSC limit is assigned to three sectors and the CDQ Program. The halibut PSC limit is apportioned to the Amendment 80 sector to execute all their fisheries, not only yellowfin sole. The Amendment 80 cooperative decides how, among the fisheries that are open for directed fishing, to use their PSC limit. In years where there is an Amendment 80 limited access fishery, halibut PSC is assigned to the Amendment 80 limited access fishery, and it is apportioned into PSC allowances for trawl fishery categories according to the procedure in § 679.21(b)(1)(ii)(A)(2) and (3). The BSAI trawl limited access sector's halibut PSC limit is also apportioned into PSC allowances for trawl fishery categories according to the procedure in § 679.21(b)(1)(ii)(A)(2) and (3).

Due to the high PSC use by the Amendment 80 sector, the Council chose to focus this action only on the Amendment 80 sector; see response to

Comment 13 for details. For more information about halibut management and bycatch in the different fishery sectors, see the preamble for the proposed rule (87 FR 75570, December 9, 2022). See the response to Comment 16 for an explanation of other actions to reduce halibut PSC limits in other fisheries.

National Standard 4

Comment 30: NMFS fails to determine whether the proposed action is an allocation. NMFS's failure to determine whether the proposed action is an allocation as a threshold matter violates the Magnuson-Stevens Act and is arbitrary. NMFS muddles the record with statements suggesting that the proposed action is and is not an allocation.

Response: NMFS disagrees. National Standard 4 states that conservation and management measures shall not discriminate between residents of different states and provides guidance regarding fair and equitable distribution of fishing privileges if it becomes necessary. NMFS does not consider this action to be an allocation of fishing privileges under National Standard 4 but has provided analysis to show that, even if it were an allocation, it is consistent with National Standard 4. To be an allocation of fishing privileges, the National Standard 4 guidelines state there must be a direct and deliberate distribution of the opportunity to participate in a fishery among identifiable, discrete user groups or individuals. While management measures can have indirect allocative effects, only those that result in direct distribution of fishing privileges are allocations for purposes of National Standard 4. The Analysis states that, under the set of alternatives considered, there is no direct allocation or assignment of fishing privileges to the directed halibut fishery participants, nor any other allocation under National Standard 4.

At times, the Analysis may refer to a "PSC allocation" e.g., Analysis at page 242 ("When a PSC allocation is reached"). In that context, allocation carries its plain meaning (apportionment or distribution) which is distinct from National Standard 4's usage, i.e., direct and deliberate distribution of fishing privileges. NMFS acknowledges that it might have been able to avoid some confusion had it used the terms "limit" or "apportionment" where appropriate in that context.

Comment 31: The proposed action violates National Standard 4 because it allocates or assigns fishing privileges

among various U.S. fishermen, but this allocation is not "[f]air and equitable to all such fishermen." Any allocation of halibut from the Amendment 80 sector to the directed halibut fishery is not fair or equitable because the negative effect on the Amendment 80 sector is extremely disproportionate to any benefit that could be realized by the directed halibut fishery. NMFS also fails to provide any interpretation of the term "fair and equitable," and its application of that term in its analysis is, at best, cursory and conclusory. NMFS's assertion that this proposed action provides a fair and equitable allocation is both baseless and unexplained.

Response: As explained above (see response to Comment 30), this action is not an allocation under National Standard 4. But even if it were, it is fair and equitable and consistent with National Standard 4. As explained in the response to Comment 12, the reason for focusing on the Amendment 80 sector is due to the high proportion of the halibut PSC used in that sector. While the action could impose regulatory costs to one sector, the actual cost borne does not determine whether the action is fair, equitable, reasonably calculated to promote conservation, or provides an excessive share to anyone. NMFS determined that the costs were reasonable when balanced with the purpose and need, and the conservation, social, management, and environmental impacts. NMFS also determined that the action is fair and equitable because this action links halibut PSC limit for the Amendment 80 sector to levels of halibut abundance. Allocation of halibut to the directed halibut fishery is not the purpose of this action, and this action makes no such allocation. The Analysis makes clear that under the existing management regulations applicable to the directed halibut fleet, the IPHC establishes the annual catch limits for the directed halibut fishery. Any benefit to the directed halibut fishery is a potential, secondary benefit to the action. See the response to Comments 32 through 38 below for further discussion on the consistency of the alternatives with National Standard 4.

Comment 32: Amendment 123 will begin to address conservation and equity issues in halibut management and will provide benefits to coast-wide North Pacific stakeholders and communities in both the short- and long-term. The amendment allows more of the harvesters of BSAI halibut to share in its conservation by establishing abundance-based measures for catch limits. It also provides much needed equity for Alaskans who rely on halibut for not only income but also food

security, cultural traditions, and many other aspects of community well-being that cannot be captured in economic data alone. This is a more equitable mechanism for allocating conservation responsibilities and, therefore, complements the intent of National Standard 2 and National Standard 4.

Response: NMFS agrees. The problematic nature of the no-action alternative for directed halibut fishery participants under halibut low abundance conditions is recognized in the Council's purpose and need statement. The action alternatives propose a range of halibut PSC limit reductions under high to low abundance conditions. Amendment 123 includes reductions under all but high IPHC index conditions and, in that case, proposes no change to the halibut PSC limit, thus providing equality for all users at times of reduced halibut abundance. Between 1998 and 2016, the PSC limit for the Amendment 80 sector would have ranged between 1,745 mt and 1396 mt (20% reduction). In years after 2016 the IPHC index shows a decline in overall halibut abundance in Area 4 that has resulted in notable harvest reductions among the direct halibut fishery participants and would have resulted in a 25% reduction in the Amendment 80's PSC limit had this action been in place.

Comment 33: The proposed action cannot be reasonably expected to result in any increase in harvest opportunities in Area 4 because the IPHC establishes catch limits in Area 4. If there are any increases in abundance in Area 4, there is no guarantee that the directed halibut users in Area 4 would benefit. By relying on such contingencies over which NMFS has no control, and that are not subject to the Magnuson-Stevens Act, the purpose and need statement is irrational, insufficient, uncertain, and unlawful.

Response: This comment mischaracterizes the action's purpose and need. The purpose of this action is to link the halibut PSC limit for the Amendment 80 sector to halibut abundance. This action will ensure that the Amendment 80 sector's use of halibut PSC does not become a larger proportion of the overall halibut PSC in the BSAI in years of lower levels of halibut abundance which will promote conservation of the halibut stock. This action does not allocate halibut harvest opportunities in Area 4. Halibut management is explained in Section 4.4 of the Analysis. The purpose and need statement includes the possible indirect result that the action may provide additional harvest opportunities in the directed halibut fisheries. However, that

would be an ancillary effect if it occurred, not the primary purpose of the action. Though there is much uncertainty about the magnitude and timing of possible benefits to the directed halibut fishery in Area 4, it is reasonable to recognize the possibility of these indirect benefits in the purpose and need statement for this action.

Comment 34: NMFS provides no interpretation of the term “reasonably calculated to promote conservation” and otherwise fails to rationally explain why the proposed action is “reasonably calculated to promote conservation.” The Analysis contradicts NMFS’s conclusion that this action will promote conservation, because the proposed action will have no effect on the conservation of the halibut stock. Amendment 123 is not consistent with National Standard 4 because it does not improve conservation of halibut.

Response: The National Standard guidelines define the “promotion of conservation” at 50 CFR 600.325(c)(3)(ii), and the definition includes actions that encourage a rational, more easily managed use of the resource. An action may also promote conservation (in the sense of wise use) by optimizing the yield in terms of size, value, market mix, price, or economic or social benefit of the product.

The Council and NMFS determined that Amendment 123 and this final rule are consistent with National Standard 4, as explained in Section 7.1 of the Analysis. NMFS notes that the Analysis indicates that none of the alternatives will affect overall halibut spawning stock biomass, which is measured coastwide from California to Alaska. Each action alternative, however, would set the Amendment 80 sector’s halibut PSC limit at or below the current level depending on indices of halibut abundance. The reduction of halibut bycatch mortality is a conservation measure; by definition, lower halibut PSC limits will result in lower halibut mortality, which is expected to provide benefits to the coastwide halibut stock, the directed halibut fisheries, or both. Given typical past IPHC practice, NMFS expects that much of the biomass conserved by this measure will accrue to the directed commercial halibut fishing limits. Later harvest of conserved halibut does not affect this action’s conservation benefit. The IPHC’s action with regard to halibut conserved under this action is neither necessary nor detrimental to this action or its analysis. Given the economic and cultural value of halibut and the competing interests of the commercial, recreational, sport, and subsistence users, the Council and NMFS’s decision

to create a bycatch management program that restricts bycatch further when halibut abundance is low represents a more rational approach to managing the halibut resource and promotes its wise use.

In addition, the halibut “stock” is distinct from and broader than the “spawning stock biomass” and is defined in the Magnuson-Stevens Act at 16 U.S.C. 1802(42) (“stock of fish”) as a species, subspecies, geographical grouping, or other category of fish capable of management as a unit. Conserved fish may benefit the stock even if they do not immediately increase the spawning stock biomass, including by greater survival of small halibut, *i.e.*, under 26 inches in size, which are expected to have longer-term positive impacts on the stock and directed fishing.

Comment 35: It is unfair that under the static PSC limit of 1,745 mt, when BSAI halibut abundance declines PSC in Amendment 80 fisheries can become a larger proportion of total halibut removals in the BSAI, particularly in Area 4CDE, and can reduce the proportion of halibut available for harvest in directed halibut fisheries. This has had disproportionately negative impacts on local participants in the directed halibut fishery.

This action would see PSC limits rise and fall based on the abundance of halibut. This is a compromise that establishes a measure of social equity and resource conservation. Bering Sea halibut fishermen will see immediate benefits of increased directed catch limits which will support Bering Sea communities.

Response: NMFS acknowledges the support for this action. The purpose and need statement recognizes that when BSAI halibut abundance declines, halibut PSC in Amendment 80 fisheries can become a larger proportion of total halibut removals in the BSAI, particularly in Area 4CDE, and can reduce the proportion of halibut available for harvest in directed halibut fisheries. The full purpose and need statement is available in Section 1.2 of the Analysis (see **ADDRESSES**). NMFS agrees that Bering Sea halibut fishermen may benefit from this action; however, the timing and magnitude of those benefits are uncertain.

Comment 36: NMFS fails to explain why it must take action to achieve “equity” or how this action improves equity.

Response: The Council recommended, and NMFS is implementing, this action to link Amendment 80 halibut PSC limits to levels of halibut abundance. This action reduces bycatch of halibut

to the extent practicable and also reflects equitable considerations between groundfish fishermen and directed halibut users. This action will reduce Amendment 80 halibut PSC limits when halibut abundance decreases, which is analogous to what typically happens to the harvest limits of the direct halibut fishery when abundance decreases. This action will reduce the disparity between the directed halibut fishery and the Amendment 80 sector by implementing PSC limits for the Amendment 80 sector that fluctuate according to halibut abundance. This will mean that, annually, indices of halibut abundance will be used to establish the Amendment 80 PSC limit. The IPHC will also use indices of halibut abundance to establish the directed halibut fishery catch limits. This action may benefit the stock and it may result in increased opportunities for directed halibut fishing among the recreational, sport, subsistence, and commercial users.

This action minimizes halibut bycatch in the Amendment 80 sector to the extent practicable. There is no specific requirement that a bycatch minimization measure achieve “equity.” Equitable considerations, however, serve varying roles in the development of actions under the Magnuson-Stevens Act. For example, section 303(a)(14) of the Magnuson-Stevens Act requires FMPs to allocate any fishery harvest restrictions or recovery benefits fairly and equitably among the commercial, recreational, and charter fishing sectors in the fishery. Similarly, under National Standard 4 and its guidelines, allocations of fishing privileges must be fair and equitable. Equitable considerations are also relevant to determinations made under E.O. 12866 and E.O. 13563. It was well within the Council’s purview to require lower bycatch levels during times of low abundance given that the directed fishery is expected to have lower harvest levels at times of low abundance. The Council and NMFS view this as a more equitable approach. The term “equitable” in this case has its common meaning and does not carry a particularized statutory or regulatory definition.

Comment 37: The purpose and need statement does not mention “equity.” Thus, NMFS’s stated justification for the proposed action (*i.e.*, that it is “equitable”) arbitrarily and unlawfully fails to satisfy or otherwise address the stated purpose and need. It is arbitrary for NMFS to conclusively determine that the proposed action is “fair and equitable” (presumably on National

Standard 4 grounds) without even determining whether its proposed action constitutes an allocation.

Response: NMFS does not consider this action to be an allocation as described in response to Comment 30. The Council's purpose and need statement for this action is included in Section 1.2 of the Analysis. This action links the halibut PSC limit for the Amendment 80 sector to levels of halibut abundance. Section 5 of the Analysis addresses how this action achieves such conservation through the minimization of the Amendment 80 sector's halibut bycatch to the extent practicable and improves consistency with the IPHC's management of halibut.

This final action also achieves an equitable outcome because, at decreasing levels of halibut abundance, NMFS expects the IPHC to reduce total halibut mortality limits which will directly influence the directed halibut catch limits and under this action the Amendment 80 sector's PSC limit will also be reduced. This is in contrast to the previous static PSC limit of 1,745 mt, which meant that the Amendment 80 sector's PSC constituted a greater proportion of overall halibut mortality in the BSAI when halibut abundance decreased. This was exemplified in 2018 when the Amendment 80 halibut PSC limit accounted for 49 percent of the IPHC's 3,559 mt halibut mortality limit for Area 4. By diminishing that effect, this action conserves halibut and also achieves a more fair and equitable outcome.

Comment 38: This proposed action violates National Standard 4 because it discriminates against residents of different states by establishing a regulation that would limit the harvesting activities of only one sector, and effectively one "person" (the Amendment 80 cooperative), which is incorporated in only one state. Amendment 80 would be the only sector or fishery subject to an abundance-based PSC limit.

Response: NMFS disagrees. While the Amendment 80 cooperative may be incorporated in Washington, the residency of the Amendment 80 cooperative or any of its members, employees, or associated people is not the basis of this action. This action is a conservation and management measure, applicable to the entire Amendment 80 sector without regard to state of incorporation or residency. The Analysis on pages 17 and 85 and the response to Comment 16 explain the rationale behind focusing this action on the Amendment 80 sector.

National Standard 5

Comment 39: NMFS did not consider efficiency in the utilization of fishery resources, as National Standard 5 requires. The Analysis describes the various ways in which the proposed action would reduce efficiency. The proposed action increases inefficiency and cost and results in a negative net benefit to the Nation.

Response: NMFS disagrees. The Council and NMFS determined that Amendment 123 and this final rule are consistent with National Standard 5, as explained in Section 7.1 of the Analysis. National Standard 5 states that conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose. Efficiency under National Standard 5 is a broad concept that considers efficiency not just in one sector or solely in costs but includes utilization of fishery resources (§ 600.330(b)). This means that, in terms of aggregate costs, efficiency becomes a conservation objective, where conservation constitutes wise use of all resources involved in the fishery, not just the directed fishery stocks. While a perfectly efficient fishery would harvest the OY with the minimum use of economic inputs such as labor, capital, interest, and fuel, these economic concerns are not the only aspects to consider when analyzing the potential impacts of a management action. National Standard 5 says the measures must consider efficiency but does not mandate the most efficient structure. Efficiency may be reduced to reach the BSAI FMP's social or biological objectives, which includes the reduction of bycatch and waste.

National Standard 6

Comment 40: NMFS fails to explain how the proposed action is consistent with National Standard 6 because the proposed action would create highly restrictive PSC limits for only the Amendment 80 sector and would hinder the ability of the Amendment 80 sector to adapt to the uncertain effects of climate change on fish stocks in the region.

Response: NMFS disagrees. National Standard 6 states that conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches. Amendment 123 and this final rule take into account the variability in and contingencies for Amendment 80 sector fishery operations. The Analysis discusses

these at length, including the creation of table 58 to part 679, which provides for yearly flexibility, takes into account changes in environmental and other factors, and provides for variability. Changes in methods used by fishermen to avoid halibut PSC are noted as a possibility for improving halibut avoidance by the Amendment 80 sector, in that new developments may help make PSC limits less constraining. Changes in the environment and economics are discussed to the extent practicable in the Analysis. Section 3.3 of the Analysis gives evidence that the Amendment 80 sector has been in a near-constant state of change during the analyzed period and that the way in which historical fishery data were used for the impact analysis in Section 5.3.2 should be carefully considered, which they were.

Comment 41: Amendment 123 is highly likely to cause the consolidation of the majority of Amendment 80 harvest opportunities into fewer vessels, because many vessels will not have adequate halibut PSC limits to harvest their allocations and may lead to even greater consolidation in the fishery, and this important factor is ignored by NMFS.

Response: In Section 5.3.2.3 of the Analysis, NMFS analyzed the practicability of meeting the PSC limits considered, including the possibility that this action may cause consolidation of harvest opportunities into fewer vessels in the fishery. In Section 5.3.2.5 of the Analysis, NMFS recognizes that this is a possible outcome and did not overlook it.

Comment 42: The proposed action is not consistent with National Standard 6 because NMFS relies on the "average" impact of the proposed action, and this does not comply with requirements at § 600.335(b). NMFS fails to consider the variations that occur in the fishery and the highly variable impacts on the Amendment 80 sector. Using average PSC use from the years 2016 through 2019 does not capture the full range of inter-annual variability in halibut PSC use by the Amendment 80 sector as well as the full range of reasons why this variability occurs.

Response: The Council and NMFS determined that Amendment 123 and this final rule are consistent with National Standard 6, as explained in Section 7.1 of the Analysis. Here, NMFS did not rely on the average impacts in its decision-making but considered the range of impacts. To account for variability and in consideration of a range of impacts, NMFS and the Council use a matrix of various abundance levels derived from two indices and they

generate a range of halibut PSC limits. Table 58 to part 679 was specifically designed to be flexible in response to the abundance of the halibut stock.

The Analysis includes the most recent data available at the time of publication, and notes that the Council considered 2016 through 2019 to be the appropriate time period to evaluate halibut PSC use because it reflects Amendment 80 sector operations under their Halibut Avoidance Plan and deck sorting, along with other available tools to avoid halibut and reduce halibut mortality. In Section 5.3.2.2.3 of the Analysis, NMFS acknowledges that halibut PSC use is variable due to a wide range of factors, including ocean conditions. Section 5.3.2.3.2 of the Analysis discusses potential impacts of changing environmental conditions on the practicability of the Amendment 80 sector to avoid bycatch, particularly as it relates to warmer Bering Sea water temperatures and spatial patterns of target fisheries. Further, Section 5.3.2.5 of the Analysis notes that external factors, such as climate change, are also anticipated to have an impact on Amendment 80 halibut mortality rates. Table 2–5 in Section 2.1 of the Analysis describes the variation of PSC use found in those years.

Comment 43: NMFS's disapproval of Amendment 22 to the Mackerel, Squid, and Butterfish Fishery Management Plan is instructive when analyzing consistency with National Standard 6. This action is inconsistent with National Standard 6 for similar reasons: it will result in reduced fishing opportunities and inefficiencies without conservation need or other rationale; it will hinder the Amendment 80 sector's ability to adapt to climate change effects; it will reduce flexibility needed to respond to shifting and evolving markets; and it is likely to cause consolidation of the fishery.

Response: NMFS notes that Amendment 22 to the Mackerel, Squid, and Butterfish Fishery Management Plan (Amendment 22) is from the Mid-Atlantic Fishery Management Council. Amendment 22 would have removed vessels from the fishery by regulation to consolidate the fleet and NMFS disapproved it because there was insufficient evidence to support the purpose and need and Council's rationale for the action. Each Fishery Management Council develops fishery management plans and management measures independently for the specific management goals and objectives for each fishery. Therefore, comparison across regions, Councils, and fisheries is not a useful means of assessing the merits of a specific action. Amendment

22 should be viewed in context and based on the NMFS analysis prepared for that action. At the time of disapproval, NMFS offered five reasons for its disapproval in broad terms. Those circumstances and the analysis, decision, and proposed Amendment 22 are very different from the circumstances, analysis, and decision at issue in this action. The disapproval of Amendment 22 is neither comparable nor instructive to this action.

National Standard 7

Comment 44: The proposed action is not consistent with National Standard 7 because it is expected to increase Amendment 80 operating costs and reduce fishing opportunities in years of low halibut abundance. This action is not practicable and does not minimize costs because NMFS envisions bankruptcy as a viable and reasonable outcome. NMFS should follow the example of disapproved Amendment 22 to the Mackerel, Squid, and Butterfish FMP. That action was found to not be necessary for conservation, did not solve the perceived race to fish, and reduced flexibility through restrictive possession limits and, as a result, was determined to be directly contrary to the intent of National Standard 7.

Response: NMFS disagrees. The Council and NMFS determined that Amendment 123 and this final rule are consistent with National Standard 7, as explained in Section 7.1 of the Analysis. National Standard 7 promotes the greatest freedom of action in business and recreation, to the extent such action is consistent with ensuring wise use of the resources and reducing conflict in the fishery. This action seeks to ensure the wise use of the resource by reducing halibut PSC when abundance of halibut is low. As described in Section 3.3 of the Analysis, the Amendment 80 sector operates as a cooperative, so when operational challenges arise within the cooperative, the cooperative may implement resolutions and improvements. Section 5.3 of the Analysis describes how operating costs may increase for the Amendment 80 sector and that the potential for revenue decreasing exists.

Despite the potential for decreasing revenue, the Analysis does not conclude that the bankruptcy of the fleet is likely to occur. The Mid-Atlantic Fishery Management Council Illex squid fleet action (Amendment 22) referenced by commenters would have removed vessels by regulation to consolidate the fleet, which is a very different type of action than this action to implement Amendment 123. As explained in response to Comment 43, each Fishery

Management Council develops fishery management plans and management measures independently for the specific management goals and objectives for each fishery. Therefore, comparison across regions, Councils, and fisheries is not useful in this context and the disapproval of Amendment 22 is neither comparable nor instructive to this action.

Comment 45: The proposed action fails to ensure wise use of fishery resources or reduce conflict as required under National Standard 7. The Amendment 80 fishery is responsible for a fraction of the overall coastwide halibut bycatch. In 2021 and 2022, halibut bycatch in the directed halibut fishery was at record low amount (in pounds) and represented approximately 10 percent and 9 percent, respectively, of total halibut removals from all sources. Halibut bycatch throughout the coastwide range of the halibut stock is at a record low of only 9 percent of total halibut removals.

Response: Halibut bycatch in the BSAI accounts for more than half of the coastwide total halibut bycatch. In the years 2010 through 2019, the Amendment 80 sector accounted for approximately 60 percent of the halibut bycatch mortality in the BSAI groundfish sectors (see Table 3–18 in the Analysis). By reducing the Amendment 80 sector halibut PSC limit in years of low halibut abundance, this action ensures the wise use of fishery resources. Halibut bycatch in the directed halibut fishery or by other fisheries is outside the scope of this action. As explained in response to Comment 16, other actions have or will address some of that bycatch. The fact that it will continue to occur, however, does not mean that this bycatch reduction action fails to ensure the wise use of fishery resources. Otherwise, NMFS could never take any discrete or incremental action to solve wise use concerns in one fishery.

National Standard 8

Comment 46: NMFS erroneously concluded that this action provides for the sustained participation of fishing communities and minimizes adverse economic impacts on such communities while balancing the requirements of the Magnuson-Stevens Act. This conclusion is not supported by the Analysis prepared for this action and does not fully consider the significant adverse impacts of the proposed action on the fishing communities that rely upon the Amendment 80 sector. NMFS does not analyze the certain and adverse impact of the proposed action on communities reliant on the Amendment 80 fishery,

compared to any benefits to communities reliant on the directed halibut fishery (which are uncertain).

Response: NMFS disagrees. National Standard 8 requires conservation and management measures shall take into account the importance of fishery resources to fishing communities by utilizing economic and social data that are based upon the best scientific information available in order to provide for the sustained participation of such communities; and to the extent practicable, minimize adverse economic impacts on such communities. NMFS analyzed the impacts of this action on communities in Appendix 1 and in Section 5.5 of the Analysis, including impacts to communities that rely on the Amendment 80 sector as well as other communities, including subsistence users. While NMFS looked at possible benefits to communities that rely on directed fishing for halibut, those benefits were only seen as a possible indirect benefit of this action, as increasing allocation to the directed halibut fleet is a function of the IPHC and outside the scope of this action. This action takes into account those competing interests and strikes a balance among them and among the National Standards.

Comment 47: Much of the analysis of community impacts is specifically focused on either a single community, Saint Paul, or a small group of discrete communities. NMFS's effort to reallocate halibut to benefit these communities (or Saint Paul individually) violates National Standard 8.

Response: The Council and NMFS determined that Amendment 123 and this final rule are consistent with National Standard 8, as explained in Section 7.1 of the Analysis. The social impacts analyzed address a number of communities with directed halibut fisheries or other impacts and are not solely focused on Saint Paul. Saint Paul is discussed at length, however, because it is within a region with some of the highest halibut revenues and halibut dependency, meaning the potential indirect benefits of this action could more significantly affect this specific community. Further, as explained in response to Comment 31, this action is not an allocation, and it does not reallocate halibut to communities. The purpose of this action is to link the halibut PSC limit for the Amendment 80 sector to halibut abundance. This action will minimize halibut bycatch to the extent practicable and thus contribute to the conservation of the halibut resource, especially at times of low abundance.

National Standard 9

Comment 48: NMFS provided no guidance to the Council or the public on the interpretation of the term "practicability" during consideration of this action, as required by National Standard guidelines. When Congress enacted the term in 1996, it stated that Regional Fishery Management Councils should make reasonable efforts in their management plans to prevent bycatch and minimize mortality, but, in so doing, could not ban a type of fishing gear or a type of fishing. Furthermore, Congress stated that practicability requires an analysis of the cost of imposing a management action.

Response: Guidance on the interpretation of National Standard 9 is given in § 600.350, which discusses a number of considerations relevant to the practicability analysis (63 FR 24212, May 1, 1998). As stated in the National Standard guidelines, inconvenience is not an excuse; bycatch must be avoided as much as practicable, and bycatch mortality must be reduced until further reductions are not practicable. Adherence to the National Standards is not discretionary, and the Councils are required to re-examine the conservation and management measures contained in their FMPs for ways to reduce bycatch on a continuing basis to ensure that bycatch is minimized to the extent practicable. This action is the result of NMFS's consideration of the costs and benefits of the PSC limit reductions at low abundance, and while NMFS agrees that there may be costs associated with the action, those costs do not exceed what is practicable. This analysis is consistent with National Standard 9, including the guidelines and the Magnuson-Stevens Act.

Comment 49: The proposed action is feasible and practicable because existing halibut avoidance tools are not fully utilized within the Amendment 80 sector. Because of the individual vessel discretion inherent in the application of existing bycatch reduction tools, available data cannot establish the extent to which existing tools may, or may not, have been fully utilized in recent years. The Amendment 80 sector could have chosen to not fully use available halibut avoidance measures to artificially inflate halibut PSC rates to improve their argument against this action by alleging that further halibut reductions are infeasible and impracticable.

Response: NMFS acknowledges this comment.

Comment 50: The proposed action is inconsistent with National Standard 9 because the Amendment 80 sector has

already reduced halibut PSC usage to the maximum extent practicable using all available tools. The sector has reduced its halibut PSC usage by nearly 35 percent since 2014. Amendment 123 would impose substantial operational costs at a time when costs are already rising, and it does not provide additional tools to help the fleet achieve the bycatch reductions expected to be imposed by this action.

Response: The Council and NMFS determined that Amendment 123 and this final rule are consistent with National Standard 9, as explained in Section 7.1 of the Analysis. The Council recommended and NMFS agrees that further halibut bycatch reductions are practicable through the improved use of existing bycatch reduction tools. In the Analysis prepared for Amendment 123, NMFS acknowledged that the Amendment 80 sector has already undertaken efforts and expenditures to reduce halibut bycatch and that dramatic increases in halibut avoidance or reductions in halibut mortality are not expected using existing bycatch reduction tools. However, additional incremental improvements are anticipated to be realized under lower halibut PSC limits and, if not realized, the Amendment 80 sector may forgo some amount of profitability to continue to reduce halibut mortality.

New bycatch reduction tools are not necessary for this action to be practicable. The amount of halibut deck sorting varied during the 2016 through 2019 period and decreased in 2020. When deck sorting was reported on a vessel during any week from 2016 through 2019, the vessel was deck sorting about 70 to 80 percent of halibut that were brought onboard the vessel. A change occurred in 2020 that resulted in the percentage of halibut that were deck sorted falling to 61 percent; in 2021 (through mid-April) the percentage of halibut deck sorted was estimated to be 49 percent. Some have attributed the declining use of halibut deck sorting after 2019 to lower bycatch of halibut, meaning that individual Amendment 80 vessels did not need to deck sort to reduce halibut mortality because they were not encountering halibut at rates where it was necessary to deck sort. It is possible that with under a lower PSC limit, the Amendment 80 sector could increase their use of halibut deck sorting. As illustrated in Section 5.3.2.4 of the Analysis, the range of PSC limits established by the action are expected to have differential impacts on Amendment 80 firms. Throughout the Analysis, NMFS acknowledges that there are many factors, including choices at the individual firm level and

vessel operational level that contribute to realized PSC use.

The amount of mortality reduction that may be expected with associated increased costs or reduced efficiency cannot be quantified with any certainty. If substantial reduction in halibut mortality is realized, it is likely to be derived from the development and implementation of new technologies. The Council and NMFS considered the potential negative economic and social impacts to the Amendment 80 sector and concluded that this action strikes a balance between potential costs to the Amendment 80 sector and conservation of the halibut resource from reductions in bycatch. As explained in the response to Comment 71, NMFS has analyzed the potential costs associated with meeting the new bycatch limits and responded to similar comments in Section 8.4.2 of the Analysis. The Council and NMFS concluded that increased costs do not mean that further bycatch reductions are impracticable.

Comment 51: NMFS fails to adhere to Magnuson-Stevens Act section 303(a)(11) because Amendment 123 prioritizes the minimization of bycatch mortality over the minimization of bycatch overall, while the statute requires the reverse order of priority.

Response: The purpose of this action is to link the halibut PSC limit for the Amendment 80 sector to halibut abundance. This action minimizes halibut bycatch to the extent practicable. Bycatch generally refers to catching non-targeted fish, while bycatch mortality more specifically refers to situations where those non-targeted fish die from their capture. Minimization of halibut bycatch is a purpose of the action, as stated in the purpose and need in Section 1.2 of the Analysis. Minimization of both halibut bycatch and bycatch mortality are expected results of the action, in that lower PSC limits will require Amendment 80 vessels to avoid halibut bycatch and, to the extent they cannot reasonably achieve further reductions in bycatch, use available tools to reduce the mortality of the halibut caught. This is consistent with the Magnuson-Stevens Act, including section 303(a)(11) and National Standard 9.

Comment 52: The proposed action is not consistent with National Standard 9, because, as indicated in the Analysis, this action could shift the location and timing of fisheries, which may result in shifts of bycatch. As a result the proposed action is not expected to reduce the bycatch of other species, such as crab, or enhance the resulting population or ecosystem effects. The

impacts on other species were not analyzed.

Response: The Analysis considers that there may be shifts in timing and location of fishery operations consistent with the current operations of bycatch avoidance of multiple species and inter annual variability in fishing timing and location across sectors. Section 3 of the Analysis describes crab PSC management in the groundfish fisheries and the Amendment 80 sector and concludes that no change to crab PSC management in the Amendment 80 sector is anticipated. Discussion of potential impacts to bycatch rates for other species in Section 5.6 of the Analysis is theoretical and identifies that as a possible result of any bycatch action. Section 6.0 describes impacts to marine mammals, seabirds, habitat and ecosystem. The Analysis does not indicate that this action is expected to result in increased bycatch of other species because this action will not shift the timing and location of fishing beyond the footprint already analyzed and implemented under the current management structure. Therefore, NMFS does not expect this action to increase the bycatch of other species beyond levels already encountered under existing management measures.

Comment 53: The Proposed Action violates National Standard 9 because it will impose substantial economic impacts on one fleet (the Amendment 80 sector), which will result in negative net benefits to the Nation. Additionally, the economic impacts to the Amendment 80 sector are underestimated according to the SSC's review of the draft Analysis in April 2021.

Response: NMFS disagrees. Under National Standard 9, the Council and NMFS considered the net benefits to the Nation, including a range of economic and non-economic impacts. NMFS analyzed the impacts of this action on the Amendment 80 sector, the halibut stock, and the directed halibut fishery in Section 5 of the Analysis. Appendix 1 to the Analysis includes the SIA, which evaluated community and regional participation patterns as well as community level impacts and potential impacts to regional subsistence and sport halibut fisheries.

The SSC April 2021 Minutes on the draft Analysis noted that the analysis provided an adequate discussion of the important assumptions that underlie the analysis and their implications for interpreting the estimated economic impacts. However, the SSC's comments indicated that the range of revenue impacts may be considerably larger than those estimated in the Analysis. This

implied that uncertainty associated with revenue impacts may be higher than predicted and that the Amendment 80 sector's ability to predict and avoid halibut bycatch is uncertain given the weak correlation with halibut abundance.

Input from the SSC received in April 2021 was taken into account in subsequent revisions to the Analysis during the Council process. Section 5.6 of the Analysis concludes that Amendment 123 is likely to result in a negative net economic benefit to the Nation; however, after considering the totality of potential impacts, including quantifiable and non-quantifiable economic and non-economic impacts, the Council and NMFS concluded that Amendment 123's overall benefits outweigh the negative economic impacts of this action and that Amendment 123 maximizes the net benefits to the Nation.

Comment 54: NMFS fails to consider the levels of halibut bycatch that currently exist, or that could exist under this proposed action, relative to other fisheries that have much higher rates of bycatch that NMFS has determined are fully compliant with National Standard 9. NMFS's own National Bycatch Report provides summaries of bycatch in each region, and in some regions, total bycatch exceeds total catch, and yet these regions are operating dozens of fisheries that NMFS has deemed meet the requirement to "minimize bycatch to the extent practicable" and are fully compliant with National Standard 9.

Response: Each Fishery Management Council develops fishery management plans and management measures independently for the specific management goals and objectives for each fishery. Therefore, comparison across regions, Councils, and fisheries is not a useful means of assessing whether this action's conservation and management measure, to reduce bycatch at low levels of abundance, minimizes such bycatch to the extent practicable.

Comment 55: When NMFS implemented Amendment 111, reductions in halibut PSC were also considered, but large reductions were rejected as too costly. The Amendment 111 final rule concluded that alternatives that would have reduced the halibut PSC limit by 30, 35, 40, 45, or 50 percent in the Amendment 80 sector would have come at significant economic cost to the Amendment 80 sector and fishing communities participating in the Amendment 80 fisheries. NMFS proposes to impose costs that are 6 to 14 times higher than those deemed acceptable in 2015 when halibut harvesting opportunities in Area

4 are 60 percent higher than they were in 2015, and halibut bycatch in the Amendment 80 sector is 35 percent lower than it was in 2015. NMFS fails to acknowledge and provide rationale to support its arbitrary and dramatic reversal in its rationale for imposing such enormously high costs on a single fishery.

Response: The practicability analysis and determination for Amendment 111 were particular to the existing time and circumstances at issue there. The current analysis was conducted with years of additional information after the approval of Amendment 111. As a result, NMFS has the benefit of observing and accounting for the sector's ability to fish under a 1,745 mt PSC limit following Amendment 111 and its ability to adopt and expand existing tools for halibut avoidance and release to minimize bycatch and bycatch mortality during that period. The Amendment 111 analysis explained why NMFS decided against further reductions at that time but did not bind future decisions using additional and new information. The explanation for the determination of practicability concerning Amendment 123 is extensively discussed in the Analysis and includes discussion of Amendment 111 and its findings (see response to comment 8.3–9 on page 319 of the Analysis).

National Standard 10

Comment 56: NMFS failed to consult with the U.S. Coast Guard and industry as required under National Standard 10 to ensure they recognize any impact on the safety of human life at sea and minimize or mitigate that impact where practicable.

Response: NMFS disagrees. The National Standard 10 guidelines encourage consultation with the U.S. Coast Guard if an action might affect safety of human life at sea. This can be done through a Council advisory panel, committee, or other review of the FMP amendment or regulations. The U.S. Coast Guard has a seat at the Council table and was engaged during the Council process for this FMP amendment. Throughout the numerous years Amendment 123 and this action were in development through the Council process, a substantial amount of public input was received from the affected industry sector.

Economic Impacts

Comment 57: The proposed action will impose certain and substantial additional costs ranging from 86 to more than 100 million dollars on the Amendment 80 sector while only

providing speculative benefits to the directed halibut fishery. NMFS has concluded these impacts will result in negative net benefits to the Nation.

Response: NMFS did not conclude that Amendment 123 will result in negative net benefits to the Nation. NMFS analyzed the potential costs and benefits of the proposed action in Section 5 of the Analysis. The quantitative analysis of economic net benefits is limited to purely economic impacts and does not account for non-economic or unquantifiable impacts. The Council and NMFS weighed the potential for the Amendment 80 sector to mitigate negative economic impacts through operational choices; weighed the retrospective estimate of revenue impacts included in the Analysis; and weighed the non-quantifiable conservation, social, and management benefits of the abundance-based management of halibut PSC. The Analysis encompassed consideration of estimated economic impacts and predicted actual economic impacts and potential non-economic impacts of the action. NMFS analyzed the range of possible economic costs to the Amendment 80 sector for the range of possible PSC limits at different levels of halibut abundance. To the extent the Amendment 80 fishery can improve implementation of existing halibut avoidance and survival strategies, or find more efficient ways to avoid halibut PSC, the expected costs associated with reduced PSC limits may be mitigated. As described below, if they cannot be mitigated, the Analysis provides a comparison of what those costs would have been based on historical catch and bycatch levels. These numbers were created to compare costs among the alternatives; they do not try to estimate what the actual, future costs of reducing bycatch will be.

The Analysis used an analytical approach that produced cost estimates by hindcasting past results as if the alternatives considered had been in effect in previous years and looked at the potential effect of the range of PSC limits on Amendment 80 revenues in past years. Table ES–1–11 on page 42 (and Table 5–21) of the Analysis illustrates the results of the revenue analysis at the range of PSC limits analyzed. NMFS acknowledges in the Executive Summary and Section 5 of the Analysis that, based on historical catch and bycatch levels, had this action been in place in previous years, it could result in an average estimated revenue reduction for the Amendment 80 sector of 100 million dollars or more. However, these revenue estimates do not represent stand-alone predictions of

future Amendment 80 revenues under each PSC limit; rather, the Council and NMFS used these estimates to illustrate the potential differences in direction and magnitude of impacts among the alternatives considered. The revenue estimates included in the Analysis do not capture behavioral adjustments such as changes in targeting, fishing location, or other halibut avoidance strategies that might have been employed if the various PSC limits were in effect during those years, nor do they include the costs associated with such avoidance strategies. The impact estimates are “upper bound” estimates due to the assumption that the Amendment 80 sector will utilize their entire PSC limit despite historic evidence that shows that they have not. Further, the estimates contained within the impact scenarios are not actual impacts, as the response of the Amendment 80 sector in applying tools such as halibut deck sorting and spatial redeployment of effort to avoid halibut have not been modeled and will affect both halibut PSC rates and attainment of TAC, albeit with potentially reduced efficiency and increased costs of production leading to negative impacts on producer surplus.

Additionally, the revenue estimates reported in the analysis do not represent the full scope of the economic impacts associated with the proposed action alternatives (see Section 5.6 of the Analysis). The economic impact estimates represent the upper bound of potential lost harvest opportunity for the Amendment 80 sector as compared to status quo revenue (Table 5–6 of the Analysis). The economic net benefits assessment must also be considered within the greater context of all relevant factors, including distributional impacts, human dignity, and equity. The Analysis states that the overall economic net benefits are expected to be negative during future conditions of low halibut abundance. However, there are instances when there are zero impacts estimated on Amendment 80 sector revenue such as when halibut abundance is relatively high.

The Council was clear that the economic impacts of the alternatives should be compared across alternatives and within the Amendment 80 sector and not used to compare the economic costs to the non-quantified benefits to the directed halibut fishery. This approach is a cost effectiveness analysis, which is an economic tool that compares alternatives to determine which can achieve a desired result at the lowest cost. In the Analysis prepared for this action, the impacts are compared to each other for their relative effect of reducing halibut mortality

versus their relative scale of the potential effects on annual revenue of the Amendment 80 sector.

Analysis of the economic net benefits does not imply that the social, cultural, or environmental impacts and benefits discussed in the Analysis are not relevant, nor that they can be excluded when considering overall costs and benefits. To the contrary, the Analysis, particularly Section 5 of the Analysis, contains extensive discussion of both economic impacts and impacts that cannot be assessed monetarily, such as social and cultural impacts.

Benefits to the directed fishery are supported by conservation of the halibut resource. To the extent halibut PSC can be reduced, the conserved biomass may be included in the directed fishery catch limit, as the IPHC has done since 2017 under its spawner per recruit-based strategy. To the extent such biomass is not harvested by the directed fishery, it is expected to accrue to the stock, resulting in a long-term potential increase in the amount of halibut available to the directed fishery.

Comment 58: The proposed action will negatively impact the Amendment 80 sector, crew members, and numerous types of support service businesses. Members of the Amendment 80 sector, a CDQ group, as well as numerous companies that support the Amendment 80 sector, provided specific information about the direct negative financial impacts to the Amendment 80 sector and Dutch Harbor tax revenue, as well as a comparison of the benefits to halibut crew members and losses to Amendment 80 crew members. Commenters expect the action to result in lost harvesting opportunity for the Amendment 80 sector and increased costs due to bycatch avoidance, longer tows, and processing time that will reduce profits and limit the Amendment 80 sector in its ability to replace or make technological upgrades to their vessels as they have in recent years. As a result, numerous support businesses expect a reduction in the demand for their services, such as welding, electronic support, stevedoring, fuel, packaging supplies, general supplies, and/or other support services.

The proposed action will have substantial adverse impacts on the Amendment 80 sector crew, the majority of whom are minorities and people of color. As indicated in the Analysis, Amendment 80 companies that cannot remain viable under this action will eventually exit the fishery. Amendment 80 vessels provide middle class and blue collar American men and women career-path jobs, and the painful impacts of contraction of the sector will

be borne by these hard-working American fishermen and their families.

Response: NMFS analyzed the impacts of this action, the community and regional participation patterns in the Amendment 80 fishery and the BSAI halibut commercial fishery, and the potential community level impacts of this action in Section 5 and Appendix 1 of the Analysis. The Analysis included a qualitative analysis of potential downstream economic impacts and a quantitative analysis of potential revenue impacts to the Amendment 80 sector. The analytical approach used to evaluate the impacts to the Amendment 80 sector is described in Section 5.3.1 of the Analysis. The Analysis notes there may be an impact to the Amendment 80 sector if they cannot reduce their halibut bycatch, but the exact financial amount could not be determined as Amendment 80 companies did not share their financial data for a detailed analysis.

In any event, the revenue impacts are only one portion of the analysis that the Council considered in selecting the preferred alternative. The Council considered the impacts of alternative ranges of halibut PSC limit reductions on: (1) the halibut stock, (2) directed halibut fishery participants and communities that are engaged in directed halibut fisheries in the BSAI and in other Areas, and (3) BSAI groundfish fishery participants and communities that are engaged in the BSAI groundfish fisheries. In particular, Section 5.5 on Social and Environmental Justice summarizes results of Appendix 1, the SIA, which evaluates community and regional participation patterns in Amendment 80 fishery (including minority population demographics) and the Area 4 halibut commercial fishery as well as potential community level impacts from the alternatives. The Council considered the detailed information provided in the analysis for the proposed action.

The costs associated with avoiding halibut are discussed quantitatively and qualitatively throughout the document, particularly in Section 5.3.2.3 of the Analysis, where it is stated that all of the measures that could be implemented to reduce halibut mortality would have a cost to the fleet and the increased costs limit how those tools can be implemented while keeping the fleet economically viable. The gross or net cost directly associated with reducing halibut mortality is not estimated in the analysis.

The Analysis did not incorporate generally understood but poorly quantified economic multipliers that would allow for an estimate of the total

economic contributions of the Amendment 80 fishery or the directed halibut fishery in terms of output, income, employment or other economic measures. The broad, downstream economic impacts of commercial fishing can be understood and appreciated without drawing an equivalency between metrics or existing studies that have fundamentally different scopes.

Comment 59: In the Analysis, NMFS used different methods to generate the revenue estimates for the Amendment 80 sector and the directed halibut fishery sector. Revenues are estimated separately using different methodologies and are meant to compare impacts across alternatives within each sector and should not be used to compare impacts across sectors. By using different methods, NMFS has made it impossible to measure benefits of this action or compare the impacts across sectors.

Response: NMFS explains the revenue estimation methodology in Section 5.3.1 of the Analysis and why it is the best available data. The methodology used to estimate revenue impacts was reviewed on several occasions by the Council's SSC, and the SSC concurred with the methodology used in the Analysis, as noted in the SSC Minutes from May 2021 (see **ADDRESSES**). The SSC concurred with the assessment of the inappropriateness of comparing revenue impacts across the two sectors and recommended that estimated revenue impacts be used only for comparing across alternatives for a given sector and not for comparing impacts across sectors. The SSC was concerned that, in its current form, reporting revenue estimates for each fleet would invite readers to make inaccurate comparisons across fleets and suggested the analysts consider whether it may be better to provide no estimate than a misleading one. In comparing the alternatives, it is not necessary to be able to directly compare the revenue impacts between the two fleets; it is merely necessary to compare the relative impacts of each alternative on each affected fleet.

Comment 60: NMFS should have used the most complete available dataset that included the years 2010 through 2021 for estimating impact revenues to the Amendment 80 sector. This wider range of years better reflects environmental and operational conditions than the dataset used by NMFS. Using the dataset that narrowly includes 2016 through 2019 does not consider the effects of annual variation and events that significantly influenced the proportion of the halibut PSC limit used in 2016 and 2017. These events include the 45 percent reduction in flatfish

harvested in 2016 than in the previous 4 years by the Alaska Groundfish Cooperative and the limited fishing by three Fishing Company of Alaska vessels in the first quarter of 2017.

Response: As discussed in the Analysis in Section 5.3.2.2, NMFS did not rely on a single dataset; rather, the analysis includes a number of different datasets and potential outcomes, as well as their likelihood of accurately representing future outcomes. After extensive input from the public, the affected industry, and the Council's SSC, NMFS concluded that the 2016 through 2019 dataset is likely the best predictor of potential revenue impacts for the reasons stated in the Analysis. Data from years prior to Amendment 111's implementation (that is, prior to 2016) have higher PSC limits and less PSC avoidance behavior, meaning the 2016 through 2019 period is likely to be more reliable in predicting future results under lower PSC limits and more PSC avoidance behavior. As described in Section 5.3.2.2.3 of the Analysis, NMFS recognizes that the analytical approach used to quantify potential revenue impacts to the Amendment 80 sector is only representative of the time period analyzed and it does not incorporate fishing adaptations or behavioral changes that may occur in the future since those are too speculative to predict. Additionally, the 2016 through 2019 dataset was not considered in isolation.

Comment 61: The resampling approach used in the Analysis to estimate revenue impacts to the Amendment 80 sector assumes 100 percent of the Amendment 80 sector's halibut PSC limit is used each year. In reality, however, the Amendment 80 sector does not use 100 percent of its halibut PSC limit and has not done so for the last 10 years. The result of this evaluation of economic impacts grossly overstates the likely effects on Amendment 80 sector revenues, and even lower PSC limits in times of low halibut abundance (as considered under Alternative 4 in the Analysis) are viable and appropriate.

Response: As explained in Section 5.3 of the Analysis, NMFS agrees that the economic impact estimates represent the upper bound of potentially forgone catch and revenue impact as compared to status quo revenue because this action will reduce halibut PSC at times of low halibut abundance. The Council and NMFS concluded that the results are most easily understood by showing 100 percent use to illustrate maximum adverse impact. Section 5.3.2.1 of the Analysis provides a detailed discussion on the assumptions and evaluation on

the assumption that 100 percent of the PSC limit would be used. Forecasting fleet behavior under a constraining PSC limit is a challenge in analyses considering alternative PSC limits; thus, in this case, the Analysis includes an estimate of the maximum adverse impact.

The revenue estimates reported in Section 5.3.2 of the Analysis compare the estimates of different alternatives under the same scenarios to inform the reader of the relative difference in direction and magnitude of the alternatives. As stated in the Analysis, these results are not stand-alone predictions of future Amendment 80 revenues under each PSC limit established by this action. A limitation of this analytical approach is that estimates reflect only the environmental conditions and fishing behavior that occurred during the past 10 years. The Amendment 80 sector is expected to make strategic choices in harvesting behavior (*i.e.*, prevalence of halibut avoidance strategies such as deck sorting) that are different from the randomized or stratified random selection of hauls used in the Analysis.

Given reductions in PSC limits and expected operational changes such as increased deck sorting, it is most likely that future PSC use will be similar to what has been seen in the years since 2015 (*i.e.*, estimates using 2016 through 2019 or 2017 through 2018 data are most likely to represent future PSC use). Revenue data for 2020 and beyond were not available when the Analysis first analyzed revenue impacts. NMFS did not subsequently include revenue data for 2021 because Amendment 80 sector operations, along with other fisheries in Alaska, were negatively affected by COVID-19 mitigation measures and pandemic-related upheavals in international supply chains and markets.

Comment 62: The Analysis provides only a cursory consideration of the potential impact of the proposed action on cooperative dynamics and misstates the potential viability of the Amendment 80 limited access fishery. The proposed action will effectively eliminate the Amendment 80 limited access fishery as a viable management option.

Response: The Amendment 80 proposed rule (72 FR 30052, May 30, 2007) states that the Council recommended the Amendment 80 Program specifically to discourage fishing practices that accelerate the race for fish in the Amendment 80 limited access fishery, and requiring a QS holder to fully commit to a cooperative would provide additional incentives to

achieve the Amendment 80 Program's objectives. The Amendment 80 Program was implemented in 2008. Since 2010 there has been no participation in the Amendment 80 limited access fishery and the regulations implementing the Amendment 80 limited access fishery remain unchanged by this final rule. The amount of Amendment 80 halibut PSC assigned to the Amendment 80 limited access fishery will continue to be determined as specified in regulations at § 679.91(d)(3).

Comment 63: This action will benefit Alaska communities because the directed halibut fishery is largely prosecuted by community-based vessels supporting Alaska-based families and businesses, many times with few income-producing alternatives. By contrast, the Amendment 80 sector is composed of large Seattle-based factory trawlers doing nearly all of their rigging, supplying, and support services in the state of Washington, leaving a minimum of monetary exchange onshore in Alaska. The high level of Alaskan ownership of the directed halibut fleets means that most halibut fishing revenues and earnings are spent locally on goods and services generating benefits for local economies.

Response: NMFS acknowledges the support for this action. See the responses to comments under the "Economic impacts" and "Directed Halibut Fishery" headings for additional discussion of the expected impacts of this action on the Amendment 80 sector and the directed halibut fishery, as well as the responses under the "National Standard 4" heading for a discussion of state residency.

NEPA

Comment 64: The Analysis fails to utilize a wealth of available and highly relevant scientific information on how climate change in the Bering Sea will affect the Amendment 80 sector's ability to catch its target species under the lower PSC levels of the proposed action.

Response: NMFS is aware of the rapid ecosystem changes in the Bering Sea ecosystem and the impacts this has had, and will continue to have, on the spatial extent of the Amendment 80 fishery. Section 5.3.2.3.2 of the Analysis provides a summary of the potential impact of warming Bering Sea waters on flatfish CPUE as targeted by the Amendment 80 sector and resultant halibut PSC. This summary notes that there is considerable variation in halibut mortality rates by week, and the greater use of deck sorting to reduce mortality in years when halibut could not be avoided makes drawing conclusions difficult. The Analysis also includes a

section (Section 6.4) on the status of the ecosystem, and the Ecosystem Status Report is incorporated by reference into the Analysis. Climate change uncertainties can be inferred from different time frames used in the analysis and the discussion of uncertainties in halibut population dynamics. See Section 8.4.3 on page 381 of the Analysis Comments on Climate change/Greenhouse gas emissions for additional information. NMFS acknowledges that changes in the distribution and abundance of fish stocks due to climate change may affect all sectors of the fishing industry to varying degrees going forward, and we do not expect the lower halibut PSC limits due to this action will measurably increase those effects for the Amendment 80 sector.

Comment 65: NMFS should have written a supplemental EIS, as there is ample, significant new information that indisputably bears on the proposed action and its impacts, requiring supplementation of the Analysis. Such information includes relevant Amendment 80 sector and halibut fishery data for the years 2020, 2021, and 2022 and consideration of the implications of recent red king crab biomass changes on the fleet's ability to avoid halibut. The Analysis should have evaluated whether a reduced red king crab PSC limit will influence halibut bycatch rates.

Response: NEPA implementing regulations at 40 CFR 1502.9(d) instruct agencies to prepare supplements to either draft or final environmental impact statements if: (1) the agency makes substantial changes to the proposed action that are relevant to environmental concerns; or (2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

Not every change requires a supplemental EIS; only those changes that cause significantly different effects from those already studied require supplementary consideration. The Supreme Court directs that "an agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decision-making intractable." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 373 (1989). On the other hand, if a major Federal action remains to occur, and if new information indicates that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared. Ultimately, an agency

is required "to take a 'hard look' at the new information to assess whether supplementation might be necessary." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 72–73 (2004).

NEPA implementing regulations at 40 CFR 1502.9(d)(4) stipulate that an agency may find that new circumstances or information relevant to environmental concerns are not significant and therefore do not require a supplement to an EIS.

NMFS issued its Analysis in December 2022; some of the information the commenter references was not available to NMFS during the development of the Analysis. NMFS considered relevant fishery data for the Amendment 80 sector and directed halibut fishery in approving Amendment 123 and developing this final rule. Based on this public comment, NMFS assessed the information from the years 2020, 2021, and 2022 that were not available prior to the publication of the Analysis on December 9, 2022. NMFS concluded that this new information is not of a scale nor scope that requires NMFS to supplement the EIS. The new information does not indicate that the action will affect the quality of the human environment in a significant manner or to a significant extent not already considered in the Analysis. Therefore, a supplemental EIS is not necessary.

Comment 66: The purpose and need statement is unlawfully narrow and forecloses the consideration of viable alternatives. By narrowing the purpose in this fashion, the Analysis forecloses the consideration of other types of bycatch reduction that, if needed, may be more rational, as well as forecloses consideration of revised or new halibut bycatch limits for any other fisheries or sectors or by any U.S. West Coast fisheries (that also have halibut bycatch).

Response: NMFS disagrees that the purpose and need statement is too narrow, thereby foreclosing the consideration of reasonable alternatives. In the Analysis, NMFS considered and analyzed five alternatives, including three options. Throughout the lengthy public Council and NEPA processes (described in Section 1.3 of the Analysis), many other ideas were considered and eliminated. Specific alternatives that were considered but not carried forward are noted in the Analysis in Section 2.8, including the reasons they were not further analyzed. The commenter did not offer other alternatives to the proposed action, and alternatives considering halibut PSC limits for other fisheries are outside the

scope of this action but, as noted above in response to Comment 16, separate actions have been taken to address halibut PSC in some other fisheries.

The purpose and need statement was crafted after substantial consideration by the Council and NMFS. It is reasonably tailored to meet the identified conservation needs, while balancing other equities. Agencies have considerable discretion in defining the purpose and need for their proposed actions, provided that they are reasonable. A purpose and need statement is unreasonable if the agency defines it so narrowly as to allow only one alternative from among the environmentally benign options in the agency's authority, such that the Analysis becomes essentially a formality. A purpose and need statement can also be unreasonable if the agency draws it so broadly that an unreasonably large number of alternatives would accomplish it, and the project would collapse under the weight of the possibilities. The agency must strike a balance between the two, as NMFS has done here.

Comment 67: Although the purpose and need statement erroneously says that the proposed action "could also promote conservation of the halibut stock," NMFS's findings elsewhere in the Analysis foreclose that possibility altogether.

Response: NMFS disagrees that its findings in the Analysis foreclose the possibility of conservation of the halibut stock. This action promotes conservation of the stock by reducing the Amendment 80 sector's halibut PSC limit in the Bering Sea under conditions of lower halibut abundance, and that conclusion is supported in the proposed rule and the Analysis. Although the IPHC is responsible for the management of the coastwide halibut stock, NMFS implements regulations that apply to the harvest of halibut including establishing halibut PSC limits in NMFS-managed groundfish fisheries under the Magnuson-Stevens Act in the BSAI FMP and Federal regulations. It is appropriate to use the Magnuson-Stevens Act definition for "conservation and management," at section 1802(5) to consider whether the reduction of PSC promotes conservation of a fishery resource, such as the halibut stock. That definition does not define conservation separately and notes that the term "conservation and management" refers to all of the rules, regulations, conditions, methods, and other measures: (1) which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and

the marine environment; and (2) which are designed to assure that a supply of food and other products may be taken and that recreational benefits may be obtained, on a continuing basis, are irreversible or long-term adverse effects on fishery resources and the marine environment are avoided, and that there will be a multiplicity of options available with respect to future uses of these resources. The Magnuson-Stevens Act does not assume that conservation means keeping a managed resource in an unfished state, since its conservation and management requirements are focused, in simple terms, on maintaining the resources for the benefit of the Nation through achieving optimum yield, while preventing overfishing and minimizing bycatch.

Where the annual Amendment 80 sector halibut PSC limit is reduced under conditions of lower halibut abundance, the overall halibut bycatch is reduced. This bycatch reduction measure helps maintain the fully-utilized halibut fishery resource and the marine environment and is designed to ensure that, on a continuing basis, a supply of food and other products may be taken and recreational benefits may be obtained. Further, the reduction of Amendment 80 halibut PSC limit at lower halibut abundance levels helps ensure that irreversible or long-term adverse effects on the halibut fishery resources and the marine environment are avoided and that there will be a multiplicity of options available with respect to future uses of these resources. As noted in the proposed rule, halibut PSC limits in the groundfish fisheries overall provide a constraint on halibut PSC mortality and promote conservation of the halibut resource.

Because the annual catch limit for the directed halibut fishery is established by the IPHC, it is uncertain whether the result of this action will benefit the long-term status of stock itself or directly benefit the directed halibut fishery. That result will mostly depend on actions of the IPHC. Due to historical IPHC practices, NMFS expects that the IPHC may establish higher catch limits for the directed halibut fleet to the degree that this action results in conserved halibut. This expectation is merely a prediction of likely impacts of this action, and the action does not depend on that result. To the extent that this action results in an overall reduction in halibut mortality in the BSAI management area, NMFS expects this to benefit the halibut stock.

Comment 68: The Analysis does not consider a reasonable range of alternatives. The Council and NMFS unreasonably and unlawfully rejected

reasonable alternatives, including those that would cause far less harm. NMFS unlawfully failed to consider other reasonable alternatives, such as (1) other mechanisms for reducing halibut bycatch and (2) other fisheries and sectors that have significant halibut bycatch. The public should have been given an opportunity to, at the very minimum, review and consider at least one alternative that would have addressed halibut bycatch in a broader array of sectors and fisheries.

Response: The Council and NMFS considered a wide range of alternatives during the development of Amendment 123. NEPA does not require an agency to explicitly consider every possible alternative to a proposed action. Under NEPA, NMFS can eliminate alternatives to FMP amendments prior to conducting a comprehensive review of such alternatives, as long as rationale is provided for its decision.

In the Analysis, five alternatives and three options were analyzed to meet the purpose and need, and many other alternatives were considered but eliminated from further analysis through the extensive period of development for Amendment 123 (see Section 2 of the Analysis). These alternatives were developed over numerous years with extensive input from the public through Council process. The Council and NMFS at one time considered including other fishery sectors but chose to focus on the Amendment 80 sector for this action. Section 1.3 of the Analysis explains the rationale for why this action is limited to the Amendment 80 sector. In short, the Amendment 80 sector comprises the majority of the annual halibut PSC mortality in the BSAI groundfish fisheries.

Comment 69: The Analysis fails to address incomplete or unavailable information under 40 CFR 1502.22. For example, the Analysis fails to consider fishery data for 2020, 2021, and 2022, and when evaluating environmental justice impacts, NMFS stated that no recent information from secondary sources on sector-wide catcher/processor crew demographics is readily available. The Analysis does not address the incomplete or unavailable information giving rise to these recognized uncertainties. NMFS acknowledges that other categories of information are unavailable but fails to perform analysis for them as required.

Response: NMFS noted in the Analysis where there was incomplete, unavailable, and uncertain information to inform the effects analysis. NEPA requires that the EIS contain high-quality information and accurate

scientific analysis, and, if there is incomplete or unavailable relevant data, the EIS discloses that fact.

The regulation cited by the commenter (40 CFR 1502.22) requires that when an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an EIS, and there is incomplete or unavailable information, the agency must make clear that such information is lacking. If the unavailable information is essential to the analysis and can be obtained without unreasonable effort or cost, the agency should obtain it; if such information is essential and the agency cannot obtain it, the agency needs to state the information is unavailable, whether its relevant, and give a summary of the existing information and state the agency's evaluation of the current information based upon approaches or research methods generally accepted in the scientific community.

The Analysis meets all requirements of NEPA and its implementing regulations. Throughout the analyses, NMFS clearly discloses where information is lacking, unavailable, or incomplete. If such information could not be obtained, NMFS explains the approach taken in the Analysis using the information available to the agency. No extra analysis is required.

Comment 70: The Analysis's cursory treatment of cumulative effects is insufficient and unlawful by including only those involving halibut, while ignoring other cumulative effects that may affect the Amendment 80 sector. The Analysis has not but should have considered additional impacts to fishing communities and the Amendment 80 sector due to: (1) an increasing likelihood that the Area 4 catch limits will not be fully harvested; (2) increased challenges in maintaining halibut fishery processing operations throughout Area 4 that have historically relied on offsetting costs with crab processing; (3) changes in distribution of Area 4 halibut deliveries; (4) additional crab bycatch management measures; (5) potential establishment of National Marine Sanctuaries near the Pribilof Islands; (6) climate change; (7) future IPHC actions; and (8) other factors including inflation, tariffs, and the market and supply disruptions due to the war in Ukraine.

Response: As explained in response to Comment 65, NEPA requires agencies to consider and give a hard look at the cumulative impacts of proposed actions. NMFS did so in Section 5.8 of the Analysis (see ADDRESSES). Cumulative impacts are effects on the environment that result from the incremental impact

of the action when added to other past, present, and reasonably foreseeable future actions. Some of the actions cited by commenters occurred so close in time to the Analysis (e.g., inflation and other market disruptions), were still under consideration and development by the Council and/or NMFS (e.g., crab bycatch measures), or occurred after publication of the Analysis (e.g., potential establishment of a National Marine Sanctuary and future IPHC actions) that they could not reasonably be considered and were therefore not “reasonably foreseeable.” As noted above, NMFS considered whether some of these new circumstances warranted supplementing the EIS and concluded they do not.

Other actions and accompanying analyses (such as directed halibut fishery catch) commenters cite were incorporated by reference either from other analyses or from other sections of the Analysis. In particular, the IPHC’s setting of directed fishery catch limits is noted as a reasonably foreseeable future action in this analysis, but in conjunction with other direct impacts of this action, is not considered to be cumulatively significant.

Some of the actions commenters cite are so uncertain or in such early stages of development that the impacts cannot be considered “reasonably foreseeable” and/or there is not enough information for a meaningful analysis. For further discussion on Climate change, considerations are addressed in the responses to Comments 26 and 64.

Comment 71: In violation of NEPA, NMFS failed to consider the additional economic impact from increased cost recovery fee percentages as a result of reduced harvest opportunity expected under this action. Specifically, the Analysis acknowledged that the Amendment 80 sector is subject to cost recovery fees as a portion of its ex-vessel revenue for costs directly related to the management of the fishery. However, because the proposed action would significantly reduce the amount of harvests in the fishery and the expected value to the fishery, Amendment 80 sector participants would expect to pay considerably higher percentage of their ex-vessel revenue to meet their required cost recovery payments. This is not analyzed in the Analysis, but effects on cost recovery fees are recognized in the proposed rule.

Response: In Section 5.9.1 of the Analysis, NMFS discussed and considered the Amendment 80 cost recovery fee program. NMFS implemented the Amendment 80 cost recovery fee program on February 4, 2016 (81 FR 150, January 5, 2016). The

Magnuson-Stevens Act section 304(d) limits total cost recovery fees to three percent of the ex-vessel value for a fishery, which is consistent with the maximum fee percentage as implemented in regulations applicable to the Amendment 80 fee program at \$ 679.95 that remain unchanged by this action. Additionally, Section 3.3.2 of the Analysis discusses cost recovery in several places and provides fee information from fiscal year 2017 through fiscal year 2020.

Comment 72: NMFS violated NEPA and the Administrative Procedure Act (APA) by arbitrarily modifying the following true statement that was included in the draft Analysis to imply an opposite conclusion, without any factual support or rational explanation:

Because of the efforts and expenditures already undertaken by the sector, dramatic increases in halibut avoidance or reductions in mortality are not expected with the tools that are currently available to the fleet. Some marginal improvements are anticipated to continue to be realized, especially if halibut limits are further reduced and the fleet forgoes some profitability to reduce halibut mortality further. Reductions in halibut mortality are expected to result from the [Amendment 80] sector increasing costs or reducing efficiency.

Response: The statements made in the draft Analysis and the Analysis prepared for this action are not significantly different. NMFS modified and clarified the language from the draft Analysis text referenced by the commenter in the Analysis in response to public comments. The Analysis adds that reductions in halibut mortality in the Amendment 80 sector could also come from “. . . improving the use of existing tools.” As required by NEPA, changes from the draft to final Analysis are documented and can be located in Section 8.8 on page 392 of the Analysis. While a number of substantive changes are detailed, Analysis Section 8.8 notes that edits were made throughout the document for clarification, in response to public comments, or both, and not all of them were expressly identified in Section 8.8. NMFS does not consider the change to imply an opposite conclusion from the draft text and does not therefore consider it a substantive change to the document. The clarified text found in the Analysis Section 5.3.2.5 states the following:

Efforts already undertaken by the sector have shown that increases in halibut avoidance or reductions in mortality are possible with the tools that are currently available to the fleet. Additional improvements are anticipated to continue to be realized, especially if halibut limits are further reduced and the fleet forgoes some amount of profitability to reduce halibut

mortality further. Reductions in halibut mortality that are realized are expected to result from the sector increasing costs or reducing efficiency. The amount of mortality reductions cannot be quantified with any certainty. If substantial reductions in halibut mortality are realized, they are likely to be derived from the development and implementation of new technologies.

Directed Halibut Fishery

Comment 73: There is no FMP for the management of halibut.

Response: True, there is no FMP for halibut because the halibut stock is managed by the IPHC under the Convention. The Council and NMFS have the authority to develop and implement regulations under the Halibut Act, including limited access regulations that are in addition to, and not in conflict with, IPHC regulations. The Council and NMFS manage groundfish fisheries under FMPs pursuant to the Magnuson-Stevens Act. Section 1.1 of the Analysis discusses how the IPHC and NMFS manage halibut.

Comment 74: There is no rational basis for NMFS’s continuing prohibition on the Amendment 80 sector’s ability to retain and sell the halibut it catches below the PSC limits.

Response: Removing halibut from the list of prohibited species or changing the provisions regarding the prohibition on retention would involve a departure from longstanding policy and is beyond the scope of this action. Section 1.1 of the Analysis discusses how the IPHC and NMFS manage halibut. This section discusses prohibition on the retention of a category of species that are valuable to other users and fully utilized by them, known as “prohibited species.” That category includes salmon, herring, crab, and halibut. Through the FMP process and regulation, NMFS and the Council have determined that the capture of species in this category must be avoided, and they prohibit their retention except when authorized by other law.

Comment 75: The halibut stock is considered to be stable and not subject to overfishing or overfished by the IPHC, even though those terms are not applicable to halibut because it is not managed under the Magnuson-Stevens Act or an FMP. The halibut stock declined in the 1990s to approximately 2012. After 2012, the stock’s spawning biomass stabilized around 100,000 mt and has remained stable since 2012.

Response: NMFS acknowledges this comment. The halibut spawning stock biomass has remained stable since 2012 at a historically low level.

Comment 76: The proposed action will not result in any identifiable

economic, social, or cultural benefits to the directed halibut fishery.

Response: The relationship between this action's PSC limit reductions and benefits to the directed halibut fishery is complex and depends on a number of factors, as discussed in Section 5.4 of the Analysis. NMFS expects that there may be benefits to the directed fishery resulting from reduced halibut PSC by the Amendment 80 sector. NMFS considered benefits to other communities and users. Benefits from conserved halibut are likely to be indirect instead of direct, due to the limited scope of the action, and because the IPHC annually establishes halibut catch limits applicable to each regulatory area. Impacts to communities, including social and cultural impacts, as well as impacts to Alaska Native and subsistence users, are considered in Section 5.5.2.1.5 of the Analysis.

Comment 77: Halibut is not fully utilized in the BSAI. The fact that utilization rates (percent harvested) in the Area 4 halibut fishery are at a record low of 66 percent is not addressed or analyzed by NMFS.

Response: The total allowable catch for halibut is completely assigned to user groups; thus, it is considered fully utilized. Halibut is targeted by commercial, recreational, charter, and subsistence users. The IPHC allocates halibut to achieve Total Constant Exploitation Yield or TCEY. Halibut is thus fully utilized even though a portion of the commercial harvest allocation may not be fully harvested every year. A portion of the distributed TCEY within Area 4 goes unharvested each year for a number of reasons. The exact amount of unharvested quota varies from year to year, area to area, and depending upon how data is aggregated. The IPHC compiles harvest figures annually in the Fisheries Data Overview presented at the Annual Meeting at the end of January. The following portion of the total catch limits were harvested in 2022 by Area: 4CDE (Bering Sea) = 91 percent; 4B (Central & Western Aleutians) = 49 percent; and 4A (Eastern Aleutians) = 80 percent.

The largest proportion of halibut that remained unharvested in Area 4 is in Area 4B, and there is a smaller amount of quota remaining unharvested in Area 4A. These areas represent remote sections of the Western Aleutian Islands. Fishing in Area 4B is usually inconsistent, resulting in directed fishing vessels spending a higher amount on fuel not only to find halibut but to reach the fishing grounds. Further, there is very little to no infrastructure out in the Western

Aleutian Islands to support a directed halibut fishing fleet resulting in vessels having to return to Dutch Harbor to sell fish and resupply.

Comment 78: Halibut is culturally, socially, and economically important to Alaska residents, a value that cannot be captured monetarily. The proposed action can help coastal communities and fishermen secure other directed fishing opportunities and be more diversified, a critical step as U.S. fisheries face growing climate impacts and uncertainty. The small-boat halibut fishery is the cultural and economic lifeblood of Saint Paul, Alaska. It is a critical source of employment (both direct and indirect). It is also an important and historically significant subsistence fishery that is key to Saint Paul Island's cultural heritage and well-being. Saint Paul identifies with this ancient resource: the halibut harvest—and sharing the bounty with the community—is an irreplaceable cultural touchstone. An abundance-based PSC limit more fairly distributes conservation limits so as not to jeopardize coastal community participants in the directed halibut fishery in the BSAI area.

Response: NMFS acknowledges this comment.

Comment 79: In 2015, the commercial IFQ and CDQ catch limits in Area 4 were 3.815 million net pounds. In 2022, the commercial IFQ and CDQ catch limits in Area 4 were 5.1 million net pounds. This improved harvest opportunity is nearly four times greater than the harvest opportunities envisioned under Amendment 111 even though the overall abundance of halibut on a coastwide basis has not changed substantially since 2015.

Response: This action is expected to minimize halibut mortality, and it may result in additional harvest opportunities for subsistence and recreational fishermen, and commercial halibut fishermen in Area 4. This action does not modify allocations of halibut under the IFQ Program or the CDQ Program. Since 2015, the amount of halibut harvested in Area 4 has remained fairly constant; however, the IPHC survey indices (*i.e.*, the estimated all-sizes WPUE time series) for Area 4 have shown a downward trend. While it may be true that there is an increase in the Area 4 halibut catch limits from 2015 to 2022, these data points are the low and high points in the time series, and this comparison fails to examine the yearly harvest across this time series, which varies drastically. As with catch limits, there is also a lot of variation within the amount of halibut harvested; however, 2022 saw the lowest harvest

from 2015 to 2022 in Area 4 with only 3.37 million net pounds harvested, well below the average TCEY for this time period of 3.71 million net pounds.

Comment 80: Canadian halibut catch limits are too high. NMFS should stop giving Canada too many fish.

Response: Halibut catch limits apportioned to Canada are determined by the IPHC and are outside the scope of this action.

Comment 81: Amendment 123 will benefit halibut users in IPHC Area 2A because reducing bycatch of small halibut in the Bering Sea will benefit the halibut stock and support migration into IPHC Area 2A.

Response: NMFS acknowledges support for this action. Expected benefits to the halibut stock are addressed in response to Comment 67.

Regulatory Process

Comment 82: It is unclear which agency official has been delegated authority to approve the Proposed Action. The proposed rule is signed by Samuel Rauch (Deputy Assistant Administrator for Regulations, NMFS). The NOA for proposed Amendment 123 is signed by Kelly Denit, Director, Office of Sustainable Fisheries, NMFS. The comment extension deadline for the NOA is signed by Jennifer M. Wallace, Acting Director, Office of Sustainable Fisheries, NMFS. The Analysis "Dear Reviewer Letter" is signed by Jon Kurland, Regional Administrator.

Response: Two delegations of authority are relevant: (1) Department of Commerce Directive (DOO 10–15) delegates the functions prescribed in the Magnuson-Stevens Act from the Secretary of Commerce to the NOAA Administrator, and (2) NOAA delegation 61 (NOAA's Organizational Handbook) delegates to the Assistant Administrator for Fisheries authority to perform functions relating to the Magnuson-Stevens Act. Pursuant to that authority, the Assistant Administrator issues and approves rulemaking actions, including the proposed and final rules. The Assistant Administrator authorizes subordinates to carry out certain ministerial tasks associated with the Assistant Administrator's issuance of rulemakings. The commenter refers to several ancillary procedural actions related to the rulemaking. These ancillary actions should not be confused with issuance of the relevant rule.

Comment 83: The Council never formally deemed the proposed regulations "necessary" or "appropriate," as the Magnuson-Stevens Act requires.

Response: It is well documented that the Council deemed the proposed

regulations to be necessary and appropriate in accordance with section 303(c) of the Magnuson-Stevens Act. In the Council Motion C2 Halibut Abundance-Based Management (ABM) from December 13, 2021, the Council deemed proposed regulations that clearly and directly flow from the provisions of the motion to be necessary and appropriate in accordance with section 303(c) of Magnuson-Stevens Act. Similar language appears in the December 2021 Council Meeting Summary Report.

Further, the Council authorized the Executive Director and the Chairman of the Council to review a draft of the proposed regulations to ensure that the proposed regulations were consistent with its instructions. On October 25, 2022, the Executive Director sent a letter to NMFS notifying it that he and Chairman Kinneen reviewed the draft FMP amendment text, notice of availability, proposed rule, initial regulatory flexibility analysis, and Analysis and concluded that they were consistent with the Council's action.

Comment 84: In the proposed rule published December 9, 2022, NMFS erroneously concluded that Amendment 123 and the proposed rule are consistent with the Magnuson-Stevens Act (87 FR 75570). NMFS has unlawfully predetermined the result of the proposed action and rubber-stamped the Council's ill-advised proposal before completing review of public comments.

Response: NMFS disagrees. The Council considered, assessed, and heard from the public on a number of different alternatives before it selected the preferred alternative. Further, in the Classification section of the proposed rule (87 FR 75570 and 75582, December 9, 2022), NMFS states that the NMFS Assistant Administrator has determined that the proposed rule was consistent with Amendment 123, other provisions of the Magnuson-Stevens Act, and other applicable laws and was subject to further consideration after public comment period. It is NMFS's common practice and consistent with applicable law to provide such a preliminary conclusion when publishing the proposed rule (see Magnuson-Stevens Act section 304(b)(1)). Because any such conclusion is subject to further consideration after public comments are received and considered by NMFS, NMFS did not predetermine the result of the proposed action.

Comment 85: If NMFS proceeds with the proposed action, it should be implemented no earlier than January 1, 2025.

Response: NMFS did not delay implementation of this action in

response to this comment. The Council recommended Amendment 123 on December 13, 2021, with the clear expectation that NMFS implement it as soon as possible. In routine reports to the Council during its regularly scheduled meetings, NMFS provided status updates to the Council and the public about the ongoing rulemaking process, and, after approval of Amendment 123 by the Secretary of Commerce on March 7, 2023, the expected timing of its implementation. During those meetings, NMFS informed the public that NMFS will implement Amendment 123 as soon as possible.

Other Applicable Laws and Executive Orders

Comment 86: NMFS fails to rationalize the enormous costs of the proposed action with the requirements of E.O. 12866 and E.O. 13563.

Response: The analysis of potential social and economic impacts is covered extensively in Sections 5.3 through 5.6 of the Analysis. In addition, a SIA is provided in Appendix 1 to the Analysis. These sections provide a thorough analysis of those E.O.s and potential socioeconomic impacts.

Comment 87: The proposed action is a "significant regulatory action" under E. O. 12866 and, therefore, should have been reviewed by the Office of Information and Regulatory Affairs (OIRA), thus NMFS unlawfully failed to comply with E.O. 12866.

Response: As noted in the Classification section of this final rule, OIRA has determined both the proposed and this final rule to be not significant for purposes of E.O. 12866 via the process outlined in the executive order itself and pursuant to all applicable laws and guidance.

Comment 88: The proposed action fails to address the statutory Capacity Reduction Program (CRP). The CRP was a key component in defining the parameters and limitations of participation in the Amendment 80 sector and is referred to extensively in the Amendment 80 implementing rulemaking (72 FR 52668, September 14, 2007). Section 219(g)(2) of the CRP makes clear that the Council should "take actions that promote the stability of [the non-pollock BSAI groundfish fisheries] consistent with the goals of this section and the purposes and policies of the Magnuson-Stevens Fishery Conservation and Management Act."

Response: NMFS agrees that the CRP defines parameters and limitations of participation on the Amendment 80 sector. The CRP, as part of a consolidated appropriations bill, made

available capacity reduction funds to certain sectors, defining those sectors/subsectors (including Amendment 80) and eligibility criteria. To this end, NMFS did not address the CRP, as this action has nothing to do with the CRP funding, definitions, or eligibility criteria. Further, section 219(g)(2) of the CRP, which was enacted in the Consolidated Appropriations Act of 2005 (Pub. L. 108-447; 118 Stat. 2890; Dec. 8, 2004) provides the Council should continue on its path toward rationalization of the BSAI non-pollock groundfish fisheries, complete its ongoing work with respect to developing management plans for the BSAI non-pollock groundfish fisheries in a timely manner, and take actions that promote stability of these fisheries consistent with the goals of this section and the purposes and policies of the Magnuson-Stevens Act. The Council and NMFS have completed those actions and any claim to the contrary is well beyond the scope of this action.

Comment 89: The proposed action violates the Information Quality Act (IQA) because NMFS is using third-party data (i.e., IPHC data) to make decisions that have a large impact on the public without showing how the use of this data complies with the IQA. For example, NMFS does not describe how it will review IPHC survey results, how it will determine the data is of "known quality," how it will determine the data's consistency with NOAA's information policy guidelines, or how the limitations of the data will be taken into account and disclosed.

Response: NMFS disagrees. The IQA directed the Office of Management and Budget (OMB) to issue guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by Federal agencies. Pursuant to OMB guidance, NOAA issued guidelines specifically for NOAA information to ensure quality of information, an important management objective for NOAA and NMFS. The Agency's information quality guidelines are not intended to prevent the use of reliable outside information or full utilization of the best scientific information available. Use of third-party information from either domestic or international sources, such as the IPHC, is a common practice in NMFS. IPHC scientists are highly-trained, independent specialists. Their work is reviewed at least twice a year by the IPHC Scientific Review Board, as well as an external review conducted every 3 years. All findings of peer reviews are openly discussed in public meetings and published online. As specified in

regulations at § 679.21(b)(1)(i)(B) governing the annual procedure for establishing the halibut PSC limit for the Amendment 80 sector, NMFS will annually receive and review the indices of halibut abundance produced by the IPHC and publish the resulting PSC limit in the annual harvest specifications.

Comment 90: The proposed action is facially arbitrary and capricious, in violation of the APA. It nonsensically premises a halibut bycatch reduction measure on a metric that has little or no correlation to halibut bycatch, intends to improve results at low abundance states but then regulates all abundance states including one (very low) that has never been observed, fails to explain rejection of proposed options to adjust the alternatives, and fails to sufficiently analyze the action and its consequences.

Response: The Council and NMFS have conducted extensive analysis and consideration in reaching the decision on this action, as recorded in the Analysis and the many documents incorporated into it. Most comments regarding assertions of APA violations are addressed in other applicable response sections, *e.g.*, Response to Comment 72. This action is well-supported and reasonable for the circumstances addressed.

Notably, the action's purpose and need statement required selection of a suitable means of determining halibut abundance. The best available science resulted in selection of the two indices included in this action. Since those indices are intended to measure abundance, not bycatch, any lack of correlation with bycatch does not affect their suitability. The goal of the action is to link the Amendment 80's PSC limit to halibut abundance, which essentially means that the annual PSC limit will vary according to indices of halibut abundance, similar to the harvest levels of other, regulated users of halibut. The fact that past bycatch levels poorly correlate to halibut abundance means there may be greater costs to reduce bycatch when halibut abundance is low, *i.e.*, the mere fact that halibut abundance is lower may not directly translate into lower bycatch levels without changes in fleet behavior to avoid the bycatch, or there may be forgone harvest of groundfish because the fleet failed to sufficiently avoid it and hit the lower PSC limit. The costs and benefits of the action are discussed extensively in Section 5 of the Analysis. The Analysis also extensively describes the alternatives and options considered and the reason for selecting this action.

Comment 91: For the same reasons that the proposed action violates the

Magnuson-Stevens Act, the proposed action violates the Halibut Act.

Response: The comment does not raise specific objections with regard to the Halibut Act. Therefore, no specific response is possible; NMFS maintains that this action is consistent with the Halibut Act and the Magnuson-Stevens Act.

Changes From the Proposed Rule

This final rule includes the following change from the proposed to final rule to address the timing for when the abundance indices will be available relative to the annual harvest specification process.

At § 679.21(b)(1)(i)(B), NMFS removed the word "proposed" from the last sentence of the paragraph referring to the annual harvest specification for BSAI groundfish fisheries. NMFS will publish the Amendment 80 sector halibut PSC limit from table 58 to part 679 in the annual harvest specifications and it is not necessary to specify "proposed." This change is necessary to make these new halibut PSC limit regulations consistent with the existing PSC regulations at § 679.21. Additionally, because the final rule specifies that the IPHC submit the IPHC index to NMFS by December 1 of each year, and the proposed annual BSAI groundfish harvest specifications are prepared prior to December 1 each year, the IPHC index may not be available for inclusion in the proposed harvest specifications each year. NMFS will make the indices available to the public and the Council when they are provided by the AFSC and IPHC. The public can apply the indices to table 58 to part 679 to see the applicable PSC limit for the upcoming year prior to the publication of the final harvest specifications.

Classification

Pursuant to sections 304(b)(3) and 305(d) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the Amendment 123 to the BSAI FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

NMFS prepared a final EIS (FEIS) for Amendment 123 to the BSAI FMP. The FEIS for this action was filed with the Environmental Protection Agency on November 28 and a notice of availability was published on December 9, 2022 (87 FR 75625). In approving Amendment 123 on March 7, 2023, NMFS issued a ROD identifying the selected alternative. A copy of the ROD is available from NMFS (see **ADDRESSES**).

This final rule has been determined to be not significant for the purposes of E.O. 12866.

Regulatory Impact Review (RIR)

An RIR was prepared to assess all costs and benefits of available regulatory alternatives. A copy of this analysis is available from NMFS (see **ADDRESSES**). NMFS implements Amendment 123 and the regulatory revisions in this final rule based on those measures that maximize net benefits to the Nation. Specific aspects of the economic analysis are discussed below in the Final Regulatory Flexibility Analysis section.

Small Entity Compliance Guide

NMFS has posted a small entity compliance guide on the NMFS Alaska Region website (<https://alaskafisheries.noaa.gov/sustainablefisheries/bycatch/default.htm>) to satisfy the Small Business Regulatory Enforcement Fairness Act of 1996, which requires a plain language guide to assist small entities in complying with this rule.

Final Regulatory Flexibility Analysis (FRFA)

Section 604 of the Regulatory Flexibility Act (RFA, 5 U.S.C. 604) requires that, when an agency promulgates a final rule under section 553 of title 5 of the U.S. Code, after being required by that section or any other law to publish a general notice of proposed rulemaking, the agency shall prepare a FRFA. The following constitutes the FRFA prepared for the regulations implementing Amendment 123. This FRFA incorporates the initial regulatory flexibility analysis (IRFA), a summary of the significant issues raised by the public comments in response to the IRFA, NMFS's responses to those comments, and a summary of the analyses completed to support this action.

Section 604 of the RFA describes the required contents of a FRFA: (1) a statement of the need for, and objectives of, the rule; (2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; (3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA) in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments; (4) a description of and an estimate of the number of small entities

to which the rule will apply or an explanation of why no such estimate is available; (5) a description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and (6) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency that affect the impact on small entities was rejected.

A description of this action, its purpose, and its legal basis is included in the preamble to this final rule and is not repeated here.

Public and Chief Counsel for Advocacy Comments on the IRFA

An IRFA was prepared in the Classification section of the preamble to the proposed rule (87 FR 75570, December 9, 2022). The Chief Counsel for Advocacy of the SBA did not file any comments on the proposed rule. NMFS has evaluated the two comments received from CDQ groups. Those comments are discussed above in the Comments and Responses section of this final rule.

Two CDQ groups provided comment letters and the substantive points of those comments were incorporated with other similar comments and responded to in this final rule. One CDQ group commented that they and many others advocated more restrictive PSC limits to further reduce halibut bycatch. They also noted the extraordinary challenge the Council faced with determining what action to recommend and that the process was informed by extensive and often divergent written comment and testimony. The central theme of their comment letter was that they strongly urge NMFS to move forward with Amendment 123 and this final rule, as crafted by the Council, without substantive alterations from NMFS.

The second CDQ group comment stressed support for liming halibut bycatch and highlighted their efforts to do so. However, the comment also indicated that the action would impose unacceptable costs on the Amendment 80 sector including their wholly owned for-profit fishing subsidiary thus adversely impacting their subsidiary. The for-profit fishing subsidiary is

considered a cooperative-affiliated large entity.

NMFS made no changes to the final rule in response to the CDQ group comments.

Number and Description of Small Entities Regulated by This Final Rule

NMFS has determined that vessels that are members of a fishing cooperative are affiliated when classifying them for the RFA analyses. In making this determination, NMFS considered the SBA “principles of affiliation” at 13 CFR 121.103. Specifically, in § 21.103(f), SBA refers to “[a]ffiliation based on identity of interest,” which states: “Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated.” If business entities are affiliated, then the threshold for identifying small entities is applied to the group of affiliated entities rather than on an individual entity basis. NMFS has reviewed affiliation information for Amendment 80 cooperative members that are directly regulated by this action and has determined that all directly regulated catcher/processors are large via cooperative affiliation, with one exception discussed below.

This action indirectly affects the six Western Alaska CDQ groups that are non-profit corporations, are not dominant in the BSAI non-pollock fishery, and are specifically identified as “small” entities in the regulations implementing the RFA. The CDQ entities have made direct investments in fishing vessels by creating wholly owned for-profit fishing companies, several of which are directly regulated by this action. However, as for-profit ventures, these companies are not automatically defined as small entities due to CDQ ownership, and this analysis has determined that they are all Amendment 80 cooperative-affiliated. Thus, while this action directly regulates these for-profit CDQ owned companies, they are considered to be large entities for RFA purposes.

The thresholds applied to determine if an entity or group of entities are “small” under the RFA depends on the industry classification for the entity or entities. Businesses classified as primarily engaged in commercial fishing are considered small entities if they have combined annual gross receipts

not in excess of 11.0 million dollars for all affiliated operations worldwide (81 FR 4469; January 26, 2016). Since at least 1993, NMFS Alaska Region has considered catcher/processors to be predominantly engaged in fish harvesting rather than fish processing.

One additional vessel, the Golden Fleece, has been identified as a potentially directly regulated small entity based on revenue analysis. Revenue data for this single small entity is confidential. The Golden Fleece is not Amendment 80 cooperative or ownership-affiliated, as it is an independent company. Therefore, the Golden Fleece is considered to be the only non-CDQ small entity directly regulated by this action.

Based on this analysis, NMFS has determined that one catcher/processor may be considered small and would be directly regulated by this action. NMFS has carefully considered whether a single entity represents a “substantial number” of directly regulated entities. When Amendment 80 was enacted, there were 27 original issuances of License Limitation Permits (LLPs). That is the same number of Amendment 80 LLPs issued currently. The Golden Fleece does not hold one of the 27 original or current LLPs issued, having not applied for an Amendment 80 LLP to date. Through consolidation and vessel replacement, all of the LLPs participating in the Amendment 80 fishery are presently owned by five distinct corporations that are all cooperative-affiliated large entities. NMFS acknowledges that the corporations owning the LLPs is the proper entity for determining whether a substantial number of directly regulated entities is affected.

Description of Significant Alternatives Considered to the Final Action That Minimize Adverse Impacts on Small Entities

No significant alternatives were identified that would accomplish the stated objectives for implementing a halibut abundance-based management via regulation, be consistent with applicable statutes, and minimize costs to potentially affected small entities more than this action. The Council and NMFS considered five alternatives including three sub-options that could apply to all action alternatives.

The Council recommended and this final rule implements Amendment 123 (Alternative 5) to establish an annual process to determine the annual PSC limit for the Amendment 80 sector based on two indices of halibut abundance, the IPHC index and NMFS EBS index. Alternatives 2 through 4

included use of the same style of index table as Amendment 123 but included different ranges of halibut PSC limits for the various survey index levels.

Alternative 2 included a range of halibut PSC limits from 1,745 mt to 1,396 mt (20 percent reduction). Alternative 3 included a range from 2,007 mt (15 percent increase) to 1,222 mt (30 percent reduction). Alternative 4 included a range from 1,745 mt to 960 mt (45 percent reduction).

This action reflects requirements for the Council, and NMFS, to balance several factors when establishing PSC limits, including the likely impacts on the halibut stock and affected participants in the Amendment 80 and directed halibut fisheries. This action specifies halibut PSC limits that range from 1,745 mt (the previous static Amendment 80 halibut PSC limit) to 1,134 mt (35 percent reduction). This is within the range of halibut PSC limits considered. The Council and NMFS acknowledged that halibut is fully utilized in the BSAI and at the medium to very low survey index states, the Amendment 80 PSC limit should be reduced. Under those conditions, reduced halibut mortality through lower PSC limits is expected to ensure that the Amendment 80 sector's share of the overall halibut removals in the Bering Sea does not become a larger proportion at lower levels of halibut abundance, consistent with the Council's purpose and need statement.

The Council and NMFS appropriately considered the Magnuson-Stevens Act requirements. This action balances the interests of the two largest halibut user groups in the BSAI, the directed commercial halibut fishery and the Amendment 80 sector, by establishing abundance-based halibut PSC limits for the Amendment 80 sector. This abundance-based approach is similar to the IPHC's management approach for the directed halibut fisheries off Alaska, which establishes annual catch limits that vary with established measures of halibut abundance.

Collection of Information Requirements

This final rule contains no information collection ("recordkeeping and reporting") requirements under the Paperwork Reduction Act of 1995. This rule does not change existing information collections or create new information collections applicable to directly regulated entities. The Amendment 80 sector is subject to a comprehensive information collection in the form of the Economic Data Reporting (EDR) Program enacted in 2008. The existing collection of information requirements for the

Amendment 80 Economic Data Report continue to apply under Office of Management and Budget Control Number 0648–0564.

Tribal Summary Impact Statement

NMFS's responsibilities for Tribal consultations on Federal policies with Tribal implications are outlined in E.O. 13175, Consultation and Coordination with Indian Tribal Governments (November 6, 2000), the Executive Memorandum (April 29, 1994), the American Indian and Alaska Native Policy of the U.S. Department of Commerce (March 30, 1995), the Department of Commerce Tribal Consultation and Coordination Policy (78 FR 33331, June 4, 2013), Presidential Memorandum (Tribal Consultation and Strengthening Nation-to-Nation Relationships) (86 FR 7491, January 29, 2021), and the updated NOAA Policy on Government-to-Government Consultations with Federally Recognized Indian Tribes and Alaska Native Corporations (July 27, 2023). Further, section 161 of Public Law 108–199 extends the consultation requirements of E.O. 13175 to Alaska Native corporations.

Section 5(b)(2)(B) of E.O. 13175 requires NMFS to prepare a "tribal summary impact statement" for any regulation that has Tribal implications, imposes substantial direct compliance costs on Native Tribal governments, and is not required by statute. The following is a Tribal Summary Impact Statement for this final rule.

Under E.O. 13175 and agency policies, NMFS notified all potentially impacted federally recognized Tribal governments in Alaska and Alaska Native Corporations potentially affected by this action and supporting analyses, as well as of the opportunity to comment and respond to the agency's invitation for Tribal consultation on the action.

Description of the Extent of NMFS's Prior Consultation With Tribal Officials

On August 18, 2020, NMFS mailed Tribal consultation invitation letters to Alaska Native Tribes, Alaska Native Corporations, and Alaska Native Organizations ("Alaska Native representatives"). The letter notified Alaska Native representatives that a preliminary draft Analysis on setting annual halibut PSC limits for the Amendment 80 sector, based on halibut abundance levels (Halibut ABM), would be presented to the Council for initial review, with an invitation to participate in the process and contribute to fishery decisions at the October 2020 meeting. NMFS and the Council sought public

input on the Analysis, including comments on the alternatives analyzed and preliminary results. In addition to public participation in the Council process, NMFS invited Alaska Native representatives to consult with and provide comments to the agency directly via virtual meeting or by telephone.

On April 26, 2021, NMFS mailed Tribal consultation invitation letters to Alaska Native representatives. The letter notified Alaska Native representatives that a draft Analysis evaluating the potential effects of the Halibut ABM action would be presented to the Council for final action at the December 2021 meeting. The letter invited Alaska Native representatives to participate in the process and contribute toward final management decisions. NMFS included information on when the Agency expected to publish the draft Analysis, further instructions to submit public comments on the document (including comments on the alternatives analyzed and preliminary results), and ways to provide additional public input on this action, including methods to provide such input through the Council process prior to the Council taking final action in December 2021. In addition to public participation in the Council process, an invitation for government-to-government consultation, and ways to provide comments to the agency on the Halibut ABM action directly via virtual meeting or by telephone, was also provided by NMFS.

In September 2021, NMFS, in conjunction with the Council, issued the draft Analysis. In conformance with NEPA requirements, NMFS solicited public comment on the draft Analysis. NMFS accepted public comments during a 60-day public comment period from September 6, 2021, to October 25, 2021. NMFS received 542 letters of comment. Of the 542 written public comments, NMFS received two letters from Alaska Native representatives: Aleutian Pribilof Islands Association (APIA) and Aleut Community of Saint Paul Island (ACSPI). A copy of the written comments are available on the NMFS Alaska Region Tribal Consultation website (see **ADDRESSES**).

Additionally, on November 10, 2021, NMFS mailed a letter inviting Alaska Native representatives to participate in a halibut bycatch listening session on November 29, 2021, to discuss Halibut ABM. NMFS listened to concerns on halibut bycatch issues and provided the time for Alaska Native representatives and NMFS staff to get acquainted. A status update and a description of how NMFS works with the Council staff on fishery management actions was

provided. This listening session was considered Tribal engagement, not government-to-government consultation. The listening session included the following Alaska Native representatives: Kuskokwim Inter-Tribal Fish Commission, Kawerak, Inc., Bristol Bay Native Association, Association of Village Council Presidents, ACSPI, APIA, and a native Bristol Bay halibut fisherman. Comments from Alaska Native representatives are summarized in the Halibut Bycatch in Alaska Listening Session (November 2021) available on the NMFS Alaska Region website (see **ADDRESSES**).

In 2021, NMFS conducted Tribal consultation on the Halibut ABM action with Alaska Native representatives that expressed interest including the ACSPI and APIA, which represents the following 13 federally recognized Tribes: Native Village of Akutan, Native Village of Atka, Native Village of Belkofski, Native Village of False Pass, Agdaagux Tribe of King Cove, Native Village of Nelson Lagoon, Native Village of Nikolski, Pauloff Harbor Village, Qagan Tayagungin Tribe of Sand Point Village, Aleut Community of St. George Island, ACSPI, Qawalangin Tribe of Unalaska, and Native Village of Unga. The purpose was to complete consultation between the ACSPI and NMFS Alaska Region per the agency's government-to-government relationship regarding the Halibut ABM action scheduled for final action at the December 2021 Council meeting. NMFS shared information about the action and its potential implementation during the meeting but primarily wanted to hear and better understand the ACSPI perspective regarding Tribal impacts.

On February 9, 2022, NMFS continued the Tribal consultation process by mailing Tribal consultation invitation letters to the following 19 federally recognized Tribes and representatives that may be impacted by the Halibut ABM action: Akutan Native Village, Atka Native Village, Village of Cheforak, Curyung Tribal Council, Native Village of Hooper Bay, Native Village of Kipnuk, Native Village of Kwinhagak, Native Village of Mekoryuk, Newtok Village, Native Village of Nightmute, Nome Eskimo Community, Nunakauyarmiut Tribe, Qawalangin Tribe of Unalaska, Native Village of Savoonga, Aleut Community of Saint George Island, ACSPI, Traditional Village of Togiak, Native Village of Tununak, and Twin Hills Village. Each agency letter to the Tribal communities potentially affected by the Halibut ABM action had a link to the website where the draft Analysis was posted. NMFS also responded to requests from Alaska

Native representatives for copies of the draft Analysis. In addition, NMFS provided information on the intent to solicit public comment on the proposed regulations to implement the action and on the notice of availability of the Amendment 123. The letter included clarification on the action, and, although the public comment period on the draft Analysis had closed, NMFS sought additional input from Alaska Native representatives that may be affected by the fishery action for the development of the Analysis. NMFS stated that any additional information Alaska Native representatives may wish to provide through Tribal consultation would be considered and summarized in the Analysis.

On March 4, 2022, NMFS sent a letter to the Bering Intergovernmental Tribal Advisory Council (BITAC) notifying them that the Council took final action on Halibut ABM and selected a preferred alternative that would determine the Amendment 80 PSC limit annually based on the most recent values from surveys conducted by the AFSC and the IPHC. NMFS also notified BITAC that during the public comment period on the draft Analysis, released in the fall of 2021, the U.S. Environmental Protection Agency submitted a comment letter on the draft Analysis advising NMFS that the BITAC may be able to provide helpful information on this action. NMFS stated in the letter to BITAC that the Agency was seeking additional input from them as this action occurred within the Northern Bering Sea Climate Resilience Area. The Agency provided a link to the draft Analysis and stated that Tribal feedback was optional, but any additional information that BITAC may wish to provide would be considered and summarized in the Analysis.

Additionally, NMFS provided a copy of the proposed rule to all potentially impacted federally recognized Tribal governments in Alaska and Alaska Native Corporations to notify them of the opportunity to comment or request a consultation on this action.

A Summary of the Nature of Tribal Concerns

Comments from Alaska Native representatives are summarized in the Halibut Abundance-Based Management Consultation Summary Aleut Community of Saint Paul Island (November 2021) and Summary of Tribal Consultation Teleconference to Discuss Halibut ABM Concerns with APIA (July 2021) available on the NMFS Alaska Region website (see **ADDRESSES**). NMFS received one letter from APIA providing oral and written public

testimony on the Halibut ABM action. A copy of the oral public testimony on April 21, 2021, at the April 2021 Council meeting (Appendix 1) and written comments on March 30, 2021 (Appendix 2), are also available in the Summary of Tribal Consultation Teleconference to Discuss Halibut ABM Concerns with Aleutian Pribilof Islands Association (July 2021) available on the NMFS Alaska Region website (see **ADDRESSES**).

On November 24, 2021, during the Tribal consultation between NMFS and the ACSPI, a summary of Tribal Concerns included: (1) the Halibut ABM action decides the future of the community of St. George, as it is linked to the success of the Saint Paul halibut fishery; (2) continued out migration of people from the Pribilof Islands to elsewhere due to limited economic opportunities; (3) more attention needs to be paid to coastal fishing communities, including Tribal members, by NMFS and the Council; (4) halibut abundance has declined, although bycatch limits have not, with cumulative losses to the directed halibut fishery of approximately 50 million dollars and this information should be included in the draft Analysis prepared for the ABM action; (5) there are 17 communities that are categorized as halibut-dependent communities in the Analysis and those communities should be directly involved with NMFS regarding this action because it is inequitable and unjust that fishery communities get the leftovers after the establishment of bycatch limits; (6) Alternative 4 of the Analysis is the only alternative supported by the Aleut Community of Saint Paul Island in order to restore equity of the resource; (7) halibut is not just a Saint Paul issue—it is an ecosystem wide issue and all communities need halibut from Norton Sound to the North Pacific; (8) the allocation policy must be addressed because it is not appropriate use of the public's resources; and (9) Tribes need a voice in halibut management because it is an issue of sovereignty related to the agency's government-to-government obligations with Alaska Native Tribes and Corporations. ACSPI discussed the history of halibut fishing in the Pribilof Islands, previous related decisions, and the current action that were threatening their way of life, and encouraged NMFS and the Council to implement Alternative 4, which would provide relief to native families and communities, curtail out migration of families/residents, and restore the long-term health of the halibut resource.

During the Tribal consultation between NMFS and APIA, a summary of

Tribal Concerns included statements such as: (1) Alaska Native regional non-profit consortiums should have the same opportunity for Tribal consultation as Alaska Native Corporations; (2) few Tribes have requested Tribal consultation on Halibut ABM because the NMFS consultation process is difficult to navigate and needs improvement; (3) APIA supports Halibut ABM Alternative 4, option 3; (4) the lack of resource access due to Amendment 80 bycatch in the Pribilof communities is an environmental justice issue; (5) National Standard 5 (economic efficacy) cannot be the reason to continue the halibut allocation policy and there is a need to reduce direct economic impacts; (6) NMFS did a decent job of capturing the negative per capita impacts and burdens to small communities, but there are more impacts to add to the draft Analysis; (7) under National Standard 9 (reducing bycatch), use of a stringent bycatch limit will give Amendment 80 the power to do so; (8) halibut are culturally important and are critical to subsistence and commercial use; (9) direct losses to IFQ users, with IFQ quota lowered to unsupportable amounts, given this may be their only fishery, should be included in the Analysis; (10) all of the impacts discussed in the Analysis, except for groundfish and Amendment 80, are experienced by users in the Pribilof Islands; (11) the Council could do a better job describing the impacts to various users using a different analysis; and (12) NMFS should provide the Council with the best available data (including information on impact to recruitment classes and on current abundance and distribution) that allows many fishery users, as well as the ecosystem benefits of halibut, to continue.

During the November 29, 2021 Listening Session, a summary of Tribal Concerns included: (1) all Alaska Native representatives who participated in the listening session supported Alternative 4 for final action; (2) the draft Analysis need to consider impacts to all 17 affected halibut native fishing communities; (3) conservation of the halibut resource is essential to the socio ecological system; and (4) NMFS should continue to improve how the agency engages under Tribal consultation.

NMFS also conducted Tribal consultations with these entities on July 16 and November 24, 2021, respectively. Specific Tribal concerns conveyed during government-to-government Tribal consultation are described above in the first two paragraphs of this section. Alaska Native representative comments were also summarized and

responded to in the Comment Summary Report in Chapter 8 of the Analysis, which is posted on the NMFS Alaska Region website (see **ADDRESSES**). In summary, Tribal Concerns were focused on providing relief to native halibut fishing families and communities as well as needed improvements in NMFS Tribal engagement and consultation process. Individual detailed summaries of the Tribal Concerns listed above are available on the NMFS Alaska Region website (see **ADDRESSES**).

NMFS's Position Supporting the Need To Issue the Regulation

This final rule is needed to implement management improvements to minimize halibut bycatch in the Amendment 80 fisheries. NMFS's position is stated in the Preamble and Response to Comments sections.

Statement of the Extent to Which the Concerns of Tribal Officials Have Been Met

From the perspective of a number of Alaska Native Tribes and Corporations, one of the primary factors in initiating this action was concern over the impacts of halibut bycatch to local Alaska Native fishing communities that rely on halibut for subsistence and commercial use. While the final fishery rule does not reflect the most conservative actions advocated by some Alaska Native representatives, it will minimize bycatch to the extent practicable within our authorities. To address Tribal concerns that the draft Analysis did not include the 17 Alaska communities potentially directly affected by this action, NMFS, during the initial screening criteria for the selection of Alaska communities for inclusion in the Analysis, identified 29 Alaska communities, 20 of which are in the BSAI region. These communities were selected for analysis as potentially substantially engaged in, and/or potentially substantially dependent on, the BSAI Area 4 halibut fishery sectors most likely to be directly affected by one or more of the proposed action alternatives communities. A total of 17 of these Alaska communities were considered halibut-dependent for the purposes of our analyses. Of the 17 Alaska communities identified, 16 are home to federally recognized Alaska Native Tribes.

NMFS and the Council have made great improvements in conducting direct outreach, communication, formal Tribal consultation, and informal engagement with Alaska Native representatives, which include Alaska Native Tribes, Alaska Native corporations, native organizations, and

communities over the last few years. NMFS and the Council made significant efforts to involve Alaska Native representatives in the Halibut ABM action. In conjunction with the Council outreach, NMFS provided information to Alaska Native representatives who were interested in engaging at each step in the process and consulted with interested Alaska Native representatives, as described in "A Description of the Extent of the Agency's Prior Consultation with Tribal Officials."

As a result of these consultations and engagements, NMFS made significant improvements to the Analysis and final rulemaking to: (1) accurately document the importance of the subsistence way of life and address resulting deficiencies within the suite of Analysis alternatives and analyses, and (2) uphold E.O. 13175 to improve the agency's Tribal consultation process regarding the Halibut ABM action.

NMFS acknowledges the long-standing challenges that Alaska Native representatives have had communicating with NMFS and appreciates the Tribes' commitment to communicating needed improvements to the consultation process. NMFS has taken several actions over the last year, including building staff capacity and hosting listening sessions, to improve Tribal consultation.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Halibut, Reporting and recordkeeping requirements.

Dated: November 14, 2023.

Samuel D. Rauch, III,
Deputy Assistant Administrator for
Regulatory Programs National Marine
Fisheries Service.

For reasons set out in the preamble, NMFS amends 50 CFR part 679 as follows:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.*; 1801 *et seq.*; 3631 *et seq.*; Pub. L. 108–447; Pub. L. 111–281.

■ 2. In § 679.21, revise paragraph (b)(1) introductory text and add paragraphs (b)(1)(i)(A) through (C) to read as follows:

§ 679.21 Prohibited species bycatch management.

* * * * *

(b) * * *
(1) *Establishment of BSAI halibut PSC limits.* Subject to the provisions in

paragraphs (b)(1)(i) through (iv) of this section, the following three BSAI halibut PSC limits are established, which total 1,770 mt: BSAI trawl limited access sector—745 mt; BSAI non-trawl sector—710 mt; and CDQ Program—315 mt (established as a PSQ reserve). An additional amount of BSAI halibut PSC limit for the Amendment 80 sector will be determined for each calendar year according to the procedure in paragraph (b)(1)(i) of this section.

(i) * * *

(A) *General.* The Amendment 80 sector BSAI halibut PSC limit applies to Amendment 80 vessels while conducting any fishery in the BSAI and is an amount of halibut determined annually according to the procedure in paragraph (b)(1)(i)(B) of this section.

(B) *Annual procedure.* By October 1 of each year, the Alaska Fisheries Science Center will provide the Regional Administrator an estimate of halibut biomass derived from the most recent Alaska Fisheries Science Center Eastern Bering Sea shelf trawl survey index. Each year, NMFS will request that the International Pacific Halibut Commission provide to the Regional Administrator, by December 1 of that year, an estimate of halibut biomass derived from the most recent International Pacific Halibut Commission setline survey index. NMFS will apply both halibut biomass estimates to table 58 to this part, such that the value at the intercept of those

survey indices in table 58 is the Amendment 80 sector halibut PSC limit for the following calendar year. NMFS will publish the new Amendment 80 sector halibut PSC limit in the annual harvest specifications.

(C) *Allocation of BSAI halibut PSC to Amendment 80 cooperatives and the Amendment 80 limited access fishery.* For Amendment 80 cooperatives and the Amendment 80 limited access fishery, BSAI halibut PSC limits will be allocated according to the procedures and formulas in § 679.91(d) and (f) (not paragraph (b)(1)(i)(B) of this section). If halibut PSC is assigned to the Amendment 80 limited access fishery, it will be apportioned into PSC allowances for trawl fishery categories according to the procedure in paragraphs (b)(1)(ii)(A)(2) and (3) of this section.

* * * * *

■ 3. In § 679.91, revise paragraphs (d)(1), (d)(2)(i), and (d)(3) to read as follows:

§ 679.91 Amendment 80 Program annual harvester privileges.

* * * * *

(d) * * *

(1) *Amount of Amendment 80 halibut PSC for the Amendment 80 sector.* The amount of halibut PSC limit for the Amendment 80 sector for each calendar year is determined according to the procedure in § 679.21(b)(1)(i). That halibut PSC limit is then assigned to Amendment 80 cooperatives and the

Amendment 80 limited access fishery pursuant to paragraphs (d)(2) and (3) of this section. If one or more Amendment 80 vessels participate in the Amendment 80 limited access fishery, the halibut PSC limit assigned to the Amendment 80 cooperatives will be reduced pursuant to paragraph (d)(3) of this section.

(2) * * *

(i) Multiply the amount of annual halibut PSC established according to the procedure in § 679.21(b)(1)(i) by the percentage of the Amendment 80 halibut PSC apportioned to each Amendment 80 species as established in table 36 to this part. This yields the halibut PSC apportionment for that Amendment 80 species.

* * * * *

(3) *Amount of Amendment 80 halibut PSC assigned to the Amendment 80 limited access fishery.* The amount of Amendment 80 halibut PSC limit assigned to the Amendment 80 limited access fishery is equal to the amount of halibut PSC assigned to the Amendment 80 sector, as established according to the procedure in § 679.21(b)(1)(i), less the amount of Amendment 80 halibut PSC assigned as CQ to all Amendment 80 cooperatives as determined in paragraph (d)(2)(iv) of this section, multiplied by 80 percent.

* * * * *

■ 4. Revise table 35 to part 679 to read as follows:

TABLE 35 TO PART 679—APPORTIONMENT OF CRAB PSC AND HALIBUT PSC BETWEEN THE AMENDMENT 80 AND BSAI TRAWL LIMITED ACCESS SECTORS

Fishery	Halibut PSC limit in the BSAI is . . . (mt)	Zone 1 Red king crab PSC limit is . . .	<i>C. opilio</i> crab PSC limit (COBLZ) is . . .	Zone 1 <i>C. bairdi</i> crab PSC limit is . . .	Zone 2 <i>C. bairdi</i> crab PSC limit is . . .
	As determined according to § 679.21(b)(1) and the procedures at § 679.21(b)(1)(i).				
Amendment 80 sector	Annual Determination ¹	49.98	49.15	42.11	23.67
BSAI trawl limited access	745	30.58	32.14	46.99	46.81

¹ See § 679.21(b)(1)(i) and table 58 to this part for the annual determination process for Amendment 80 halibut PSC limits in the BSAI.

■ 5. Add table 58 to part 679 to read as follows:

TABLE 58 TO PART 679—AMENDMENT 80 SECTOR ANNUAL BSAI PACIFIC HALIBUT PSC LIMITS

Survey index ranges	Eastern Bering Sea shelf trawl survey index (t)		
	Low <150,000	High ≥150,000	
IPHC setline survey index in Area 4ABCDE (WPUE)	High ≥11,000	1,745 mt	1,745 mt
	Medium 8,000–10,999	1,396 mt	1,571 mt
	Low 6,000–7,999	1,309 mt	1,396 mt
	Very Low <6,000	1,134 mt	1,134 mt



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Part V

The President

Presidential Determination No. 2024–01 of November 11, 2023—
Presidential Determination Pursuant to Section 1245(d)(4)(B) and (C) of the
National Defense Authorization Act for Fiscal Year 2012
Presidential Determination No. 2024–02 of November 16, 2023—
Presidential Determination on the Proposed Agreement for Cooperation
Between the Government of the United States of America and the
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Title 3—

Presidential Determination No. 2024–01 of November 11, 2023

The President

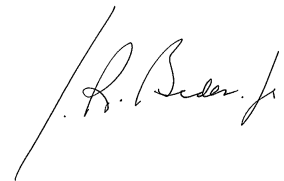
Presidential Determination Pursuant to Section 1245(d)(4)(B) and (C) of the National Defense Authorization Act for Fiscal Year 2012

Memorandum for the Secretary of State[, the Secretary of the Treasury[, and] the Secretary of Energy

By the authority vested in me as President by the Constitution and the laws of the United States, after carefully considering the reports submitted to the Congress by the Energy Information Administration, including the report submitted in October 2023, and other relevant factors, including global economic conditions, the level of spare capacity, and the availability of strategic reserves, I determine, pursuant to section 1245(d)(4)(B) and (C) of the National Defense Authorization Act for Fiscal Year 2012, Public Law 112–81, and consistent with prior determinations, that there is a sufficient supply of petroleum and petroleum products from countries other than Iran to permit a significant reduction in the volume of petroleum and petroleum products purchased from Iran by or through foreign financial institutions.

I will continue to monitor this situation closely.

The Secretary of State is authorized and directed to publish this determination in the *Federal Register*.



THE WHITE HOUSE,
Washington, November 11, 2023

Presidential Documents

Presidential Determination No. 2024-02 of November 16, 2023

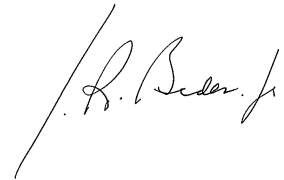
Presidential Determination on the Proposed Agreement for Cooperation Between the Government of the United States of America and the Government of the Republic of the Philippines Concerning Peaceful Uses of Nuclear Energy

Memorandum for the Secretary of State [and] the Secretary of Energy

I have considered the proposed Agreement for Cooperation between the Government of the United States of America and the Government of the Republic of the Philippines Concerning Peaceful Uses of Nuclear Energy (the “proposed Agreement”), along with the views, recommendations, and statements of the interested departments and agencies.

I have determined that the performance of the proposed Agreement will promote, and will not constitute an unreasonable risk to, the common defense and security. Pursuant to section 123 b. of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2153(b)), I hereby approve the proposed Agreement and authorize the Secretary of State to arrange for its execution.

The Secretary of State is authorized and directed to publish this determination in the *Federal Register*.



THE WHITE HOUSE,
Washington, November 16, 2023

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