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FEDERAL REGISTER

Vol. 81 Wednesday,
No. 240 December 14, 2016

Pages 90185–90674

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402 is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1250

[Doc. No. AMS–LPS–15–0042]

Amendment to the Egg Research and Promotion Rules and Regulations To Update Patents, Copyrights, Trademarks, and Information Provisions

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the Patents, Copyrights, Trademarks, Publications, and Product Formulations (IP) language of the Egg Research and Promotion Rules and Regulations (Regulations) to conform with commodity research and promotion program orders created under the Commodity Promotion, Research, and Information Act of 1996 (1996 Act).

DATES: Effective January 13, 2017.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Payne, Research and Promotion Division; Livestock, Poultry, and Seed Program; AMS, USDA; 1400 Independence Avenue SW., Room 2610–S; Washington, DC 20250; telephone (202) 720–5705; fax (202) 720–1125; or email *Kenneth.Payne@ams.usda.gov.*

SUPPLEMENTARY INFORMATION:

Executive Order 12866

The Office of Management and Budget (OMB) has waived the review process required by Executive Order 12866 for this action.

Executive Order 12988

This rule was reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have a retroactive effect. This action will not preempt any state or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule. The Egg Research and Consumer Information Act (Act) [7 U.S.C. 2701 *et seq.*] provides that administrative proceedings be filed before parties may consider suit in court. Under section 14 of the Act [7 U.S.C. 2713], a person subject to the Egg Promotion and Research Order (Order) may file a petition with the Department of Agriculture (USDA) stating that the Order, any provision of the Order, or any obligation imposed in connection with the Order, is not in accordance with the law and request a modification of the Order or an exemption from the Order. The petitioner is afforded the opportunity for a hearing on the petition. After a hearing, USDA would rule on the petition. The Act provides that district courts of the U.S. in any district in which such person is an inhabitant, or has their principal place of business, has jurisdiction to review USDA's ruling on the petition, if a complaint for this purpose is filed within 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (RFA) [5 U.S.C. 601–612], the Agricultural Marketing Service (AMS) has determined that this rule will not have a significant economic impact on a substantial number of small entities as defined by RFA. The purpose of RFA is to fit regulatory action to scale on businesses subject to such action so that small businesses will not be disproportionately burdened. As such, these changes will not impose a significant impact on persons subject to the program.

According to the American Egg Board (Board), in 2015, approximately 181 egg producers were subject to the provisions of the Order, including paying assessments. Under the current Order, producers in the 48 contiguous States of the U.S. and the District of Columbia who own more than 75,000 laying hens currently pay a mandatory assessment of 10 cents per 30-dozen case of eggs sold. Egg handlers are responsible for collecting and remitting assessments to the Board. According to the Board, of those 181 egg producers, about 138 egg handlers collect assessments. Assessments under the program are used by the Board to finance promotion, research, and consumer information programs designed to increase consumer demand for eggs in domestic and international markets.

In 13 CFR part 121, the Small Business Administration (SBA) defines small agricultural producers as those having annual receipts of no more than $750,000 and small agricultural service firms as those having annual receipts of no more than $7 million. Under this definition, the vast majority of egg producers that would be affected by this rule would not be considered small entities. Producers owning 75,000 or fewer laying hens are eligible to be exempt from this program. This rule does not impose additional recordkeeping requirements on egg producers or handlers. There are no Federal rules that duplicate, overlap, or conflict with this rule.

Paperwork Reduction Act

In accordance with OMB regulation 5 CFR part 1320, which implements the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35], the information collection and recordkeeping requirements that are imposed by the Order and Rules and Regulations have been approved previously under OMB control number 0581–0093. This rule does not result in a change to those information collection and recordkeeping requirements.

Background

The Act established a national egg research and promotion program—administered by the Board—that is financed through industry assessments and subject to oversight by USDA's AMS. This program of promotion, research, and consumer information is designed to strengthen the position of eggs in the marketplace and to establish, maintain, and expand markets for eggs.

Under the current Regulations initially established in 1976, any IP financed by assessment funds or other revenues of the Board shall become property of the U.S. Government as represented by the Board. The language does not allow for alternative ownership arrangements. In addition, there is no explicit allowance for alternative ownership arrangements in cases where the Board is not providing all of the funding for a project. According to the Board, the current language in the Order has made negotiating contracts for

shared ownership of IP rights with research entities difficult and in some cases impossible. Specifically, a majority of university policies typically reflect a requirement for the university to own any IP created under research projects they conduct, even if the project is funded with outside money. These university policies have made it difficult for the Board to contract with universities for research due to the IP ownership requirements contained in the Order.

As a result, USDA is amending § 1250.542 of the Regulations to incorporate language utilized by research and promotion boards created under the 1996 Act that would provide the Board with flexibility in negotiating over the ownership of IP rights. The research and promotion boards created under the 1996 Act have utilized this language to negotiate ownership rights over IP to effectively expend assessment funds to promote agricultural commodities.

Summary of Comments

AMS published the notice of proposed rulemaking in the **Federal Register** on March 16, 2016 [81 FR 14021]. The comment period ended on May 16, 2016. AMS received one timely comment from a university. The commenter expressed that it is the policy of the university to retain ownership of intellectual property generated through research funded by external parties and encouraged AMS to adopt policies and rules that closely follow the standard approaches articulated in Federal Government grants. However, the egg research and promotion program is not a grant program and is not subject to Federal grants policy. In addition, the Board does not receive Federal funding. All funds are received from egg producers required under the enabling legislation to pay an assessment to the Board to fund programs designed to increase demand for eggs and egg products both domestically and internationally. Accordingly, AMS did not incorporate the Federal grants policy into the final rule.

List of Subjects in 7 CFR Part 1250

Administrative practice and procedure, Advertising, Agricultural research, Eggs and egg products, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 1250 is amended as follows:

PART 1250—EGG RESEARCH AND PROMOTION

■ 1. The authority citation of 7 CFR part 1250 continues to read as follows:

Authority: 7 U.S.C. 2701–2718; 7 U.S.C. 7401.

■ 2. Revise § 1250.542 to read as follows:

§ 1250.542 Patents, Copyrights, Inventions, Trademarks, Information, Publications, and Product Formulations.

(a) Except as provided in paragraph (b) of this section, any patents, copyrights, inventions, trademarks, information, publications, or product formulations developed through the use of funds collected by the Board under the provisions of this subpart shall be the property of the U.S. Government, as represented by the Board, and shall, along with any rents, royalties, residual payments, or other income from the rental, sales, leasing, franchising, or other uses of such patents, copyrights, inventions, trademarks, information, publications, or product formulations, inure to the benefit of the Board; shall be considered income subject to the same fiscal, budget, and audit controls as other funds of the Board; and may be licensed subject to approval by the Secretary. Upon termination of this subpart, § 1250.358 shall apply to determine disposition of all such property.

(b) Should patents, copyrights, inventions, trademarks, information, publications, or product formulations be developed through the use of funds collected by the Board under this subpart and funds contributed by another organization or person, the ownership and related rights to such patents, copyrights, inventions, trademarks, information, publications, or product formulations shall be determined by an agreement between the Board and the party contributing funds towards the development of such patents, copyrights, inventions, trademarks, information, publications, or product formulations in a manner consistent with paragraph (a) of this section.

Dated: December 8, 2016.

Elanor Starmer,

Administrator, Agricultural Marketing Service.

[FR Doc. 2016–29988 Filed 12–13–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 1

[Docket No. FDA–2011–N–0146]

RIN 0910–AH23

Amendments to Accreditation of Third-Party Certification Bodies To Conduct Food Safety Audits and To Issue Certifications To Provide for the User Fee Program

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is amending its regulations on accreditation of third-party certification bodies to conduct food safety audits and to issue certifications to provide for a reimbursement (user fee) program to assess fees for the work FDA performs to establish and administer the third-party certification program under the FDA Food Safety Modernization Act (FSMA).

DATES: This rule is effective January 13, 2017.

FOR FURTHER INFORMATION CONTACT: Sylvia Kim, Office of Foods and Veterinary Medicine, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 3212, Silver Spring, MD 20993–0002, 301–796–7599.

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I. Background

A. FDA Food Safety Modernization Act and Section 808 of the Federal Food, Drug, and Cosmetics Act

FSMA (Pub. L. 111–353), signed into law by President Obama on January 4, 2011, is intended to allow FDA to better protect public health by helping to ensure the safety and security of the food supply. FSMA enables us to focus more on preventing food safety problems rather than relying primarily on reacting to problems after they occur. The law also provides new enforcement authorities to help achieve higher rates of compliance with risk-based, prevention-oriented safety standards and to better respond to and contain problems when they do occur. In addition, the law contains important new tools to better ensure the safety of imported foods and encourages partnerships with State, local, tribal, and territorial authorities and international collaborations with foreign regulatory counterparts.

FSMA added section 808 to the FD&C Act (21 U.S.C. 384d), which directs FDA to establish a program for accreditation of third-party certification bodies [1] to conduct food safety audits and to certify that eligible foreign entities (including registered foreign food facilities) and food produced by such entities meet applicable FDA food safety requirements. FSMA specifies two uses for the food and facility certifications issued by accredited third-party certification bodies under this program. First, facility certifications will be used by importers that want to establish eligibility for the Voluntary Qualified Importer Program (VQIP) under section 806 of the FD&C Act (21 U.S.C. 384b). VQIP offers participating importers expedited review and entry of food that is part of VQIP. Second, section 801(q) of the FD&C Act (21 U.S.C. 381(q)) gives FDA the authority to make a risk-based determination to require, as a condition of admissibility, that a food imported or offered for import into the United States be accompanied by a certification or other assurance that the food meets the applicable requirements of the FD&C Act. The authority to mandate import certification for food, based on risk, is one of the tools we can use to help prevent potentially harmful food from reaching U.S. consumers.

B. Third-Party Certification Regulation

On November 27, 2015, FDA published in the **Federal Register** a final rule, ''Accreditation of Third-Party Certification Bodies to Conduct Food Safety Audits and to Issue Certifications'' (third-party certification regulation), to implement section 808 of the FD&C Act on accreditation of third-party certification bodies to conduct food safety audits of eligible foreign entities (including registered foreign food facilities) and to issue certifications of foreign food facilities and foods for humans and animals for purposes of sections 801(q) and 806 of the FD&C Act (80 FR 74570). The third-party certification regulation establishes the framework, procedures, and requirements for accreditation bodies and third-party certification bodies for purposes of the program under section 808 of the FD&C Act. It sets requirements for the legal authority, competency, capacity, conflict of interest safeguards, quality assurance, and records procedures that accreditation bodies must demonstrate that they have to qualify for recognition. Accreditation bodies also must demonstrate capability to meet the applicable program requirements of the third-party certification regulation that would apply upon recognition. Additionally, the regulation establishes requirements for the legal authority, competency, capacity, conflict of interest safeguards, quality assurance, and records procedures that third-party certification bodies must demonstrate that they have to qualify for accreditation. Third-party certification bodies also must demonstrate capability to meet the applicable program requirements of the third-party certification regulation that would apply upon accreditation.

Under FSMA section 307 (21 U.S.C. 384d), accredited third-party certification bodies must perform unannounced facility audits conducted under the third-party certification program, notify FDA upon discovering a condition that could cause or contribute to a serious risk to the public health, and submit to FDA reports of regulatory audits conducted for certification purposes. The regulation includes stringent requirements to prevent conflicts of interest from influencing the decisions of recognized accreditation bodies and accredited third-party certification bodies.

C. Purpose of This Rulemaking

This rulemaking implements section 808(c)(8) of the FD&C Act to establish a reimbursement (user fee) program to assess fees and require reimbursement for the work we perform to establish and administer the third-party certification program. In this document, we amend the third-party certification regulation (21 CFR part 1, subpart M) to provide for the assessment of user fees on accreditation bodies that include application fees for accreditation bodies seeking FDA recognition and annual monitoring fees, once recognized. We also provide for the assessment of user fees that include application fees for only those third-party certification bodies that seek FDA direct accreditation and annual monitoring fees for any third-party certification body participating in FDA's program, whether accredited directly by FDA or by an FDA-recognized accreditation body.

D. The Proposed Rule

FDA published a proposed rule titled ''User Fee Program to Provide for Accreditation of Third-Party Auditors/Certification Bodies to Conduct Food Safety Audits and To Issue Certifications'' on July 24, 2015 (80 FR 43987). The proposed rule on the third-party certification program user fees includes the following: (1) Who would be subject to a user fee; (2) how user fees would be computed; (3) how FDA would notify the public about annual fee rates; (4) how the user fee would be collected; and (5) what the consequences would be for not paying a user fee. The comment period closed on October 7, 2015.

E. Public Comments

FDA received comments from accreditation bodies, certification bodies, foreign governments, industry associations, consumer groups, and members of industry. In the remainder of this document, we describe the comments that are within the scope of this rulemaking, respond to them, and explain any revisions we made from the proposed rule.

II. Legal Authority

Section 307 of FSMA, Accreditation of Third-Party Auditors, amends the FD&C Act to create a new provision, section 808, under the same name. Section 808 of the FD&C Act directs us to establish a new program for accreditation of third-party certification bodies conducting food safety audits and issuing food and facility certifications to eligible foreign entities (including registered foreign food

[1] For the reasons explained in the third-party certification final rule (80 FR 74570 at 74578–74579, November 27, 2015), and for consistency with the implementing regulations for the third-party certification program in 21 CFR parts 1, 11, and 16, this final rule uses the term ''third-party certification body'' rather than the term ''third-party auditor/certification body'' that was used in the proposed rule.

facilities) that meet the applicable food safety requirements. Under this provision, we will recognize accreditation bodies to accredit third-party certification bodies, except for limited circumstances in which we may directly accredit third-party certification bodies to participate in the third-party certification program.

Our authority for this rule is derived in part from section 808(c)(8) of the FD&C Act, which requires us to establish by regulation a reimbursement (user fee) program by which we assess fees and require accredited third-party certification bodies and audit agents to reimburse us for the work performed to establish and administer the third-party certification program under section 808. Accordingly, section 808(c)(8) of the FD&C Act authorizes us to assess fees and require reimbursement from accreditation bodies applying for recognition under section 808, third-party certification bodies applying for direct accreditation under section 808, and recognized accreditation bodies and accredited third-party certification bodies participating in the third-party certification program under section 808.

Further, section 701(a) of the FD&C Act (21 U.S.C. 371(a)) authorizes us to issue regulations for the efficient enforcement of the FD&C Act, including this rule establishing a user fee program for the third-party certification program under section 808 of the FD&C Act. Thus, FDA has the authority to issue this rule under sections 808 and 701(a) of the FD&C Act.

III. Comments on Who Is Subject to a User Fee Under This Subpart (§ 1.700)

We proposed in § 1.700 that four main groups would be subject to a user fee under the regulation: (a) Accreditation bodies submitting applications, including renewal applications, for recognition in the third-party certification program; (b) recognized accreditation bodies participating in the third-party certification program; (c) third-party certification bodies submitting applications, including renewal applications, for direct accreditation; and (d) accredited third-party certification bodies participating in the third-party certification program. On our own initiative, and consistent with the third-party certification regulation, in this final rule we are using the term ''third-party certification body'' rather than the term ''third-party auditor/certification body'' that was used in the proposed rule.

Additionally, in the proposed rule we noted that the proposed user fee program would not recover all costs associated with the establishment and administration of the third-party certification program, such as the costs of any work by FDA in reviewing requests for reconsideration and waivers, revoking recognition of accreditation bodies, or withdrawing accreditation of third-party certification bodies, where necessary (80 FR 43987 at 43989). We also identified some of FDA's initial startup costs that would not be fully recouped, such as for some previously incurred costs for training employees and developing the third-party certification program IT portal that will accept applications for recognition and for direct accreditation and submissions from recognized accreditation bodies and accredited third-party certification bodies. We solicited comment on whether the costs for activities other than application processing and monitoring (*i.e.,* unaccounted for costs) should be paid for through user fees and if so, to whom should the fees be charged and how should the fees be calculated.

FDA received no adverse comments specific to our proposal to assess user fees on accreditation bodies submitting applications to FDA for recognition, third-party certification bodies submitting applications to FDA for direct accreditation, and recognized accreditation bodies and accredited third-party certification bodies participating in the program.

(Comment 1) In response to our request for comments on unaccounted for costs, some comments suggest that these costs should be recouped through fees paid by recognized accreditation bodies and accredited third-party certification bodies. Some comments opine that accreditation bodies should be responsible for paying any additional user fees related to maintenance of a database for recognized accreditation bodies and accredited certification bodies for the third-party certification bodies they accredit under the FDA program, as some accreditation bodies already invoice the certification bodies for these services. The comments do not address the feasibility of calculating or collecting such fees.

(Response 1) We decline the suggestion to assess additional fees on recognized accreditation bodies and accredited third-party certification bodies. Section 808(c)(8) of the FD&C Act requires us to establish a user fee program that assesses fees to reimburse FDA for the work in establishing and administering the third-party certification program. The statute further provides that FDA must not generate surplus revenue from the user fee program.

In implementing this provision, FDA is estimating the average costs of work it will perform to establish the program by recognizing accreditation bodies under section 808(b)(1) of the FD&C Act to accredit third-party certification bodies to participate in the third-party certification program (and, in limited circumstances under section 808(b)(1)(A)(ii), to directly accredit third-party certification bodies). Additionally, FDA is estimating the average costs of work it will perform in administering the program through monitoring, under section 808(f) of the FD&C Act, of recognized accreditation bodies and accredited third-party certification bodies, including through onsite audits of eligible entities issued certifications. The user fee program gives us flexibility to adjust estimates of the number of hours various activities will require and the hourly rates for performing the work, which will allow us to ensure that we are not generating a surplus.

We do not think it would be feasible at this time to accurately calculate and collect fees for all additional unaccounted for costs. For example, we do not have information on the number of, if any, waiver requests, revocations, and withdrawals we may get. It would be difficult to project a fee based on this limited information and assess it on accreditation bodies and certification bodies.

Additionally, it would be difficult to fairly distribute a fee for startup costs to future participants. We also do not want to disincentivize early participants from applying by imposing higher fees early on to cover initial program start-up costs related to setting up an IT portal or training employees.

(Comment 2) Some comments agree that both accreditation bodies and certification bodies are the appropriate parties to be assessed fees.

(Response 2) We agree and are finalizing § 1.700 as proposed, with conforming editorial changes as discussed previously.

IV. Comments on What User Fees Are Established Under This Subpart (§ 1.705)

Under the proposed user fee program we would assess user fees for two types of activities: (1) Application review; and (2) performance monitoring.

We proposed in § 1.705(a) that application fees would be assessed on accreditation bodies seeking FDA recognition or renewal of recognition and on third-party certification bodies seeking direct accreditation (and renewal of direct accreditation) by FDA. The application fees would be based on

the estimated average cost of the work FDA performs in reviewing and evaluating each type of application. To calculate the estimated average cost of reviewing applications for recognition and for direct accreditation, we estimated the average number of hours it would take for FDA to conduct the relevant activities and multiplied that by the appropriate fully supported full time equivalent (FTE) hourly rate to derive flat rates for reviews of each of the following types of applications: (1) Initial applications for recognition of accreditation bodies; (2) applications for renewal of recognition; (3) initial applications for direct accreditation of third-party certification bodies; and (4) applications for renewal of direct accreditation.

We requested comment on an alternative approach for calculating application fees by tracking the actual number of hours it takes FDA staff to conduct relevant activities for each applicant, multiply that number by the fully supported FTE hourly rate calculated by the Agency for the applicable fiscal year, and then bill each applicant separately for the actual application costs attributable to it.

We requested comment on whether the proposed or alternative approach would create more favorable incentives for quality of the application. For the alternative approach, we specifically requested comment on possible consequences we should impose for not paying the application fee on time, since with this approach we would likely not be able to bill the applicant until after it learns whether it is accepted into the program. We also requested comment on whether we should adopt the alternative approach for a portion of the application review process (*e.g.,* the onsite audit portion), while maintaining a flat fee for other portions (*e.g.,* the paper application review).

Under proposed § 1.705(b), recognized accreditation bodies would be subject to an annual fee for the estimated average cost of the work FDA performs to monitor performance of recognized accreditation bodies under § 1.633. Under § 1.633(a), FDA will periodically evaluate the performance of each recognized accreditation body at least 4 years after the date of recognition for a 5-year term of recognition, or by no later than the mid-term point for a term of recognition of less than 5 years. We would estimate the average number of hours it would take for FDA to conduct relevant activities and multiply that by the appropriate fully supported FTE hourly rate for the applicable fiscal year. To calculate the annual fee for each recognized accreditation body, FDA would take the estimated average cost of work FDA performs to monitor performance of a single recognized accreditation body and annualize that over the average term of recognition (*e.g.,* 5 years).

The proposed user fee program also would assess fees for the estimated average cost for the work FDA will perform in monitoring the performance of third-party certification bodies accredited by FDA-recognized accreditation bodies, and third-party certification bodies directly accredited by FDA. We estimated the average number of hours it would take for FDA to conduct relevant monitoring activities for each, including a representative sample of onsite audits, and multiplied that by the appropriate fully supported FTE hourly rate. We further proposed that these monitoring fees would be annualized over the length of the term of accreditation (*e.g.,* 4 years).

In developing the proposed rule, we also considered annualizing the cost of application review over the length of the term of recognition (*e.g.,* 5 years) or direct accreditation (*e.g.,* 4 years), adjusting for inflation, and adding this to the annual fee funding FDA's monitoring activities. We tentatively concluded in the proposed rule that this alternative fee structure could potentially reimburse FDA less for work performed and could also lead to more lower-quality applications. We requested comment on the proposed annual fee structure, the alternative annual fee structure described in the proposed rule, and any other alternative fee structures that may be simpler or more consistent with industry practice.

(Comment 3) Some comments propose a different approach whereby FDA would establish one application fee for accreditation bodies which encompasses all of the anticipated costs (and specify what those costs are for each part of the assessment process) and then provide for reimbursements upon completion of the process for costs that were not incurred. The comment suggests that this would create incentives for an accreditation body to have a well-documented and implemented accreditation process and to cooperate fully to facilitate the assessment by FDA. Some comments request that we simplify the user fee program, but do not provide suggestions as to what changes would simplify the program.

(Response 3) We decline to accept the alternative approach, for a couple of reasons: First, we expect that the costs for reviewing applications for recognition will not vary significantly among the accreditation bodies, because we expect most, if not all, of the accreditation bodies that seek recognition under the third-party certification program will use documentation of their conformance with International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC) 17011:2004, Conformity assessment—General requirements for accreditation bodies accrediting conformity assessment bodies (ISO/IEC 17011:2004) (Ref. 1) to support their applications. This will allow FDA to use a common approach in reviewing accreditation body applications and, as a result, will help keep the costs of application review fairly steady and predictable across applications, making the alternative approach unnecessary.

Second, in authorizing FDA to assess fees and recover the costs associated with establishing and administering the third-party certification program, section 808(c)(8) of the FD&C Act helps to ensure that FDA has a stable funding base for the program. The alternative approach would limit our ability to develop and execute program plans or to sustain program services and operations at predictable levels. Third, the alternative approach would be administratively burdensome and would generate new administrative costs associated with providing a series of reimbursements at various steps in the processing of a single application. The net result would be to drive up program costs, which would increase user fee rates.

With respect to the comments requesting that we simplify the user fee program, we decline to adopt a different approach absent any feasible suggestions as to what changes would simplify the program. Further, the approach we have established in this final rule limits the types of fees that are assessed to just application fees and annual fees. Our approach is designed to be simple. It is similar to the fee structure used by several accreditation bodies, who charge third-party certification bodies initial fees and annual fees (Ref. 2).

(Comment 4) Some comments recommend that the recognized accreditation bodies and accredited third-party certification bodies pay for monitoring as it is conducted. The comments note that for a recognized accreditation body this would assume that the level of monitoring would be related to its performance, the number of third-party certification bodies it accredited, and their performance. The comments further assert that the level of

monitoring FDA performs for an accredited third-party certification body would be based on its performance, the number of clients that the accredited third-party certification body has certified, and their performance.

(Response 4) We disagree. As explained in Response 3, the user fee program is designed to provide FDA a stable funding base for operating the program. The proposed approach of paying for monitoring as it is conducted would not offer stability and predictability for FDA or for recognized accreditation bodies and accredited certification bodies. In addition, we note that the number of certification bodies the accreditation body has accredited under the program is only one of several factors we may consider in developing our plans for monitoring a recognized accreditation body. Under § 1.633(b) we may elect to observe a representative sample of certification bodies the recognized accreditation body accredited when conducting an assessment of its accreditation body. The size of the representative sample may depend on a number of factors including the scope of accreditation of the certification bodies accredited by the accreditation body, how many years the accreditation body has been in the program, how many prior assessments of the accreditation body we have performed, and the length of time since any prior assessments, in addition to the number of third-party certification bodies it has accredited. Similarly, when monitoring an accredited third-party certification body under § 1.662 we may elect to observe regulatory audits the accredited third-party certification body performs, and we will base our decision regarding how many onsite observations to conduct based on a number of factors such as how many years the certification body has been in the program, how many prior assessments we have performed and the length of time since the last assessment, in addition to the number of eligible entities the certification body certifies. Further, we do not anticipate that the cost of monitoring will vary greatly among accreditation bodies or among certification bodies. We note that the third-party certification regulations allow recognized accreditation bodies and accredited third-party certification bodies to use documentation of their conformance with applicable ISO/IEC standards, which we expect will allow FDA greater consistency and efficiency in conducting monitoring activities.

(Comment 5) Some comments recommend that FDA establish application and monitoring fees that relate to costs for the services by FDA and that these be paid in the years the services are provided, rather than annualized fees.

(Response 5) We decline the recommendation to change the fee structure from an estimated average cost to a pay-as-you go system. As explained in Response 3, the estimated average cost approach to the fee assessments provides prospective applicants, participants, and FDA predictability that allows for proper planning and budgeting. The monitoring fee is structured to annualize the payments for the total cost of monitoring recognized accreditation bodies and accredited third-party certification bodies, which provides predictability that helps accreditation bodies, third-party certification bodies, and FDA in planning and budgeting. Additionally, the recommended approach would be administratively burdensome and would generate new administrative costs associated with billing for various monitoring activities across the duration of each accreditation body's recognition and each third-party certification body's accreditation. The net result would be to drive up program costs, which would increase user fee rates. Further, we do not think that system suggested in the comment would be particularly beneficial to participants, since we do not anticipate that there will be much variability in the cost of monitoring services. We note that the user fee program is flexible. The fee rates are adjusted annually, as appropriate, so estimates regarding the cost of monitoring will be refined regularly.

V. Comments on How Will FDA Notify the Public About the Fee Schedule (§ 1.710)

We proposed to notify the public of the fee schedule annually prior to the beginning of the fiscal year for which the fees apply. We further proposed that each new fee schedule would be calculated based on the parameters in the proposed rulemaking and adjusted for improvements in the cost to FDA of performing relevant work for the upcoming year and inflation. At our own initiative, we revised proposed § 1.710 to create an exception to the requirement to provide notice prior to the start of the fiscal year for which the fees apply, in order to provide notice of the FSMA Third-Party Certification Program User Fee Rate for FY 2017, which is published elsewhere in this issue of the **Federal Register**. The notice for fiscal year (FY) 2017 sets the application fee rate for accreditation bodies applying for recognition. The rate will be effective on January 13, 2017, and will allow accreditation bodies to apply to participate in the third-party certification program prior to the start of FY 2018.

(Comment 6) Several comments address user fee costs. Some raise general concerns that user fees may serve as a disincentive to program participation by accreditation bodies and third-party certification bodies, especially during the initial phase of the program. One such comment characterized the estimated user fee amounts as ''somewhat high.'' Other comments noted the proposed fees were reasonably aligned with the third-party certification body fees assessed under the Global Food Safety Initiative (GFSI). (By way of background, a group of international retailers established GFSI in 2000 with the goal of reducing the need for duplicative third-party audits by benchmarking private food safety schemes against a harmonized set of criteria for food safety and management systems.)

(Response 6) With respect to the comments suggesting that user fees may serve as a disincentive to program participation by accreditation bodies and third-party certification bodies, we note that the FD&C Act requires us to establish by regulation a user fee program by which we assess fees and require accredited third-party auditors and audit agents to reimburse us for the work performed to establish and administer the third-party accreditation program under section 808 of the FD&C Act. With respect to comments suggesting that the estimated user fee rates in the proposed rule may be too high, we disagree. We have designed the proposed user fee program to be flexible—that is, we expect that the estimates of the number of FTE hours used to calculate the actual user fees for accreditation bodies and third-party certification bodies will be informed by FDA's experience with the program each year (80 FR 43987 at 43990). Once the program begins we will update the estimates used to calculate the annual user fees as appropriate on a yearly basis. For example, if we determine it takes less time, on average, for us to prepare written reports documenting our onsite assessments of recognized accreditation bodies, we will use that information to decrease the fee for the following year.

(Comment 7) Some comments contend that the third-party certification program user fees and the indirect costs of complying with the third-party certification regulation will be passed down to food firms, negatively impacting the number of foreign food facilities that will become certified under the program and resulting in

further proliferation of the multitude of audit schemes.

(Response 7) The comments did not provide any data to support assertions regarding the indirect impacts of the proposed rule on dynamics of markets for third-party audits of foreign food facilities and private audit standards. Absent data or other information to support changes to the proposal, we are not modifying § 1.710 in anticipation of possible market forces on third-party audits and private audit schemes.

(Comment 8) Some comments discourage FDA from annually reviewing its fees for at least one 5-year cycle because fluctuations in the fees could significantly disadvantage accreditation bodies or third-party certification bodies that enter the program early.

(Response 8) We disagree with the suggestion to review fees less frequently than annually. Section 808(c)(8) of the FD&C Act provides that FDA shall not generate a surplus from the user fee program. By annually reviewing (and, if appropriate, adjusting) the fee rates, we can help ensure that we do not generate a surplus.

VI. Comments on When a User Fee Required by This Subpart Must Be Submitted (§ 1.715)

We proposed to require accreditation bodies applying for recognition and third-party certification bodies applying for direct accreditation to submit their application fees concurrently with submitting an application, including a renewal application. We also proposed that recognized accreditation bodies and accredited third-party certification bodies subject to an annual fee must submit payment within 30 days of receiving billing for the fee.

(Comment 9) Some comments support having initial and renewal application fees paid upon application. The comments also assert that FDA should not review any applications until payment has been received.

(Response 9) We agree and are maintaining these requirements in the final rule.

VII. Comments on Whether User Fees Under This Subpart Are Refundable (§ 1.720)

Under proposed § 1.720, user fees would not be refundable. We requested comment on whether we should consider refund requests under this program, and if so, under what circumstances.

At our own initiative, we are revising § 1.720 to clarify that we will not refund any fees accompanying completed applications or annual user fees. However, user fees submitted with applications will not be considered to have been accepted until the application is complete and ready for FDA review. Applications for recognition and direct accreditation will not be substantively reviewed by FDA until a completed submission with all of the required elements is received in accordance with §§ 1.631(a) and 1.671(a).

(Comment 10) Some comments recommend that FDA charge a flat fee for the application fees, but provide for refunds of portions of the initial application and renewal application fees if we do not incur all the anticipated costs during review of the application. This would ensure that FDA has adequate funding to cover costs up front without overburdening accreditation bodies or third-party certification bodies financially if we don't end up using all the costs.

(Response 10) We disagree with providing a refund as described by the comment. As noted in Response 3, we anticipate that costs for reviewing applications for recognition will not vary significantly among the accreditation bodies. In addition, it would be administratively burdensome to track and process refunds at various stages of the application process for each applicant and would potentially drive up the costs of the program.

VIII. Comments on the Consequences of Not Paying a User Fee Under This Subpart on Time (§ 1.725)

In proposed § 1.725(a), we proposed that applications would not be considered complete until FDA receives the application fee. In proposed § 1.725(b), we proposed that a recognized accreditation body that fails to submit its annual user fee within 30 days of the due date would have its recognition suspended. We proposed that FDA would notify the accreditation body electronically that its recognition is suspended and would notify the public of the suspension on the Web site that lists the recognized accreditation bodies. We requested comment on our tentative conclusion that there is no reason for the process of notifying the accreditation body and the public of suspension to differ from the process of notifying the accreditation body and the public of revocation in these respects. We also requested comment on whether FDA should notify a certification body if the recognition of its accreditation body has been suspended.

We further proposed that while an accreditation body's recognition is suspended, it will not be able to accredit additional third-party certification bodies. However, we proposed that any certification bodies accredited by such accreditation body prior to the suspension would be unaffected by the suspension, as would any food or facility certification issued by such certification body. We also proposed that if payment is not received within 90 days of the payment due date, FDA would revoke the accreditation body's recognition and provide notice of such revocation in accordance with the procedures in § 1.634. Accordingly, we proposed to amend § 1.634(a)(4) by adding proposed § 1.634(a)(4)(iii), which would explicitly include failure to pay the annual user fee within 90 days of the payment due date as a basis for revoking an accreditation body's recognition.

In proposed § 1.725(c), we proposed that an accredited third-party certification body that fails to submit its annual user fee within 30 days of the due date would have its accreditation suspended. We proposed that FDA would electronically notify the certification body that its accreditation is suspended and would notify the public of the suspension on the Web site that lists the recognized accreditation bodies and accredited third-party certification bodies. While a certification body's accreditation is suspended, it would not be allowed to issue food or facility certifications as part of FDA's third-party certification program. However, we proposed that food or facility certifications issued by a certification body prior to the suspension of its accreditation would remain in effect. We proposed that if payment is not received within 90 days of the payment due date, FDA would withdraw the third-party certification body's accreditation under § 1.664(a), and provide notice of such withdrawal in accordance with the procedures in § 1.664. Accordingly, we proposed to amend § 1.664(a) by adding proposed § 1.664(a)(4), which would explicitly include failure to pay the annual user fee within 90 days of the payment due date as a basis for withdrawal of accreditation. We requested comment on whether the consequences of a third-party certification body failing to pay a user fee by the due date are appropriate.

(Comment 11) Some comments agree with FDA's proposal to suspend an accreditation body's recognition or a third-party certification body's accreditation if it fails to submit its annual user fee within 30 days of the payment due date and to revoke the accreditation body's recognition or withdraw a certification body's accreditation if it fails to submit its annual user fee within 90 days of the payment due date.

(Response 11) We agree and are retaining these provisions in the final rule.

(Comment 12) One comment recommends that notice of the suspension or revocation on FDA's Web site differentiate between suspension and revocation for financial reasons and suspension or revocation for failure to conform to requirements.

(Response 12) We agree with respect to notice of revocation or withdrawal. In accordance with §§ 1.634(f) and 1.664(h), FDA will provide the basis for revocation of recognition and for withdrawal of accreditation on its Web site, as applicable. With respect to suspension of recognition or accreditation by FDA, failure to pay the user fee would be the only reason for FDA suspension.

(Comment 13) One comment recommends that FDA should notify a third-party certification body if its accreditation body's recognition has been suspended and that FDA should notify an accreditation body if a third-party certification body accredited by that accreditation body is suspended.

(Response 13) At this time FDA has determined that, unlike notice of withdrawal of accreditation and notice of revocation of recognition, notice of suspension is not essential to the operation of an accredited certification body or a recognized accreditation body. For example, accredited certification bodies would remain accredited even if their accreditation body had their recognition suspended. Further, we note that FDA's electronic portal for the third-party certification program currently does not have the capability to provide notice of suspension. We will consider the feasibility of adding this capability as resources allow.

IX. Comments on Possible Exemptions

We did not propose a small business exemption or reduction in the proposed rule because no statutory requirement to establish or consider an exemption or reduction in user fees exists in section 808 of the FD&C Act. However, we requested comment on whether we should account for small businesses in other ways, including whether an exemption or fee reduction would be appropriate. We requested that comments in favor of an exemption or fee reduction for small businesses state who should be eligible for an exemption or fee reduction; if recommending a fee reduction, how much of a reduction should be granted; and why.

(Comment 14) Some comments recommend that there be no exemption or reduced fee for small businesses or entities because the costs to FDA for performing the work activities are not lower for small businesses or entities. Other comments recommend that the user fees for public-sector and private-sector accreditation bodies or third-party certification bodies be the same because the costs to FDA are not lower for one group compared to the other. Some comments recommend that the program offer reduced fees or exemptions for small businesses to be consistent with the principles embedded in FSMA. Other comments request a reduction in fees or an exemption for public-sector accreditation bodies or third-party certification bodies.

(Response 14) We agree that there be no exemptions or reduced fees for small businesses or entities or for public-sector entities. Section 808(c)(8) of the FD&C Act makes no distinction between public and private bodies for purposes of the user fee program, and, as noted previously, contains no requirement to establish or consider an exemption or reduction in user fees. As explained in Responses 3 and 4, we agree that the cost to FDA for performing the application review and monitoring will not vary greatly across entities participating in the third-party certification program, regardless of the entity's size or public versus private status. Moreover, creating exemptions or fee reductions would hinder FDA's ability to create a stable funding base for the third-party certification program.

X. Economic Analysis of Impacts

We have examined the impacts of the final rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct us to assess all 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, and other advantages; distributive impacts; and equity). We believe that this final rule is not a significant regulatory action as defined by Executive Order 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. This rule demonstrates how user fees will be calculated and assessed for different activities FDA conducts under FDA's third-party accreditation program. This rule does not require action by entities affected by the Third-Party Certification regulation; it merely provides additional information so that affected entities can make an informed decision on whether to participate in FDA's third-party certification program. FDA analyzed the costs and benefits of FDA's third-party certification program including imposition of user fees resulting from participating in the third-party certification program in the regulatory impact analysis of the Third-Party Certification final rule. Therefore because this rule does not require actions by affected entities, we certify that the final rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before issuing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $146 million, using the most current (2015) Implicit Price Deflator for the Gross Domestic Product. This final rule would not result in an expenditure in any year that meets or exceeds this amount.

The full analysis of the economic impacts of the Third-Party Certification regulation is available at *https://www.regulations.gov* under the docket number (FDA–2011–N–0146) for this final rule (Ref. 3) and at *http://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm.*

XI. Paperwork Reduction Act of 1995

This rule contains no collection of information. Therefore, clearance by OMB under the Paperwork Reduction Act of 1995 is not required.

XII. Analysis of Environmental Impact

We previously considered the environmental effects of this rule, as stated in the proposed rule ''User Fee Program to Provide for Accreditation of Third-Party Auditors/Certification Bodies to Conduct Food Safety Audits and To Issue Certifications'' published on July 24, 2015 (80 FR 43987). We stated that we had determined, under 21 CFR 25.30(h), that this action ''is of a type that does not individually or cumulatively have a significant effect on the human environment'' such that neither an environmental assessment nor an environmental impact statement is required. We have not received any new information or comments that

would affect our previous determination.

XIII. Federalism

We have analyzed this final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule does not contain policies that 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. Accordingly, we conclude that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

XIV. References

The following references are on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fisher Lane, Rm. 1061, Rockville, MD 20852 and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at *https://www.regulations.gov.* FDA has verified the Web site addresses, as of the date this document publishes in the **Federal Register**, but Web sites are subject to change over time.

1. International Organization for Standardization/International Electrotechnical Commission, ISO/IEC ''17011:2004 Conformity Assessment—General Requirements for Accreditation Bodies Accrediting Conformity Assessment Bodies,'' Copies are available from the International Organization for Standardization, 1, rue de Varembe, Case postale 56, CH–1211 Geneve 20, Switzerland, or on the Internet at *http://www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=29332* or may be examined at the Division of Dockets Management (see **ADDRESSES**) (Reference Docket No. FDA–2011–N–0146 and/or RIN 0910–AG66).

2. FDA, ''Preliminary Regulatory Impact Analysis for the proposed rules on Foreign Supplier Verification Programs (Docket No. FDA–2011–N–0143) and Accreditation of Third-Party Auditors/Certification Bodies to Conduct Food Safety Audits and to Issue Certifications (Docket No. FDA–2011–N–0146) under Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520),'' *http://www.fda.gov/downloads/aboutfda/reportsmanualsforms/reports/economicanalyses/ucm363286.pdf,* November 2013.

3. FDA, ''Final Regulatory Impact Analysis: Accreditation of Third-Party Certification Bodies to Conduct Food Safety Audits and to Issue Certifications,'' *http://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/UCM471886.pdf,* November 2015.

List of Subjects in 21 CFR Part 1

Cosmetics, Drugs, Exports, Food labeling, Imports, Labeling, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 1 is amended as follows:

PART 1—GENERAL ENFORCEMENT REGULATIONS

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

Authority: 15 U.S.C. 1333, 1453, 1454, 1455, 4402; 19 U.S.C. 1490, 1491; 21 U.S.C. 321, 331, 332, 333, 334, 335a, 342, 343, 350c, 350d, 350e, 350j, 350k, 352, 355, 360b, 360ccc, 360ccc–1, 360ccc–2, 362, 371, 373, 374, 379j–31, 381, 382, 384a, 384b, 384d, 387, 387a, 387c, 393; 42 U.S.C. 216, 241, 243, 262, 264, 271; Pub. L. 107–188, 116 Stat. 594, 668–69; Pub. L. 111–353, 124 Stat. 3885, 3889.

■ 2. In § 1.634, add paragraph (a)(4)(iii) to read as follows:

§ 1.634 When will FDA revoke recognition?

(a) * * *

(4) * * *

(iii) Failure to pay the annual user fee within 90 days of the payment due date, as specified in § 1.725(b)(3).

* * * * *

■ 3. In § 1.664, add paragraph (a)(4) to read as follows:

§ 1.664 When would FDA withdraw accreditation?

(a) * * *

(4) If payment of the third-party certification body's annual fee is not received within 90 days of the payment due date, as specified in § 1.725(c)(3).

* * * * *

■ 4. In Subpart M, add an undesignated center heading and §§ 1.700 through 1.725 to read as follows:

Requirements for User Fees Under This Subpart

Sec.
1.700 Who is subject to a user fee under this subpart?
1.705 What user fees are established under this subpart?
1.710 How will FDA notify the public about the fee schedule?
1.715 When must a user fee required by this subpart be submitted?
1.720 Are user fees under this subpart refundable?
1.725 What are the consequences of not paying a user fee under this subpart on time?

§ 1.700 Who is subject to a user fee under this subpart?

(a) Accreditation bodies submitting applications or renewal applications for recognition in the third-party certification program;

(b) Recognized accreditation bodies participating in the third-party certification program;

(c) Third-party certification bodies submitting applications or renewal applications for direct accreditation; and

(d) Accredited third-party certification bodies (whether accredited by recognized accreditation bodies or by FDA through direct accreditation) participating in the third-party certification program.

§ 1.705 What user fees are established under this subpart?

(a) The following application fees:

(1) Accreditation bodies applying for recognition are subject to an application fee for the estimated average cost of the work FDA performs in reviewing and evaluating applications for recognition of accreditation bodies.

(2) Recognized accreditation bodies submitting renewal applications are subject to a renewal application fee for the estimated average cost of the work FDA performs in reviewing and evaluating renewal applications for recognition of accreditation bodies.

(3) Third-party certification bodies applying for direct accreditation are subject to an application fee for the estimated average cost of the work FDA performs in reviewing and evaluating applications for direct accreditation.

(4) Accredited third-party certification bodies applying for renewal of direct accreditation are subject to an application fee for the estimated average cost of the work FDA performs in reviewing and evaluating renewal applications for direct accreditation.

(b) The following annual fees:

(1) Recognized accreditation bodies are subject to an annual fee for the estimated average cost of the work FDA performs to monitor performance of recognized accreditation bodies under § 1.633.

(2) Third-party certification bodies directly accredited by FDA are subject to an annual fee for the estimated average cost of the work FDA performs to monitor directly accredited third-party certification bodies under § 1.662.

(3) Third-party certification bodies accredited by recognized accreditation bodies are subject to an annual fee for the estimated average cost of the work

FDA performs to monitor third-party certification bodies that are accredited by a recognized accreditation body under § 1.662.

§ 1.710 How will FDA notify the public about the fee schedule?

FDA will notify the public of the fee schedule annually. The fee notice will be made publicly available prior to the beginning of the fiscal year for which the fees apply, except for the first fiscal year in which this regulation is effective. Each new fee schedule will be adjusted for inflation and improvements in the estimates of the cost to FDA of performing relevant work for the upcoming year.

§ 1.715 When must a user fee required by this subpart be submitted?

(a) Accreditation bodies applying for recognition and third-party certification bodies applying for direct accreditation must submit a fee concurrently with submitting an application or a renewal application.

(b) Accreditation bodies and third-party certification bodies subject to an annual fee must submit payment within 30 days of receiving billing for the fee.

§ 1.720 Are user fees under this subpart refundable?

User fees accompanying completed applications and annual fees under this subpart are not refundable.

§ 1.725 What are the consequences of not paying a user fee under this subpart on time?

(a) An application for recognition or renewal of recognition will not be considered complete for the purposes of § 1.631(a) until the date that FDA receives the application fee. An application for direct accreditation or for renewal of direct accreditation will not be considered complete for the purposes of § 1.671(a) until FDA receives the application fee.

(b) A recognized accreditation body that fails to submit its annual user fee within 30 days of the due date will have its recognition suspended.

(1) FDA will notify the accreditation body electronically that its recognition is suspended. FDA will notify the public of the suspension on the Web site described in § 1.690.

(2) While an accreditation body's recognition is suspended, the accreditation body will not be able to accredit additional third-party certification bodies. The accreditation of third-party certification bodies that occurred prior to an accreditation body's suspension, as well as food or facility certifications issued by such third-party certification bodies, would remain in effect.

(3) If payment is not received within 90 days of the payment due date, FDA will revoke the accreditation body's recognition under § 1.634(a)(4)(iii), and provide notice of such revocation in accordance with § 1.634.

(c) An accredited third-party certification body that fails to submit its annual fee within 30 days of the due date will have its accreditation suspended.

(1) FDA will notify the third-party certification body that its accreditation is suspended, electronically and in English. FDA will notify a recognized accreditation body, electronically and in English, if the accreditation of one if its third-party certification bodies is suspended. FDA will notify the public of the suspension on the Web site described in § 1.690.

(2) While a third-party certification body's accreditation is suspended, the third-party certification body will not be able to issue food or facility certifications. A food or facility certification issued by a third-party certification body prior to the suspension of the auditor/certification body accreditation will remain in effect.

(3) If payment is not received within 90 days of the payment due date, FDA will withdraw the third-party certification body's accreditation under § 1.664(a)(4), and provide notice of such withdrawal in accordance with § 1.664.

Dated: December 9, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–30033 Filed 12–13–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA–342]

RIN 1117–AB33

Establishment of a New Drug Code for Marihuana Extract

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Final rule.

SUMMARY: The Drug Enforcement Administration is creating a new Administration Controlled Substances Code Number for ''Marihuana Extract.'' This code number will allow DEA and DEA-registered entities to track quantities of this material separately from quantities of marihuana. This, in turn, will aid in complying with relevant treaty provisions.

Under international drug control treaties administered by the United Nations, some differences exist between the regulatory controls pertaining to marihuana extract versus those for marihuana and tetrahydrocannabinols. The DEA has previously established separate code numbers for marihuana and for tetrahydrocannabinols, but not for marihuana extract. To better track these materials and comply with treaty provisions, DEA is creating a separate code number for marihuana extract with the following definition: ''Meaning an extract containing one or more cannabinoids that has been derived from any plant of the genus Cannabis, other than the separated resin (whether crude or purified) obtained from the plant.'' Extracts of marihuana will continue to be treated as Schedule I controlled substances.

DATES: *Effective:* January 13, 2017.

FOR FURTHER INFORMATION CONTACT: Michael J. Lewis, Office of Diversion Control, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone (202) 598–6812.

SUPPLEMENTARY INFORMATION:

Background

As provided in 21 CFR 1308.03, each controlled substance or basic class thereof is assigned a four digit Administration Controlled Substance Code Number (''Code number'' or ''drug code'') that is used to track quantities of the controlled substance imported and exported to and from the United States. Additionally, the DEA uses these code numbers in establishing aggregate production quotas for basic classes of controlled substances listed in Schedules I and II as required by 21 U.S.C. 826.

Consistent with the Controlled Substances Act (CSA), the schedules contained in DEA regulations include marihuana (drug code 7360) in Schedule I. 21 CFR 1308.11(d)(23). This listing includes (unless specifically excepted or unless listed in another schedule) any material, compound, mixture, or preparation, which contains any quantity of the substance, or which contains any of its salts, isomers, and salts of isomers that are possible within the specific chemical designation. Because the definition of marihuana in 21 U.S.C. 802(16) includes both derivatives and preparations of marihuana, the DEA until now has used drug code 7360 for extracts of marihuana. This final rule finalizes a

July 5, 2011, Notice of Proposed Rulemaking (76 FR 39039) in which the DEA proposed that a new drug code 7350 be used for extracts of marihuana.

Why a New Code Number Is Needed

The United Nations Conventions on international drug control treats extracts from the cannabis plant somewhat differently than marihuana or tetrahydrocannabinols. The creation of a new drug code in the DEA regulations for marihuana extracts will allow for more appropriate accounting of such materials consistent with treaty provisions.

The Single Convention on Narcotic Drugs, 1961 (''Single Convention'') and the 1971 Convention on Psychotropic Substances (''Psychotropic Convention'') provide for the international control of marihuana constituents. Many of the CSA's provisions were drafted to comply with these Conventions. The CSA includes schemes of drug scheduling and procedures for adding, removing, and transferring drugs among the schedules that are similar, in some ways, to those in the Single Convention. With respect to those drugs that are subject to control under the Single Convention, the CSA mandates that DEA control such drugs in a manner that will ensure the United States meets its obligations under the Single Convention. 21 U.S.C. 811(d)(1).

Somewhat similar to the CSA, the Single Convention lists substances in four schedules. However, under the Single Convention, the drugs that are subject to the most stringent controls are in Schedule IV. Another difference between the CSA and the Single Convention is that, under the latter, a drug can be listed in more than one schedule. Cannabis and cannabis resin are listed in both Schedule IV and Schedule I of the Single Convention. Schedule I controls under the Single Convention include: Requirements for import and export authorization, licensing of manufacturers/distributors, recordkeeping requirements, a requirement for prescriptions for medical use, annual estimate of needs, quotas, annual statistical reporting, and a requirement that use be limited to medical and scientific purposes. Schedule II of the Single Convention is similar in controls to Schedule I with a few exceptions, and Schedule III is less restrictive. All substances listed in Schedule IV are also listed in Schedule I under the Single Convention in order to encompass the requirements mentioned above. In addition, as indicated, the Single Convention imposes certain heightened measures of control with respect to Schedule IV drugs. The placing of a drug into both Schedule I and Schedule IV, therefore imposes the most stringent controls under the Single Convention. Although cannabis and cannabis resin are listed in Schedules I and IV of the Single Convention, cannabis extracts are listed only in Schedule I.

Comments

In response to the July 5, 2011, Notice of Proposed Rulemaking (76 FR 39039), the DEA received six submissions from five commenters. Three of the comments raised issues relating to the medical use or legality of marihuana/cannabis; these comments were not germane to the issues addressed by this rulemaking. A fourth comment was merely a clarification of a comment previously submitted.

One comment requested clarification of whether the new drug code will be applicable to cannabidiol (CBD), if it is not combined with cannabinols.

DEA response: For practical purposes, all extracts that contain CBD will also contain at least small amounts of other cannabinoids.[1] However, if it were possible to produce from the cannabis plant an extract that contained only CBD and no other cannabinoids, such an extract would fall within the new drug code 7350. In view of this comment, the regulatory text accompanying new drug code 7350 has been modified slightly to make clear that it includes cannabis extracts that contain only one cannabinoid.

Another comment from a pharmaceutical firm currently involved in cannabinoid research and product development praised DEA's efforts to establish a new drug code for marihuana extracts as a means to more accurately reflect the activities of scientific research and provide more consistent adherence to the requirements of the Single Convention. However, the comment expressed concerns that the proposed definition for the new drug code (*i.e.* ''meaning extracts that have been derived from any plant of the genus Cannabis and which contain cannabinols and cannabidiols'') is too narrow. The comment suggested that the broader term ''cannabinoids'' be substituted for ''cannabinols and cannabidiols.'' The comment pointed out that other constituents of the marihuana plant may have therapeutic potential. The comment further clarified that the broader term ''cannabinoid'' includes both cannabinol-type compounds and cannabidiol-type compounds, as well as cannabichromene-type compounds, cannabigerol-type compounds, and other categories of compounds.

DEA response: DEA agrees with the commenter that the term ''cannabinoid'' would provide for a broader definition of marihuana extract; however, use of the term ''cannabinoid'' necessitates that the DEA clarify that the new marihuana extract category (drug code 7350) is not intended to include ''cannabis resin'' as defined in the U.N. Single Convention.

As discussed in the NPRM, a new drug code is necessary in order to better account for these materials in accordance with treaty obligations. The Single Convention placed ''cannabis'' and ''cannabis resin'' under both Schedule I and IV of the Convention, the most stringent level of control under the Convention. While ''cannabis resin'' is extracted from ''cannabis,'' the Single Convention specifically controls ''extracts'' separately. Extracts of cannabis are controlled only under Schedule I of the Convention, which is a lower level of control than ''cannabis resin.''

Accordingly, it is the DEA's intent to define the term ''marihuana extract'' so as to exclude material referenced as ''cannabis resin'' under the Single Convention on Narcotics. ''Cannabis resin'' (regulated under the CSA as a resin of marihuana) contains a variety of ''cannabinoids'' and will continue to be regulated as marihuana under drug code 7360. The new drug code for marihuana extracts under 21 CFR 1308.11(d)(58) will exclude the resin. Cannabis resin and marihuana resin remain captured under the drug code for marihuana (drug code 7360), thus differentiating this material from marihuana extracts (new drug code 7350). This will maintain compliance with the Single Convention.

Final Action

After careful consideration of all comments, the DEA is hereby amending 21 CFR 1308.11(d) to include a new subparagraph (58) which creates a new code number in Schedule I as follows:

''(58) Marihuana Extract—7350

''Meaning an extract containing one or more cannabinoids that has been derived from any plant of the genus Cannabis, other than the separated resin (whether crude or purified) obtained from the plant.''

The creation of this new drug code in the DEA regulations for marihuana extracts allows for more appropriate accounting of such materials consistent with treaty provisions. Such marihuana

[1] Although it might be theoretically possible to produce a CBD extract that contains absolutely no amounts of other cannabinoids, the DEA is not aware of any industrially-utilized methods that have achieved this result.

extracts remain in Schedule I. Entities registered to handle marihuana (under drug code 7360) that also handle marihuana extracts, will need to apply to modify their registrations to add the new drug code 7350 to their existing DEA registrations and procure quotas specifically for drug code 7350 each year.

Regulatory Analyses

Executive Orders 12866 and 13563, Regulatory Planning and Review, and 13563, Improving Regulation and Regulatory Review

This regulation has been drafted and reviewed in accordance with the principles of Executive Orders 12866 and 13563. This rule is not a significant regulatory action under Executive Order 12866.

Executive Order 12988, Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate drafting errors and ambiguity, minimize litigation, provide a clear legal standard for affected conduct, and promote simplification and burden reduction.

Executive Order 13132, Federalism

This rulemaking does not have federalism implications warranting the application of Executive Order 13132. The rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This rule does not have tribal implications warranting the application of Executive Order 13175. It does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Regulatory Flexibility Act

The Administrator, in accordance with the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–602, has reviewed this rule and by approving it, certifies that it will not have a significant economic impact on a substantial number of small entities. This rule establishes a new drug code for marihuana extracts. DEA already registers persons handling marihuana extracts but within another already-established drug code. Thus, persons who handle these marihuana extracts have already met DEA's registration, security, and other statutory and regulatory requirements. The only direct effect to registrants who handle marihuana extracts will be the requirement to add the new drug code to their registration. Therefore, DEA has concluded that this rule will not have a significant effect on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

On the basis of information contained in the ''Regulatory Flexibility Act'' section above, DEA has determined and certifies pursuant to the Unfunded Mandates Reform Act (UMRA) of 1995, 2 U.S.C. 1501 *et seq.,* that this action would not result in any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted for inflation) in any one year. Therefore, neither a Small Government Agency Plan nor any other action is required under provisions of the UMRA of 1995.

Paperwork Reduction Act of 1995

This action does not impose a collection of information requirement under the Paperwork Reduction Act of 1995. 44 U.S.C. 3501–3521. This action would not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. 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.

Congressional Review Act

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act (CRA)). This rule will not result in: An annual effect on the economy of $100,000,000 or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based companies to compete with foreign based companies in domestic and export markets. However, pursuant to the CRA, the DEA has submitted a copy of this final rule to both Houses of Congress and to the Comptroller General.

List of Subjects in 21 CFR Part 1308

Drug traffic control, Controlled substances.

For the reasons set out above, 21 CFR part 1308 is amended as follows:

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

■ 1. The authority citation for part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b), unless otherwise noted.

■ 2. Section 1308.11 is amended by adding paragraph (d)(58) to read as follows:

§ 1308.11 Schedule I.

* * * * *

(d) * * *

(58) Marihuana Extract—(7350)

Meaning an extract containing one or more cannabinoids that has been derived from any plant of the genus Cannabis, other than the separated resin (whether crude or purified) obtained from the plant.

* * * * *

Dated: December 7, 2016.

Chuck Rosenberg,

Acting Administrator.

[FR Doc. 2016–29941 Filed 12–13–16; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1988

[Docket Number: OSHA–2015–0021]

RIN 1218–AC88

Procedures for Handling Retaliation Complaints Under Section 31307 of the Moving Ahead for Progress in the 21st Century Act (MAP–21)

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Final rule.

SUMMARY: On March 16, 2016, the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor (Department) issued an interim final rule (IFR) that provided procedures for the Department's processing of complaints under the employee protection (retaliation or whistleblower) provisions of Section 31307 of the Moving Ahead for Progress in the 21st Century Act (MAP–21). The IFR established procedures and time frames for the

handling of retaliation complaints under MAP–21, including procedures and time frames for employee complaints to OSHA, investigations by OSHA, appeals of OSHA determinations to an administrative law judge (ALJ) for a hearing de novo, hearings by ALJs, review of ALJ decisions by the Administrative Review Board (ARB) (acting on behalf of the Secretary of Labor) and judicial review of the Secretary's final decision. It also set forth the Department's interpretations of the MAP–21 whistleblower provisions on certain matters. This final rule adopts, without change, the IFR.

DATES: This final rule is effective December 14, 2016.

FOR FURTHER INFORMATION CONTACT: Britania C. Smith, Program Analyst, Directorate of Whistleblower Protection Programs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–4618, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–2199. This is not a toll-free number. Email: *OSHA.DWPP@dol.gov.* This **Federal Register** publication is available in alternative formats. The alternative formats available are: Large print, electronic file on computer disk (Word Perfect, ASCII, Mates with Duxbury Braille System), and audiotape.

SUPPLEMENTARY INFORMATION:

I. Background

The Moving Ahead for Progress in the 21st Century Act, Public Law 112–141, 126 Stat. 405, was enacted on July 6, 2012 and, among other things, funded surface transportation programs at over $105 billion for fiscal years 2013 and 2014. Section 31307 of the Act, codified at 49 U.S.C. 30171 and referred to throughout this rulemaking as MAP–21, prohibits motor vehicle manufacturers, parts suppliers, and dealerships from discharging or otherwise retaliating against an employee because the employee provided, caused to be provided or is about to provide information to the employer or the Secretary of Transportation relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of Chapter 301 of title 49 of the U.S. Code (Chapter 301); filed, caused to be filed or is about to file a proceeding relating to any such defect or violation; testified, assisted or participated (or is about to testify, assist or participate) in such a proceeding; or objected to, or refused to participate in, any activity that the employee reasonably believed to be in violation of any provision of Chapter 301, or any order, rule, regulation, standard or ban under such provision. Chapter 301 is the codification of the National Traffic and Motor Vehicle Safety Act of 1966, as amended, which grants the National Highway Traffic Safety Administration (NHTSA) authority to issue vehicle safety standards and to require manufacturers to recall vehicles that have a safety-related defect or do not meet federal safety standards. This final rule adopts, without change, the provisions in the IFR which established procedures for the handling of whistleblower complaints under MAP–21.

II. Interim Final Rule, Comment Received and OSHA's Response

On March 16, 2016, OSHA published in the **Federal Register** an IFR establishing procedures for the handling of whistleblower retaliation complaints under MAP–21. 81 FR 13976. The IFR also requested public comments. The prescribed comment period closed on May 16, 2016. OSHA received one comment responsive to the IFR. The commenter, a private citizen, stated in full that:

> After the OSHA investigation, the complainant should have a reasonable chance to respond to whatever the investigation found before the final determination. The investigation should rely on facts: Any witness remarks need to be substantiated by facts, and the complainant should be able to respond to them. Investigations need to be conducted according to strict guidelines with facts checked perhaps by another investigator.

OSHA is making no revisions to the MAP–21 rule in response to this comment. OSHA believes that the procedures in the IFR, see *e.g.,* 29 CFR 1988.104(c), as supplemented by OSHA's whistleblower investigations manual, available at *http://www.whistleblowers.gov,* operate to give complainants adequate opportunities to review and respond to information submitted by the employer in a MAP–21 whistleblower investigation and to ensure adequate supervision of investigators. In addition, as provided in the rules, any party who objects to OSHA's findings has an opportunity to seek de novo review before an administrative law judge. Accordingly, this rule adopts as final, without change, the IFR published on March 16, 2016.

III. Paperwork Reduction Act

This rule contains a reporting provision (filing a retaliation complaint, Section 1988.103) which was previously reviewed and approved for use by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The assigned OMB control number is 1218–0236.

IV. Administrative Procedure Act

The notice and comment rulemaking procedures of Section 553 of the Administrative Procedure Act (APA) do not apply ''to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.'' 5 U.S.C. 553(b)(A). This is a rule of agency procedure, practice, and interpretation within the meaning of that section. Therefore, publication in the **Federal Register** of a notice of proposed rulemaking and request for comments was not required for this rulemaking. Although this is a procedural and interpretative rule not subject to the notice and comment procedures of the APA, OSHA provided persons interested in the IFR 60 days to submit comments and considered the one comment pertinent to the IFR that it received in deciding to finalize without change the procedures in the IFR.

Furthermore, because this rule is procedural and interpretative rather than substantive, the normal requirement of 5 U.S.C. 553(d) that a rule be effective 30 days after publication in the **Federal Register** is inapplicable. OSHA also finds good cause to provide an immediate effective date for this final rule, which simply finalizes without change the procedures that have been in place since publication of the IFR. It is in the public interest that the rule be effective immediately so that parties may know what procedures are applicable to pending cases.

V. Executive Orders 12866 and 13563; Unfunded Mandates Reform Act of 1995; Executive Order 13132

The Department has concluded that this rule is not a ''significant regulatory action'' within the meaning of Executive Order 12866, reaffirmed by Executive Order 13563, because it is not likely to: (1) Have an annual effect on the economy of $100 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 Executive Order 12866. Therefore, no economic impact analysis under Section 6(a)(3)(C) of Executive Order 12866 has been prepared. For the same reason, and because no notice of proposed rulemaking has been published, no statement is required under Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532. In any event, this rulemaking is procedural and interpretive in nature and is thus not expected to have a significant economic impact. Finally, this rule does not have ''federalism implications.'' The rule does not have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government'' and therefore is not subject to Executive Order 13132 (Federalism).

VI. Regulatory Flexibility Analysis

The notice and comment rulemaking procedures of Section 553 of the APA do not apply ''to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.'' 5 U.S.C. 553(b)(A). Rules that are exempt from APA notice and comment requirements are also exempt from the Regulatory Flexibility Act (RFA). See SBA Office of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act, at 9; also found at: *https://www.sba.gov/advocacy/guide-government-agencies-how-comply-regulatory-flexibility-act.* This is a rule of agency procedure, practice, and interpretation within the meaning of 5 U.S.C. 553; and, therefore, the rule is exempt from both the notice and comment rulemaking procedures of the APA and the requirements under the RFA. Nonetheless OSHA, in the IFR, provided interested persons 60 days to comment on the procedures applicable to retaliation complaints under MAP–21 and considered the one comment pertinent to the IFR that it received in deciding to finalize without change the procedures in the IFR.

List of Subjects in 29 CFR Part 1988

Administrative practice and procedure, Automobile dealers, Employment, Investigations, Motor vehicle defects, Motor vehicle manufacturers, Part suppliers, Reporting and recordkeeping requirements, Whistleblower.

PART 1988—PROCEDURES FOR HANDLING RETALIATION COMPLAINTS UNDER SECTION 31307 OF THE MOVING AHEAD FOR PROGRESS IN THE 21ST CENTURY ACT (MAP–21)

■ For the reasons set out in the preamble, the interim final rule adding 29 CFR part 1988, which was published at 81 FR 13976 on March 16, 2016, is adopted as a final rule without change.

Signed at Washington, DC, on December 8, 2016.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2016–29914 Filed 12–13–16; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2016–1044]

Drawbridge Operation Regulation; Sacramento River, Sacramento, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of deviation from drawbridge regulation.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the Tower Drawbridge across the Sacramento River, mile 59.0, at Sacramento, CA. The deviation is necessary to allow the community to participate in the New Year's Eve fireworks. This deviation allows the bridge to remain in the closed-to-navigation position during the deviation period.

DATES: This deviation is effective from 8:30 p.m. on December 31, 2016 to 12:15 a.m. on January 1, 2017.

ADDRESSES: The docket for this deviation, [USCG–2016–1044], is available at *http://www.regulations.gov.* Type the docket number in the ''SEARCH'' box and click ''SEARCH''. Click on Open Docket Folder on the line associated with this deviation.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email David H. Sulouff, Chief, Bridge Section, Eleventh Coast Guard District; telephone 510–437–3516, email *David.H.Sulouff@uscg.mil.*

SUPPLEMENTARY INFORMATION: California Department of Transportation has requested a temporary change to the operation of the Tower Drawbridge, mile 59.0, over Sacramento River, at Sacramento, CA. The vertical lift bridge navigation span provides a vertical clearance of 30 feet above Mean High Water in the closed-to-navigation position. The draw operates as required by 33 CFR 117.189(a). Navigation on the waterway is commercial and recreational.

The drawspan will be secured in the closed-to-navigation position from 8:30 p.m. on December 31, 2016 to 12:15 a.m. on January 1, 2017, to allow the community to participate in the New Year's Eve fireworks. This temporary deviation has been coordinated with the waterway users. No objections to the proposed temporary deviation were raised.

Vessels able to pass through the bridge in the closed position may do so at any time. The bridge will not be able to open for emergencies and there is no immediate alternate route for vessels to pass. The Coast Guard will also inform the users of the waterway through our Local and Broadcast Notices to Mariners of the change in operating schedule for the bridge so that vessel operators can arrange their transits to minimize any impact caused by the temporary deviation.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: December 9, 2016.

D.H. Sulouff,

District Bridge Chief, Eleventh Coast Guard District.

[FR Doc. 2016–29986 Filed 12–13–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AP44

Advanced Practice Registered Nurses

AGENCY: Department of Veterans Affairs.

ACTION: Final rule with comment period.

SUMMARY: The Department of Veterans Affairs (VA) is amending its medical regulations to permit full practice authority of three roles of VA advanced practice registered nurses (APRN) when they are acting within the scope of their VA employment. Certified Registered Nurse Anesthetists (CRNA) will not be included in VA's full practice authority

under this final rule, but comment is requested on whether there are access issues or other unconsidered circumstances that might warrant their inclusion in a future rulemaking. The final rulemaking establishes the professional qualifications an individual must possess to be appointed as an APRN within VA, establishes the criteria under which VA may grant full practice authority to an APRN, and defines the scope of full practice authority for each of the three roles of APRN. The services provided by an APRN under full practice authority in VA are consistent with the nursing profession's standards of practice for such roles. This rulemaking increases veterans' access to VA health care by expanding the pool of qualified health care professionals who are authorized to provide primary health care and other related health care services to the full extent of their education, training, and certification, without the clinical supervision of physicians, and it permits VA to use its health care resources more effectively and in a manner that is consistent with the role of APRNs in the non-VA health care sector, while maintaining the patient-centered, safe, high-quality health care that veterans receive from VA.

DATES: This final rule is effective January 13, 2017. Comments on full practice authority for CRNAs must be received by VA on or before January 13, 2017.

ADDRESSES: Written comments may be submitted: Through *http://www.Regulations.gov;* by mail or hand-delivery to Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue NW., Room 1068, Washington, DC 20420; by fax to (202) 273–9026. Comments should indicate that they are submitted in response to ''RIN 2900–AP44–Advanced Practice Registered Nurses.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Call (202) 461–4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: David J. Shulkin, M.D., Under Secretary for Health, (202) 461–7000 or Linda M. McConnell, Office of Nursing Services, (202) 461–6700, 810 Vermont Avenue NW., Washington, DC 20420. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: In a document published in the **Federal Register** on May 25, 2016 (81 FR 33155), VA proposed to amend its medical regulations in part 17 of Title 38, Code of Federal Regulations (CFR) to permit full practice authority of four roles of VA advanced practice registered nurses (APRN) when they were acting within the scope of their VA employment. We provided a 60-day comment period, which ended on July 25, 2016. We received 223,296 comments on the proposed rule.

The Office of the Federal Register has prepared a document, A Guide to the Rulemaking Process, that states that an agency is not permitted to base its final rule on the number of comments received in support of the rule over those in opposition to it or vice versa. The document further states that an agency must base its reasoning and conclusions on the rulemaking record, which consists of the comments received, scientific data, expert opinions, and facts accumulated during the pre-rule and proposed rule stages. This final rule adheres to the guidance established by the Office of the Federal Register.

Section 7301 of title 38 United States Code (U.S.C.) establishes the Veterans Health Administration (VHA) within VA, and establishes that its primary function is to ''provide a complete medical and hospital service for the medical care and treatment of veterans, as provided in this title and in regulations prescribed by the Secretary pursuant to this title.'' To allow VA to carry out its medical care mission, Congress also established a comprehensive personnel system for certain medical employees in VHA, independent of the civil service rules. See Chapters 73 and 74 of title 38, U.S.C. As an integrated Federal health care system with the responsibility to provide comprehensive care under 38 U.S.C. 7301, it is essential that VHA wisely manage its resources and fully utilize the skills of its health care providers to the full extent of their education, training, and certification.

By permitting the three APRN roles, Certified Nurse Practitioner (CNP), Clinical Nurse Specialist (CNS), or Certified Nurse-Midwife (CNM), throughout the VHA system with a way to achieve full practice authority in order to provide advanced nursing services to the full extent of their professional competence, VHA furthers its statutory mandate to provide quality health care to our nation's veterans. This regulatory change to nursing policy permits three roles of APRNs to practice to the full extent of their education, training and certification, without the clinical supervision or mandatory collaboration of physicians. Standardization of APRN full practice authority, without regard for individual State practice regulations, helps to ensure a consistent delivery of health care across VHA by decreasing the variability in APRN practice that currently exists as a result of disparate State practice regulations. Certified Registered Nurse Anesthetists (CRNA) will not be included in VA's full practice authority under this final rule, but comment is requested on whether there are access issues or other unconsidered circumstances that might warrant their inclusion in a future rulemaking.

Standardization of full practice authority to the three APRN roles also aids VA in making the most efficient use of VHA APRN staff capabilities, which increases VA's capacity to provide timely, efficient, and effective primary care services, as well as other services. This increases veteran access to needed VA health care, particularly in medically-underserved areas and decreases the amount of time veterans spend waiting for patient appointments. In addition, standardizing APRN practice authority enables veterans, their families, and caregivers to understand more readily the health care services that VA APRNs are authorized to provide. This preemptive rule increases access to care and reduces the wait times for VA appointments utilizing the current workforce already in place. VA's position to not include the CRNAs in this final rule does not stem from the CRNAs' inability to practice to the full extent of their professional competence, but rather from VA's lack of access problems in the area of anesthesiology.

To ensure that VA would have available highly qualified medical personnel, Congress mandated the basic qualifications for certain health care positions, including registered nurses. Sections 7401 through 7464 of title 38, U.S.C., grant VA authority to regulate the professional activities of such personnel. To be eligible for appointment as a VA employee in a health care position (other than Director) covered by section 7402(b), of title 38, U.S.C., a person must, among other requirements, be licensed, registered, or certified to practice their profession in a State. The standards prescribed in section 7402(b) establish only the basic qualifications necessary ''[t]o be eligible for appointment'' and

do not limit the Secretary or Under Secretary for Health from establishing other qualifications for appointment, or additional rules governing such personnel. In particular, 38 U.S.C. 7403(a)(1) provides that appointments under Chapter 74 ''may be made only after qualifications have been established in accordance with regulations prescribed by the Secretary, without regard to civil-service requirements.'' As the head of VHA, the Under Secretary for Health has the duty to ''prescribe all regulations necessary to the administration of the Veterans Health Administration,'' subject to approval by the Secretary. See 38 U.S.C. 7304; see also 38 U.S.C. 501. Pursuant to this authority, the Under Secretary for Health is authorized to establish the qualifications and clinical practice standards of VHA's nursing personnel and to otherwise regulate their professional conduct.

To continue to provide high quality health care to veterans, this final rule will allow three roles of APRNs to practice to the full extent of their education, training, and certification when acting within the scope of their VA employment, regardless of State restrictions that limit such full practice authority, except for applicable State restrictions on the authority to prescribe and administer controlled substances.

The proposed rule stated that VA was proposing to grant full practice authority to four APRN roles. We received 104,256 comments against granting full practice authority to VA CRNAs. The American Society of Anesthesiologists lobbied heavily against VA CRNAs having full practice authority. They established a Web site that would facilitate comments against the CRNAs, which went as far as providing the language for the comment. These comments were not substantive in nature and were akin to votes in a ballot box. The main argument against the VA CRNAs was that by granting CRNAs full practice authority VA would be eliminating the team based concept of care in anesthesia, which is currently established in VA policy via VHA Handbook 1123, Anesthesia Service. Team based care was not addressed in the proposed rule because we consider it to be an integral part in addressing all of a veteran's health care needs. Establishing full practice authority to VA APRNs, including CRNAs, would not eliminate any well-established team based care. The second argument posed against granting full practice authority to VA CRNAs was that there is ''no shortage of physician anesthesiologists in VA and the current system allows for sufficient flexibility to address the needs of all VA hospitals.'' Again, most of these comments were not substantiated by evidence, though as discussed further below, VA does believe that evidence exists that there is not currently a shortage of anesthesiologists that critically impacts access to care, and therefore VA agrees with the sentiment of this argument.

We similarly received 45,915 comments in support of full practice authority for APRNs as a whole without specific mention of CRNAs. We received 9,613 comments in support of full practice authority for CRNAs. The CRNA-specific commenters stated that ''CRNAs currently exercise their full scope of practice in 17 states and in the Army, Navy, Air Force, Combat Support Hospitals, Forward Surgical Teams, and the Indian Health Services, even in some VAs where CRNAs are the only anesthesia providers. Evidence shows that APRN provided care increases access, improves quality, and reduces costs for all Americans. By extending Full Practice authority to CRNAs and other APRNs at the VHA, we can help end delays to high-quality, safe, and cost-effective care for America's Veterans. Implement this well researched policy change promptly.'' The commenters also stated that ''APRN's and CRNAs practicing in a manner which they have been educated and trained to provide expert care has been backed by decades of research.'' Several other commenters stated ''Over 900 CRNAs provide every type of anesthesia care, as well as chronic pain management services, for our Veterans in the VHA. The safety of CRNA services has long been recognized by the VHA and underscored by peer-reviewed scientific studies, including a major study published in Health Affairs which found that anesthesia care by CRNAs was equally safe with or without physician supervision.'' VA agrees with these comments, but has chosen not to include CRNAs in this final rule due to VA's lack of access problems in the area of anesthesiology.

Commenters raised anesthesia issues related to the RAND Assessment, which the public can view at *http://www.va.gov/opa/choiceact/documents/assessments/Assessment_B_Health_Care_Capabilities.pdf.* Specifically, the Department of Veterans Affairs Independent Assessment B, Appendix E–I reported on qualitative interviews with Chiefs of Staff at VA facilities; fourteen comments discussed lack of anesthesia service/support as a barrier to providing care, including for urgent and non-urgent cardiovascular surgeries (three comments), as well as colon cancer/gastrointestinal services such as endoscopy and colonoscopy (eleven comments).[1] As discussed further below, VA understands that there are difficulties hiring and retaining anesthesia providers, but generally believes that this situation is improving. VA reviewed the qualitative interviews with Chiefs of Staff at VA facilities contained in the RAND Assessment but did not determine that data supported granting FPA to CRNAs to solve access issues. Nonetheless, VA is requesting further comments on whether advanced practice authority for CRNAs would bring further improvements.

We reviewed the Veterans Health Administration payroll data revealed that, as of August 31, 2016, VHA employs 940 Physician Anesthesiologists (physicians), 5,444 Nurse Practitioners, 937 CRNAs, and 386 Nurse Specialists. Nurse Practitioner is currently #3 in the top 5 difficult to recruit and retain nurse specialties. Additional workforce trend data is available in the Regulatory Impact Analysis.

In a 2015 independent survey of VA general facility Chief of Staffs conducted by the Rand Corporation, approx. 38% (43 of 111) reported problems *recruiting or hiring* advanced practice providers, such as Nurse Practitioners, and 50% reported problems recruiting or hiring nurses such as clinical specialists.[2] The most commonly reported barriers to recruitment and hiring for these medical experts were: Non-competitive wages (72% of 43 responses for advanced practice providers; 64% of 56 responses percent for nurses), Human Resources process (42% for advanced practice providers; 45% for nurses), geographic location of facility (35% for advanced practice providers; 23% for nurses), and lack of qualified applicants (26% for advanced practice providers; 32% for nurses).[3]

Similarly, nearly 30% (33 of 111) of Chiefs of Staffs reported problems *retaining* advanced practice providers, such as NPs, and almost half reported problems retaining nurses, such as clinical specialists.[4] The most commonly reported reasons for problems with retention of these medical experts were: Dissatisfaction

[1] VA Independent Assessment, Appendices E–I, *http://www.va.gov/opa/choiceact/documents/assessments/Assessment_B_Health_Care_Capabilities_Appendices_E-I.pdf.*

[2] RAND, Independent Assessment B, Appendix G.1.1 Chief of Staff, 2015 Survey of VA Capabilities and Resources, G–5.

[3] *Id.* at G–6. (Totals greater than 100 due to option to select the two most important factors affecting recruiting and hiring. Only respondents who reported problems recruiting specific personnel categories were asked to respond.)

[4] *Id.* at G–7.

with supervision/management support (61% of 31 responses for advanced practice providers; 57% of 49 responses percent for nurses) and dissatisfaction with pay (36% of advanced practice providers; 27% of nurses).[5] Chiefs of Staff rarely selected lack of opportunity for professional growth/promotion as a top two reason for retention problems, only 6% selected this option for advanced practice providers and 8% for nurses. Lack of professional autonomy was also not viewed as a significant contributor to retention issues (3% for advanced practice providers, 0% for nurses).

In fiscal years 2011 through 2015, CRNAs were in the top 10 VHA Occupations of Critical Need, but dropped to 12th place in FY 2015. Despite the challenges discussed above, within VHA the occupation has grown approximately 27% between FY 2010 and FY 2014 (166 employees). Total loss rates decreased from 6.6% in FY 2013 to 6.2% in FY 2014, but have ranged from 9.4% to 6.2% between FY 2009 and FY 2014. Voluntary retirements decreased from 3.2% in FY 2013 to 2.7% in FY 2014. Quits increased from 1.9% in FY 2013 to 2.6% in FY 2014. VA has taken steps to improve recruitment of CRNAs, including partnering with the U.S. Army to educate interested and qualified VA registered nurses in the field of nurse anesthesia.[6] Also, as previously stated in this rulemaking, VA CRNAs are a crucial part of the team based anesthesia care. VHA Handbook 1123, Anesthesia Service, states in paragraph 4.a. ''In facilities with both anesthesiologists and nurse anesthetists, care needs to be approached in a team fashion taking into account the education, training, and licensure of all practitioners.''

Anesthesiology is not in the top 5 difficult to recruit and retain physician specialties. However, in a 2015 independent survey of VA general facility Chief of Staffs conducted by the Rand Corporation, 25% (27 of 111) reported problems *recruiting or hiring* anesthesiologists.[7] The most commonly reported barriers to recruitment and hiring for these medical experts were: Non-competitive wages (78% of 27 respondents), Human Resources process (25%), and geographic location of facility (22.2%).[8] Nearly 10% of Chiefs of Staff (11/111) reported difficulties *retaining* anesthesiologists.[9] The most commonly reported reason for staff retention problems for these medical experts were: Dissatisfaction with supervision/management support (27%) and dissatisfaction with pay (55%).[10] Despite these challenges, over the past 5 years, the number of anesthesiologists VHA hired increased from 87 in FY11 to 149 in FY15. The FY15 turnover rate for anesthesiologists is slightly lower than the turnover rate for physicians overall. VHA has had recent successes in hiring or contracting for Anesthesiology services.

Recruiting, hiring, and retention challenges, as reported by VA facility Chiefs of Staffs struggling with these issues, are similar among advanced practice or specialist nurses and anesthesiologists. These managers did not view lack of advancement opportunity or practice autonomy as significant barriers to retention, which may indicate that increased use of advanced practice authority is unlikely to fully resolve this challenge—both because it may not address the root causes of these problems and because similar challenges constrain hiring of both doctors and nurses. On the other hand, the perceptions of potential applicants and staff may not be fully reflected by a survey of facility management. Further, it is possible that resources might be available to address some of these underlying issues if efficiencies were realized as a result of advanced practice nursing authority. VA welcomes comment on whether lack of advanced practice authority is a hiring, recruitment, or retention barrier for CRNAs, as well as on the extent to which advanced practice authority could help to resolve these issues either directly or indirectly.

Based on this analysis, VHA believes that VA does not have immediate and broad access problems in the area of anesthesia care across the full VA health care system that require full practice authority for all CRNAs.

However, VA requests comment on the question of whether there are current anesthesia care access issues for particular states or VA facilities and whether permitting CRNAs to practice to the full extent of their advanced authority would resolve these issues. VA also requests comment on potential future anesthesia care access issues, particularly in light of projected increases in demand for VA care, including surgical care, in coming years.

We will, therefore, not finalize the provision including CRNAs in the rule as one of the APRN roles that may be granted full practice authority at this time. However, we request comment on this decision. If we learn of access problems in the area of anesthesia care in specific facilities or more generally that would benefit from advanced practice authority, now or in the future, or if other relevant circumstances change, we will consider a follow-up rulemaking to address granting full practice authority to CRNAs.

VA CRNAs that have already been granted full practice authority by their State license will continue to practice in VA in accordance with their State license and subject to credentialing and privileging by a VA medical facility's medical executive committee. VA will not restrict or eliminate these CRNAs' full practice authority.

This final rule uses the term ''full practice authority'' to refer to the APRN's authority to provide advanced nursing services without the clinical oversight of a physician when that APRN is working within the scope of their VA employment. Such full practice authority is granted by VA upon demonstrating that the advanced educational, testing, and licensing requirements established in this rulemaking are met and upon the recommendation and approval of the medical executive committee when the provider is credentialed and privileged.

In this rulemaking, VA is exercising Federal preemption of State nursing licensure laws to the extent such State laws conflict with the full practice authority granted to VA APRNs while acting within the scope of their VA employment. Preemption is the minimum necessary action for VA to allow APRNs full practice authority. It is impractical for VA to consult with each State that does not allow full practice authority to APRNs to change their laws regarding full practice authority.

The campaign in support of the proposed rule was not as extensive as the campaign against granting full practice authority to CRNAs. The main lobbyists in support of the proposed rule were the American Nurses Association and the American Association of Nurse Practitioners, who supported a letter campaign. We received 45,915 comments in support of the proposed rule. Of these 45,915, we received specific support of individual APRN roles as follows: 9,613 in support of CRNAs, 1,079 in support of CNM, and 495 in support of CNPs. These

[5] *Id.* at G–9.

[6] VA, Patient Care Services, Nurse Anesthetist Education Program, available at: *http://www.patientcare.va.gov/CRNA_Education/Pages/Certified_Registered_Nurse_Anesthetists.asp* (last accessed Oct. 18, 2016).

[7] RAND, Independent Assessment B, Appendix G.1.1 Chief of Staff, 2015 Survey of VA Capabilities and Resources, G–5.

[8] *Id.* at G–6.

[9] *Id.* at G–8.

[10] *Id.* at G–9.

commenters agreed that the proposed rule aligns with the Institute of Medicine (IOM) of the National Academy of Sciences 2010 IOM Report in that the rule removes scope of-practice barriers and increases access to VA care. The commenters also agreed that the APRNs are highly skilled in their particular APRN role, as demonstrated by their education and hours of skilled training. Several commenters stated that ''APRNs will deliver care to the full scope of their education and training and ensure that the VA has the flexibility to utilize all providers within the healthcare team, maximizing the effective use of resources and providing optimal care for the men and women who have served our country in uniform.'' Other commenters supported the proposed rule by stating ''this proposal supports the VHA team model of care and promotes efficiency in healthcare delivery by making smarter use of the 6,000 APRNs'' that are employed by VA. ''Most importantly, this proposal has the ability to make real and significant improvements to the availability of high-quality care for millions of Veterans.'' The commenters also stated that ''APRN full practice authority within the VA would create nationwide consistency, thereby improving upon the current patchwork of state regulations and making the most effective use of these health care professionals.'' We thank the commenters for their support of the proposed rule.

We received a comment in support of the proposed rule from the Federal Trade Commission (FTC). The FTC focuses on the ''impact of regulation on competition in the private sector and, ultimately, on consumers.'' The FTC's main interest in the proposed rule was ''the extent that the VA's actions may encourage entry into health care service provider markets, broaden the availability of health care services outside the VHA system, as well as within it, and yield information about new models of health care delivery.'' The FTC believes that its experience ''may inform and support the VA's endeavor.'' The FTC staff supports the granting of full practice authority to APRNs, which will benefit ''VA's patients and the institution itself, by improving access to care, containing costs, and expanding innovation in health care delivery.'' VA's actions could also spur competition among ''health care providers and generate additional data in support of safe APRN practice,'' which could also spill into the private health care sector. We thank the FTC for their support of the proposed rule and make no edits based on this comment.

Several commenters stated that they were concerned with proposed § 17.415(d)(1)(i)(B), where we stated that a Certified Nurse Practitioner (CNP) may order, perform, or supervise laboratory studies. The commenters stated that the proposed language does not ''adequately appreciate the levels of complexity involved in laboratory testing'' and that there are rigid standards for laboratory tests that require rigorous academic and practical training, which are not part of the training for APRNs. Another commenter stated, ''While the VHA uses the word 'interpret' in reference to laboratory and imaging studies,'' the commenter ''. . . infers that the VA's intent is to grant the ability for CNPs to interpret laboratory and imaging results, not to interpret or report raw images or data.'' The commenter suggested that VA amend the term "'interpret' and recommends instead to use 'integrate results into clinical decision making,' or some other phrase'' in order to avoid confusion between the duties of an APRN and those of a laboratory specialist. We agree with the commenter in that the proposed language might be construed as allowing CNPs the ability to perform laboratory studies. It is not VA's intent to have APRNs take over the role of laboratory specialists. These specialists perform a crucial role at VA medical facilities and are skillfully trained in performing the various testing techniques that allow health care professionals to properly treat a veteran's medical condition. We are amending proposed § 17.415(d)(1)(i)(B) to now state that a CNP may be granted full practice authority to ''Order laboratory and imaging studies and integrate the results into clinical decision making.''

Other commenters were similarly concerned with the language in proposed § 17.415(d)(1)(i)(B), but as it refers to ordering, performing, supervising and interpreting imaging studies. The commenters stated that only trained radiologists, who undergo 10 years of comprehensive training to accurately interpret high-tech imaging exams and safely account for the radiation used in many scans should perform these duties. The commenters further stated that imaging exams should only be performed by registered radiological technologists. It is not VA's intent to replace our highly qualified radiologists or radiological technologists. VA is committed to providing high quality health care for our nation's veterans and is proud of the outstanding work performed by radiologists in our system. We note, however, that during the course of care, other health care providers may review radiology exams and make evaluations based upon the radiologist's findings. These health care providers include providers in emergency departments, primary care clinics, and specialty clinics throughout the VA health care system. All radiology studies are formally performed and read by individuals who are credentialed in radiology. This rulemaking will not change this practice. In order to avoid confusion, we are amending § 17.415(d)(1)(i)(B) by removing performing, supervising, and interpreting imaging studies and replacing it with ''Order laboratory and imaging studies and integrate the results into clinical decision making.''

Some commenters were also concerned that CNPs ''may order more imaging studies, which increases the total cost and the radiation dose to the patient.'' One commenter cited a study that indicated that CNPs may order imaging more frequently than primary care physicians. However, the study defined advanced practice clinicians to include CNPs and physician assistants, and did not differentiate between these two different types of health care providers in the study. This rulemaking only addresses APRNs, and it is unclear how the study was influenced by including physician assistants. It's also unclear whether there is actually a significantly higher rate of ordering imaging among these groups. We found no other significant evidence provided by the commenters to support the claim that CNPs order more imaging studies than physicians. For these reasons, we make no changes based on this comment.

Several commenters were concerned that the value of team-based care would be undermined by granting full practice authority to APRNs. They stated that physicians and other members of a health care team bring unique value to patient care that is based on the individual member's education, skill, and training. The commenters argued that by eliminating team-based care, patients would be placed at risk. Team-based care is an integral part of VA health care and is used in a wide range of settings, which include polytrauma care, nutrition support, and primary care. VA will continue to provide the already established team-based care to properly treat the veteran's individual health care needs. The proposed rule only addressed the granting of full practice authority to APRNs and does not address team-based care. Any change to current VA team-based health

care is beyond the scope of this rulemaking. We are not making any edits based on these comments.

Other commenters questioned an APRN's years of training versus those of a physician, citing an American Medical Association statement that ''physicians typically receive a combined total of over 10,000 hours of training and patient experience prior to beginning practice, whereas the typical APRN receives less than 1,000 hours of training and patient experience.'' The commenters added that trained physicians should be taking care of the veterans' medical needs as opposed to a nurse who has not received the same training and education as physicians. APRN education is competency based and APRNs must demonstrate that they have integrated the knowledge and skill to provide safe patient care. Entry into APRN practice is predicated on the requirement to attain national certification. APRNs are held to the same standard as physicians in measuring patient outcomes for safe and effective care. VHA acknowledges the fact there are differences in physician and APRN educational and training models and is not planning on replacing physicians with APRNs in any health care setting within VHA.

APRNs are valuable members of VA's health care system and provide a degree of much needed experience to alleviate the current access problems that are affecting VA. APRNs, like physicians, are required to maintain their State license and their health care skills are continuously assessed through the privileging process. As we stated in the proposed rule ''APRNs would not be authorized to replace or act as physicians or to provide any health care services that are beyond their clinical education, training, and national certification'' and an APRN will require approval of their credentials and privileges by the VA medical facility's medical executive committee. An APRN will refer patients to a physician for care that goes beyond that of the APRN's training. We will not make any edits based on these comments.

Several commenters stated that they would like all veterans to receive the best and safest medical care in VA and do not believe that granting APRNs full practice authority will lead to such care. As previously stated in this final rule, VHA's primary function is to ''provide a complete medical and hospital service for the medical care and treatment of veterans'' under 38 U.S.C. 7301(b). We also stated in the proposed rule that in carrying out this function, VHA has an obligation to ensure that patient care is appropriate and safe and its health care practitioners meet or exceed generally-accepted professional standards for patient care. The general qualifications for a person to be appointed as a VA nurse are found in 38 U.S.C. 7402(b)(3). In addition to these general qualifications, the proposed rule stated that APRNs would now be required to have ''successfully completed a nationally-accredited, graduate-level educational program that prepares the advanced practice registered nurse in one of the four APRN roles; and to possess, and maintain, national certification and State licensure in that APRN role.'' VA believes that these additional qualifications for APRNs ensure that VA has highly qualified health care personnel to provide safe health care to veterans. In addition, the VA medical facility's medical executive committee will be responsible for the quality and oversight of the health care provider. Additionally, the IOM Report states that ''the contention that APRNs are less able than physicians to deliver care that is safe, effective, and efficient is not supported by the decades of research that has examined this question (Brown and Grimes, 1995; Fairman, 2008; Groth et al., 2010; Hatem et al., 2008; Hogan et al., 2010; Horrocks et al., 2002; Hughes et al., 2010; Laurant et al., 2004; Mundinger et al., 2000; Office of Technology Assessment, 1986). No studies suggest that care is better in states that have more restrictive scope-of-practice regulations for APRNs than in those that do not.'' We will not make any edits based on these comments.

Several commenters stated that the proposed rule would undermine the State requirement that CNPs need to collaborate with or be supervised by physicians. They were also concerned that the rule would eliminate local control of licensing and regulation of physicians and health care providers, which would result in lower standard of care. We note that there may be discrepancies between State practice acts and this final rule which is why this regulation preempts conflicting state and local law. As we stated in the proposed rule, ''In circumstances where there is a conflict between Federal and State Law, Federal law prevails in accordance with Article VI, clause 2, of the U.S. Constitution (Supremacy Clause).'' We also stated ''where there is conflict between State law and Federal law with regard to full practice authority of APRNs working within the scope of their federal VA employment, this regulation would control.'' Again, we emphasize that this rule only preempts State law for VA employees practicing within the scope of their VA employment, and that as a result, any such infringement upon State authority would be limited. Further, this final rule does not eliminate the APRN's need to possess a license from a State licensing board in one of the recognized APRN roles. This is a requirement in proposed § 17.415(a)(3). Proposed § 17.415(a)(4) also requires an APRN to maintain both the national certification and licensure. In addition to these requirements, an APRN must demonstrate the knowledge and skills necessary to provide the services described in proposed § 17.415(d) without the clinical oversight of a physician, and is thus qualified to be privileged for such scope of practice by the medical executive committee. These measures will ensure that patients receive care from an APRN that is credentialed and privileged to perform the specified tasks and will promote patient safety. We will not make any edits based on these comments.

Several commenters were concerned that APRNs would be at a higher risk of malpractice, especially when the APRN's State license does not grant full practice authority. A commenter asserted that the APRN's defense would be diminished when the ''state in which the APRN is practicing in deems an act beyond the provider's scope of practice, but the Federal government has given all APRNs the broadest rights available.'' Under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2401(b), 2671–2680, and the Westfall Act, 28 U.S.C. 2679(b)–(d), employees furnishing medical care or services in the exercise of their duties for VHA are immune from personal liability for malpractice in the scope of their employment; the rule clarifies the intent of VA that APRNs will be acting within the scope of employment when performing their duties in the capacities set forth herein. The commenters further stated that the preemption of State law would create a discrepancy with VA policy in that VA states in the proposed rule that an APRN must be licensed by a State. As previously stated in this rulemaking, where there is conflict between State law and Federal law with regard to full practice authority of APRNs working within the scope of their Federal employment, this regulation would control. In doing so, VA is better able to protect the APRNs against any challenge of their State license when practicing within the scope of their VA employment. VA does not see a disconnect between preemption and the requirement that an APRN must have a State license. Such requirement is established in statute

under 38 U.S.C. 7402 for the qualifications of appointment as a health care provider in VA. As we stated in the proposed rule, we are establishing ''additional professional qualifications an individual must possess to be appointed as an APRN within VA.'' These additional requirements go beyond the requirements of some State licenses and ensure consistency for health care provided within VA. We are not making any edits to the rule based on these comments.

One commenter indicated that the proposed rule stated ''Section 4 of Executive Order 13132 requires that when an agency proposes to act through rulemaking to preempt state law, 'the agency shall consult, to the *extent practicable,* with appropriate State and local officials in an effort to avoid such conflict.' '' [Emphasis added.] The commenter further stated that ''VA did not provide affected state and local officials with such notice.'' Specifically, ''no state medical boards (whether osteopathic or allopathic) were consulted. By the very nature of the Notice of Proposed Rule Making (NPRM), these state medical boards, who are charged with overseeing independent medical practice and assuring patient safety, are 'affected State officials.' '' Initially, we note that section 1(d) of the Executive Order defines State and local officials as including only *elected* officials, and we do not believe the officials overseeing State medical boards are elected. Additionally, section 4 of the Executive Order, as cited by the commenter, states that the ''agency shall consult, to the *extent practicable*'' with affected State and local officials (emphasis added). Because advanced practice registered nurses, particularly NPs, are typically regulated by state Boards of Nursing rather than by State medical board we believe they are most affected by this rule.[11] Although VA did not specifically engage State medical boards, VA reached out to several medical associations, including the American College of Surgeons, American Academy of Family Practice Physicians, American Society of Anesthesiologists, American Medical Association, Association of American Medical Colleges, and, although not a medical association, The Joint Commission-Office of Accreditation and Certification. VA consulted with elected State officials, as required by Executive Order 13132, when it received numerous calls and correspondence from State and local officials in support of this proposed rule. Such State and local officials included State Senators from Georgia and Illinois, State Representatives from Florida, Ohio, Vermont, North Carolina, Georgia, and Illinois, County Commissioners from Nevada, Ohio, and North Carolina, and the State Comptroller and Secretary of State from Illinois, to name a few. We also consulted with the National Council of State Boards of Nursing. We believe that VA's efforts to consult with State and local officials meet the requirements of section 4(d) of Executive Order 13132. Furthermore, the proposed rule encouraged any comments regarding the granting of full practice authority, which afforded the ''affected State and local officials notice and an opportunity for appropriate participation in the proceedings.'' As we state in the Federalism paragraph in this rule, at least twelve States responded to VA's outreach efforts prior to publication of the proposed rule. It would have been impracticable for VA to have consulted with all State medical boards as an outreach effort prior to publication of the proposed rule. We are not making edits based on this comment.

Another commenter stated that the proposed rule ''will directly affect many individuals and will directly affect small entities.'' The commenter further stated that the rule should not be exempt from the initial regulatory flexibility analysis as stated in the Regulatory Flexibility Act (5 U.S.C. 603 and 604), will not maximize net benefits and equity and will raise novel and legal policy issues. Another comment emphasizes only that ''some private-sector anesthesiology services'' are provided by small physician practices, which ''may'' include nurse anesthetists. It further notes that in a ''limited'' number of states, there is a ''possibility'' that private sector anesthetists could be induced to work at VA instead of in the private sector. None of these claims demonstrate that the regulation would have a significant economic effect on a substantial number of small entities; VA found no such effect would result in its proposed rule, and certified this finding as required by 5 U.S.C. 605(b). We further note that private sector providers are not subject to the proposed regulation, which would only regulate the activities of VA employees, and hence would be outside the scope of a required analysis under the Regulatory Flexibility Act. See, *e.g., Mid-Tex Electric Cooperative* v. *FERC,* 773 F.2d 327, 342–3 (D.C. Cir. 1985); *Cement Kiln Recycling Coalition* v. *EPA,* 255 F.3d 855, 868–9 (D.C. Cir. 2001); and *Aeronautical Repair Station Ass'n* v. *F.A.A.,* 494 F.3d 161, 174–7. We are not making any edits based on these comments.

Another commenter was in support of the proposed rule, but had concerns regarding prescriptive authority, namely that in some States the prescriptive authority regulations ''are linked to scope of practice laws which would create confusion in VA facilities operating within those states.'' The commenter further stated that ''collaborative agreements may limit the scope of practice of the advanced practice registered nurse and inhibit full practice authority.'' VA understands that the proposed change could create confusion, and as a result, VA will train and educate its APRNs in their authorities based upon this rule to reduce the potential for confusion and to ensure they can practice to the full extent of their authority. We make no edits based on this comment.

A commenter stated a belief that there is a distinction ''between the ability of APRNs to perform tasks autonomously and their ability to practice independently. The former is a well-established practice, while the latter is controversial.'' The commenter distinguished '' 'autonomy' from 'independence,' the latter referring to practitioners acting alone and not in a team-based model.'' The commenter stated that they support ''highly trained APPs who are part of a care team practicing autonomously within the scope and ability of their licensure. This is generally accomplished with collaborative practice between a collaborating physician and APPs on the care team.'' We previously stated in this final rule that team-based care was not addressed in the proposed rule. Team-based care is an integral part of VA health care, and we will continue to adhere to the already established team-based models of care within VA. We are not making any edits based on this comment.

Several commenters stated that VA should include physician assistants (PA) in the final rule and grant them full practice authority as well. Other commenters were opposed to the granting of full practice authority to PAs. We similarly received comments requesting that we include pharmacist practitioners in the rule. The granting of full practice authority to PAs and pharmacist practitioners was not addressed in the proposed rule and granting such authority in this final rule is beyond the scope of the proposed rule. VA would only be able to address

[11] Carolyn Buppert, Nurse Practitioner's Business Practice and Legal Guide, Appendix 3–A (5th Ed. 2015). (Delaware and Alabama, with joint oversight authority, are rare exceptions to this general rule.)

the granting of full practice authority to PAs and pharmacist assistants in a future rulemaking.

One commenter opposed the proposed rule and urged VA ''to instead focus on ways to improve access to care provided to veterans in community settings through the Choice Program. This would reduce wait times for appointments for all veterans, and free up VA clinicians to care for sicker and more complex patients in VA facilities prepared to address their unique needs.'' The Veterans Choice Program is authorized by section 101 of the Veterans Access, Choice, and Accountability Act of 2014. The program is implemented in 38 CFR 17.1500 through 17.1540. The proposed rule did not address the Veterans Choice Program, and in no way affects the Veterans Choice Program. This comment is beyond the scope of this rulemaking. We are not making any edits based on this comment.

One commenter suggested that VA amend its application process for hiring physicians citing that there are delays in the *usajobs.gov* job portal that often leads physicians to remove themselves from job contention. The application process for physician positions was not addressed in the proposed rule, and this issue is beyond the scope of this rulemaking. We are not making any edits based on this comment.

VA received many comments that expressed general support or opposition to this rulemaking and raised various issues related to administration of the VA health care system or VA benefits that are beyond the scope of this rulemaking. We make no changes based on these comments.

We are making a minor typographical edit by adding a comma in proposed § 17.415(e) to correct an error in the proposed rule. We are also amending the last sentence of the paragraph to now read ''Any State or local law, or regulation pursuant to such law, is without any force or effect on, and State or local governments have no legal authority to enforce them in relation to, activities performed under this section or decisions made by VA under this section.'' The proposed rule inadvertently did not include the phrase ''activities performed under''. We are now adding this clarifying language.

Based on the rationale set forth in the Supplementary Information to the proposed rule and in this final rule, VA is amending the proposed rule with the edits stated in this final rule.

Executive Order 13132, Federalism

Section 4 of Executive Order 13132 (titled ''Federalism'') requires an agency that is publishing a regulation that preempts State law to follow certain procedures. Section 4(b) of the Executive Order requires agencies to ''construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rulemaking only when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute or there is clear evidence to conclude that the Congress intended the agency to have the authority to preempt State law.'' Section 4(d) of the Executive Order requires that when an agency proposes to act through rulemaking to preempt State law, ''the agency shall consult, to the extent practicable, with appropriate State and local officials in an effort to avoid such a conflict.'' Section 4(e) of the Executive Order requires that when an agency proposes to act through rulemaking to preempt State law, ''the agency shall provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings.''

Section 6(c) of Executive Order 13132 states that ''no agency shall promulgate any regulation that has federalism implications and that preempts State law, unless the agency, prior to the formal promulgation of the regulation, (1) consulted with State and local officials early in the process of developing the proposed regulation; (2) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of the Office of Management and Budget a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met; and (3) makes available to the Director of the Office of Management and Budget any written communications submitted to the agency by State and local officials.''

Because this regulation addresses preemption of certain State laws, VA conducted prior consultation with State officials in compliance with Executive Order 13132. Such State officials include State Senators from Georgia and Illinois, State Representatives from Florida, Ohio, Vermont, North Carolina, Georgia, and Illinois, County Commissioners from Nevada, Ohio, and North Carolina, and the State Comptroller and Secretary of State from Illinois, to name a few. Although not necessarily required by the Executive Order, VA sent a letter to the National Council of State Boards of Nursing to state VA's intent to allow full practice authority to VA APRNs and for the National Council of State Boards of Nursing (NCSBN) to notify every State Board of Nursing of VA's intent and to seek feedback from such Boards of Nursing. In response to its request for comments, VA received correspondence from the Executive Director and other relevant staff members within NCSBN, which agreed with VA's position that this rulemaking properly identifies the areas in VA regulations that preempt State laws and regulations.

VA additionally engaged other relevant external groups on the proposed changes in this rulemaking, including the American Association of Nurse Anesthetists, American Association of Nurse Practitioners, American College of Surgeons, American Academy of Family Practice Physicians, American Society of Anesthesiologists, American Medical Association, Association of American Medical Colleges, The Joint Commission-Office of Accreditation and Certification, American Association of Retired Persons, American Legion, Blinded Veterans Association, Vietnam Veterans of America, American Women Veterans, Disabled American Veterans, Paralyzed Veterans of America, and Veterans of Foreign Wars. VA also engaged the Senate and House Veterans' Affairs Committees and the Senate and House Armed Services Committees.

Many external stakeholders expressed general support for VA's positions taken in the proposed rule, particularly with respect to full practice authority of APRNs in primary health care. However, we also received comments opposing full practice authority for CRNAs when providing anesthetics. To aid in VA's full consideration to this issue, VA encouraged any comments regarding the proposed full practice authority. In this way, VA provided all affected State and local officials notice and an opportunity for appropriate participation in the proceedings.

VA's promulgation of this regulation complies with the requirements of Executive Order 13132 by (1) in the absence of explicit preemption in the authorizing statute, identifying where the exercise of State authority conflicts with the exercise of Federal authority under Federal statute; (2) limiting the preemption to only those areas where we find a conflict exists; (3) restricting the regulatory preemption to the minimum level necessary to achieve the objectives of the statute; (4) receiving and considering input from State and

local officials as indicated above; and (5) providing opportunity for comment through this rulemaking.

Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as revised by this final rulemaking, represents VA's implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

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. This final rule directly affects only individuals and would not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct 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 12866 (Regulatory Planning and Review) defines a ''significant regulatory action,'' requiring review by the Office of Management and Budget (OMB), unless OMB waives such review, as ''any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 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 Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined to be a significant regulatory action under Executive Order 12866 because it is likely to result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order. VA's impact analysis can be found as a supporting document at *http://www.regulations.gov,* usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at *http://www.va.gov/orpm/,* by following the link for ''VA Regulations Published From FY 2004 Through Fiscal Year to Date.''

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 has no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are: 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; 64.013, Veterans Prosthetic Appliances; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care; and 64.024, VA Homeless Providers Grant and Per Diem Program.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document 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. Robert D. Snyder, Chief of Staff, Department of Veterans Affairs, approved this document on September 2, 2016, for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs—health, Grant programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and recordkeeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

Dated: December 8, 2016.

Jeffrey Martin,

Office Program Manager, Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

For the reasons set forth in the preamble, we amend 38 CFR part 17 as follows:

PART 17—MEDICAL

■ 1. The authority citation for part 17 is revised to read as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

Section 17.415 is also issued under 38 U.S.C. 7301, 7304, 7402, and 7403.

■ 2. Add an undesignated center heading immediately after § 17.410 and add new § 17.415 to read as follows:

Nursing Services

§ 17.415 Full practice authority for advanced practice registered nurses.

(a) *Advanced practice registered nurse (APRN).* For purposes of this section, an advanced practice registered nurse (APRN) is an individual who:

(1) Has completed a nationally-accredited, graduate-level educational program that prepares them for one of the three APRN roles of Certified Nurse Practitioner (CNP), Clinical Nurse Specialist (CNS), or Certified Nurse-Midwife (CNM);

(2) Has passed a national certification examination that measures knowledge in one of the APRN roles described in paragraph (a)(1) of this section;

(3) Has obtained a license from a State licensing board in one of three recognized APRN roles described in paragraph (a)(1) of this section; and

(4) Maintains certification and licensure as required by paragraphs (a)(2) and (3) of this section.

(b) *Full practice authority.* For purposes of this section, full practice authority means the authority of an APRN to provide services described in paragraph (d) of this section without the clinical oversight of a physician, regardless of State or local law restrictions, when that APRN is working within the scope of their VA employment.

(c) *Granting of full practice authority.* VA may grant full practice authority to an APRN subject to the following:

(1) Verification that the APRN meets the requirements established in paragraph (a) of this section; and

(2) Determination that the APRN has demonstrated the knowledge and skills necessary to provide the services described in paragraph (d) of this section without the clinical oversight of a physician, and is thus qualified to be privileged for such scope of practice.

(d) *Services provided by an APRN with full practice authority.* (1) Subject to the limitations established in paragraph (d)(2) of this section, the full practice authority for each of the three APRN roles includes, but is not limited to, providing the following services:

(i) A CNP has full practice authority to:

(A) Take comprehensive histories, provide physical examinations and other health assessment and screening activities, diagnose, treat, and manage patients with acute and chronic illnesses and diseases;

(B) Order laboratory and imaging studies and integrate the results into clinical decision making;

(C) Prescribe medication and durable medical equipment;

(D) Make appropriate referrals for patients and families, and request consultations;

(E) Aid in health promotion, disease prevention, health education, and counseling as well as the diagnosis and management of acute and chronic diseases.

(ii) A CNS has full practice authority to provide diagnosis and treatment of health or illness states, disease management, health promotion, and prevention of illness and risk behaviors among individuals, families, groups, and communities within their scope of practice.

(iii) A CNM has full practice authority to provide a range of primary health care services to women, including gynecologic care, family planning services, preconception care (care that women veterans receive before becoming pregnant, including reducing the risk of birth defects and other problems such as the treatment of diabetes and high blood pressure), prenatal and postpartum care, childbirth, and care of a newborn, and treating the partner of their female patients for sexually transmitted disease and reproductive health, if the partner is also enrolled in the VA healthcare system or is not required to enroll.

(2) The full practice authority of an APRN is subject to the limitations imposed by the Controlled Substances Act, 21 U.S.C. 801 *et seq.,* and that APRN's State licensure on the authority to prescribe, or administer controlled substances, as well as any other limitations on the provision of VA care set forth in applicable Federal law and policy.

(e) *Preemption of State and local law.* To achieve important Federal interests, including but not limited to the ability to provide the same comprehensive care to veterans in all States under 38 U.S.C. 7301, this section preempts conflicting State and local laws relating to the practice of APRNs when such APRNs are working within the scope of their VA employment. Any State or local law, or regulation pursuant to such law, is without any force or effect on, and State or local governments have no legal authority to enforce them in relation to, activities performed under this section or decisions made by VA under this section.

[FR Doc. 2016–29950 Filed 12–13–16; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA–R06–OAR–2016–0275; FRL–9956–08–Region 6]

Determination of Nonattainment and Reclassification of the Houston-Galveston-Brazoria 2008 8-hour Ozone Nonattainment Area; Texas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is determining that the Houston-Galveston-Brazoria, Texas 2008 8-hour ozone nonattainment area (HGB area) failed to attain the 2008 8-hour ozone national ambient air quality standard (NAAQS) by the applicable attainment deadline of July 20, 2016, and thus is classified by operation of law as ''Moderate''. In this action, EPA is also determining January 1, 2017 as the deadline by which Texas must submit to the EPA the State Implementation Plan (SIP) revisions that meet the Clean Air Act (CAA) statutory and regulatory requirements that apply to 2008 ozone NAAQS nonattainment areas reclassified as Moderate.

DATES: This rule is effective December 14, 2016.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2016–0275. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733.

FOR FURTHER INFORMATION CONTACT: Ms. Nevine Salem, (214) 665–7222, *salem.nevine@epa.gov.*

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

I. Background

The background for this action is discussed in detail in our September 27, 2016, (81 FR 66240) proposal. In that document, we proposed to determine that the HGB area failed to attain the 2008 ozone NAAQS by the applicable attainment deadline of July 20, 2016,[1] and to reclassify the area as Moderate. We also proposed that Texas must submit to us the SIP revisions to address the Moderate ozone nonattainment area requirements of the CAA section 182(b), as interpreted by 40 CFR part 51 Subpart AA, by January 1, 2017. We received comments on the proposal

[1] The attainment date of July 20, 2016, was established for the Houston-Galveston-Brazoria, TX 2008 ozone Marginal nonattainment area in EPA's final rule, *Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Several Areas for the 2008 Ozone National Ambient Air Quality Standards,* 81 FR 26697, May 4, 2016.

from one commenter. Our response to comments are presented below.

II. Good Cause Exemption Under the Administrative Procedure Act (APA)

Under APA section 553(d)(3), 5 U.S.C. 553(d)(3), an agency may make a rule immediately effective ''for good cause found and published with the rule.'' The EPA believes that there is ''good cause'' to make this rule effective upon publication in the **Federal Register** in order to avoid an impractical outcome and to provide time for the state to meet the relevant statutory and regulatory deadlines. Specifically, for any areas classified as Moderate nonattainment for the 2008 ozone NAAQS, the EPA has interpreted CAA section 182, in conjunction with 40 CFR 51.1108(d) and 51.1112(a)(3), to require states to submit their Moderate area SIP revisions and comply with RACT implementation requirements by January 1, 2017. While EPA acknowledges and addresses comments related to the compressed timeline associated with this action elsewhere in this notice, the agency believes that establishing an effective date of this action simultaneous with the date of publication will reconcile the competing statutory interests by eliminating a potentially impractical outcome in which the area might otherwise be subject to Moderate nonattainment area statutory and regulatory deadlines that would already have passed prior to the normal 30 days post-publication effective date. EPA made clear in the action providing the initial extension for this area that absent a second extension, a state would be under a tight deadline to develop an acceptable attainment plan. *See* 81 FR 26703. When 2015 monitoring data became available earlier this year showing that the HGB area would not be eligible for a second one-year extension, the state had every reason to anticipate and prepare for reclassification. In addition, EPA published its proposed rule for this reclassification on September 27, 2016 and is providing direct notice to the state of this final action simultaneous with signature of this rule. Accordingly, the EPA finds that the preparation time actually available to the state and the need to reconcile the statutory interest in reclassification with the deadlines for submission of Moderate area SIP revisions and compliance with RACT implementation requirements, constitute good cause under 5 U.S.C. 553(d)(3) to make this final action effective upon publication.

III. Response to Comments

The EPA published the proposed rule for this action on September 27, 2016, (81 FR 66240), and started a public comment period that ended on October 27, 2016. We received one set of comments from one commenter, Texas Commission on Environmental Quality (TCEQ) during this period. The comments received from TCEQ can be found in the electronic docket for this action.

Comment 1: TCEQ stated that the proposed SIP submittal deadline of January 1, 2017 for the HGB area is unreasonable, not consistent with previous practice, and the EPA's lack of timely notification of the abbreviated schedule resulted is an undue burden on the state and stakeholders in the HGB area. Instead EPA staff communicated to the State and local stakeholders on several occasions that these SIP revisions would be due one year from final reclassification by the EPA. TCEQ also requested a clarification on how the EPA is working with them to support submittal of the required moderate nonattainment SIP by the proposed January 1, 2017.

EPA Response: EPA greatly appreciates the State's commitment to meet the January 1, 2017 submittal deadline and we understand the significant effort involved in preparing an attainment SIP revision. TCEQ states that they have in the past received a year to submit SIP revisions once reclassified and they should have been given more notice that the time frame for this reclassification's submittal date would be shorter. In fact, as early as 2015 EPA stated we would be linking the submittal due date for Moderate areas to the ozone season of 2017. EPA explained this in our August 27, 2015 (80 FR 51992 at 51999) proposal in relation to reclassifying 11 Marginal nonattainment areas. When that proposal was finalized at 81 FR 26697, (May 4, 2016) we established a submittal due date for those Moderate areas as expeditiously as practicable, but no later than January 1, 2017, so control measures could be in place no later than the ozone season preceding the attainment year. This provided approximately 9 months for these reclassified areas to submit an attainment plan, clearly not a year. In addition, we stated in the May 4, 2016, final rule that Marginal areas like Sheboygan County, Wisconsin that received a 1-year extension based on certified 2012–2014 air quality data would not likely attain or receive a second 1-year attainment date extension as indicated by preliminary 2015 air quality data, and that the area should begin preparing for that possibility. We also stated that ''we expect Wisconsin to be taking the necessary steps to achieve timely attainment . . .'' 81 FR 26697, 26703. The HGB area also met the criteria of CAA section 181(a)(5), as interpreted in 40 CFR 51.1107, similarly to the results of Sheboygan County area and received a 1-year attainment date extension from July 20, 2015 to July 20, 2016. This request for an extension was granted by EPA as part of the May 4, 2016 final action. See, 81 FR 26697 at 26701. Additionally, similar to Sheboygan County, preliminary HGB area air quality data trends for 2015 were not supporting attainment of the July 20, 2016 attainment date or the possibility of EPA granting a second 1-year attainment date extension.

The attainment period (to attain by July 20, 2016) for the HGB area is based on the most recent three full years of ozone available data (which in the case of the HGB area after the first 1-year extension would be 2013–2015 data). The 2015 preliminary air quality data indicated that HGB area would not likely attain the July 20, 2016 attainment date. On April 25, 2016, TCEQ submitted quality assured and certified data with no changes from preliminary data for 2015 air quality data. In addition, the design values TCEQ submitted to EPA on December 2015, demonstrated that Texas was aware they would not attain by the July 20, 2016, date or be eligible for a second 1-year extension and that EPA would propose to reclassify the HGB area as Moderate. Our longstanding policy, as stated in the 1994 EPA Berry Memorandum,[2] cautions states to consider whether an attainment date extension will ultimately be helpful if the area is not likely to attain the NAAQS by the extended attainment date.

As stated in the 1994 Berry Memo, EPA's policy regarding attainment date extensions and reclassifications of marginal areas explicitly cautions: ''When requesting an extension, States should consider the consequences of eventually not attaining the NAAQS. Although areas can request two 1-year extensions, those that ultimately fail to attain the NAAQS will be bumped up to at least a moderate classification. Consequently, areas that are bumped up will be under very tight timeframes to implement the new SIP requirements, in

[2] *See* memorandum signed by D. Kent Berry, Acting Director, Air Quality Management Division, ''Procedures for Processing Bump Ups and Extension Requests for Marginal Ozone Nonattainment Areas.'' U.S. EPA, February 3, 1994.

addition to achieving the reductions to meet the new attainment date.''

Region 6 staff regularly participates in monthly calls with TCEQ, including the April/May 2016 timeframe where TCEQ insisted on the impossibility of submitting a SIP revision for a reclassified HGB area by January 1, 2017. Region 6 notified TCEQ in a May 2016 monthly call that if we didn't get the green light to proceed with a later SIP submittal deadline as they requested, our proposal would be published with a January 1, 2017, SIP submittal deadline and require Reasonable Available Control Technology (RACT) implementation by the same deadline. Ultimately, the January 1, 2017, SIP submission deadline was chosen as being consistent and reasonable based on the information discussed above.

Also, EPA has offered assistance to states as they consider the most appropriate course of action for Marginal areas that may be at risk for failing to meet the NAAQS within the three-year timeframe. States can choose to adopt additional controls for such areas or they can seek a voluntary reclassification to a higher classification category (as Texas did for the HGB area with regard to the 1997 ozone standard). See, 73 FR 56983, October 1, 2008. Also we will continue to offer assistance as we have in the past during the monthly calls regarding the TCEQ Dallas-Fort Worth and HGB 2008 Ozone nonattainment areas. A regular topic on the meetings' agenda is to discuss any issues/updates/actions with TCEQ and offer, assistance/guidance on any issues requested by TCEQ. As TCEQ knows, the determination of how to reach attainment is a state decision. It's up to EPA to determine whether the plan submitted meets the requirements of the CAA. EPA's ability to extend deadlines for areas being reclassified as required by CAA section 181(b)(2) is governed by section 182(i) of the CAA, which directs that the state shall meet the new requirements according to the schedules prescribed in those requirements, but provides ''that the Administrator may adjust any applicable deadlines (other than attainment dates) to the extent such adjustment is necessary or appropriate to assure consistency among the required submissions.'' CAA section 182(b), as interpreted by 40 CFR 51.1100 *et seq.,* describes the required SIP revisions and associated deadlines for a nonattainment area classified as moderate at the time of the initial designations. Accordingly, EPA proposed to exercise its discretion under CAA section 182(i) to adjust the moderate SIP submittal deadlines for the HGB area.

In determining an appropriate deadline for the moderate area SIP revisions for the HGB area, EPA had to consider that pursuant to 40 CFR 51.1108(d), the state must provide for implementation of all control measures needed for attainment no later than the beginning of the attainment year ozone season. The attainment year ozone season is the complete ozone season immediately preceding a nonattainment area's attainment date. In the case of nonattainment areas classified as moderate for the 2008 ozone NAAQS, the attainment year ozone season is the 2017 ozone season (40 CFR 51.1100(h)). Because an extension of the attainment date is not appropriate here, and control measures for other moderate areas are to be implemented no later than the beginning of the 2017 ozone season, EPA determined it would not be appropriate to adjust the attainment date beyond the beginning of the 2017 ozone season for the HGB area. Further, because ozone seasons begin as early as January 1, EPA determined that a SIP submission deadline of January 1, 2017, is the latest submittal deadline that allows all states to meet 40 CFR 51.1108(d) requirements, and thus assures consistency as directed by 182(i).

We believe based on the facts discussed above that TCEQ was aware of the likelihood of a January 1, 2017 submission deadline, which lines up with the deadlines of the Marginal areas reclassified as Moderate in the 81 FR 26697, (May 4, 2016) action. In that action, we stated that we recognized the value of providing states as much time as possible to develop an attainment demonstration, however, we also recognized the value in establishing a single due date for Moderate area SIP submissions—including RACT—that would not extend beyond the deadline for implementing such controls. We believe the area was provided adequate notice that time to develop and submit a moderate area attainment plan was likely to be short given that the moderate area attainment year ozone season is the 2017 ozone season for the 2008 ozone NAAQS and that other moderate areas were also required to submit their plans in January 2017.

Comment 2: The TCEQ disagrees with the proposed January 1, 2017 RACT compliance deadline for the reclassified HGB area and recommends adjusting this deadline to allow affected entities to comply with RACT no later than July 20, 2018, the Moderate attainment deadline.

EPA Response: In the 2008 ozone NAAQS SIP Requirements Rule, the EPA promulgated that areas must implement RACT measures as expeditiously as practicable, but no later than January 1 of the 5th year after the effective date of nonattainment designation.[3] Nonattainment designation for all areas of the country were effective July 20, 2012,[4] RACT measures (for areas where they are required) must be implemented by January 1, 2017. We retained the statutory timeframe and the SIP submission deadline of January 1, 2017, in large part, because it occurs no later than the statutory deadline for RACT implementation. In the 2008 ozone NAAQS SIP Requirements Rule, we did state that EPA would set new SIP submission and RACT compliance dates on a reasonable schedule when reclassifying areas. In the May 4, 2016, final rule that made determinations of attainment, provided first 1-year attainment date extensions and reclassified some areas,[5] we recognized the value in establishing a single due date for Moderate area SIP submissions—including RACT—that does not extend beyond the deadline for implementing such controls. Thus the EPA set the SIP revision and the RACT compliance deadline to be as expeditiously as practicable, but no later than January 1, 2017. This approach aligns the SIP submittal deadline with the deadline for implementing RACT pursuant to 40 CFR 51.1112(a)(3), for each area, and would ensure that SIPs requiring control measures needed for attainment, including RACM, would be submitted concurrent to when those controls are required to be implemented. This treats states consistently, in keeping with CAA section 182(i). For the reasons discussed in this preamble, we believe this time frame is reasonable and consistent with prior actions included in our May 2016 final action when we reclassified 11 areas from Marginal to Moderate.[6]

While the commenter objected to the deadline, citing the need to accelerate schedules and expend added resources to have RACT implemented by the proposed deadline, the state, nonetheless, committed to have their state requirements in place by the deadline proposed by EPA. We acknowledge that the timeline for submitting SIP revisions and implement

[3] See 80 FR 12264 at 12280, March 6, 2015 and 40 CFR 51.1112(a)(3).

[4] See 77 FR 30088, May 21, 2012, Air Quality Designations for the 2008 Ozone National Ambient Air Quality Standards, Final Rule.

[5] See 81 FR 26697, (May 4, 2016).

[6] *Id.*

RACT requirements is compressed, yet, the state has not been prohibited from beginning development of Moderate area SIP revisions prior to finalization of this reclassification. In fact, although reclassification of the HGB area is being finalized in this rule, Texas has been aware that EPA would propose to reclassify the HGB area as Moderate from the time that 2015 monitoring data became available showing that the Houston area would not be eligible for an additional 1-year extension. For further discussion of this issue, please see EPA's response to Comment 1 above. Additionally, Texas has experience in developing air quality planning requirements since the HGB area has been previously designated nonattainment for both the 1979 1-hour ozone standard and the 1997 8-hour ozone standard, receiving a classification of Severe for both NAAQS. The EPA has consistently encouraged states to begin working on Moderate area SIP revision requirements ahead of finalization of the reclassification required by the CAA.

A review of the State's SIP revision proposal of September 21, 2016,[7] indicates that the state did not specifically propose any additional or new RACT requirements in the 2018 attainment demonstration, yet, simply proposed expanded coverage of a list of existing sources. TCEQ's expansion was stated as follows:

''the commission expects that all facilities that are currently subject to the 90% control efficiency are already meeting the 95% control efficiency requirement and that this change will not require any of those subject to the current rule to replace their current control device. Generally the commission expects the proposed requirements to place minimal burden (proposed change: the aggregate of crude oil and condensate storage tanks at pipeline breakout station in the HGB area (total of 6 sites)) on affected owners and operators and that the proposed compliance date provide adequate amount of time for these owners and operators to make all necessary installations and adjustment . . . the proposed amendments are not anticipated to add any significant additional costs to affected individuals or businesses beyond what is already required to comply with these federal standards on the economy, a sector of the economy, productivity, competition jobs, the environment, or the public health and safety of the state or a sector of the state.'' [8]

In addition, the EPA notes that after a state's SIP revisions are submitted to EPA, the agency has 6 months to determine completeness of the SIP. Within that timeframe, the state may submit updates or revisions to their SIP submission. After 6 months, if the EPA has not determined the SIP to be complete, the SIP submission is deemed complete by operation of law. There will also be a time span before EPA initiates action to provide notice and comment on EPA's action to approve/disapprove the state's attainment plan. When EPA approves a SIP revision, it becomes federally enforceable at that time. The EPA believes these timeframes provide adequate time for all affected entities to have implemented RACT.

III. Final Action

We are determining that the HGB area failed to attain the 2008 ozone NAAQS by the attainment deadline date of July 20, 2016, and to reclassify the area as Moderate. Texas must submit to us the SIP revisions to address the Moderate ozone nonattainment area requirements of the CAA by January 1, 2017. This action is being taken under section 181(b)(2) of the Act. The requirements of this final action is effective immediately upon publication. See, 5 U.S.C. 553(d)(3).

IV. Statutory and Executive Order Reviews

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

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

B. Paperwork Reduction Act (PRA)

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

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action merely determines that the HGB area failed to meet an ozone NAAQS attainment deadline, reclassifies the area, and sets the date when a revised SIP is due to EPA.

D. Unfunded Mandates Reform Act (UMRA)

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

E. Executive Order 13132: Federalism

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

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

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

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

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it merely determines that the HGB area failed to meet an ozone NAAQS attainment deadline, reclassifies the area, and sets the date when a revised SIP is due to EPA.

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

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

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

[7] TCEQ Chapter 115-Control of Air Pollution from Volatile Organic Compounds Rule Project No. 2016–039–115–AI at Page 5 and 23, received by EPA under a cover letter dated September 21, 2016. This action by the State is their proposal for a SIP revision to address how HGB area will attain the 2008 ozone standard by its attainment date.

[8] TCEQ Chapter 115-Control of Air Pollution from Volatile Organic Compounds Rule Project No. 2016–039–115–AI at Page 5 and 23, received by EPA under a cover letter dated September 21, 2016.

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

EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations. This action merely determines that the HGB area failed to meet an ozone NAAQS attainment deadline, reclassifies the area, and sets the date when a revised SIP is due to EPA.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action 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.** A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 13, 2017. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control.

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

Dated: December 8, 2016.

Ron Curry,

Regional Administrator, Region 6.

40 CFR part 81 is amended as follows:

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

■ 1. The authority citation for part 81 continues to read as follows:

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

Subpart SS—Texas

■ 2. In § 81.344, the table titled ''Texas—2008 8-Hour Ozone NAAQS (Primary and secondary)'' is amended by revising the entry for ''Houston-Galveston-Brazoria, TX'' to read as follows.

§ 81.344 Texas.

* * * * *

TEXAS—2008 OZONE NAAQS

[Primary and secondary] [2]

Designated area	Designation		Classification	
	Date [1]	Type	Date [1]	Type
* * *	*	*	*	*
Houston-Galveston-Brazoria, TX: [2]	.....	Nonattainment	1/13/17	Moderate.
Brazoria County				
Chambers County				
Fort Bend County				
Galveston County				
Harris County				
Liberty County				
Montgomery County				
Waller County				
* * *	*	*	*	*

[1] This date is July 20, 2012, unless otherwise noted.
[2] Excludes Indian country located in each area, unless otherwise noted.

* * * * *

[FR Doc. 2016–29999 Filed 12–13–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 494

[CMS–3337–IFC]

RIN 0938–AT11

Medicare Program; Conditions for Coverage for End-Stage Renal Disease Facilities—Third Party Payment

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Interim final rule with comment period.

SUMMARY: This interim final rule with comment period implements new requirements for Medicare-certified dialysis facilities that make payments of premiums for individual market health plans. These requirements apply to dialysis facilities that make such payments directly, through a parent organization, or through a third party. These requirements are intended to protect patient health and safety; improve patient disclosure and transparency; ensure that health insurance coverage decisions are not

inappropriately influenced by the financial interests of dialysis facilities rather than the health and financial interests of patients; and protect patients from mid-year interruptions in coverage.

DATES: *Effective date:* These regulations are effective on January 13, 2017.

Comment date: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on January 11, 2017.

ADDRESSES: In commenting, please refer to file code CMS–3337–IFC. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four 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–3337–IFC, 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–3337–IFC, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* Alternatively, you may deliver (by hand or courier) your written comments ONLY to the following addresses prior to the close of the comment period:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, call telephone number (410) 786–9994 in advance to schedule your arrival with one of our staff members.

Comments erroneously mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period. For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Lauren Oviatt, (410) 786–4683, for issues related to the ESRD Conditions for Coverage.

Lina Rashid, (301) 492–4103, for issues related to individual market health plans.

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 Web site as soon as possible after they have been received: *http://regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will be also available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

I. Background

A. Statutory and Regulatory Background

1. End-Stage Renal Disease, Medicare, and Medicaid

End-Stage Renal Disease (ESRD) is a kidney impairment that is irreversible and permanent. Dialysis is a process for cleaning the blood and removing excess fluid artificially with special equipment when the kidneys have failed. People with ESRD require either a regular course of dialysis or kidney transplantation in order to live.

Given the high costs and absolute necessity of transplantation or dialysis for people with failed kidneys, Medicare provides health care coverage to qualifying individuals diagnosed with ESRD, regardless of age, including coverage for kidney transplantation, maintenance dialysis, and other health care needs. The ESRD benefit was established by the Social Security Amendments of 1972 (Pub. L. 92–603). This benefit is not a separate program, but allows qualifying individuals of any age to become Medicare beneficiaries and receive coverage. Under the statute, individuals under 65 who are entitled to Medicare through the ESRD program, or individuals over age 65 who are diagnosed with ESRD while in Original Medicare, generally cannot enroll in Medicare Advantage. Additionally, as access to Medigap policies is generally governed by state law, individuals under age 65 who are entitled to Medicare through the ESRD program cannot sign up for a Medigap policy in many States.[1]

The ESRD Amendments of 1978 (Pub. L. 95–292), amended title XVIII of the Social Security Act (the Act) by adding section 1881 of the Act. Section 1881(b)(1) of the Act further authorizes the Secretary of the Department of Health and Human Services (the Secretary) to prescribe additional requirements (known as conditions for coverage or CfCs) that a facility providing dialysis and transplantation services to dialysis patients must meet to qualify for Medicare payment.

Medicare pays for routine maintenance dialysis provided by Medicare-certified ESRD facilities, also known as dialysis facilities. To gain certification, the State survey agency performs an on-site survey of the facility to determine if it meets the ESRD CfCs at 42 CFR part 494. If a survey indicates that a facility is in compliance with the conditions, and all other Federal requirements are met, CMS then certifies the facility as qualifying for Medicare payment. Medicare payment for outpatient maintenance dialysis is limited to facilities meeting these conditions. The ESRD CfCs were first adopted in 1976 and comprehensively revised in 2008 (73 FR 20369). There are approximately 6,737 Medicare-certified dialysis facilities in the United States, providing dialysis services and specialized care to people with ESRD.

In addition to Medicare, Medicaid provides coverage for some people with ESRD. Many individuals enrolled in

[1] Medigap policies are available to people under age 65 with ESRD only in the following states: Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Oklahoma, and Wisconsin.

Medicare may also qualify for full benefits under the Medicaid program on the basis of their income, receipt of Supplemental Security Income, being determined medically-needy, or other eligibility categories under the State Plan. In addition, low income individuals enrolled in Medicare may qualify for the Medicare Savings Program under which the state's Medicaid program covers some or all of the individual's Medicare premiums and, for some individuals, Medicare cost-sharing. Finally, some individuals who are not eligible for enrollment in Medicare may qualify for Medicaid.

According to data published by the United States Renal Data System (USRDS), Medicare is the predominant payer of ESRD services in the United States, covering (as primary or secondary payer) about 88 percent of the United States ESRD patients receiving hemodialysis in 2014. Among those enrolled in Medicare on the basis of ESRD and receiving hemodialysis in 2015, CMS has determined 41 percent were enrolled in both Medicare and Medicaid (including full and partial duals). Among those enrolled in Medicare on the basis of ESRD under age 65, 51 percent were dual enrollees.

2. The Affordable Care Act and Health Insurance Exchanges

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 the Affordable Care Act, was enacted on March 30, 2010. In this interim final rule with comment, we refer to the two statutes collectively as the ''Affordable Care Act.''

The Affordable Care Act reorganizes and amends the provisions of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets. The Affordable Care Act enacted a set of reforms to make health insurance coverage more affordable and accessible to millions of Americans. These reforms include the creation of competitive marketplaces called Affordable Insurance Exchanges, or ''Exchanges'' through which qualified individuals and qualified employers can purchase health insurance coverage.

In addition, many individuals who enroll in qualified health plans (QHPs) through individual market Exchanges are eligible for advance payments of the premium tax credit (APTC) to make health insurance premiums more affordable, and cost-sharing reduction (CSR) payments to reduce out-of-pocket expenses for health care services. Individuals enrolled in Medicare or Medicaid are not eligible for APTC or CSRs. The Affordable Care Act also established a risk adjustment program and other measures that are intended to mitigate the potential impact of adverse selection and stabilize the price of health insurance in the individual and small group markets.

The Public Health Service Act, as amended by the Affordable Care Act, generally prohibits group health plans and health insurance issuers offering group or individual health insurance coverage from imposing any preexisting condition exclusions. Health insurers can no longer charge different cost sharing or deny coverage to an individual because of a pre-existing health condition. Health insurance issuers also cannot limit benefits for that condition. The pre-existing condition provision does not apply to ''grandfathered'' individual health insurance policies.

Beginning January 1, 2014, the Affordable Care Act prohibited insurers in the individual and group markets (with the exception of grandfathered individual plans) from imposing pre-existing condition exclusions. The Affordable Care Act's prohibition on pre-existing condition exclusions enables consumers to access necessary benefits and services, beginning from their first day of coverage. The law also requires insurance companies to guarantee the availability and renewability of non-grandfathered health plans to any applicant regardless of his or her health status, subject to certain exceptions. It imposes rating restrictions on issuers prohibiting non-grandfathered individual and small group market insurance plans from varying premiums based on an individual's health status. Issuers of such plans are now only allowed to vary premiums based on age, family size, geography, or tobacco use.

In previous rulemaking, CMS outlined major provisions and parameters related to many Affordable Care Act programs. This includes regulations at 45 CFR 156.1250, which require, among other things, that issuers offering individual market QHPs, including stand-alone dental plans, and their downstream entities, accept premium payments made on behalf of QHP enrollees from the following third party entities (in the case of a downstream entity, to the extent the entity routinely collects premiums or cost sharing): (1) A Ryan White HIV/AIDS Program under title XXVI of the PHS Act; (2) an Indian tribe, tribal organization, or urban Indian organization; and (3) a local, state, or Federal government program, including a grantee directed by a government program to make payments on its behalf. This regulation made clear that it did not prevent issuers from contractually prohibiting other third party payments. The regulation also reiterated that CMS discouraged premium payments and cost sharing assistance by certain other entities, including hospitals and other health care providers, and discouraged issuers from accepting premium payments from such providers.[2] Regulations at 45 CFR 156.1240 require issuers offering individual market QHPs to accept payment from individuals in the form of paper checks, cashier's checks, money orders, EFT, and all general-purpose pre-paid debit cards. Regulations at 45 CFR 147.104 and 156.805 prohibit issuers from discriminating against or employing marketing practices that discriminate against individuals with significant health care needs.

3. Anti-Duplication

Individuals who are already covered by Medicare generally cannot become concurrently enrolled in coverage in the individual market. Section 1882(d)(3) of the Act makes it unlawful to sell or issue a health insurance policy (including policies issued on and off Exchanges) to an individual entitled to benefits under Medicare Part A or enrolled under Medicare part B with the knowledge that the policy duplicates the health benefits to which the individual is entitled. Therefore, while an individual with ESRD is not required to apply for and enroll in Medicare, once they become covered by Medicare it is unlawful for them to be sold a commercial health insurance policy in the individual market if the seller knows the individual market policy would duplicate benefits to which the individual is entitled.[3] CMS has, moreover, solicited comments in a recent proposed rulemaking about whether it is unlawful in most or all cases to knowingly renew coverage under the same circumstances.[4]

[2] Patient Protection and Affordable Care Act; Third Party Payment of Qualified Health Plan Premiums; Final Rule, 79 FR 15240 (March 14, 2014).

[3] As discussed below, these anti-duplication standards—which govern the conduct of insurance companies, not health care providers—have not prevented inappropriate steering of individuals eligible for Medicare to individual market plans.

[4] Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2018; Proposed Rule, 81 FR 61455 (September 6, 2016).

4. HHS Request for Information on Inappropriate Steering of Individuals Eligible for or Receiving Medicare and Medicaid Benefits to Individual Market Plans

HHS has recently become concerned about the inappropriate ''steering'' of individuals eligible for or entitled to Medicare or Medicaid into individual market plans. In particular, HHS is concerned that because individual market health plans typically provide significantly greater reimbursement to health care providers than public coverage like Medicare or Medicaid, providers and suppliers may be engaged in practices designed to encourage individual patients to forego public coverage for which they are eligible and instead enroll in an individual market plan.[5] In other words, health care providers may be encouraging individual patients to make coverage decisions based on the financial interest of the health care provider, rather than the best interests of the individual patient. Further, as one tool to influence these coverage decisions, health care providers may be offering to pay for, or arrange payment for, the premium for the individual market plan.

Based on these concerns, in August 2016, CMS issued a request for information (RFI), titled ''Request for Information: Inappropriate Steering of Individuals Eligible for or Receiving Medicare and Medicaid Benefits to Individual Market Plans'', which published in the **Federal Register** on August 23, 2016, seeking comment from the public regarding concerns about health care providers and provider-affiliated organizations steering people into coverage that was of financial benefit to the provider, without regard to the impact on the patient (81 FR 57554). In response to this RFI, we received over 800 public comments by the comment closing date of September 22, 2016. Commenters included: Patients; providers and provider-affiliated organizations involved in the financing of care for patients; health insurance companies; social workers who are involved in counseling patients about potential health care coverage options; and other stakeholders. While commenters discussed patients with a variety of health care needs, the overwhelming majority of comments focused on patients with ESRD.

Comments indicated that dialysis facilities are involving themselves in ESRD patients' coverage decisions and that this practice is widespread. In addition, all commenters on the topic—including insurance companies, dialysis facilities, patients, and non-profit organizations—stated that they believe many dialysis facilities are paying for or arranging payments for individual market health care premiums for patients they serve.

Comments show that some ESRD patients are satisfied with their current premium arrangements. In particular, more than 600 individuals currently receiving assistance for premiums participated in a letter writing campaign in response to the RFI and stated that charitable premium assistance supports patient choice and is valuable to avoid relying on ''taxpayer dollars.''

However, comments also documented a range of concerning practices, with providers and suppliers influencing enrollment decisions in ways that put the financial interest of the supplier above the needs of patients. As explained further below, commenters detailed that dialysis facilities benefit financially when individuals enroll in individual market health care coverage. Comments also described that, even though it is financially beneficial to suppliers, enrollment in individual market coverage paid for by dialysis facilities or organizations affiliated with dialysis facilities can lead to three types of harm to patients: Negatively impacting their determination of readiness for a kidney transplant, potentially exposing patients to additional costs for health care services, and putting them at significant risk of a mid-year disruption in health care coverage. Based on these comments, HHS has concluded that the differences between providers' and suppliers' financial interests and patients' interests may result in providers and suppliers taking actions that put patients' lives and wellbeing at risk.

B. Individual Market Coverage Is in the Financial Interest of Dialysis Facilities

All commenters who addressed the issue made clear that enrolling a patient in commercial coverage (including coverage in the individual market) rather than public coverage like Medicare and/or Medicaid is of significant financial benefit to dialysis facilities. For example, one comment cited reports from financial analysts estimating that commercial coverage generally pays dialysis facilities an average of four times more per treatment ($1,000 per treatment in commercial coverage, compared to $260 per treatment under public coverage). For a specific subset of individual market health plans—QHPs—the analysts estimated that the differential could be somewhat smaller, but that QHPs would still provide an average of an additional $600 per treatment when compared to public coverage. Based on these reports, dialysis facilities would be estimated to be paid at least $100,000 more per year per patient if a typical patient enrolled in commercial coverage rather than public coverage, despite providing the exact same services to patients. Another commenter estimated that a dialysis facility would earn an additional $234,000 per year per patient by enrolling a patient in commercial coverage rather than Medicaid ($312,000 per year rather than $78,000 per year). A number of other commenters explained that commercial coverage reimburses dialysis facilities at significantly higher rates overall. These figures are consistent with other sources of data. For example, USRDS data show that for individuals with ESRD enrolled in Medicare receiving hemodialysis, health care spending averaged $91,000 per individual in 2014, including dialysis and non-dialysis services. By contrast, using the Truven MarketScan database, a widely-used database of health care claims, we estimate that average total spending for individuals with ESRD who are enrolled in commercial coverage was $187,000 in 2014. In addition, recent filings with a federal court by one insurance company concluded that commercial coverage could pay more than ten times more per treatment than public coverage ($4,000 per treatment rather than $300 per treatment).[6]

As described, the comments in response to the RFI, data related to CMS's administration of the risk adjustment program, and registry data from the USRDS demonstrate that dialysis facilities can be paid tens or even hundreds of thousands of dollars more per patient when patients enroll in individual market coverage rather than public coverage. On the other hand, the premiums for enrollment in individual market coverage average $4,200 per year according to data related to CMS's administration of the risk adjustment program. Dialysis facilities therefore have much to gain financially (on the order of tens or even hundreds of thousands of dollars per patient) by making a relatively small outlay to pay

[5] Throughout this Interim Final Rule with Comment, the term ''public coverage'' is intended to refer to Medicare and Medicaid, not to a group health plan or health insurance purchased in the individual market in a state. A qualified health plan (QHP) purchased through an Exchange is individual market coverage, not public coverage.

[6] Davita encouraged some low-income patients to enroll in commercial plans; (Oct 23, 2016). *http://www.stltoday.com/business/local/davita-encouraged-some-low-income-patients-to-enroll-in-commercial/article_ec5dc34e-ca4d-52e0-bc26-a3e56e1e2c85.html.*

an individual's premium to enroll in commercial coverage so as to receive a much larger payment for providing an identical set of health care services. This asymmetry creates a strong financial incentive for such providers to use premium payments to steer as many patients as possible to commercial plans.

Commercial coverage pays at higher rates than public coverage for many health care services, and therefore this pattern could theoretically appear in a variety of contexts. Dialysis patients are, however, particularly vulnerable to harmful steering practices for a number of reasons. First, ESRD is the only health condition for which nearly all patients are eligible to apply for and enroll in Medicare coverage and with eligibility linked specifically to the diagnosis. Thus, individuals with ESRD face a unique situation where they have alternative public coverage options, but these coverage options may be less profitable from the perspective of the facilities providing their treatment due to lower reimbursement rates. Second, as described above, patients with ESRD must receive services from a dialysis facility several times per week for the remainder of their lives (unless and until they obtain a kidney transplant). This sort of ongoing receipt of specialized care from a particular facility is not typical of most health conditions and it creates especially strong incentives and opportunities for dialysis facilities to influence the coverage arrangements of the patients under their care.

C. Individual Market Coverage Supported by Third Parties Places Patients at Risk of Harm

Supporting premium payments to facilitate enrollment of their patients in individual market coverage is, as illustrated above, in the financial interest of the dialysis facilities. It is often not, however, in the best interests of individual patients. The comments in response to the RFI illustrated three types of potential harm to patients that these arrangements create for ESRD patients: Negatively impacting patients' determination of readiness for a kidney transplant, potentially exposing patients to additional costs for health care services, and putting individuals at significant risk of a mid-year disruption in health care coverage.

While each of these potential harms is itself cause for concern, they collectively underscore the complexity of the decision for a patient with ESRD of choosing between coverage options, decisions that have very significant consequences for these patients in particular. The involvement of their providers in incentivizing, and steering them to enroll in, individual market coverage is highly problematic absent safeguards to ensure both that the individual is making a decision fully informed of these complex tradeoffs and that the risk of a mid-year disruption in health care coverage is eliminated. Each of these specific potential harms to the patient is discussed further below.

1. Interference With Transplant Readiness

Access to kidney transplantation is a major and immediate concern for many patients with ESRD; transplantation is the recommended course of treatment for individuals with severe kidney disease, and is a life-saving treatment, as the risk of death for transplant recipients is less than half of that for dialysis patients. In addition to improving health outcomes, receipt of a transplant can dramatically improve patients' quality of life; instead of being required to undergo dialysis several times per week, individuals who have received transplants are able to resume a more typical pattern of daily life, travel, and employment. Of the approximately 700,000 people with ESRD in the United States, more than 100,000 are on formal waiting lists to receive a kidney transplant. Further, in 2015 more than 80 percent of kidney transplants went to patients under age 65, suggesting that transplantation is of special concern to nonelderly patients, who are most likely to be targeted by dialysis facilities for enrollment in individual market coverage because they may not already be enrolled in Medicare.

Therefore, any practice that interferes with patients' ability to pursue a kidney transplant is of significant concern. Even a small reduction in the likelihood of a patient receiving a transplant would be detrimental to a patient's health and wellbeing. The comments in response to the RFI support the conclusion that, today, enrollment in individual market coverage for which there are third party premium payments is hampering patients' ability to be determined ready for a kidney transplant. Comments make clear that, consistent with clinical guidelines, in order for a transplant center to determine that a patient is ready for a transplant, they must conclude that the individual will have access to continuous health care coverage. (This is necessary to ensure that the patient will have ongoing access to necessary monitoring and follow-up care, and to immunosuppressant medications, which must typically be taken for the lifetime of a transplanted organ to prevent rejection.) However, when individuals with ESRD are enrolled in individual market coverage supported by third parties, they may have difficulty demonstrating continued access to care due to loss of premium support after transplantation. Documents in the comment record indicate that major non-profits that receive significant financial support from dialysis facilities will support payment of health insurance premiums only for patients currently receiving dialysis. Documents in the record show that these non-profits will not continue to provide financial assistance once a patient receives a successful kidney transplant, nor will the non-profit cover any costs of the transplant itself, living donor care, post-surgical care, post-transplant immunosuppressive therapy, or long-term monitoring, which can cause significant issues for patients that cannot afford their coverage without financial support. This policy is consistent with the conclusion that these third party payments are being targeted based on the financial interest of the dialysis facilities who contribute to these non-profits, rather than the patients' interests. Once a patient has received a transplant, it is no longer in the dialysis facility's financial interest to continue to support premium payments, although there are severe consequences to individuals when that support ceases. If this occurs after transplantation, individuals enrolled in individual market coverage could be required to pay the full amount of the premium, which may be unaffordable for many patients who previously relied on third party premium assistance.

Theoretically, individuals could arrange for Medicare coverage to begin at the time of transplantation, thereby demonstrating continued access to care. In practice, however, patients struggle to understand their coverage options and rapidly navigate the Medicare sign-up process during a period where they are particularly sick and preparing for major surgery. Some commenters to the RFI emphasized that this is an extremely vulnerable group of patients who have difficulty navigating their health insurance options. As evidenced by the rate of dually eligible individuals discussed above, many ESRD patients are low income and have limited access to the resources necessary to navigate these sorts of coverage transitions, and patients are particularly vulnerable during the short window when they are preparing for transplants. Consistent with this, a number of comments describe how these arrangements and patients' vulnerability and confusion

about alternative coverage both pre- and post-transplant have in fact interfered with patients' care. For example, one comment describes a family that was trying to obtain a transplant for a young child that had to arrange other coverage on an emergency basis to obtain their child's transplant. The family had allegedly been given inaccurate information by a dialysis facility about their coverage options and how private health insurance and Medicare would affect their child's transplant. Another commenter employed by a transplant facility described that ''many'' patients in individual market plans had ''their transplant evaluations discontinued or delayed while they worked to obtain appropriate and affordable insurance coverage.'' A number of other social workers who submitted comments in response to the RFI also identified these transplant access issues as a major concern.

2. Exposure to Additional Costs for Health Care Services

In addition to impeding access to transplants, enrollment in individual market coverage, even when third parties cover costs, is financially disadvantageous for some patients with ESRD. That is, while it is in dialysis facilities' financial interest to support enrollment in the individual market, those arrangements may cause financial harms to patients that would have been avoided had the patients instead enrolled in public coverage.

People with ESRD often have complex needs and receive care from a wide variety of health care providers and suppliers. Data from USRDS show that total health care spending per Medicare ESRD enrollee receiving hemodialysis averaged more than $91,000 in 2014, but spending on hemodialysis is only 32 percent of that amount, meaning that a typical patient may incur thousands of dollars in costs for other services. While some of the non-dialysis services these patients receive may also be provided by their dialysis facilities, half or more of Medicare spending on this population is for care that is likely delivered by other providers and suppliers, including creation and maintenance of vascular access, inpatient hospital care, skilled nursing facility services, home health services, palliative services, ambulance services, treatment for primary care and comorbid conditions, and prescription drugs. Thus, when considering the financial impact of coverage decisions, it is important to consider costs that a patient will incur for services received that go beyond dialysis.

a. Eligibility for Medicaid

As described above, many people with ESRD are eligible for Medicaid. Indeed, more than half of ESRD Medicare enrollees under age 65 are also enrolled in Medicaid.[7] For many Medicaid enrollees, the health care costs for which they are financially responsible are negligible—and many face no cost-sharing or premiums at all. By contrast, consumers in the individual market were responsible for out-of-pocket costs up to $7,150 in 2017.[8] As described above, much of that out-of-pocket exposure is likely to be incurred outside of the dialysis facility so, even if a provider or non-profit covers out-of-pocket costs related to dialysis, enrolling in an individual market plan rather than Medicaid exposes very-low income patients to thousands of dollars in out-of-pocket costs.[9] Indeed, given the Medicaid income limits, this cost-sharing is likely to be an extraordinarily large fraction of their income. Further, Medicaid includes coverage for services not likely to be covered by individual market plans, such as non-emergency medical transportation (which can vary based on the state or type of Medicaid coverage), and patients will forego these benefits if they instead enroll in the individual market. It is possible for an individual to be enrolled in both Medicaid and individual market coverage,[10] and Medicaid would, in theory, wrap around the individual market plan. Such an arrangement would be of great financial benefit to the dialysis facility, but would be unlikely to provide financial benefits to the individual (because the individual's cost sharing and benefits would often be the same as if they had enrolled only in Medicaid). Moreover, in practice, this arrangement creates a significant financial risk for low-income individuals, who will need to coordinate multiple types of coverage or else could find themselves receiving large bills from health care providers and suppliers not aware of their Medicaid coverage. Thus, it is very unlikely that it would be in such individual's financial interest to elect individual market coverage.

b. Eligible for Medicare But Not Medicaid

For individuals with ESRD not eligible for Medicaid, enrolling in the individual market rather than Medicare may also pose significant financial risks. As noted above, these patients generally require access to a wide variety of services received outside of a dialysis facility. Patients with ESRD are generally enrolled in Original Medicare (including Part A and Part B) and can therefore receive services from any Medicare-participating provider or supplier. However, unlike Original Medicare, which provides access to a wide range of eligible providers and suppliers, and which has standard cost-sharing requirements for all Medicare-eligible providers and suppliers, individual market plans generally limit access to a set network of providers that is more restrictive than what is available to an Original Medicare beneficiary. If the individual sees providers or suppliers outside of that network, they will incur higher cost-sharing for necessary out-of-network services, and may have very limited coverage for non-emergency out-of-network health care.

There may be other personal circumstances that lead to financial burden caused by enrolling in an individual market plan rather than Medicare. For example, individuals who are entitled to Part A and do not enroll in Part B generally will incur a Part B late enrollment penalty when they do ultimately enroll in Medicare Part B. Accordingly, an individual who enrolls in Part A based on ESRD but does not enroll in or drops Part B will generally be subject to a late enrollment penalty should they decide to enroll in Part B later while still entitled to Part A on the basis of ESRD. Individuals who receive a kidney transplant may also face higher cost-sharing for immunosuppressant drugs if they delay Medicare enrollment as immunosuppressive drugs are covered under Part B only if the transplant recipient established Part A effective with the month of the transplant.

As noted above, for some members of this group, there is potentially an offsetting financial benefit from individual market coverage if total premiums and cost sharing are lower in an individual market plan with third party premium assistance than in Medicare. In particular, non-grandfathered individual markets plans are required to cap total annual out-of-pocket expenditures for essential health benefits at a fixed amount, the

[7] This figure includes both individuals who are fully enrolled in Medicare and Medicaid, and individuals enrolled in Medicare and the Medicare Saving Program.

[8] Patient Protection and Affordable Care Act; HHS Notice of Payment and Benefit Parameters for 2017, (March 8, 2016); *https://www.gpo.gov/fdsys/pkg/FR-2016-09-06/pdf/2016-20896.pdf.*

[9] Because these individuals are eligible for Medicaid, they are generally prohibited from receiving cost-sharing reductions for enrolling in coverage through an Exchange.

[10] No APTC or CSR would be available to support enrollment in the individual market in this circumstance.

maximum out-of-pocket limit, which is $7,150 in 2017. The individual may not be able to cap their annual out-of-pocket expenses in Medicare; while individuals over age 65 are eligible to enroll in Medicare Advantage or Medigap supplemental plans, which do cap annual expenses, individuals under age 65 with ESRD generally do not have such options in many states.[11] However, third party assistance is also frequently available to offset out-of-pocket costs for Medicare enrollees. Moreover, if dialysis facilities were not providing assistance for individual market coverage on such a widespread basis, they might use these resources to make assistance for out-of-pocket Medicare costs even more widely available.

3. Risks of Mid-Year Disruption in Coverage

Finally, the comments in response to the RFI demonstrate that there is a significant risk of mid-year disruptions in coverage for patients/individuals who have individual market coverage for which third parties make premium payments. It is critically important that patients on dialysis have continuous access to health care coverage. Prior to transplantation this population requires an expensive health care service several times per week in order to live; any interruption in their access to care is serious and life-threatening. Moreover, as noted, this group generally has health care needs beyond dialysis that require care from a variety of medical professionals.

However, the comments reveal that patients/individuals who have individual market coverage for which third parties make premium payments are presently at risk of having their coverage disrupted at any point during the year. CMS does not require that issuers accept premium payments made by third parties except in certain circumstances consistent with applicable legal requirements,[12] and CMS has consistently discouraged issuers from accepting payments directly from health care providers.[13] Many issuers have provisions in their contracts with enrollees that are intended to void the contract if payment is made by someone other than the enrollee. Issuers that provided comments in response to the RFI confirmed that they do not accept certain third party payments. One comment included a list of ten states where major issuers are known to reject these payments when identified. Comments from health care providers and non-profits described that entities that make third party payments to issuers have attempted to disguise their payments to circumvent detection by issuers. These comments also described how issuers are increasingly monitoring for and seeking to identify third party payments, and when issuers discover those payments, they are rejected. The lack of transparency around third party payments has therefore resulted in a situation in which patients are at significant and ongoing risk of losing access to coverage based on their issuer detecting payment of their premiums by parties other than the enrollee.

When payments are rejected, commenters noted that individuals are typically unable to continue their coverage because of the increased financial burden. Indeed, patients may not even realize for some period that their premiums, which are being paid by third parties, are being rejected and that their coverage will be terminated if they do not have an ability to pay themselves. HHS received 600 comments from ESRD patients participating in a letter-writing campaign that describe the adverse impact on patients receiving third party payment premium assistance if those funds were no longer available. Other patients who commented described significant and unexpected disruptions in coverage such as no longer being able to afford the high cost of prescriptions and office visit copays, delays receiving dialysis treatments, or no longer being able to receive treatments. Due to the life-sustaining nature of dialysis, dialysis facilities are not permitted to involuntarily discharge patients, except in very limited circumstances. However, one of those circumstances is lack of payment (42 CFR 494.180 (f)(1)). While we believe that such discharges are rare, and that dialysis facilities try to avoid them, they are permitted. Moreover, even when patients are able to enroll in other public coverage (which may have retroactive effective dates) disruptions in coverage still force patients to navigate a complicated set of coverage options. They may face gaps in care or be forced to appeal health care claims. Comments emphasized that many ESRD patients are low-income and do not have a great deal of familiarity with the health care system, leaving them more vulnerable to gaps in coverage. Therefore, any disruption in coverage is problematic and can interrupt patient care.

In sum, the lack of transparency in how these payments are made and whether or not they are accepted means that patients are at risk of sudden gaps in coverage which may be dangerous to patients' health.

D. Conflict Between Dialysis Facilities' Financial Interest and Patients' Interest Has Led to Problematic Steering

As described above, dialysis facilities have very meaningful financial incentives to have their patients enroll in individual market coverage rather than public coverage programs. However, enrollments in individual market coverage are often not in patients' best interest: It can complicate and potentially delay the process for obtaining a kidney transplant; is often financially costly for patients, especially when they are eligible for Medicaid; and places consumers at risk of a mid-year coverage disruption. These risks make the task of deciding among coverage options complex for ESRD patients. Furthermore, the asymmetry between facilities' and patients' interests and information with respect to enrollment decisions creates a high likelihood that a conflict of interest will develop. Comments submitted in response to the RFI support the conclusion that this conflict of interest is harming patients, with dialysis facility patients being steered toward enrollment in individual market coverage with third party premium payments, rather than enrollment in the public coverage for which they are likely eligible and which is frequently the better coverage option for them.

Many comments were submitted by social workers or other professionals who work or have worked with ESRD patients. Those comments describe a variety of ways in which dialysis facilities have attempted to influence coverage decisions made by patients or have failed to disclose information that is relevant to determining consumers' best interest. Specific practices described in comments include:

- Facilities engaging in systematic efforts to enroll people in the individual market, often targeting Medicaid enrollees, without assessing any personal needs. One commenter explained, ''My experience was that the provider wanted anyone [who] was Medicaid only to be educated about the opportunity to apply for an individual plan. . . . The goal was 100%

[11] Congress recently passed legislation that would allow people enrolled in Medicare on the basis of ESRD to select a Medicare Advantage plan beginning in 2021.

[12] 45 CFR 156.1250 requires issuers to accept third party payment from federal, state and local government programs, Ryan White/HIV Aids Programs and Indian Tribes, Tribal Organizations, and Urban Indian Organizations.

[13] Third Party Payments of Premiums for Qualified Health Plans in the Marketplaces, November 4, 2013, *https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/third-party-qa-11-04-2013.pdf.*

education, whether there was an assessed need or not. . . . Valuable hours of professional interventions were taken from direct patient care concerns and diverted to this.'' Another explained, ''There was a list of all Medicaid patients and the insurance management team was responsible for documenting why the patient did not switch to an individual market plan.'' Comments also described cases in which social worker compensation was linked to enrolling patients in individual market coverage.

• Patients are not always informed about eligibility for Medicare or Medicaid, or the benefits of those programs. For example, one social worker explained, ''The patient is frequently not educated about the benefits that are available with Medicaid (that is, transportation, dental, and other home support services).'' Another former social worker said that facility employees ''may not tell patients that they could be subject to premium penalties and potentially higher out-of-pocket costs than they would have with traditional Medicare.'' Another commenter said, ''Enrollment counselors offer no information about Medicare eligibility to members. In several cases members were not aware that they were Medicare eligible.''

• Patients are sometimes specifically discouraged from pursuing Medicare or Medicaid. One commenter said: ''In the transplant setting I have seen patients advised to delay in securing Medicare.'' Another employee at a dialysis facility relayed the story of a mother seeking a transplant for her daughter but being told by a dialysis facility not to enroll in Medicare. A transplant facility employee explained ''In some circumstances, the patient has been encouraged to drop their MediCal (Medicaid) coverage in favor of the individual market plan, without having a full understanding of the personal financial impact of doing so.''

• Patients are unaware that a dialysis facility is seeking to enroll them in the individual market and are not informed of this fact by their health care providers. As one commenter said, ''In numerous instances, these patients were already admitted at these facilities, and interviews have found that many were unaware they had insurance, let alone who was providing it.''

• Patients are not informed about how their third party premium support is linked to continued receipt of dialysis. For example, one comment explained, ''People receiving assistance don't realize that if they want a transplant the premiums will no longer get paid.''

• Facilities retaliate against social workers who attempt to disclose additional information to consumers. One commenter explained that they were ''reported to upper management of [dialysis corporations] for voicing my concerns of the impact this [enrollment in the individual market] will have on patients after transplant.''

• Social workers are concerned that patients' trust in health care providers is being manipulated to facilitate individual market enrollment. For example, comments explained that insurance counselors ''meet often with the patients establishing a relationship of trust'' before pursuing individual market enrollment. A commenter said, ''Most of us, who have some sophistication in health care coverage, are aware of how confusing it is to negotiate the information and reach the best decisions. Dialysis patients who may be less sophisticated and already highly stressed are vulnerable to being steered.'' Another commenter vividly explained, ''Patients . . . are in a vulnerable position when they come to a dialysis facility. I hope those of you reviewing these comments realize the power disequilibrium which exists when a patient is hooked up with needles in their arm, lifeblood running through their arms attached to a machine.''

In addition, HHS's own data and information submitted in response to the RFI suggest that this inappropriate steering of patients may be accelerating over time. Insurance industry commenters stated that the number of enrollees in individual market plans receiving dialysis increased 2 to 5 fold in recent years. Based on concerns raised in the public comments in response to the RFI, we have reviewed administrative data on enrollment of patients with ESRD. Information available from the risk adjustment program in the individual market show that between 2014 and 2015, the number of individual market enrollees with an ESRD diagnosis more than doubled.[14] In some states increases were more rapid, with some states seeing more than five times as many patients with ESRD in the individual market in 2015 as in 2014. While increased enrollment in the individual market among individuals who have ESRD is not in itself evidence of inappropriate provider or supplier behavior, these changes in enrollment patterns raise concerns that the steering behavior commenters described may be becoming increasingly common over time.

E. HHS Is Taking Immediate Regulatory Action To Protect Patients

In the face of harms like those above, which go to essential patient safety and care in life-threatening circumstances, HHS is taking immediate regulatory action to prevent harms to patients. As described in more detail below, we are establishing new Conditions for Coverage standards (CfCs) for dialysis facilities. This standard applies to any dialysis facility that makes payments of premiums for individual market health plans (in any amount), whether directly, through a parent organization (such as a dialysis corporation), or through another entity (including by providing contributions to entities that make such payments). Dialysis facilities subject to the new standard will be required to make patients aware of potential coverage options and educate them about the benefits of each to improve transparency for consumers. Further, in order to ensure that patients' coverage is not disrupted mid-year, facilities must ensure that issuers are informed of and have agreed to accept the payments.[15]

This action is consistent with comments from dialysis facilities, non-profits, social workers, and issuers that generally emphasized disclosure and transparency as important components of a potential rulemaking. By focusing on transparency, we believe we can promote patients' best interests. CMS remains concerned, however, about the extent of the abuses reported. We are considering whether it would be appropriate to prohibit third party premium payments for individual market coverage completely for people with alternative public coverage. Given the magnitude of the potential financial conflict of interest and the abusive practices described above, we are unsure if disclosure standards will be sufficient to protect patients. We seek comments from stakeholders on whether patients would be better off if premium payments in this context were more strictly limited. We also seek comment on alternative options where

[14] Risk adjustment applies to the entire individual market, including plans offered on and off an Exchange.

[15] There are two potential ways to prevent mid-year disruptions in coverage—either requiring issuers to accept these payments or requiring facilities to disclose them and assure acceptance. Both would equally promote continuity of coverage for consumers. However, requiring issuers to accept payments in these circumstances would destabilize the individual market risk pool, a position CMS has consistently articulated since 2013, when we expressly discouraged issuers from accepting these third party payments from providers. The underlying policy considerations have not changed and therefore CMS is seeking to prevent mid-year disruption by requiring facilities to disclose payments and assure acceptance.

payments would be prohibited absent a showing that a third party payment was in the individual's best interest, and we seek comment on what such a showing would require and how it could prevent mid-year disruptions in coverage.

II. Provisions of the Interim Final Rule

Through this Interim Final Rule with comment (IFC) we are implementing a number of disclosure requirements for dialysis facilities that make payments of premiums for individual market health plans, whether directly, through a parent organization, or through another entity, to ensure proper protections for those patients. These requirements are intended to ensure that patients are able to make insurance coverage decisions based on full and accurate information.

As described in more detail below, we are establishing new CfC standards for dialysis facilities. New standards apply to any dialysis facility that makes payments of premiums for individual market health plans (in any amount), whether directly, through a parent organization (such as a dialysis corporation), or through another entity (including by providing contributions to entities that make such payments). While we remain concerned about any type of financial assistance that could be used to influence patients' coverage decisions, we believe these individual market premium payments are particularly prone to abuse because they are so closely tied to the type of coverage an individual selects. Further, as described above, such third party payments in the individual market uniquely put patients at risk of mid-year coverage disruption if their issuer discovers and rejects such payments. Dialysis facilities subject to the new standards will be required to make patients aware of potential coverage options and educate them about certain benefits and risks of each. Further, in order to ensure that patients' coverage is not disrupted mid-year, dialysis facilities must ensure that issuers are informed of and have agreed to accept such payments for the duration of the plan year.

A. Disclosures to Consumers: Patients' Right To Be Informed of Coverage Options and Third Party Premium Payments (42 CFR 494.70(c))

In order to increase awareness of health coverage options for individuals receiving maintenance dialysis in Medicare-certified dialysis facilities, we are establishing a new patient rights standard under the CfCs at 42 CFR 494.70(c). This new standard applies only to those facilities that make payments of premiums for individual market health plans (in any amount), whether directly, through a parent organization (such as a dialysis corporation), or through another entity (including by providing contributions to entities that make such payments).

Dialysis facilities that do not make premium payments, and do not make financial contributions to other entities that make such payments, are not subject to the new requirements.[16] We recognize that dialysis facilities make charitable contributions to a variety of groups and causes. This rule applies only to those dialysis facilities that make payments of premiums for individual market health plans, whether directly, through a parent organization, or through another entity.

At § 494.70(c)(1), we detail the health insurance information that must be provided to all patients served by applicable facilities. These requirements establish that such information must cover how plans in the individual market will affect the patient's access to and costs for the providers and suppliers, services, and prescription drugs that are currently within the individual's care plan, as well as those likely to result from other documented health care needs. This must include an overview of the health-related and financial risks and benefits of the individual market plans available to the patient (including plans offered through and outside the Exchange). This information must reflect local, current plans, and thus would need to be updated at least annually to reflect changes to individual market plans. We expect that applicable dialysis facilities will meet this requirement by providing the required information upon an individual's admittance to the facility, and annually thereafter, on a timely basis for each plan year.

While current costs to the patient are important, information about potential future costs related to the current health plan selection must also be addressed. In particular, we are requiring that coverage of transplantation and associated transplant costs must be included in information provided to patients. For example, some plans may not cover all costs typically covered by Medicare, such as necessary medical expenses for living donors. Kidney transplant patients who want Medicare to cover immunosuppressive drugs must have Part A at the time of the kidney transplant. Upon enrolling in Part B, Medicare will generally cover the immunosuppressive drugs. Therefore, the beneficiary must file for Part A no later than the 12th month after the month of the kidney transplant. Entitlement to Part A and Part B based on a kidney transplant terminates 36 months after the transplant. However, a beneficiary who establishes Part A entitlement effective with the month of the transplant is eligible for immunosuppressive drug coverage when subsequent entitlement to Part B is based on age or disability. Facilities must provide information regarding enrollment in Medicare, and clearly explain Medicare's benefits to the patient. Facilities must also provide individuals with information about Medicaid, including State eligibility requirements, and if there is any reason to believe the patient may be eligible, clearly explain the State's Medicaid benefits, including the Medicare Savings Programs.

For other potential future effects, the facilities must provide information about penalties associated with late enrollment (or re-enrollment) in Medicare Part B or Part D for those that have Medicare Part A as well as potential delays or gaps in coverage. Section 1839(b) of the Act outlines the Medicare premium—Part A (for those who are not eligible for premium-free Part A) and Part B late enrollment penalty. Individuals who do not enroll in Medicare premium—Part A or Medicare Part B when first eligible (that is, during their Initial Enrollment Period) will have to pay a late enrollment penalty should they decide to enroll at a later time. There are certain circumstances in which individuals are exempt from the late enrollment penalty, such as those who are eligible for Medicare based on Age or Disability, and did not enroll when first eligible because they had or have group health plan coverage based on their own or spouse's (or a family

[16] A facility that makes payments of premiums for individual market coverage of its patients must comply with this standard. Similarly, a facility that makes a financial contribution to another organization, that is able to use the funds to make payments of premiums for individual market coverage of some dialysis patients must also comply, even when the contributions from the facility are not directly linked to the premium payments; we note, moreover, that mere recitation on a check that a contribution cannot be used for premium payments would not establish that an organization is unable to use the contribution for such payments. Further, an entity that makes contributions through a third party that in turn contributes to an entity that is able to use the contribution to make third party premium payments will still be subject to these standards. In contrast, a facility that does not make payments of premiums for individual market coverage and does not contribute to any organization that makes such payments, but does contribute to an organization that supports premiums for Medicare enrollment, would not be required to comply with this standard.

member if Medicare is based on disability) current employment.

Although an ESRD diagnosis may establish eligibility for Medicare regardless of age, it does not make individuals eligible for a Medicare Special Enrollment Period or provide relief from the late enrollment penalty. Thus, if an individual enrolls in Medicare Part A but does not enroll in Part B, or later drops Part B coverage, that individual will pay a Part B (and Part D) late enrollment penalty when ultimately enrolling, or reenrolling, in Medicare Part B (and Part D). Additionally, that individual will need to wait until the Medicare General Enrollment Period to apply for Medicare Part B. The General Enrollment Period runs from January 1 to March 31 each year, and Part B coverage becomes effective July 1 of the same year. Thus, individuals could face significant gaps in coverage while waiting for their Medicare Part B coverage to become effective. We note that late enrollment penalties and statutory enrollment periods do not apply to premium-free Part A.

Information about potential costs to the patient is vitally important for patients considering individual market coverage. An individual may benefit in the short term by selecting a private health plan instead of enrolling in Medicare, but patients must be informed that those plans, or the particular costs and benefits of those plans, may only exist for a given plan year, and that the individual may be at a disadvantage (that is, late enrollment penalties for those that are enrolled in Medicare Part A) should they choose to enroll in Medicare Part B (or Part D) at a later date.

At § 494.70(c)(2) and (3), we require that applicable facilities provide information to all patients about available premium payments for individual market plans and the nature of the facility's or parent organization's contributions to such efforts and programs. This information must include, but is not limited to, limits on financial assistance and other information important for the patient to make an informed decision, including the reimbursements for services rendered that the facility would receive from each coverage option. For example, if premium payments are not guaranteed for an entire plan year, or funding is capped at a certain dollar amount, patients must be informed of such limits. Facilities also must inform patients if the premium payments are contingent on continued use of dialysis services or use of a particular facility, and would therefore be terminated in the event that the patient receives a successful kidney transplant or transfers to a different dialysis facility. Further, facilities must disclose to patients all aggregate amounts that support enrollment in individual market health plans provided to patients directly, to issuers directly, through the facility's parent organization, or through third parties.

As with all patient rights standards for dialysis facilities, the information and disclosures required in § 494.70(c) must be provided to all patients of applicable facilities, not just those new to a facility who have not yet enrolled in Medicare or Medicaid. This ensures that all patients are treated fairly and appropriately, and not treated differently based on their health care payer, as required by CMS regulations at 42 CFR 489.53(a)(2).

B. Disclosures to Issuers (42 CFR 494.180(k))

In conjunction with these requirements for patient information and disclosures, we establish at § 494.180(k), a new standard that requires facilities that make payments of premiums for individual market health plans, whether directly, through a parent organization, or through another entity to ensure that issuers are informed of and have agreed to accept the third party payments. Facilities should develop reasonable procedures for communicating with health insurance issuers in the individual market, and for obtaining and documenting that the issuer has agreed to accept such payments. If an issuer does not agree to accept the payments for the duration of the plan year, the facility shall not make payments of premiums and shall take reasonable steps to ensure that such payments are not made by any third parties to which the facility contributes.

These requirements are intended to protect ESRD patients from avoidable interruptions in health insurance coverage mid-year by ensuring that they have access to full, accurate information about health coverage options. We intend to outline expectations for compliance in subsequent guidance. This rule does not alter the legal obligations or requirements placed on issuers, including with respect to the guaranteed availability and renewability requirements of the Public Health Service Act and non-discrimination-related regulations issued pursuant to the Affordable Care Act.[17]

[17] See 45 CFR 147.104, 156.225, 156.805.

C. Effective Date

Because we are concerned that patients face risks that are not disclosed to them, and that they may be at risk of disruptions in coverage on an ongoing basis, we are taking action to ensure greater disclosure to consumers and to provide for smooth and continuous access to stable coverage when these rules are fully implemented. At the same time, we are mindful of the need for dialysis facilities that make payments of premiums for individual market health plans, whether directly, through a parent organization, or through another entity, to develop new procedures to comply with the standards established in this rule. Therefore, the requirements in this rule will become effective beginning January 13, 2017.

We note that, in specific circumstances, individuals may not be eligible to enroll in Medicare Part A or Part B except during the General Enrollment Period, which runs from January 1 to March 31 and after which coverage becomes effective on July 1. These individuals may experience a temporary disruption in coverage between the effective date of the rule and the time when Medicare Part A and/or Part B coverage becomes effective. In light of these circumstances, while the standards under § 494.180(k) will be effective beginning January 13, 2017, if a facility is aware of a patient who is not eligible for Medicaid and is not eligible to enroll in Medicare Part A and/or Part B except during the General Enrollment Period, and the facility is aware that the patient intends to enroll in Medicare Part A and/or Part B during that period, the standards under § 494.180(k) will not apply until July 1, 2017, with respect to payments made for that patient.

III. Waiver of Proposed Rulemaking and Delay in Effective Date

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** and invite public comment on the proposed rule in accordance with 5 U.S.C. 553(b) of the Administrative Procedure Act (APA) and section 1871(b)(1) of the Social Security Act. The notice of proposed rulemaking includes a reference to the legal authority under which the rule is proposed, and the terms and substance of the proposed rule or a description of the subjects and issues involved. This procedure can be waived, however, if an agency finds good cause that a notice-and-comment procedure is impracticable, unnecessary, or contrary to the public interest and incorporates a

statement of the finding and its reasons in the rule issued.

HHS has determined that issuing this regulation as a proposed rulemaking, such that it would not become effective until after public comments are submitted, considered and responded to in a final rule, would be contrary to the public interest and would cause harm to patients. Based on the newly available evidence discussed in section I of this rule, that is, the responses to the August 2016 RFI, HHS has determined that the widespread practice of third parties making payments of premiums for individual market coverage places dialysis patients at significant risk of three kinds of harms: Having their ability to be determined ready for a kidney transplant negatively affected, being exposed to additional costs for health care services, and being exposed to a significant risk of a mid-year disruption in health care coverage. We believe these are unacceptable risks to patient health that will be greatly mitigated by this rulemaking, and that the delay caused by notice and comment rulemaking would continue to put patient health at risk. Given the risk of patient harm, notice and comment rulemaking would be contrary to the public interest. Therefore, we find good cause to waive notice and comment rulemaking and to issue this interim final rule with comment. We are providing a 30-day public comment period.

In addition, we ordinarily provide a 60-day delay in the effective date of the provisions of a rule in accordance with the APA (5 U.S.C. 553(d)), which requires a 30-day delayed effective date, and the Congressional Review Act (5 U.S.C. 801(a)(3)), which requires a 60-day delayed effective date for major rules. However, we can waive the delay in the effective date if the Secretary finds, for good cause, that the delay is impracticable, unnecessary, or contrary to the public interest, and incorporates a statement of the finding and the reasons in the rule issued (5 U.S.C. 553(d)(3).

In addition, the Congressional Review Act (5 U.S.C. 801(a)(3)) requires a 60-day delayed effective date for major rules. However, we can determine the effective date of the rule if the Secretary finds, for good cause, that notice and public procedure is impracticable, unnecessary, or contrary to the public interest, and incorporates a statement of the finding and the reasons in the rule issued (5 U.S.C. 808(2)).

As noted above, for good cause, we have found that notice and public procedure is contrary to the public interest. Accordingly, we have determined that it is appropriate to issue this regulation with an effective date 30 days from the date of publication. As described above, we believe patients are currently at risk of harm. Health-related and financial risks are not fully disclosed to them, and they may have their transplant readiness delayed or face additional financial consequences because of coverage decisions that are not fully explained. Further, consumers are at risk of mid-year coverage disruptions. This is the time of year when patients often make enrollment decisions, with Open Enrollment in the individual market ongoing and General Enrollment Period for certain new enrollees in Medicare about to begin on January 1. We have therefore determined that the rule will become effective on January 13, 2017 to best protect consumers.

IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 30-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. This interim final rule with comment contains information collection requirements (ICRs) that are subject to review by OMB. A description of these provisions is given in the following paragraphs with an estimate of the annual burden, summarized in Table 1. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on each of these issues for the following sections of the interim final rule with comment that contain ICRs. We generally used data from the Bureau of Labor Statistics to derive average labor costs (including a 100 percent increase for fringe benefits and overhead) for estimating the burden associated with the ICRs.[18]

1. ICRs Regarding Patient Rights (§ 494.70(c))

Under § 494.70(c), HHS implements a number of requirements and establishes a new patient rights standard for Medicare-certified dialysis facilities that make payments of premiums for individual market health plans, whether directly, through a parent organization, or through another entity, to ensure proper protections for those patients. Those applicable facilities will be required, on an annual basis, to inform patients of health coverage options available to them, including Medicare and Medicaid and locally available individual market plans; enrollment periods for both Medicare and the individual market; the effects each option will have on the patients access to, and costs for the providers and suppliers, services, and prescription drugs that are currently within the individual's ESRD plan of care and other documented health care needs; coverage and anticipated costs for transplant services, including pre- and post-transplant care; any funds available to the patient for enrollment in an individual market health plan, including but not limited to limitations and any associated risks of such assistance; and current information about the facility's, or its parent organization's premium payments for patients, or to other third parties that make such premium payments to individual market health plans for individuals on dialysis.

We assume that each applicable facility will develop a system to educate and inform each ESRD patient of their options and the effects of these options. For our purposes, we assume that each facility will develop a pamphlet containing information that compares the benefits and costs for each locally available individual market plan, Medicare, and Medicaid, and display it prominently in their facility. In addition, it is assumed that a facility staff such as a health care social worker will review the required information with the patient and answer any questions.

There are 6,737 Medicare-certified dialysis facilities. As explained later in the regulatory impact analysis section, we estimate that approximately 90 percent, or 6,064, facilities make payments of premiums for individual market health plans, whether directly, through a parent organization, or through another entity, and therefore, will need to comply with these disclosure requirements. We estimate

[18] See May 2015 Bureau of Labor Statistics, Occupational Employment Statistics, National Occupational Employment and Wage Estimates at *http://www.bls.gov/oes/current/oes_stru.htm.*

that approximately 491,500 patients receive services at Medicare-certified facilities. Therefore, on average, each facility provides dialysis services to approximately 73 patients annually. While we expect to detail in forthcoming guidance how dialysis facilities may comply with these requirements, we are providing an example of one type of disclosure, an informational pamphlet, to illustrate potential costs. We note, that we expect dialysis facilities will use various tools for disclosure including but not limited to informational pamphlets, handouts, etc. It is estimated that each facility will prepare, on average, a 6-page pamphlet that includes all required information. We estimate that an administrative assistant will spend approximately 40 hours (at an hourly rate of $37.86) on average to research the required information and develop a pamphlet. We estimate it will take an administrative manager (at an hourly rate of $91.20) 4 hours to review the pamphlet. The total annual burden for each facility will be 44 hours with an equivalent cost of $1,879.20 ((40 hours × $37.86 hourly rate) + (4 hours × $91.20 hourly rate)). In order to print the pamphlet, we estimate that it will cost each facility $3.00 (for a 6-page pamphlet at $0.50 per page). For all 6,064 facilities, the total annual burden will be 266,816 hours (44 hours × 6,064 facilities) with an equivalent cost of approximately $11,395,469 ($1,879.20 annual burden cost × 6,064 facilities) and a total materials and printing cost of $1,328,016. It is anticipated that the burden to prepare the pamphlet will be lower in subsequent years since all that will be needed is to review and update plan information. We estimate that an administrative assistant will spend approximately 32 hours (at an hourly rate of $37.86) on average to update the information in the pamphlet, and it will take an administrative manager (at an hourly rate of $91.20) 3 hours to review it. The total annual burden for each facility will be 35 hours with an equivalent cost of approximately $1,485 ((32 hours × $37.86 hourly rate) + (3 hours × $91.20 hourly rate)). The total burden for all facilities will be 212,240 hours (35 hours × 6,064 facilities) with an equivalent cost of approximately $9,005,768 ($1,485.12 annual burden cost × 6,064 facilities).

In addition to providing a copy of the pamphlet to the patients, it is assumed that a health care social worker or other patient assistance personnel at each facility will review the information with the patients and obtain a signed acknowledgement form stating that the patient has received this information. We estimate that a lawyer (at an hourly rate of $131.02) will take 30 minutes to develop an acknowledgement form confirming that the required information was provided to be signed by the ESRD patient. The total burden for all 6,064 facilities to develop the acknowledgement form in the initial year only will be 3,032 hours (0.5 hours × 6,064 facilities) with an equivalent cost of approximately $397,253 (($131.02 hourly rate × 0.5 hours) × 6,064 facilities).

We estimate that a health care social worker (at an hourly rate of $51.94) will take an average of 45 minutes to further educate each patient about their coverage options. The social worker will also obtain the patient's signature on the acknowledgement form and save a copy of the signed form for recordkeeping, incurring a materials and printing cost of $0.05 per form. The total annual burden for each facility will be 54.75 hours (0.75 hours × 73 patients) with an equivalent cost of approximately $2,844 ($51.94 hourly rate × 54.75 hours), and approximately $4 in printing and materials cost. The total annual burden for all 6,064 facilities will be 332,004 hours 54.75 hours × 6,064 facilities) with an equivalent cost of approximately $17,244,288 ($2,843.72 annual burden cost × 6,064 facilities), and approximately $22,134 in printing and materials cost.

We will revise the information collection currently approved under OMB Control Number 0938–0386 to account for this additional burden.

2. ICRs Regarding Disclosure of Third Party Premium Payments, or Contributions to Such Payments, to Issuers (§ 494.180(k))

Under § 494.180(k), HHS is implementing a requirement for those dialysis facilities that make payments of premiums for individual market health plans, whether directly, through a parent organization, or through another entity, must ensure issuers are informed of and have agreed to accept the payments for the duration of the plan year.

Based on comments received in response to the RFI, it is assumed that approximately 7,000 patients that receive such payments are enrolled in individual market plans. Therefore, we estimate that 6,064 facilities will be required to send approximately 7,000 notices. It is assumed that these notices will be sent and returned electronically at minimal cost. We estimate that, for each facility during the initial year, it will take a lawyer one hour (at an hourly rate of $131.02) to draft a letter template notifying the issuer of third party payments and requesting assurance of acceptance for such payments. The total annual burden for all facilities during the initial year will be 6,064 hours with an equivalent cost of approximately $794,505 ($131.02 × 6,064 facilities). This is likely to be an overestimation since parent organizations will probably develop a single template for all individual facilities they own. We further estimate that it will require an administrative assistant approximately 30 minutes (at an hourly rate of $37.86) to insert customized information and email the notification to the issuer, send any follow-up communication, and then save copies of the responses for recordkeeping. The total annual burden for all facilities for sending the notifications will be 3,500 hours (7,000 notifications x 0.5 hours) with an equivalent cost of $132,510 ($37.86 hourly rate × 3,500 hours).

There are an estimated 468 issuers in the individual market. It is assumed that the approximately 7,000 patients are uniformly distributed between these issuers. Issuers will incur a burden if they respond to the notifications from dialysis facilities and inform them whether or not they will accept third party payments. It is estimated that it will take a lawyer 30 minutes (at an hourly rate of $131.02) to review the notification and an administrative manager 30 minutes (at an hourly rate of $91.20) to approve or deny the request and respond to any follow-up communication. It will further take an administrative assistant approximately 30 minutes (at an hourly rate of $37.86) to respond electronically to the initial notification and any follow-up communications. The total annual burden for all issuers to respond to 7,000 notifications will be 10,500 hours (1.5 hours × 7,000 notifications) with an equivalent cost of $910,280 (10,500 hours × $86.69 average hourly rate per notification per issuer).

We will revise the information collection currently approved under OMB Control Number 0938–0386 to account for this additional burden.

TABLE 1—ANNUAL REPORTING, RECORDKEEPING AND DISCLOSURE BURDEN: FIRST YEAR

Regulation section(s)	OMB control No.	Number of respondents	Responses	Burden per response (hours)	Total annual burden (hours)	Hourly labor cost of reporting ($)	Total labor cost of reporting ($)	Total capital/ maintenance costs ($)	Total cost ($)
Patient Rights (§ 494.70 (c)) 0 Pamphlets	0938–0386	6,064	442,672	44	266,816	$42.71	$11,395,468.80	$1,328,016.00	$12,723,484.80
Patient Rights (§ 494.70 (c))—Patient Education and Recordkeeping	0938–0386	6,064	442,672	0.75	332,004	51.94	17,244,287.76	22,133.60	17,266,421.36
Patient Rights (§ 494.70 (c))—acknowledgement form	0938–0386	6,064	6,064	0.5	3,032	131.02	397,252.64	0.00	397,252.64
Disclosure of Third Party Premium Assistance to Issuers (§ 494.180(k))—letter template	0938–0386	6,064	6,064	1	6,064	131.02	794,505.28	0.00	794,505.28
Disclosure of Third Party Premium Assistance to Issuers (§ 494.180(k))—notification from facility	0938–0386	6,064	7,000	0.5	3,500	37.86	132,510	0.00	132,510
Disclosure of Third Party Premium Assistance to Issuers (§ 494.180(k))—issuer response	0938–0386	468	7,000	1.5	10,500	86.69	910,280	0.00	910,280
Total		6,532	911,472	48.25	621,916	481.24	30,874,304.48	1,350,149.60	32,224,454.08

TABLE 2—ANNUAL REPORTING, RECORDKEEPING AND DISCLOSURE BURDEN: SUBSEQUENT YEARS

Regulation section(s)	OMB control No.	Number of respondents	Responses	Burden per response (hours)	Total annual burden (hours)	Hourly labor cost of reporting ($)	Total labor cost of reporting ($)	Total capital/ maintenance costs ($)	Total cost ($)
Patient Rights (§ 494.70 (c)) 0 Pamphlets	0938–0386	6,064	442,672	35	212,240	$42.43	$9,005,767.68	$1,328,016.00	$10,333,783.68
Patient Rights (§ 494.70 (c))—Patient Education and Recordkeeping	0938–0386	6,064	442,672	0.75	332,004	51.94	17,244,287.76	22,133.60	17,266,421.36
Disclosure of Third Party Premium Assistance to Issuers (§ 494.180(k))—notification from facility	0938–0386	6,064	7,000	0.5	3,500	37.86	132,510.00	0.00	132,510.00
Disclosure of Third Party Premium Assistance to Issuers (§ 494.180(k))—issuer response	0938–0386	468	7,000	1.5	10,500	86.69	910,280.00	0.00	910,280.00
Total		6,532	899,344	37.75	558,244	218.93	27,292,845.44	1,350,149.60	28,642,995.04

If you comment on these information collection requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of this interim final rule with comment; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: CMS Desk Officer, CMS–3337–IFC. Fax: (202) 395–6974; or Email: *OIRA_submission@omb.eop.gov.*

V. Regulatory Impact Analysis

A. Introduction

This interim final rule with comment implements a number of requirements for Medicare-certified dialysis facilities that make payments of premiums for individual market health plans, whether directly, through a parent organization, or through another entity. It establishes a new patient rights standard applicable only to such facilities that they must provide patients with information on available health insurance options, including locally available individual market plans, Medicare, Medicaid, and CHIP coverage. This information must include the effects each option will have on the patient's access to, and costs for the providers and suppliers, services, and prescription drugs that are currently within the individual's ESRD plan of care as well as those likely to result from other documented health care needs. This must include an overview of the health-related and financial risks and benefits of the individual market plans available to the patient (including plans offered through and outside the Exchange). Patients must also receive information about all available financial assistance for enrollment in an individual market health plan and the limitations and associated risks of such assistance; including any and all current information about the facility's, or its parent organization's contributions to patients or third parties that subsidize enrollment in individual market health plans for individuals on dialysis.

In addition, the interim final rule with comment establishes a new standard requiring dialysis facilities that make payments of premiums for individual market health plans, whether directly, through a parent organization, or through another entity, to disclose these payments to applicable issuers and requiring the contributing facility to obtain assurance from the issuer that the issuer will accept such payments for the duration of the plan year.

These requirements are intended to ensure that patients are able to make coverage decisions based on full, accurate information, and are not inappropriately influenced by financial interests of dialysis facilities and suppliers, and to minimize the likelihood that coverage is interrupted midyear for these vulnerable patients.

B. Statement of Need

This interim final rule with comment addresses concerns raised by commenters and by HHS regarding the inappropriate steering of patients with ESRD, especially those eligible for Medicare and Medicaid, into individual market health plans that offer significantly higher reimbursement rates compared to Medicare and Medicaid, without regard to the potential risks incurred by the patient. As discussed previously in the preamble, public comments received in response to the August 2016 RFI indicated that dialysis facilities may be encouraging patients to move from one type of coverage into another based solely on the financial benefit to the dialysis facility, and without transparency about the potential consequences for the patient, in circumstances where these actions may result in harm to the individual.[19] Further, enrollment trends indicate that the number of individual market enrollees with ESRD more than doubled between 2014 and 2015, which is not itself evidence of inappropriate behavior but does raise concerns that the steering behavior described by commenters may be becoming increasingly common, and without immediate rulemaking patients are at considerable risk of harm.

This interim final rule with comment addresses these issues by implementing a number of requirements that will provide patients with the information they need to make informed decisions about their coverage and will help to ensure that their care is not at risk of disruptions, gaps in coverage, limited access to necessary treatment, or undermined by the providers' or suppliers' financial interests.

C. Overall Impact

We have examined the effects of this rule as required by Executive Order 12866 (58 FR 51735, September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism, and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 (58 FR 51735) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 (76 FR 3821, January 21, 2011) is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review as established in Executive Order 12866.

Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule—(1) having an annual effect on the economy of $100 million or more in any one year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year. We estimate that this rulemaking is ''economically significant'' as measured by the $100 million threshold, and hence also a major rule under the Congressional Review Act. Accordingly, we have prepared an RIA that to the best of our ability presents the costs and benefits of the rulemaking.

D. Impact Estimates and Accounting Table

In accordance with OMB Circular A–4, Table 3 below depicts an accounting statement summarizing HHS' assessment of the benefits, costs, and transfers associated with this regulatory action. The period covered by the RIA is 2017 through 2026.

HHS anticipates that the provisions of this interim final rule with comment will enhance patient protections and enable patients with ESRD to choose health insurance coverage that best suits their needs and improve their health outcomes. Providing patients with accurate information will help to ensure that patients are able to obtain necessary health care, reduce the likelihood of coverage gaps, as well as provide financial protection. Dialysis facilities and issuers will incur costs to comply with these requirements. If patients covered through individual market plans opt to move to (or return to) Medicare and Medicaid, then there will be a transfer of patient care costs to the Medicare and Medicaid programs. For those patients covered through individual market plans who chose to apply for and enroll in Medicare, there would be a transfer of premium payments from individual market issuers to the Medicare program. In accordance with Executive Order 12866, HHS believes that the benefits of this regulatory action justify the costs.

TABLE 3—ACCOUNTING TABLE

Benefits:
Qualitative:
* Provide patient protections and ensure that patients are able to make coverage decisions based on complete and accurate information, and are not inappropriately influenced by the financial interests of dialysis facilities.

[19] Individuals who are already covered by Medicare generally cannot become enrolled in coverage in the individual market. Section 1882(d)(3) of the Social Security Act makes it unlawful to sell or issue a health insurance policy (including policies issued on and off Exchanges) to an individual entitled to benefits under Medicare Part A or enrolled under Medicare part B with the knowledge that the policy duplicates the health benefits to which the individual is entitled. Therefore, while an individual with ESRD is not required to apply for and enroll in Medicare, once they become enrolled, it is unlawful for them to be sold a commercial health insurance policy in the individual market if the seller knows the individual market policy would duplicate benefits to which the individual is entitled. The financial consequences for patients moving from Medicare to private insurance—including late enrollment penalties for individuals in Medicare Part A but not Part B if they return to Medicare, and lack of coverage for certain drugs following a kidney transplant—are routinely not disclosed and may be unknown to patients. These financial consequences can have significant impact on patient care.

TABLE 3—ACCOUNTING TABLE—Continued

* Improve health outcomes for patients by ensuring that patients have coverage that best fits both current and future needs, including transplantation services.
* Ensure that issuers will accept any premium assistance payments for the duration of the plan year and patients' coverage is not interrupted midyear.

Costs:	Estimate (millions)	Year dollar	Discount rate percent	Period covered
Annualized Monetized	$29.1	2016	7	2017–2026
	29.1	2016	3	2017–2026
Costs reflect administrative costs incurred by dialysis facilities and issuers to comply with ICRs.				
Transfers:				
Annualized Monetized	$688.4	2016	7	2017–2026
	688.4	2016	3	2017–2016
Transfers reflect transfer of patient care costs from individual market issuers to Medicare and Medicaid; out-of-pocket costs from dual eligible patients to Medicare and Medicaid; transfer of premium dollars from individual market issuers to Medicare; and transfer of reimbursements from dialysis facilities to individual market issuers if patients move from individual market plans to Medicare and Medicaid.				

a. Number of Affected Entities

There are 6,737 dialysis facilities across the country that are certified by Medicare, and an estimated 495,000 patients on dialysis. Based on USRDS data for recent years, we estimated that approximately 99.3 percent or 491,500 patients receive services at Medicare-certified facilities. Therefore, each Medicare-certified facility is providing services to approximately 73 patients on average annually. As mentioned previously, data indicates that about 88 percent of ESRD patients receiving hemodialysis were covered by Medicare (as primary or secondary payer) in 2014. Data from the CMS risk adjustment program in the individual market (both on and off exchange) suggest that the number of enrollees with an ESRD diagnosis in the individual market more than doubled between 2014 and 2015. Although some of the increase could be due to increases in coding intensity and cross-year claims, the gross number is still significant and concerning. Comments received in response to the RFI suggest that the inappropriate steering of patients may be accelerating over time. Insurance industry commenters stated that the number of patients in individual market plans receiving dialysis increased 2 to 5 fold in recent years. We will continue to analyze these data to better understand trends in ESRD diagnoses as well as the extent to which individuals may be enrolled in both Medicare and individual market plans and implications for the anti-duplication provision outlined in section 1882(d)(3) of the Act.

There is no data on how many dialysis facilities make payments of premiums for individual market health plans, whether directly, through a parent organization, or through another entity. We believe that these practices are likely concentrated within large dialysis chains that together operate approximately 90 percent of dialysis facilities, and therefore estimate that approximately 6,064 facilities make payments of premiums for individual market health plans, whether directly, through a parent organization, or through another entity.

b. Anticipated Benefits, Costs and Transfers

This interim final rule with comment implements a number of requirements for Medicare-certified dialysis facilities (as defined in 42 CFR 494.10) that make payments of premiums for individual market health plans (in any amount), whether directly, through a parent organization (such as a dialysis corporation), or through another entity (including by providing contributions to entities that make such payments). Such facilities must provide patients with information on available health coverage options, including local, current individual market plans, Medicare, Medicaid, and CHIP coverage. This information must include; the effects each coverage option will have on the patient's access to, and costs for, the providers and suppliers, services, and prescription drugs that are currently within the individual's ESRD plan of care as well as those likely to result from other documented health care needs. This must include an overview of the health-related and financial risks and benefits of the individual market plans available to the patient (including plans offered through and outside the Exchange). Information on coverage of transplant-associated costs must also be provided to patients, including pre- and post-transplant care. In addition, facilities must provide information about penalties associated with late enrollment in Medicare. Patients must also receive information about available financial assistance for enrollment in an individual market health plan and limitations and associated risks of such assistance; the financial benefit to the facility of enrolling the individual in an individual market plan as opposed to public plans; and current information about the facility's, or its parent organization's contributions to patients or third parties that make payments of premiums for individual market plans for individuals on dialysis.

These requirements are intended to ensure that patients are able to make insurance coverage decisions based on full, accurate information, and not based on misleading, inaccurate, or incomplete information that prioritizes providers and suppliers' financial interests. It is likely that some patients will elect to apply for and enroll in Medicare and Medicaid (if eligible) instead of individual market plans once they are provided all the information as required. As previously discussed, Medicare (and Medicaid) enrollment will provide health benefits by reducing the likelihood of disruption of care, gaps in coverage, limited access to necessary treatment, denial of access to kidney transplants or delay in transplant readiness, and denial of post-surgical care. By enrolling in Medicare (and Medicaid), many individuals can avoid potential financial loss due to Medicare late enrollment penalties; higher cost-sharing, especially for out-of-network services; higher deductibles; and coverage limits in individual market plans. This is particularly true for the individuals eligible for Medicare based on ESRD who are also eligible for

Medicaid. While a patient with individual market coverage could be liable for out-of pocket costs of up to $7,150 in 2017, a patient dually enrolled in Medicare and Medicaid will have very limited, and in many cases no, out-of-pocket costs in addition to a wider range of eligible providers and suppliers.

In addition, this interim final rule with comment establishes a new standard, applicable only to facilities that make payments of premiums for individual market health plans, whether directly, through a parent organization (such as a dialysis corporation), or through another entity (including by providing contributions to entities that make such payments), requiring that the facility disclose such payments to applicable issuers and obtain assurance from the issuer that they will accept such payments for the duration of the plan year. This will lead to improved health outcomes for patients by ensuring that coverage is not interrupted midyear for these vulnerable patients, leaving them in medical or financial jeopardy.

Dialysis facilities that make premium payments for patients as discussed above will incur costs to comply with the provisions of this rule. The administrative costs related to the disclosure requirements have been estimated in the previous section.

If patients elect to apply for and enroll in Medicare and Medicaid (if eligible) instead of individual market plans, the cost of their coverage will be transferred from the patients and the individual market issuers to the Medicare and Medicaid programs (if the patient is eligible for both). This will lead to increased spending for these programs. For the purpose of this analysis, we assume that approximately 50 percent of patients enrolled in individual market plans that receive third party premium payments will elect to apply for and enroll in Medicare. USRDS data show that for individuals with ESRD enrolled in Medicare receiving hemodialysis, total health care spending averaged $91,000 per person in 2014, including dialysis and non-dialysis services. Therefore, if 3,500 patients switch to Medicare, the total transfer from individual market issuers to the Medicare program will be approximately $318,500,000. We assume that about 50 percent of patients that opt to enroll in Medicare will also be eligible for Medicaid and will have negligible or zero cost-sharing, rather than the maximum out-of-pocket cost of $7,150, which will be a transfer from the patients to the Medicare and Medicaid programs. Therefore, for 1,750 dual eligible patients, the total transfer is estimated to be $12,512,500. For those patients covered through individual market plans who choose to enroll in Medicare there will also be a transfer of premium payments from the individual market issuers to the Medicare program. Assuming that patients will pay the standard Part B premium amount, which will be $134 in 2017, and an average Part D premium of $42.17,[20] the total transfer for 3,500 patients is estimated to be $7,399,140. In addition, if patients move from individual market plans to Medicare, then reimbursements to dialysis facilities will be reduced, since individual market plans currently have higher reimbursement rates for dialysis services compared to Medicare, resulting in a transfer from dialysis facilities to issuers. As discussed previously, based on comments received, dialysis facilities are estimated to be paid at least $100,000 more per year per patient for a typical patient enrolled in commercial coverage rather than public coverage. For 3,500 patients, the total transfer from dialysis facilities to issuers is estimated to be at least $350,000,000.

E. Alternatives Considered

Under the Executive Order, HHS is required to consider alternatives to issuing rules and alternative regulatory approaches. HHS considered not requiring any additional disclosures to patients. Providing complex information regarding available coverage options may not always help patients make the best decisions. In addition, disclosure requirements may not be as effective where financial conflicts of interest remain for the dialysis facilities. We also considered prohibiting outright contributions from dialysis suppliers to patients or third parties for individual market plan premiums, but determined that we wanted to have additional data before implementing additional restrictions. A ban could potentially cause financial hardship for some patients. On the other hand, dialysis facilities would not be able to use these contributions to steer patients towards individual market plans that are more in the financial interests of dialysis facilities rather than those of the patient. In the absence of additional data, it is not possible to estimate the costs, benefits and transfers associated with such a ban, whether the benefits would outweigh the costs, and whether it would be more effective in ending the practice of steering.

HHS believes, however, that patients will benefit from having complete and accurate information regarding their options, especially information on Medicare and Medicaid and the financial and medical/coverage consequences of each option. In addition, CMS can ensure compliance with the disclosure requirements through the survey and certification process. CMS plans to issue interpretive guidance and a survey protocol for the enforcement of the new standards by state surveyors to ensure that the facilities share appropriate information with patients.

We also considered requiring issuers to accept all third party premium payments. However, requiring issuers to accept such payments could skew the individual market risk pool, a position CMS has consistently articulated since 2013, when we expressly discouraged issuers from accepting these premium payments from providers. We also received comments from issuers, social workers, and others in response to the RFI indicating that inappropriate steering practices could have the effect of skewing the insurance risk pool. The underlying policy considerations have not changed and therefore CMS is seeking to prevent mid-year disruption by requiring facilities to disclose payments and assure acceptance. In light of the comments received regarding dialysis facilities' practices in particular, and the unique health needs and coverage options available to this population, we are at this time imposing disclosure-related obligations only on the ESRD facilities themselves. This rule does not change the legal obligations or requirements placed on issuers.

In addition, to determine whether further action is warranted, we seek comments from stakeholders on whether patients would be better off on balance if premium assistance originating from health care providers and suppliers were more strictly limited and disclosed. We also seek comment on alternative options where payments would be limited absent a showing that the individual market coverage was in the individual's best interest, and we seek comment on what such a showing would require and how it could prevent mid-year disruptions in coverage.

F. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative

[20] Source: Jack Hoadley et al., Medicare Part D: A First Look at Prescription Drug Plans in 2017, Kaiser Family Foundation, October 2016, *http://kff.org/medicare/issue-brief/medicare-part-d-a-first-look-at-prescription-drug-plans-in-2017/.*

Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a rule is not likely to have a significant economic impact on a substantial number of small entities, section 604 of RFA requires that the agency present a final regulatory flexibility analysis describing the impact of the rule on small entities and seeking public comment on such impact.

The RFA generally defines a ''small entity'' as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA) (13 CFR 121.201); (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. (States and individuals are not included in the definition of ''small entity.'') HHS uses as its measure of significant economic impact on a substantial number of small entities a change in revenues of more than 3 to 5 percent.

Because this provision is issued as a final rule without being preceded by a general notice of proposed rulemaking, a final regulatory analysis under section 604 of the Regulatory Flexibility Act (94 Stat. 1167) is not required. Nevertheless, HHS estimates that approximately 10 percent of Medicare-certified dialysis facilities are not part of a large chain and may qualify as small entities. It is not clear how many of these facilities make payments of premiums for individual market health plans, whether directly, through a parent organization, or through another entity. To the extent that they do so, these facilities will incur costs to comply with the provisions of this interim final rule with comment and experience a reduction in reimbursements if patients transfer from individual market coverage to Medicare. However, HHS believes that very few small entities, if any, make such payments. Therefore, HHS expects that this interim final rule with comment will not affect a substantial number of small entities. Accordingly, the Secretary certifies that a regulatory flexibility analysis is not required.

In addition, section 1102(b) of the Social Security Act requires agencies to prepare a regulatory impact analysis if a rule may have a significant economic impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. This interim final rule with comment will not affect small rural hospitals. Therefore, HHS has determined that this regulation will not have a significant impact on the operations of a substantial number of small rural hospitals.

G. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act (UMRA) of 1995 requires that agencies assess anticipated costs and benefits before issuing any rule that includes a Federal mandate that could result in expenditure in any one year by state, local or tribal governments, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. In 2016, that threshold level is approximately $146 million.

UMRA does not address the total cost of a rule. Rather, it focuses on certain categories of cost, mainly those ''Federal mandate'' costs resulting from—(1) imposing enforceable duties on state, local, or tribal governments, or on the private sector; or (2) increasing the stringency of conditions in, or decreasing the funding of, state, local, or tribal governments under entitlement programs.

This interim final rule with comment includes no mandates on state, local, or tribal governments. Thus, this rule does not impose an unfunded mandate on state, local or tribal governments. As discussed previously, dialysis facilities that wish to make payments of premiums for individual market health plans (in any amount), whether directly, through a parent organization (such as a dialysis corporation), or through another entity (including by providing contributions to entities that make such payments), will incur administrative costs in order to comply with the provisions of this interim final rule with comment. Issuers will incur some administrative costs as well. However, consistent with policy embodied in UMRA, this interim final rule with comment has been designed to be the least burdensome alternative for state, local and tribal governments, and the private sector.

H. Federalism

Executive Order 13132 outlines fundamental principles of federalism. It requires adherence to specific criteria by Federal agencies in formulating and implementing policies that have ''substantial direct effects'' on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government.

This rule does not have direct effects on the states, the relationship between the Federal government and states, or on the distribution of power and responsibilities among various levels of government.

I. Congressional Review Act

This interim final rule with comment is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), which specifies that before a rule can take effect, the Federal agency promulgating the rule shall submit to each House of the Congress and to the Comptroller General a report containing a copy of the rule along with other specified information, and has been transmitted to the Congress and the Comptroller General for review.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 494

Health facilities, Incorporation by reference, Kidney diseases, Medicare, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR Chapter IV as follows:

PART 494—CONDITIONS FOR COVERAGE FOR END-STAGE RENAL DISEASE FACILITIES

■ 1. The authority citation for part 494 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

■ 2. Section 494.70 is amended by redesignating paragraph (c) as paragraph (d) and adding a new paragraph (c) to read as follows:

§ 494.70 Condition: Patients' rights.

* * * * *

(c) Standard: Right to be informed of health coverage options. For patients of dialysis facilities that make payments of premiums for individual market health plans (in any amount), whether directly, through a parent organization (such as a dialysis corporation), or through another entity (including by providing contributions to entities that make such payments), the patient has the right to—

(1) Be informed annually, on a timely basis for each plan year, of all available health coverage options, including but not limited to Medicare, Medicaid, CHIP and individual market plans. This must include information on:

(i) How plans in the individual market will affect the patient's access to, and costs for the providers and suppliers, services, and prescription

drugs that are currently within the individual's ESRD plan of care as well as those likely to result from other documented health care needs. This must include an overview of the health-related and financial risks and benefits of the individual market plans available to the patient (including plans offered through and outside the Exchange).

(ii) Medicare and Medicaid/Children's Health Insurance Coverage (CHIP) coverage, including Medicare Savings Programs, and how enrollment in those programs will affect the patient's access to and costs for health care providers, services, and prescription drugs that are currently within the individual's plan of care.

(iii) Each option's coverage and anticipated costs associated with transplantation, including patient and living donor costs for pre- and post-transplant care.

(2) Receive current information from the facility about premium assistance for enrollment in an individual market health plan that may be available to the patient from the facility, its parent organization, or third parties, including but not limited to limitations and any associated risks of such assistance.

(3) Receive current information about the facility's, or its parent organization's, contributions to patients or third parties that subsidize the individual's enrollment in individual market health plans for individuals on dialysis, including the reimbursements for services rendered that the facility receives as a result of subsidizing such enrollment.

* * * * *

■ 3. Section 494.180 is amended by adding a new paragraph (k) to read as follows:

§ 494.180 Condition: Governance.

* * * * *

(k) *Standard: Disclosure to Insurers of Payments of Premiums.* (1) Facilities that make payments of premiums for individual market health plans (in any amount), whether directly, through a parent organization (such as a dialysis corporation), or through another entity (including by providing contributions to entities that make such payments) must—

(i) Disclose to the applicable issuer each policy for which a third party payment described in this paragraph (k) will be made, and

(ii) Obtain assurance from the issuer that the issuer will accept such payments for the duration of the plan year. If such assurances are not provided, the facility shall not make payments of premiums and shall take reasonable steps to ensure such payments are not made by the facility or by third parties to which the facility contributes as described in this paragraph (k).

(2) If a facility is aware that a patient is not eligible for Medicaid and is not eligible to enroll in Medicare Part A and/or Part B except during the General Enrollment Period, and the facility is aware that the patient intends to enroll in Medicare Part A and/or Part B during that period, the standards under this paragraph (k) will not apply with respect to payments for that patient until July 1, 2017.

Dated: November 28, 2016.

Andrew M. Slavitt,

Acting Administrator, Centers for Medicare & Medicaid Services.

Dated: November 29, 2016.

Sylvia M. Burwell,

Secretary, Department of Health and Human Services.

[FR Doc. 2016–30016 Filed 12–12–16; 4:15 pm]

BILLING CODE 4120–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1816, 1832, 1842, and 1852

RIN 2700–AE34

NASA Federal Acquisition Regulation Supplement: Revised Voucher Submission & Payment Process (NFS Case 2016–N025)

AGENCY: National Aeronautics and Space Administration.

ACTION: Final rule.

SUMMARY: NASA has adopted as final, without change, an interim rule amending the NASA Federal Acquisition Regulation Supplement (NFS) to implement revisions to the voucher submittal and payment process.

DATES: *Effective:* December 14, 2016.

FOR FURTHER INFORMATION CONTACT: Mr. John J. Lopez, telephone 202–358–3740.

SUPPLEMENTARY INFORMATION:

I. Background:

NASA published an interim rule in the **Federal Register** at 81 FR 63143 on September 14, 2016, to amend the NASA Federal Acquisition Regulation Supplement (NFS) to implement revisions to the voucher submittal and payment process.

II. Discussion and Analysis

There were no public comments submitted in response to the interim rule. The interim rule has been converted to a final rule, without change.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

NASA does not expect this final rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* A final regulatory flexibility analysis has been performed and is summarized as follows:

The purpose of this rule is to implement revisions to the NASA voucher submittal and payment process. These revisions are necessary due to section 893 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114–92) prohibiting DCAA from performing audit work for non-Defense Agencies. This rule removes an outdated NFS payment clause and its associated prescription relative to the NASA voucher submittal and payment process and replaces it with a new clause that revises NASA's current cost voucher submission and payment process to ensure the continued prompt payment to its suppliers.

No comments were received in response to the initial regulatory flexibility analysis.

This rule applies to contractors requesting payment under cost reimbursement contracts. An analysis of data in the Federal Procurement Data System (FPDS) revealed that cost reimbursement contracts are primarily awarded to large businesses. FPDS data compiled over the past three fiscal years (FY 2013 through FY 2015) showed an average of 311 active cost reimbursement NASA contracts, of which 141 (approximately 45%) were awarded to small businesses. However, there is no significant economic or administrative cost impact to small or

large businesses because the rule does not impose any additional burden and will have a positive benefit in the way of fewer voucher rejections, rework, and payment delays.

There are no new reporting requirements or recordkeeping requirements associated with this rule. Further, there are no significant alternatives that could further minimize the already minimal impact on businesses, small or large.

V. Paperwork Reduction Act

The rule contains information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35); however, these changes to the NFS do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0070, entitled Payments—FAR Sections Affected: 52.232–1 thru 52.232–4 and 52.232–6 thru 52.232–11.

List of Subjects in 48 CFR Parts 1816, 1832, 1842, and 1852

Government procurement.

Manuel Quinones,

NASA FAR Supplement Manager.

■ Accordingly, the interim rule amending 48 CFR parts 1816, 1832, 1842, and 1852, which was published at 81 FR 63143 on September 14, 2016, is adopted as a final rule without change.

[FR Doc. 2016–29951 Filed 12–13–16; 8:45 am]

BILLING CODE 7510–13–P

SURFACE TRANSPORTATION BOARD

49 CFR Part 1122

[Docket No. EP 731]

Rules Relating to Board-Initiated Investigations

AGENCY: Surface Transportation Board.

ACTION: Final rules.

SUMMARY: The Surface Transportation Board (Board or STB) is adopting final rules for investigations conducted on the Board's own initiative pursuant to Section 12 of the Surface Transportation Board Reauthorization Act of 2015.

DATES: These rules are effective on January 13, 2017.

ADDRESSES: Information or questions regarding these final rules should reference Docket No. EP 731 and be in writing addressed to Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001.

FOR FURTHER INFORMATION CONTACT: Scott M. Zimmerman at (202) 245–0386. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

SUPPLEMENTARY INFORMATION: Section 12 of the Surface Transportation Board Reauthorization Act of 2015, Public Law 114–110, 129 Stat. 2228 (2015) (*STB Reauthorization Act* or *Act*) (*see* 49 U.S.C. 11701) authorizes the Board to investigate, on its own initiative, issues that are ''of national or regional significance'' and are subject to the Board's jurisdiction under 49 U.S.C. Subtitle IV, Part A. Under Section 12, the Board must issue rules implementing this investigative authority not later than one year after the date of enactment of the *STB Reauthorization Act* (by December 18, 2016).

By decision served on May 16, 2016, the Board issued a Notice of Proposed Rulemaking (NPRM) in which the Board proposed rules for investigations conducted on the Board's own initiative pursuant to Section 12 of the *STB Reauthorization Act.* The proposed rules were published in the **Federal Register**, 81 FR 30,510 (May 17, 2016), and comments were submitted in response to the NPRM.[1]

After consideration of parties' comments, the Board is adopting final rules, to be set forth at 49 CFR part 1122, that establish the procedures for Board investigations conducted pursuant to Section 12 of the *STB Reauthorization Act.* These final rules do not apply to other types of investigations that the Board may conduct.

Introduction

The *STB Reauthorization Act* provides a basic framework for conducting investigations on the Board's own initiative, as follows:

Within 30 days after initiating an investigation, the Board must provide notice to parties under investigation stating the basis for such investigation. The Board may only investigate issues that are of national or regional significance. Parties under investigation have a right to file a written statement describing all or any facts and circumstances concerning a matter under investigation. The Board should separate the investigative and decisionmaking functions of Board staff to the extent practicable.

Investigations must be dismissed if they are not concluded with administrative finality within one year after commencement.[2] In any such investigation, Board staff must make available to the parties under investigation and the Board Members any recommendations made as a result of the investigation and a summary of the findings that support such recommendations. Within 90 days of receiving the recommendations and summary of findings, the Board must either dismiss the investigation if no further action is warranted, or initiate a proceeding to determine whether a provision of 49 U.S.C. Subtitle IV, Part A has been violated. Any remedy that the Board may order as a result of such a proceeding may only be applied prospectively.

The *STB Reauthorization Act* further requires that the rules issued under Section 12 comply with the requirements of 49 U.S.C. 11701(d) (as amended by the *STB Reauthorization Act*), satisfy due process requirements, and take into account ex parte constraints.

Discussion of Issues Raised in Response to the NPRM

In the NPRM, the Board proposed a three-stage process, consisting of (1) Preliminary Fact-Finding, (2) Board-Initiated Investigations, and (3) Formal Board Proceedings. Having considered the comments, the Board will adopt this three-stage process in the final rules, subject to certain modifications from what was proposed in the NPRM. Below we address the comments received in response to the NPRM pertaining to each stage, as well as other related issues, and the Board's responses, including modifications from the NPRM. The final rules are below.

A. Preliminary Fact-Finding

As proposed in the NPRM, Preliminary Fact-Finding refers to the process in which Board staff would conduct, at their discretion, an initial, informal, nonpublic inquiry regarding an issue. The purpose of the Preliminary Fact-Finding would be to determine if there is enough information to warrant

[1] The Board received comments and replies from the following: Association of American Railroads (AAR); City of Jersey City, Rails to Trails Conservancy (Jersey City) (comments only); National Grain and Feed Association (NGFA); The National Industrial Transportation League (NITL) (comments only); Norfolk Southern Railway Company (NSR); and SMART/Transportation Division, New York State Legislative Board (SMART/TD–NY).

[2] The one-year deadline for investigations conducted on the Board's own initiative does not include any Board proceeding conducted subsequent to the investigation. S. Rep. No. 114–52, at 13 (2015).

a request for authorization to open a Board-Initiated Investigation into whether there may be a potential violation of 49 U.S.C. Subtitle IV, Part A, of national or regional significance. In this section, we address parties' comments on (1) whether the Board should adopt a time limit for Preliminary Fact-Finding, (2) whether Preliminary Fact-Finding should be confidential, (3) how the Board should decide to commence Preliminary Fact-Finding, and (4) fact-gathering.

Time Limit for Preliminary Fact-Finding. In the NPRM, the Board did not impose a time limit on Preliminary Fact-Finding. Because Board staff would be solely determining whether a matter merits seeking authorization to pursue a Board-Initiated Investigation, and would not be able to issue subpoenas to compel testimony or the production of information or documents, the Board does not consider this stage to be part of the one-year period for an investigation. Some commenters, however, contend that the statutorily-mandated one-year time limit for investigations should include Preliminary Fact-Finding. Other commenters disagree with including Preliminary Fact-Finding in the statutorily-mandated one-year time limit for investigations, arguing that the Board should instead impose a ''reasonable time limit'' on Preliminary Fact-Finding.

In particular, AAR asserts that the one-year time limit for investigations should apply to Preliminary Fact-Finding because an ''open-ended, limitless Preliminary Fact-Finding phase'' would undermine the ''purpose of the statutory scheme'' and would force parties to ''endure the burdens and uncertainty of an open-ended inquiry that could last for years.'' [3] (AAR Comment 4.)

NSR asserts two arguments in support of including Preliminary Fact-Finding in the one-year time limit. First, NSR states that the plain language of the statute ''expressly provides that the Board has one year to conclude any 'investigation' with administrative finality.'' Therefore, the Board's proposed ''Preliminary Fact-Finding phase is a blatant attempt to buy itself more time to conduct an investigation than afforded'' by Section 12 of the *STB Reauthorization Act.* (NSR Comment 5.) Second, NSR argues that Preliminary Fact-Finding should be included in the statutorily-mandated one-year time limit so that the Board's proposed investigatory process is subject to ''durational restraints'' in accordance with other agencies' best practices. According to NSR, ''other administrative agencies do not permit indefinite 'pre-investigation' phases'' and the Securities Exchange Commission requires that its ''pre-investigation'' phase, called ''Matters Under Inquiry,'' be completed within 60 days. (NSR Comment 5–6.)

NGFA and NITL disagree with including Preliminary Fact-Finding in the statutorily-mandated one-year time limit for investigations, but argue that the Board should instead impose a reasonable time limit on Preliminary Fact-Finding. NGFA supports the Board imposing a time limit of 60 days. (NGFA Reply 5.) NITL supports a 45-day deadline for Preliminary Fact-Finding. (NITL Comment 2.)

SMART–TD argues that ''there is always 'preliminary' work'' before an ''official'' agency action and, therefore, the Board should delete the provision for Preliminary Fact-Finding from the final rules. (SMART–TD Comment 11.)

Although 49 U.S.C. 11701 requires that the Board dismiss any investigation that is not concluded with administrative finality within one year, Preliminary Fact-Finding does not constitute part of an investigation; rather, it is the Board's informal process of determining *whether* an investigation should be commenced. The Board must have a mechanism to gather information on a preliminary basis to determine whether an investigation is warranted. The Preliminary Fact-Finding period is intended to allow the Board to dismiss unfounded complaints without unnecessarily expending limited Board or party resources. This approach is in the best interest of our stakeholders, as the Board would be able to more effectively allocate its resources to only investigate potential violations of sufficient gravity to warrant Board action. This approach would also alleviate the burden on parties potentially subject to Board-Initiated Investigations by limiting such investigations only to situations where, in the Board's discretion, investigation into a matter of national or regional significance is warranted. Although SMART–TD argues that the Board should delete the concept of Preliminary Fact-Finding from the rules and merely conduct any such preliminary work without making it an official part of the process, the Board finds that it is in the public interest that our regulations notify stakeholders of the existence of this stage. Accordingly, in the interest of transparency, the Board will not delete this provision from the regulations.

Although there is no limitation in the statute as to how long Preliminary Fact-Finding should occur, the Board understands the concern from the parties that the Board not allow the Preliminary Fact-Finding phase to continue ''indefinitely.'' The final rules, accordingly, require that Preliminary Fact-Finding be concluded within a reasonable period of time. As a matter of policy, we determine ''a reasonable period of time'' to be approximately 60 days from the date the Board notifies the party subject to Preliminary Fact-Finding that Preliminary-Fact Finding has commenced. *See* 49 CFR 1122.5(a).

Confidentiality. The NPRM proposed that Preliminary Fact-Finding generally would be nonpublic and confidential, subject to certain exceptions. Several commenters oppose this proposal and request that all of, or certain parts of, Preliminary Fact-Finding be made public.

Jersey City requests that the Board publish notice of commencement of Preliminary Fact-Finding in the **Federal Register**, make information submitted by parties during Preliminary Fact-Finding publicly available, and publish Board staff's findings from Preliminary Fact-Finding so that third parties may comment on such information. (Jersey City Comment 13.) NITL asks that the Board publish notice of commencement of Preliminary Fact-Finding—which should include a ''high level summary'' of the issue being investigated—as well as Board staff's conclusions from Preliminary Fact-Finding. (NITL Comment 2.) Similarly, NGFA asks that the Board publish on its Web site, or in the **Federal Register**, a description of any issues subject to Preliminary Fact-Finding, and the outcomes of such inquiries, with any sensitive information such as party names redacted. (NGFA Comment 6; NGFA Reply 3.)

AAR opposes making Preliminary Fact-Finding public, stating that to do so would make parties ''reluctant to volunteer information'' and subject to ''unwarranted reputational damage or other harm.'' (*See* AAR Reply 1–2, 4.) Moreover, AAR states that a publicly available description of an issue subject to Preliminary Fact-Finding, even one in which sensitive information is redacted, would be insufficient to protect a railroad's identity given the nature of the industry. (AAR Reply 4–5.) AAR further notes that shippers' justifications for making Preliminary Fact-Finding public—namely, transparency and public participation—could be satisfied

[3] AAR, however, supports the Board's proposal to have a Preliminary Fact-Finding phase preceding Board-Initiated Investigations, stating that ''providing for a Preliminary Fact-Finding phase makes practical sense and should be maintained in the final rules.'' (AAR Comment 5.)

during a Formal Board Proceeding, if one were opened. (AAR Reply 2.)

The Board will adopt the proposal in the NPRM to keep the Preliminary Fact-Finding confidential, subject to certain limited exceptions (discussed below). Having considered the parties' arguments, we are not convinced the potential benefits of making Preliminary Fact-Finding public outweigh the risks. During Preliminary Fact-Finding, Board staff would only be ascertaining whether a matter warrants an investigation by the Board. Preliminary Fact-Finding would not be a formal, evidence-gathering process, and, if the Board were to make Preliminary Fact-Finding public, parties subject to Preliminary Fact-Finding could possibly be subject to unwarranted reputational damage or other harm. NGFA suggests that concerns about confidentiality could be avoided by redacting the parties' names, but even a general description of the issues subject to Preliminary Fact-Finding might effectively disclose the identity of involved parties, regardless of whether the name(s) of the parties were redacted. Therefore, the final rules presume that Preliminary Fact-Finding would be nonpublic and confidential, unless the Board otherwise finds it necessary to make certain information related to, or the fact of, Preliminary Fact-Finding public.

As previously proposed in the NPRM, the final rules would continue to allow the Board to make aspects of Preliminary Fact-Finding public. *See* section 1122.6(a)(1). In instances where the Board chooses to exercise this discretion, the Board would weigh, on a case-by-case basis, potential harm to innocent parties, markets, or the integrity of the inquiry and subsequent investigation. However, because of the risks associated with making Preliminary Fact-Finding public, we will not adopt a mechanism through which a party may request that Preliminary Fact-Finding be made public pursuant to section 1122.6(a)(1). The same reasoning applies to confidentiality of Board-Initiated Investigations, as discussed later.

Commencement. The NPRM proposed that Board staff would commence Preliminary Fact-Finding, at its discretion, to determine if an alleged violation could be of national or regional significance and subject to the Board's jurisdiction under 49 U.S.C. Subtitle IV, Part A, and warrant a Board-Initiated Investigation. AAR proposes three modifications to the Board's regulations. We discuss each in turn.

First, AAR asserts that the Board or the Director of the Office of Proceedings, as opposed to Board staff, should approve commencement of Preliminary Fact-Finding, ''given the potentially significant consequences on regulated parties'' from Preliminary Fact-Finding, or from a Board-Initiated Investigation or Formal Board Proceeding opened as a result of Preliminary Fact-Finding. (AAR Comment 6.) We decline to incorporate the suggestion that the Board or the Director of the Office of Proceedings should approve commencement of Preliminary Fact-Finding. The Board must gather information concerning potentially qualifying violations to determine whether it should commence a Board-Initiated Investigation. For the reasons discussed earlier,[4] such activities are informal and preliminary, and, thus, we find that the initiation of Preliminary Fact-Finding does not merit a formal Board action or finding, although the Board would be aware of the commencement of Preliminary Fact-Finding.

Second, AAR suggests that the Board should notify parties subject to Preliminary Fact-Finding that Preliminary Fact-Finding has commenced. AAR argues that, without such notice, railroads may not be willing to coordinate and share information with the Board's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) out of concern that such information could be used by Board staff in Preliminary Fact-Finding against them. (AAR Comment 7–8.) To address AAR's concerns regarding OPAGAC, we are modifying section 1122.3 to include a requirement that Board staff notify parties subject to Preliminary Fact-Finding that Preliminary Fact-Finding has commenced. *See* section 1122.3 (stating that ''Board staff shall inform the subject of Preliminary Fact-Finding that Preliminary Fact-Finding has commenced''). The Board finds that it is necessary to maintain railroad confidence in OPAGAC, as OPAGAC's Rail Customer and Public Assistance Program (RCPA) provides a valuable informal venue for the private-sector resolution of shipper-railroad disputes, and, without railroad participation, RCPA would be less effective at facilitating communication among the various segments of the rail-transportation industry and encouraging the resolution of rail-shipper operational or service issues. Thus, the final rules incorporate AAR's request that the Board provide notice to parties subject to Preliminary Fact-Finding that Preliminary Fact-Finding has commenced.

Third, AAR argues that section 1122.3 should use the terminology ''warranted'' or ''not warranted'' (instead of ''appropriate'' or ''not appropriate''), as both the NPRM's preamble and the statute use the word ''warranted.'' (AAR Comment 9 n.3.) The final rules incorporate this suggestion, adopting the terminology of ''warranted'' or ''not warranted,'' instead of ''appropriate'' or ''not appropriate.'' *See* 49 CFR 1122.3.

Fact Gathering. The NPRM proposed that, during Preliminary Fact-Finding, Board staff could request that parties voluntarily provide testimony, information, or documents to assist in Board staff's informal inquiry, but could not issue subpoenas to compel the submission of evidence. In response to this proposal, AAR, NITL, and NGFA suggest that certain clarifications are needed regarding the collection of information during Preliminary Fact-Finding. We address these comments below.

AAR seeks clarification that (1) the production of documents during Preliminary Fact-Finding is voluntary, (2) the requirement to certify a production of documents applies to Preliminary Fact-Finding, (3) the Board retains its right to demand to inspect and copy any record of a rail carrier pursuant to 49 U.S.C. 11144(b) during Preliminary Fact-Finding, and (4) the information submitted during Preliminary Fact-Finding will be ''subject to disclosure in any subsequent Board-Initiated Investigation on the same terms as other materials gathered during Board-Initiated Investigations.'' (AAR Comment 5, 7–8.)

In response to AAR's comments, the Board provides the following clarifications. First, the production of documents during Preliminary Fact-Finding would be voluntary. *See* section 1122.9 (granting Investigating Officer(s) the right to compel the submission of evidence only in Board-Initiated Investigations). Second, parties that choose to voluntarily produce documents during Preliminary Fact-Finding would not be required to certify such productions. Whereas the NPRM proposed to require a producing party to submit a statement certifying that such person made a diligent search for responsive documents ''[w]hen producing documents *under this part,*'' the final rules at section 1122.12(a) now limit that to ''[w]hen producing documents *under section 1122.4,*'' the regulation governing Board-Initiated Investigations only. Third, as a matter of policy, the Board would not demand to inspect and copy any record—relating to

[4] *See supra* Part A: Time Limit for Preliminary Fact-Finding.

the subject of Preliminary Fact-Finding—of a rail carrier pursuant to 49 U.S.C. 11144(b) during Preliminary Fact-Finding by Board staff. Finally, information submitted during Preliminary Fact-Finding would be subject to disclosure in any subsequent Board-Initiated Investigation on the same terms as materials gathered during Board-Initiated Investigations. This is provided for in the final rules at section 1122.6, which states that all information and documents obtained under section 1122.3 (referring to Preliminary Fact-Finding) or section 1122.4 (referring to Board-Initiated Investigations) whether or not obtained pursuant to a Board request or subpoena, shall be treated as nonpublic by the Board and its staff, subject to the exceptions described in section 1122.6(a)–(c).

NITL and NGFA state that the Board should provide staff the ''appropriate tools'' to obtain information needed during Preliminary Fact-Finding. (NITL Comment 2; NGFA Reply 5–6.) NGFA also suggests that the Board should adopt deadlines for a party subject to Preliminary Fact-Finding to submit evidence to the Board. (NGFA Reply 6.)

The Board declines to give Board staff additional authority to obtain information during Preliminary Fact-Finding. As previously noted, Preliminary Fact-Finding is an initial, informal inquiry to determine whether a Board-Initiated Investigation is warranted. The Board, thus, has intentionally limited Board staff's authority to collect evidence in order to prevent undue burden on anyone. However, during Preliminary Fact-Finding, Board staff would be able to request that parties produce information and documents on a voluntary basis and request that any evidence submitted be provided by a certain deadline. Although Board staff would not be able to issue subpoenas to compel the production of evidence during Preliminary Fact-Finding, parties would have an incentive to provide information or documents to show that a Board-Initiated Investigation is not warranted. For these reasons, the Board declines to grant Board staff any further authority to obtain information during Preliminary Fact-Finding.

B. Board-Initiated Investigation

As proposed in the NPRM, Board-Initiated Investigation refers to an investigation, conducted in accordance with Section 12 of the *STB Reauthorization Act,* to decide whether to recommend to the Board that it open a proceeding to determine if a violation of 49 U.S.C. Subtitle IV, Part A occurred. The NPRM stated that a Board-Initiated Investigation would begin with the Board issuing an Order of Investigation and providing a copy of the order to the parties under investigation within 30 days of issuance. The NPRM also provided that Board-Initiated Investigations would be nonpublic and confidential, subject to certain exceptions, to protect both the integrity of the process and the parties under investigation from any unwarranted reputational damage or other harm. Finally, the NPRM stated that parties who are not the subject of the investigation would not be able to intervene or participate as a matter of right in Board-Initiated Investigations.

In this section, we address parties' comments on (1) the standard for opening a Board-Initiated Investigation, (2) the definition of ''national or regional significance,'' (3) timing of providing the Order of Investigation to parties under investigation, (4) confidentiality of Board-Initiated Investigations, (5) parties' requests for the right to intervene in Board-Initiated Investigations, (6) railroads' request for access to exculpatory evidence, (7) parties' comments relating to the collection of information and documentation, and (8) the process for providing Board staff's recommendations and summary of findings to a party under investigation.[5]

Standard for Opening a Board-Initiated Investigation. The NPRM stated that the Board could commence a Board-Initiated Investigation of any matter of national or regional significance that is subject to the jurisdiction of the Board under 49 U.S.C. Subtitle IV, Part A when it appears that the statute may have been violated. The NPRM further stated that, in instances where Preliminary Fact-Finding had been conducted,[6] in order to seek authorization to commence a Board-Initiated Investigation, Board staff would have to determine that (1) a violation of 49 U.S.C. Subtitle IV, Part A subject to the Board's jurisdiction may have occurred and (2) that the potential violation may be of national or regional significance warranting the opening of an investigation.

In comments, AAR asks the Board to clarify the standard for commencing a Board-Initiated Investigation and require that (1) ''the issue [be] of national or regional significance'' and (2) ''there [be] *reasonable cause* to believe that there may be a violation of 49 U.S.C. Subtitle IV, Part A.'' (AAR Comment 9–11.) (emphasis added.) Under 49 U.S.C. 11701, however, the Board may begin an investigation of alleged violations of 49 U.S.C. Subtitle IV, Part A as long as the issue is of national or regional significance. As a result, AAR's proposal would require a higher standard for commencing a Board-Initiated Investigation than imposed by the statute—*i.e.,* by requiring ''reasonable cause to believe'' that a violation under 49 U.S.C. Subtitle IV, Part A occurred. Accordingly, we decline to adopt AAR's proposed standard and will maintain in the final rules the statutory standard, which provides that the Board may, in its discretion, commence a Board-Initiated Investigation of any matter of national or regional significance that is subject to the jurisdiction of the Board under 49 U.S.C. Subtitle IV, Part A. *See* section 1122.4.

AAR further asks that the Board require that any Order of Investigation issued state that ''the matter at issue 'is' of national or regional significance'' (instead of ''may be'' of national or regional significance). (AAR Comment 9.) Relatedly, NSR asks that the Board clarify that any issue subject to a Board-Initiated Investigation must ''remain of national or regional significance throughout the Board-Initiated Investigation and related Formal Board Proceeding.'' (NSR Comment 3.)

The final rules will continue to require that an alleged violation subject to a Board-Initiated Investigation be of national or regional significance. *See* section 1122.4. Section 12 of the *STB Reauthorization Act* permits the Board to investigate issues that ''are of national or regional significance.'' We interpret this language to mean that an alleged violation of 49 U.S.C. Subtitle IV, Part A that is of national or regional significance upon commencement of the investigation may continue to be subject to Board-Initiated Investigation even if the conduct that created the alleged violation ceases. Similarly, conduct underlying an alleged violation does not have to be of ongoing national or regional significance so long as the Board determines that the alleged violation created an issue of national or regional significance at the time the

[5] Jersey City requests the Board also address the ''institutional structure, staffing, and resources'' it has related to investigations conducted pursuant to Section 12 of the *STB Reauthorization Act.* As this issue is not pertinent to the regulations, we decline to comment on internal Board staffing issues. (Jersey City Comment 7.)

[6] NGFA asks the Board to change § 1122.4 to clarify that Preliminary Fact-Finding is not required in order to commence a Board-Initiated Investigation. (NGFA Comment 7.) However, there was no requirement in the regulations that Preliminary Fact-Finding must precede a Board-Initiated Investigation, and the NPRM's preamble was clear that Preliminary Fact-Finding was not required in order to commence a Board-Initiated Investigation. We, therefore, decline to make this change to the final rules.

investigation was initiated. Otherwise, conduct that is capable of repetition could create future crises without redress. The final rules thus will adopt the language proposed in the NPRM. *See* section 1122.4.

Definition of ''National or Regional Significance.'' In the NPRM, the Board did not define the phrase ''of national or regional significance.'' As a result, some commenters request that the Board define this phrase or provide examples of issues that would be considered of national or regional significance.

In particular, AAR states that the Board should define ''national or regional significance'' as ''widespread and significant effects on transportation service or markets in a region or across the nation.'' AAR also asks that the Board clarify that issues of national or regional significance do not include individual rate disputes or disputes involving a single shipper. (AAR Comment 10.) Similarly, Jersey City states that the Board should define ''national or regional significance'' in order to avoid litigation on jurisdictional issues stemming from this phrase. (Jersey City Comment 11–12.)

We decline to adopt a definition of ''national or regional significance.'' The Board finds that AAR's proposed definition does not provide significantly more insight than the phrase itself as to what constitutes a matter ''of national or regional significance.'' In addition, there is no need to expressly exclude rate disputes in these rules—such disputes are not subject to Board-Initiated Investigation under the statute (whether or not they are of national or regional significance). Section 11701(a) of Title 49 of the United States Code states that the Board may begin an investigation on its own initiative, ''[e]xcept as otherwise provided in this part.'' Rate disputes are governed by 49 U.S.C. 10704, which specifically states that rate disputes may only be commenced ''on complaint.'' 49 U.S.C. 10704(b). Therefore, rate disputes fall outside the purview of the investigatory authority conferred to the Board under Section 12 of the *STB Reauthorization Act.*

As to disputes involving a single shipper, the Board declines to adopt a blanket approach as to whether such issues are of national or regional significance. Such a determination would be fact-dependent and require the Board to make a determination based on the specific situation and various factors (such as the dispute's impact on national or regional rail traffic), which are discussed further below.

NSR and NGFA also ask that the Board provide clarification related to the definition of ''national or regional significance.'' Specifically, NSR asks the Board to explain how it ''intends to apply the jurisdictional standard of 'national or regional significance.' '' (NSR Comment 3.) NGFA requests that the Board ''provide a discussion of the types of rail practices or issues the Board would consider to be of national or regional significance.'' (NGFA Comment 3–4; NGFA Reply 6.)

Under the final rules, the Board would apply the jurisdictional standard of national or regional significance on a case-by-case basis, considering, for instance, the extent of the impacts of the potential violation on national or regional rail traffic, customers, or third parties, or the geographic scope of the alleged violation. Examples of recent matters that the Board might consider to be of national or regional significance include (but are not limited to): Fertilizer shipment delays; rail car supply issues that impact grain shipments; or extensive congestion at strategic interchange points such as Chicago, Ill.

Confidentiality. As with Preliminary Fact-Finding, the NPRM proposed that Board-Initiated Investigations generally would be nonpublic and confidential, subject to certain exceptions,[7] in order to protect the integrity of the process and to protect parties under investigation from possibly unwarranted reputational damage or other harm.

In comments, NGFA asks that the Board publish Orders of Investigation in the **Federal Register** or on the Board's Web site, so that third parties may request access to documents produced during a Board-Initiated Investigation, and NGFA and Jersey City ask the Board to inform the public as to the outcome of a Board-Initiated Investigation.[8] (NGFA Comment 6–7.) Similarly, NITL asks that the Board make the Order of Investigation available to the public, and SMART–TD asks the Board to delete the ''automatic 'nonpublic' process.'' (NITL Comment 3; SMART–TD Comment 11.) On reply, AAR opposes making Board-Initiated Investigations public for the same reasons it opposes making Preliminary Fact-Finding public.[9] (AAR Reply 4–5.) For instance, AAR states that public disclosure of the subject of a Board-Initiated Investigation could cause ''unwarranted reputational damage or other harm'' and that ''the threat of public disclosure w[ould] create the incentive to be less cooperative in the discovery process.'' (AAR Reply 4.)

We find that the risks of making Board-Initiated Investigations public outweigh the potential benefits, absent extraordinary circumstances.[10] If, after conducting a Board-Initiated Investigation, the Board believes that a Formal Board Proceeding should be commenced to determine if a qualifying violation occurred, the Board would open such a proceeding. At that time, any Formal Board Proceeding would be public, subject to the Board's existing rules protecting confidential information. *See* 49 CFR 1104.14. However, if the Board determines that no further action is warranted and therefore dismisses the Board-Initiated Investigation with no further action, the Board generally would seek to maintain the confidentiality of the party subject to the Board-Initiated Investigation, in order to prevent the party from being subject to any stigma that may be associated with having been investigated. For these reasons, the final rules maintain that Board-Initiated Investigations are presumptively nonpublic and confidential.

With respect to confidentiality, AAR asks that the Board clarify that it is ''not claiming unbounded discretion to make confidential *information and documents* public'' and that it revise the NPRM's confidentiality provision to include the protections provided by 49 CFR 1001.4, which governs predisclosure notification procedures for confidential commercial information. (AAR Comment 17–18.) NSR also asks that the Board ''create a reasonable opportunity for the person claiming confidentiality to respond to the Board's denial of a request for confidential treatment prior to any public disclosure of the purportedly confidential information.'' (NSR Comment 4, 28–29.)

The Board will grant these requests to clarify that parties will be given notice and the ability to respond to the potential disclosure of confidential commercial information prior to its release. Specifically, the final rules at

[7] *See* § 1122.6(a)–(c). *See also infra* note 10.

[8] NGFA and Jersey City make the same request with respect to Preliminary Fact-Finding. (NGFA Comment 6–7; Jersey City Comment 14.) NGFA further asks that the Order of Investigation identify a point of contact for Preliminary Fact-Finding and the Board-Initiated Investigation and request from third parties information related to the issue being investigated. (NGFA Comment 6; NGFA Reply 3.) NGFA states that Board could redact information identifying the party subject to the investigation. For the reasons provided above, the final rules maintain that Preliminary Fact-Finding and Board-Initiated Investigations generally would be nonpublic and confidential, subject to the exceptions described in § 1122.6(a)–(c).

[9] *See supra* Part A: Confidentiality.

[10] The Board recognizes that there may be instances where it is necessary to make a Board-Initiated Investigation, or aspects of a Board-Initiated Investigation, public, in which case the Board would rely on § 1122.6(a)(1) to release such information.

section 1122.6(a)(1) now expressly incorporate 49 CFR 1001.4(c), (d) and (e), which require that the Board notify the person claiming confidential treatment prior to publicly disclosing any purportedly confidential commercial information and provide such persons an opportunity to object to the disclosure. The Board's final rules at section 1122.7 also continue to require that, if a Freedom of Information Act (FOIA) request seeks information that a party has claimed constitutes trade secrets and commercial or financial information within the exception in 5 U.S.C. 552(b)(4), the Board shall give the party an opportunity to respond pursuant to 49 CFR 1001.4.

Order of Investigation. As proposed in the NPRM, the Board would issue an Order of Investigation in order to commence a Board-Initiated Investigation. The Board then would provide a copy of the Order of Investigation to the party under investigation within 30 days of issuance.

In its comments, AAR asks that the Board instead provide a copy of the Order of Investigation to the parties under investigation within 10 days of its issuance. (AAR Comment 12.) Similarly, NGFA asks that the Board provide a copy of the Order of Investigation to the public within 10 or 15 days of its issuance. (NGFA Reply 7.)

Under 49 U.S.C. 11701(d)(1), the Board is required to provide written notice to the parties under investigation by not later than 30 days after initiating the investigation. Although in practice the Board intends to provide copies of the Order of Investigation to parties within a shorter timeframe as requested by AAR and NGFA, the Board declines to adopt regulations that are stricter than the requirements of Section 12 of the *STB Reauthorization Act.* The final rules therefore maintain the statutory requirement of providing notice to parties under investigation within 30 days.

Intervention. The NPRM provided that third parties, who are not the subject of a Board-Initiated Investigation, may not intervene or participate as a matter of right in any Board-Initiated Investigation. Commenters, mostly shippers, ask that the Board either permit third parties to intervene in Board-Initiated Investigations or comment on an ongoing investigation. These commenters assert, among other arguments, that third parties have a statutory right to intervene and that intervention would promote transparency and assist Board staff in compiling a more complete record. (NITL Comment 3; NGFA Comment 5–7; NGFA Reply 4, 8; Jersey City Comment 15; SMART–TD 11.) AAR opposes allowing third parties to intervene in Board-Initiated Investigations. (AAR Reply 2, 9.)

We decline to permit third parties to intervene or participate as a matter of right in Board-Initiated Investigations. Although NGFA and Jersey City argue that interventions could increase transparency and assist Investigative Officers in developing a more complete record and determining whether a qualifying violation occurred, a final, binding determination in that regard is not made during a Board-Initiated Investigation. (*See* NGFA Comment 7; Jersey City Comment 15.) Rather, that decision would be made during the Formal Board Proceeding, where, as AAR notes, third parties could move to intervene and participate in a proceeding. Therefore, shippers' objectives in intervening in Board-Initiated Investigations would be satisfied during a Formal Board Proceeding. In addition, there is a statutory one-year time limitation on Board-Initiated Investigations. Allowing third parties to intervene as of right could make it difficult for the Board to complete its investigation in the required time frame.[11]

Finally, we disagree with Jersey City's argument that 28 U.S.C. 2323 grants interested ''[c]ommunities, associations, firms, and individuals'' a right to intervene in any Board-Initiated Investigation. As AAR points out, section 2323 applies only to federal court proceedings arising from challenges to Board rulemakings or attempts to enforce Board orders. (AAR Reply 9.) For these reasons, the final rules continue to prohibit intervention or participation by third parties in any Board-Initiated Investigation.

Information and Documentation Collection. Parties raise several concerns with respect to the production of documents and testimony under the proposed rules. In the NPRM, the Board proposed that, if any transcripts were taken of investigative testimony, they would be recorded by an official reporter or other authorized means. In comments, AAR asks that parties under investigation be given full access to transcripts of their testimony, while NSR asks that subpoenaed witnesses be able to obtain copies of their evidence and transcripts of their testimony. (AAR Comment 14; NSR Comment 22.) AAR also asks that the Board revise the proposed regulation governing transcripts to always require a transcript of investigative testimony. (AAR Comment 14.) AAR further requests that Investigating Officers be limited in the amount of information and documents that they can request of parties and also limited to requesting ''documents that are likely to be directly relevant to the investigation.'' (AAR Comment 15.) NSR asks that the Board ''ensure that subpoenas are issued only where they are likely to lead to admissible evidence regarding the investigated issue . . . and are otherwise limited in scope, specific in directive, and in good faith.'' (NSR Comment 4.)

In response to AAR and NSR's comments pertaining to transcripts, the Board declines to always require a transcript of investigative testimony, but will require that witnesses be given access to any transcript of their investigative testimony—either by receiving a copy of the transcript or by inspecting the transcript. Specifically, the final rules now provide that ''[a] witness who has given testimony pursuant to [part 1122 of the regulations] shall be entitled, upon written request, to procure a transcript of the witness' own testimony or, upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony.'' *See* section 1122.10.

As to Investigating Officers' right to request documents, we will adopt AAR's suggestion that Investigating Officers be limited to request documents that are likely to be directly relevant to the investigation. (AAR Comment 15.) Thus, we have modified the language of section 1122.9 to state that Investigating Officer(s) may interview or depose witnesses, inspect property and facilities, and request and require the production of any information, documents, books, papers, correspondence, memoranda, agreements, or other records, in any form or media, ''that are likely to be directly relevant to the issues of the Board-Initiated Investigation.'' This change also sufficiently addresses NSR's concern that Investigating Officers' requests for evidence be ''limited in scope, specific in directive, and in good faith.'' (NSR Comment 4.) The Board declines to otherwise limit the Investigating Officers' right to request evidence.

AAR and NSR also ask that the Board provide parties under investigation the right to seek discovery.[12] (*See* AAR

[11] Shippers also request that third parties be allowed to intervene in Preliminary Fact-Finding. We reject this request for the same reasons we reject the request that third parties be allowed to intervene in the Board-Initiated Investigations.

[12] AAR also asks for the right to obtain discovery during a Formal Board Proceeding, which we

Comment 14; NSR Comment 4, 35–37.) On reply, NGFA opposes the railroads' request that parties under investigation be provided the right to seek discovery, stating that the ''final rules should not impose complex requirements and associated legal and other costs on rail customers.'' (NGFA Reply 3.) NGFA adds that, if the Board were to allow railroads to conduct discovery in Board-Initiated Investigations, such discovery ''should be limited to entities that elect to become parties by formally intervening in the proceeding.'' (NGFA Reply 3, 8.) We agree with NGFA that permitting parties under investigation to seek discovery could impose unnecessary legal and other costs on parties that are not subject to investigation, and we find that permitting such discovery, even of materials gathered by the Board, also could unnecessarily obstruct and delay a Board-Initiated Investigation, which must be concluded within a specific timeline. We therefore decline to permit parties under investigation the right to seek discovery. In the event a party under investigation believes that a third party has information likely to be directly relevant to the investigation, the party under investigation should convey that to the Investigating Officer(s), who may then request that information from the relevant third parties.

Finally, AAR and NSR request that the Board eliminate or add certain other provisions related to the Board's collection of information and documentation during a Board-Initiated Investigation. First, AAR asks that the Board entirely eliminate the proposed regulation (proposed in the NPRM as 49 CFR 1122.11) titled ''Certifications and false statements,'' including subparagraph (b), which requires a party from whom documents are sought to submit a list of all documents withheld due to privilege, and subparagraph (c), which sets forth the criminal penalty for perjury. (AAR Comment 16–17.) Alternatively, AAR asks the Board to revise the ''Certifications and false statements'' provision to ''require the person [producing documents] to confirm that it produced all responsive, non-privileged documents located after reasonable search and subject to any agreed-upon protocols regarding reduction of duplicative documents.'' (AAR Comment 16.) AAR claims its language would allow a party to only have to produce one copy of a document, even if duplicative digital versions exist. Its language would also require a party to perform a ''reasonable'' search, rather than a ''diligent'' search, as proposed in the NPRM. Additionally, AAR asks that the Board adopt a ''witness rights'' provision in accordance with other agencies' practices. (AAR Comment 17.) NGFA opposes AAR's request to remove the ''Certifications and false statements'' provision. (NGFA Reply 8.)

We decline to eliminate the ''Certifications and false statements'' provision in its entirety, or its subparagraph (b) relating to the privilege log requirements. Subparagraphs (a) and (b) are necessary, as they would be the Investigating Officers' primary means of ensuring that parties under investigation have conducted their due diligence and provided the Board with the information requested. However, we will grant AAR's request regarding agreed-upon protocols for duplicative documents. Accordingly, the final rules now expressly subject the ''Certifications and false statements'' provision to any search protocols that the Investigating Officer(s) and producing parties may agree upon. *See* section 1122.12. We also will change the description of the search from ''diligent'' to ''reasonable.'' In addition, at AAR's suggestion (AAR Comment 16–17), we will remove the criminal penalty for perjury provision, as it is redundant in light of already-applicable federal law, *see* 18 U.S.C. 1001, 1621, and add a witness rights provision, which is included in the final rules at section 1122.11, in order to clarify the rights and responsibilities of witnesses. *See also* section 1122.10 (addressing the right of a witness to review his or her transcript).

Second, AAR and NSR request that the Board remove the attorney disqualification provision, proposed in the NPRM as section 1122.9(b), in which the Board would have the authority to exclude a particular attorney from further participation in any Board-Initiated Investigation in which the attorney is obstructing the Board-Initiated Investigation. (AAR Comment 18; NSR Comment 26–27.) After considering the comments, we will remove the attorney disqualification provision from the final rules, as the Board's current rules governing attorney conduct sufficiently protect the integrity of any investigation. *See e.g.,* 49 CFR 1103.12.

Exculpatory Evidence. AAR and NSR ask that the Board adopt in its final rules a mandatory disclosure provision, modeled after *Brady* v. *Maryland,* 373 U.S. 83, 88 (1963), to provide a party subject to investigation exculpatory and potentially exculpatory evidence. (AAR Comment 13; NSR Comment 4, 32–35.) In *Brady,* the United States Supreme Court, in criminal proceedings, held that the Due Process clause of the Fifth Amendment requires the prosecutor to disclose exculpatory evidence material to guilt or punishment, known to the government but not known to the defendant. Currently, no statute or case law mandates the application of the Brady Rule to administrative agencies,[13] though some agencies such as the Securities and Exchange Commission and the Commodities Futures Trading Commission have adopted varying versions of the Brady Rule.

The Board recognizes the merits of the Brady Rule and expects to employ the practice of disclosing exculpatory evidence if the Board were to open a Formal Board Proceeding following the conclusion of a Board-Initiated Investigation involving any criminal provisions of 49 U.S.C. Subtitle IV, Part A. However, because (1) most Board-Initiated Investigations will not likely involve any such criminal provisions, (2) Board-Initiated Investigations only determine if the Board should open a Formal Board Proceeding, and (3) any remedy that may result from an investigation must be prospective only, the Brady Rule does not appear directly applicable, and the Board will not codify it in the final rules adopted here.

Recommendations and Summary of Findings. As proposed in the NPRM, Investigating Officer(s) would be required to conclude the Board-Initiated Investigation no later than 275 days after issuance of the Order of Investigation and, at that time, submit to the Board and parties under investigation any recommendations made as a result of the Board-Initiated Investigation and a summary of findings that support such recommendations.

The NPRM also provided an optional process whereby Investigating Officer(s), in their discretion and time permitting, could present (orally or in writing) their recommendations and/or summary of findings to parties under investigation *prior to* submitting this information to the Board Members. The NPRM stated that, in such cases, the Investigating Officer(s) would be required to permit the parties under investigation to submit a written response to the recommendations and/or summary of findings. The Investigating Officer(s) would then submit their recommendations and summary of

decline to provide for in the final rules, but which may be considered on a case-by-case basis during Formal Board Proceedings.

[13] *Mister Discount Stockbrokers* v. *SEC,* 768 F.2d 875, 878 (7th Cir. 1985); *Zandford* v. *NASD,* 30 F. Supp. 2d 1, 22 n.12 (D.C. Cir. 1998), *NLRB* v. *Nueva Eng'g, Inc.,* 761 F.2d 961, 969 (4th Cir. 1985).

findings, as well as any response from the parties under investigation, to the Board members and parties under investigation.

In response, AAR and NSR request that the Board make this optional process mandatory.[14] (AAR Comment 19; NSR Comment 4, 23–25.) Alternatively, AAR asks that if the Board does not make this process mandatory, the Board require Investigating Officer(s) to provide their recommendations and summary of findings to parties at the same time they are submitted to Board Members.

The Board intends that Investigating Officer(s), when possible, will utilize the optional process of presenting their recommendations and summary of findings to parties under investigation prior to submitting them to the Board Members. However, given the one-year deadline for concluding Board-Initiated Investigations, the Board will not make this process mandatory, as there may be circumstances in which Investigating Officer(s) cannot complete their recommendations and summary of findings sufficiently in advance of the one-year deadline to allow them to be presented to the party under investigation prior to submission to the Board. In such cases, the Investigating Officer(s) will provide their recommendations and summary of findings to parties at the same time they are submitted to the Board Members. This is provided for in the final rules at section 1122.5(c), which states that the Investigating Officer(s) must submit their recommendations and summary of findings to the Board and parties under investigation within 275 days.

With respect to parties' responses to Investigating Officers' recommendations and summary of findings, AAR also requests that the Board clarify that parties have the right to submit arguments in their response to Board staff's recommendations and summary of findings. AAR also argues that the Board should increase the 15-page limit for parties' responses to Board staff's recommendations and summary of findings, but if not, then clarify that the party's supporting data, evidence, and verified statements would not count towards the 15-page limit. We will grant AAR's requests, as they would provide the Board with more information in determining whether further action is warranted following a Board-Initiated Investigation. The final rules now provide that: parties have the right to submit arguments in their response to Board staff's recommendations and summary of findings; supporting data, evidence, and verified statements do not count towards the page limit of such responses; and parties may submit written statements responding to the Investigating Officers' recommendations and summary of findings of up to 20 pages. *See* App. A to Pt. 1122 (stating ''parties under investigation may submit a written statement . . . [that] shall be no more than 20 pages, not including any supporting data, evidence, and verified statements that may be attached . . . setting forth the views of the parties under investigation of factual or legal matters or other arguments relevant to the commencement of a Formal Board Proceeding'').

C. Formal Board Proceeding

As proposed in the NPRM, the Formal Board Proceeding refers to a public proceeding that may be instituted by the Board pursuant to an Order to Show Cause after a Board-Initiated Investigation has been conducted. With respect to the Formal Board Proceeding phase, commenters express concerns relating to (1) the duration of the Formal Board Proceeding, (2) the standard for commencing a Formal Board Proceeding, and (3) the Order to Show Cause.

Duration of the Formal Board Proceeding. As proposed in the NPRM, there are no time limits for the Formal Board Proceeding. However, NSR argues that the Formal Board Proceeding should be included in the statutorily-mandated one-year time limit on investigations, based on the plain language of Section 12 of the *STB Reauthorization Act,* federal court precedent interpreting administrative finality, and other provisions in the Board's governing statute. (NSR Comment 6–8.) We address each of NSR's arguments in turn.

According to NSR, because 49 U.S.C. 11701(d)(6) states that the Board must ''dismiss any investigation that is not concluded by the Board with administrative finality within 1 year after the date on which it was commenced,'' the Board must either dismiss the Board-Initiated Investigation or decide on the merits of the Formal Board Proceeding within one year of opening the Board-Initiated Investigation. (NSR Comment 6–7.) However, such an interpretation directly contradicts the Senate Report for the *STB Reauthorization Act,* which clearly excludes the Formal Board Proceeding from the statute's one-year deadline on Board-Initiated Investigations, stating:

> The requirement to dismiss any investigation that is not concluded within 1 year after the date on which it was commenced would only include the time period needed to generate recommendations and summary of findings. The time period needed to complete a proceeding, after receipt of the recommendations and summary of findings, would not be included in the 1 year timeline for investigations.

S. Rep. No. 114–52, at 13 (2015).

NSR nonetheless states that the Senate Report ''is trumped by the unambiguous new section 11701(d)(6),'' arguing that ''administrative finality'' is ''a known term of art with a specific definition, thus precluding any need to rely on legislative history.'' As support, NSR, among other cases, compares the Board's proposed investigation process to *Newport Galleria Group* v. *Deland,* 618 F. Supp. 1179 (D.C. Cir. 1985), in which the court found that the Environmental Protection Agency's commencement of an investigation did not constitute final agency action. (NSR Comment 6–7.)[15] In *Newport Galleria Group,* however, the question was whether judicial review of the *initiation* of an investigation was proper. *Newport Galleria Group,* 618 F. Supp. at 1185. Here, under 49 U.S.C. 11701(d)(6), the question is whether the Board's *conclusion* of an investigation and opening of a Formal Board Proceeding—as opposed to the initiation of an investigation—constitutes administratively final action for purposes of Section 12 of the *STB Reauthorization Act.*

Moreover, under 49 U.S.C. 11701(d)(7), which immediately follows the requirement that the Board conclude a Board-Initiated Investigation with administrative finality within one year, the Board's options for concluding the Board-Initiated Investigation, and thus

[14] NSR cites to 5 U.S.C. 557(c) as requiring this process to be mandatory. However, 5 U.S.C. 557 applies to hearings in rulemakings or adjudications. *See* 5 U.S.C. 553, 554, 556, & 557(a). Because the recommendations and findings at issue here address only whether to open a proceeding in which the Board would make a decision, 5 U.S.C. 557(c) is not applicable.

[15] NSR also cites *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944) (determining that findings from an investigation are preliminary), *Reliable Automatic Sprinkler Co.* v. *Consumer Prod. Safety Commission,* 324 F.3d 726 (D.C. Cir. 2003) (finding that the Consumer Product Safety Commission's (1) investigation of a manufacturer's product, (2) statement of ''intention to make a preliminary determination that the [product] present[ed] a substantial hazard'' and (3) ''request for voluntary corrective action'' did not constitute final agency action under the Administrative Procedure Act), and *Tenneco, Inc.* v. *FERC,* 688 F.2d 1018 (5th Cir. 1982) (finding the Federal Energy Regulatory Commission's decision terminating an adjudicatory proceeding and instituting an investigation of the matter to be a non-final order for purposes of judicial review). These cases are not controlling as to the definition of ''administrative finality'' for Board-Initiated Investigations for the same reasons as discussed below with respect to *Newport Galleria Group* involving 49 U.S.C. 11701(d)(6) & (7).

satisfying the requirement in section 11701(d)(6), are to ''dismiss the investigation if no further action is warranted'' or ''initiate a proceeding to determine if a provision under this part has been violated.'' We read section 11701(d)(6), in conjunction with section 11701(d)(7), as stating that the Board must dismiss investigations that have not been concluded within a year (*i.e.,* concluded either by dismissal because no further action is warranted, or by the opening of a Formal Board Proceeding). While the meaning of ''administrative finality'' within section 10701(d)(6) may need to be defined in the future, the language of the statute and the Senate Report support not including the Formal Board Proceeding in the one-year deadline for concluding the Board-Initiated Investigation pursuant to Section 12(b) of the *STB Reauthorization Act.*

Additionally, NSR states that ''other provisions of the Board's governing statute reinforce that administrative finality occurs only with [a] Board decision.'' (NSR Comment 8.) Specifically, NSR cites 49 U.S.C. 11701(e)(7), which ''permits judicial review upon conclusion of the Formal Board Proceeding,'' and 49 U.S.C. 722(d),[16] which states that ''an action of the Board under this section is final on the date on which it is served,'' for the proposition that ''administrative finality occurs only with the Board decision'' issued upon conclusion of the Formal Board Proceeding. (NSR Comment 8.) However, the relevant governing statutory provisions for concluding a Board-Initiated Investigation—which are more specific to the process at issue than those cited by NSR—are 49 U.S.C. 11701(d)(6) & (7), which, as previously explained, provide that the Board conclude an investigation with administrative finality within one year by either ''dismiss[ing] the investigation if no further action is warranted'' or ''initiat[ing] a proceeding to determine if a provision under this part has been violated.'' The final rules, therefore, continue to impose no time limit on Formal Board Proceedings. *See* sections 1122.1(b) & 1122.5(e).

Standard for Opening a Formal Board Proceeding. AAR asks the Board to clarify the standard for commencing a Formal Board Proceeding, specifically requesting that the Board require that there be ''reasonable cause'' to believe that a violation of 49 U.S.C. Subtitle IV, Part A occurred.[17] (AAR Comment 20–21.) As discussed above,[18] the Board declines to adopt this ''reasonable cause'' standard for initiating a Board-Initiated Investigations because it would require a higher standard than imposed by the statute. For that same reason, the Board declines to adopt this standard for opening a Formal Board Proceeding. The final rules therefore maintain, in accordance with Section 12 of the *STB Reauthorization Act,* that the Board shall dismiss a Board-Initiated Investigation if no further action is warranted, or shall initiate a Formal Board Proceeding to determine whether any provision of 49 U.S.C. Subtitle IV, Part A has been violated.

Order to Show Cause. With respect to the Order to Show Cause, AAR asks that the Board clarify that the burden of proof remains on the agency to prove that a violation of 49 U.S.C. Subtitle IV, Part A occurred. (AAR Comment 20–21.) We affirm that the Order to Show Cause does not change the burden of proof from the requirements of Section 12 of the *STB Reauthorization Act* for proving that a violation of 49 U.S.C. Subtitle IV, Part A occurred.

Additionally, NSR asks that the Board require that the Order to Show Cause state the issues to be considered in the Formal Board Proceeding. (NSR Comment 4, 30–32.) We find this request to be reasonable, as a party subject to a Formal Board Proceeding should have notice as to the issues that will be publicly considered by the Board. Based on NSR's comment, the final rules include a requirement that the Order to Show Cause state the issues to be considered during the Formal Board Proceeding. *See* section 1122.5(e) (stating ''[t]he Order to Show Cause shall state the basis for, and the issues to be considered during, the Formal Board Proceeding and set forth a procedural schedule'').

D. Other Related Issues

Separation of Investigative and Decisionmaking Functions. In the NPRM, the Board proposed to separate the investigative and decisionmaking functions of Board staff to the extent practicable, in accordance with the requirements of Section 12 of the *STB Reauthorization Act.* Although NGFA supports the Board's proposal, AAR requests that the ''rules expressly state that the Board will separate investigative and decisionmaking functions of staff'' and NSR requests that the Board remove from the final rules the phrase ''to the extent practicable.'' (AAR Comment 11–12; NSR Comments 13, 20.)

The NPRM's proposed language expressly tracked 49 U.S.C. 11701(d)(5), which states that in any investigation commenced on the Board's own initiative, the Board must ''to the extent practicable, separate the investigative and decisionmaking functions of staff.'' Although AAR argues that this is insufficient, as it is merely a ''ritualistic incantation of [the] statutory language,'' the NPRM also proposed that the Order of Investigation would identify the Investigating Officer(s) and provided that parties subject to investigation could submit written materials to the Board Members at any time. As a result, parties that feel that the investigative and decisionmaking functions of staff are not properly separated may express their concerns in writing directly to the Board during the course of a Board-Initiated Investigation or Formal Board Proceeding. *See* section 1122.13. Moreover, the Board declines to remove the phrase ''to the extent practicable'' from the final rules because doing so would not be in full compliance with the statutory language of Section 12 of the *STB Reauthorization Act.*

AAR further asks that the Board explain ''any instances where it may not be practicable to separate these functions.'' AAR also requests that the Board include in the final rules provisions ensuring the separation of investigatory and decisionmaking functions, such as requirements that the Board ''[i]dentify all staff who work in an investigation, not just the Investigating Officers'' and ''[n]otify Board Members, decisional staff within the Board, and parties subject to investigation who has been designated investigation staff for any particular Board-Initiated Investigation.'' (AAR Comment 11–12.)

The Board declines to describe instances where it may not be practicable to separate these functions. Based on AAR's comment, however, we clarify that our intent is that *any* Board staff substantively working on a Board-Initiated Investigation would be identified as an Investigating Officer. To better reflect this intent, the final rules now require that the Order of Investigation ''identify all Board staff who are authorized to conduct the investigation as Investigating Officer(s).'' *See* section 1122.4. Additionally, Board Members would be notified regarding who has been designated as investigative staff for any

[16] The *STB Reauthorization Act* redesignated 49 U.S.C. 722(d) as 49 U.S.C. 1322(d).

[17] AAR also requests that the Board include in the standard for opening a Formal Board Proceeding that the Board base its decision on the results of the Board-Initiated Investigation. (AAR Comment 20–21.) The Board declines to expressly include such a requirement in the final rules, as the final rules mirror the statutory standard for opening a Formal Board Proceeding.

[18] *See supra* Part B: Standard for Opening a Board-Initiated Investigation.

particular Board-Initiated Investigation because Board Members would have to issue an Order of Investigation, which, according to the final rules at section 1122.4, would include the names of the Investigating Officers.

Ex Parte Communications. Section 12(c)(3) of the *STB Reauthorization Act* requires the Board, in issuing rules implementing its investigatory authority, to take into account ex parte constraints. Consistent with analogous ex parte constraints in other proceedings at the Board, the NPRM proposed that, as a matter of policy, the Board Members would not engage in off-the-record verbal communications concerning the matters under investigation with parties subject to Board-Initiated Investigations. However, the NPRM provided that parties under investigation would have the right to submit written statements to the Board at any time.

Jersey City and NSR ask the Board to revise the NPRM's approach to ex parte communications. First, Jersey City asks that the Board remove the NPRM's provision allowing any party subject to a Board-Initiated Investigation to submit to the Board written statements at any time during the Board-Initiated Investigation. (Jersey City Comment 16.) Second, NSR requests that the Board restrict ex parte communications between Investigating Officers and Board staff conducting Preliminary-Fact Finding and other Board staff, as well as Board Members involved in the Formal Board Proceeding. Finally, NSR states that, should such communications occur, Section 5 and Section 12 of the *STB Reauthorization Act* should apply. (NSR Comment 3, 20–21.)

The Board declines to adopt Jersey City's and NSR's proposals regarding ex parte communications. As explained above, the final rules require the Board to identify in the Order of Investigation (which would be voted on by the Board Members) all Board staff conducting a Board-Initiated Investigation. Therefore, Board Members and their staffs would know with whom to restrict their communications to avoid ex parte issues. Additionally, the final rules continue to provide parties under investigation with the ability to notify the Board in writing of any facts or circumstances relating to the investigation, including potentially prohibited ex parte communications. *See* 49 CFR 1122.13. As such, the Board would address any ex parte issues that may arise on a case-by-case basis as raised by the parties subject to investigation.

Settlement. The NPRM proposed that, during Board-Initiated Investigations, the Investigating Officer(s) would be able to engage in settlement negotiations with parties under investigation and that, if at any time during the investigation, the Investigating Officer(s) and parties under investigation were to reach a tentative settlement agreement, the Investigating Officer(s) would submit the settlement agreement as part of their proposed recommendations to the Board Members for approval or disapproval, along with the summary of findings supporting the proposed agreement. As proposed in the NPRM, the Board would then decide whether to approve the agreement and/or dismiss the investigation or open a Formal Board Proceeding in accordance with the NPRM's proposed procedural rules. In response to this proposal, NGFA comments that the settlement process is too ''nontransparent.'' However, for the reasons provided above with respect to confidentiality,[19] the Board declines to require that the settlement process be public or to permit third-party involvement in the process. Therefore, as a matter of policy, the Board maintains the settlement process as proposed in the NPRM.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) Assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. 5 U.S.C. 601–604. Under section 605(b), an agency is not required to perform an initial or final regulatory flexibility analysis if it certifies that the proposed or final rules will not have a ''significant impact on a substantial number of small entities.''

Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities ''whose conduct is circumscribed or mandate'' by the proposed rule. *White Eagle Coop. Ass'n* v. *Conner,* 553 F.3d 467, 478, 480 (7th Cir. 2009). An agency has no obligation to conduct a small entity impact analysis of effects on entities that it does not regulate. *United Distrib. Cos.* v. *FERC,* 88 F.3d 1105, 1170 (D.C. Cir. 1996).

In the NPRM, the Board certified under 5 U.S.C. 605(b) that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. The Board explained that the proposed rule would not place any additional burden on small entities, but rather clarify an existing obligation. The Board further explained that, even assuming for the sake of argument that the proposed regulation were to create an impact on small entities, which it would not, the number of small entities so affected would not be substantial. No parties submitted comments on this issue. A copy of the NPRM was served on the U.S. Small Business Administration (SBA).

The final rule adopted here revises the rules proposed in the NPRM. However, the same basis for the Board's certification of the proposed rule applies to the final rules adopted here. The final rules would not create a significant impact on a substantial number of small entities, as the regulations would only specify procedures related to investigations of matters of regional or national significance conducted on the Board's own initiative and do not mandate or circumscribe the conduct of small entities. Therefore, the Board certifies under 5 U.S.C. 605(b) that the final rules will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

List of Subjects in 49 CFR Part 1122

Investigations.

It is ordered:

1. The final rules set forth below are adopted and will be effective on January 13, 2017.

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

3. This decision is effective on January 13, 2017.

Decided: December 7, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

Jeffrey Herzig,

Clearance Clerk.

■ For the reasons set forth in the preamble, the Surface Transportation Board amends title 49, chapter X, subchapter B, of the Code of Federal

[19] *See supra* Part B: Confidentiality.

Regulations by adding part 1122 to read as follows:

PART 1122—BOARD-INITIATED INVESTIGATIONS

Sec.
1122.1 Definitions.
1122.2 Scope and applicability of this part.
1122.3 Preliminary Fact-Finding.
1122.4 Board-Initiated Investigations.
1122.5 Procedural rules.
1122.6 Confidentiality.
1122.7 Request for confidential treatment.
1122.8 Limitation on participation.
1122.9 Power of persons conducting Board-Initiated Investigations.
1122.10 Transcripts.
1122.11 Rights of witnesses.
1122.12 Certifications and false statements.
1122.13 Right to submit statements.
Appendix A to Part 1122—Informal Procedure Relating to Recommendations and Summary of Findings from the Board-Initiated Investigation

Authority: 49 U.S.C. 1321, 11144, 11701.

§ 1122.1 Definitions.

(a) *Board-Initiated Investigation* means an investigation instituted by the Board pursuant to an Order of Investigation and conducted in accordance with Section 12 of the Surface Transportation Board Reauthorization Act of 2015, now incorporated and codified at 49 U.S.C. 11701.

(b) *Formal Board Proceeding* means a public proceeding instituted by the Board pursuant to an Order to Show Cause after a Board-Initiated Investigation has been conducted.

(c) *Investigating officer(s)* means the individual(s) designated by the Board in an Order of Investigation to conduct a Board-Initiated Investigation.

(d) *Preliminary Fact-Finding* means an informal fact-gathering inquiry conducted by Board staff prior to the opening of a Board-Initiated Investigation.

§ 1122.2 Scope and applicability of this part.

This part applies only to matters subject to Section 12 of the Surface Transportation Board Reauthorization Act of 2015, 49 U.S.C. 11701.

§ 1122.3 Preliminary Fact-Finding.

The Board staff may, in its discretion, conduct nonpublic Preliminary Fact-Finding, subject to the provisions of § 1122.6, to determine if a matter presents an alleged violation that could be of national or regional significance and subject to the Board's jurisdiction under 49 U.S.C. Subtitle IV, Part A, and warrants a Board-Initiated Investigation. Board staff shall inform the subject of Preliminary Fact-Finding that Preliminary Fact-Finding has commenced. Where it appears from Preliminary Fact-Finding that a Board-Initiated Investigation is warranted, staff shall so recommend to the Board. Where it appears from the Preliminary Fact-Finding that a Board-Initiated Investigation is not warranted, staff shall conclude its Preliminary Fact-Finding and notify any parties involved that the process has been terminated.

§ 1122.4 Board-Initiated Investigations.

The Board may, in its discretion, commence a nonpublic Board-Initiated Investigation of any matter of national or regional significance that is subject to the jurisdiction of the Board under 49 U.S.C. Subtitle IV, Part A, subject to the provisions of § 1122.6, by issuing an Order of Investigation. Orders of Investigation shall state the basis for the Board-Initiated Investigation and identify all Board staff who are authorized to conduct the investigation as Investigating Officer(s). The Board may add or remove Investigating Officer(s) during the course of a Board-Initiated Investigation. To the extent practicable, an Investigating Officer shall not participate in any decisionmaking functions in any Formal Board Proceeding(s) opened as a result of any Board-Initiated Investigation(s) that he or she conducted.

§ 1122.5 Procedural rules.

(a) After notifying the party subject to Preliminary Fact-Finding that Preliminary Fact-Finding has commenced, the Board staff shall, within a reasonable period of time, either:

(1) Conclude Preliminary Fact-Finding and notify any parties involved that the process has been terminated; or

(2) Recommend to the Board that a Board-Initiated Investigation is warranted.

(b) Not later than 30 days after commencing a Board-Initiated Investigation, the Investigating Officer(s) shall provide the parties under investigation a copy of the Order of Investigation. If the Board adds or removes Investigating Officer(s) during the course of the Board-Initiated Investigation, it shall provide written notification to the parties under investigation.

(c) Not later than 275 days after issuance of the Order of Investigation, the Investigating Officer(s) shall submit to the Board and the parties under investigation:

(1) Any recommendations made as a result of the Board-Initiated Investigation; and

(2) A summary of the findings that support such recommendations.

(d) Not later than 90 days after receiving the recommendations and summary of findings, the Board shall decide whether to dismiss the Board-Initiated Investigation if no further action is warranted or initiate a Formal Board Proceeding to determine whether any provision of 49 U.S.C. Subtitle IV, Part A, has been violated in accordance with section 12 of the Surface Transportation Board Reauthorization Act of 2015. The Board shall dismiss any Board-Initiated Investigation that is not concluded with administrative finality within one year after the date on which it was commenced.

(e) A Formal Board Proceeding commences upon issuance of a public Order to Show Cause. The Order to Show Cause shall state the basis for, and the issues to be considered during, the Formal Board Proceeding and set forth a procedural schedule.

§ 1122.6 Confidentiality.

(a) All information and documents obtained under § 1122.3 or § 1122.4, whether or not obtained pursuant to a Board request or subpoena, and all activities conducted by the Board under this part prior to the opening of a Formal Board Proceeding, shall be treated as nonpublic by the Board and its staff except to the extent that:

(1) The Board, in accordance with 49 CFR 1001.4(c), (d), and (e), directs or authorizes the public disclosure of activities conducted under this part prior to the opening of a Formal Board Proceeding. If any of the activities being publicly disclosed implicate records claimed to be confidential commercial information, the Board shall notify the submitter prior to disclosure in accordance with 49 CFR 1001.4(b) and provide an opportunity to object to disclosure in accordance with 49 CFR 1001.4(d);

(2) The information or documents are made a matter of public record during the course of an administrative proceeding; or

(3) Disclosure is required by the Freedom of Information Act, 5 U.S.C. 552 or other relevant provision of law.

(b) Procedures by which persons submitting information to the Board pursuant to this part of title 49, chapter X, subchapter B, of the Code of Federal Regulations may specifically seek confidential treatment of information for purposes of the Freedom of Information Act disclosure are set forth in § 1122.7. A request for confidential treatment of information for purposes of Freedom of Information Act disclosure shall not, however, prevent disclosure for law

enforcement purposes or when disclosure is otherwise found appropriate in the public interest and permitted by law.

§ 1122.7 Request for confidential treatment.

Any person that produces documents to the Board pursuant to § 1122.3 or § 1122.4 may claim that some or all of the information contained in a particular document or documents is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (FOIA), 5 U.S.C. 552, is information referred to in 18 U.S.C. 1905, or is otherwise exempt by law from public disclosure. In such case, the person making such a claim shall, at the time the person produces the document to the Board, indicate on the document that a request for confidential treatment is being made for some or all of the information in the document. In such case, the person making such a claim also shall file a brief statement specifying the specific statutory justification for non-disclosure of the information in the document for which confidential treatment is claimed. If the person states that the information comes within the exception in 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information, and the information is responsive to a subsequent FOIA request to the Board, 49 CFR 1001.4 shall apply.

§ 1122.8 Limitation on participation.

No party who is not the subject of a Board-Initiated Investigation may intervene or participate as a matter of right in any such Board-Initiated Investigation under this part.

§ 1122.9 Power of persons conducting Board-Initiated Investigations.

The Investigating Officer(s), in connection with any Board-Initiated Investigation, may interview or depose witnesses, inspect property and facilities, and request and require the production of any information, documents, books, papers, correspondence, memoranda, agreements, or other records, in any form or media, that are likely to be directly relevant to the issues of the Board-Initiated Investigation. The Investigating Officer(s), in connection with a Board-Initiated Investigation, also may issue subpoenas, in accordance with 49 U.S.C. 1321, to compel the attendance of witnesses, the production of any of the records and other documentary evidence listed above, and access to property and facilities.

§ 1122.10 Transcripts.

Transcripts, if any, of investigative testimony shall be recorded solely by the official reporter or other person or by means authorized by the Board or by the Investigating Officer(s). A witness who has given testimony pursuant to this part shall be entitled, upon written request, to procure a transcript of the witness' own testimony or, upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony.

§ 1122.11 Rights of witnesses.

(a) Any person who is compelled or requested to furnish documentary evidence or testimony in a Board-Initiated Investigation shall, upon request, be shown the Order of Investigation. Copies of Orders of Investigation shall not be furnished, for their retention, to such persons requesting the same except with the express approval of the Chairman.

(b) Any person compelled to appear, or who appears in person at a Board-Initiated Investigation by request or permission of the Investigating Officer may be accompanied, represented, and advised by counsel, as provided by the Board's regulations.

(c) The right to be accompanied, represented, and advised by counsel shall mean the right of a person testifying to have an attorney present with him during any aspect of a Board-Initiated Investigation and to have this attorney advise his client before, during and after the conclusion of such examination.

§ 1122.12 Certifications and false statements.

(a) When producing documents under § 1122.4, the producing party shall submit a statement certifying that such person has made a reasonable search for the responsive documents and is producing all the documents called for by the Investigating Officer(s), subject to any search protocols agreed to by the Investigating Officer(s) and producing parties. If any responsive document(s) are not produced for any reason, the producing party shall state the reason therefor.

(b) If any responsive documents are withheld because of a claim of the attorney-client privilege, work product privilege, or other applicable privilege, the producing party shall submit a list of such documents which shall, for each document, identify the attorney involved, the client involved, the date of the document, the person(s) shown on the document to have prepared and/or sent the document, and the person(s) shown on the document to have received copies of the document.

§ 1122.13 Right to submit statements.

Any party subject to a Board-Initiated Investigation may, at any time during the course of a Board-Initiated Investigation, submit to the Board written statements of facts or circumstances, with any relevant supporting evidence, concerning the subject of that investigation.

Appendix A to Part 1122—Informal Procedure Relating to Recommendations and Summary of Findings From the Board-Initiated Investigation

(a) After conducting sufficient investigation and prior to submitting recommendations and a summary of findings to the Board, the Investigating Officer, in his or her discretion, may inform the parties under investigation (orally or in writing) of the proposed recommendations and summary of findings that may be submitted to the Board. If the Investigating Officer so chooses, he or she shall also advise the parties under investigation that they may submit a written statement, as explained below, to the Investigating Officer prior to the consideration by the Board of the recommendations and summary of findings. This optional process is in addition to, and does not limit in any way, the rights of parties under investigation otherwise provided for in this part.

(b) Unless otherwise provided for by the Investigating Officer, parties under investigation may submit a written statement, as described above, within 14 days after of being informed by the Investigating Officer of the proposed recommendation(s) and summary of findings. Such statements shall be no more than 20 pages, not including any supporting data, evidence, and verified statements that may be attached to the written statement, double spaced on 8½ by 11 inch paper, setting forth the views of the parties under investigation of factual or legal matters or other arguments relevant to the commencement of a Formal Board Proceeding. Any statement of fact included in the submission must be sworn to by a person with personal knowledge of such fact.

(c) Such written statements, if the parties under investigation choose to submit, shall be submitted to the Investigating Officer. The Investigating Officer shall provide any written statement(s) from the parties under investigation to the Board at the same time that he or she submits his or her recommendations and summary of findings to the Board.

[FR Doc. 2016–29902 Filed 12–13–16; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 160129062–6999–02]

RIN 0648–BF49

Atlantic Highly Migratory Species; Commercial Retention Limit for Blacknose Sharks and Non-Blacknose Small Coastal Sharks in the Atlantic Region

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

ACTION: Final rule.

SUMMARY: This final rule establishes a commercial retention limit of eight blacknose sharks for all Atlantic shark limited access permit holders in the Atlantic region south of 34°00′ N. latitude. NMFS manages four small coastal shark (SCS) species in the Atlantic: Blacknose, Atlantic sharpnose, finetooth, and bonnethead. All of these species except blacknose sharks are managed in a management group called the ''non-blacknose SCS.'' This action is being taken to reduce discards of non-blacknose small coastal sharks (SCS) while increasing the utilization of available Atlantic non-blacknose SCS quota and aid in rebuilding and ending overfishing of Atlantic blacknose sharks. The final action affects fishermen who fish in the Atlantic region and who hold commercial shark limited access permits. In addition, this final rule implements two small, unrelated administrative changes to existing regulatory text to remove cross-references to an unrelated section and a section that does not exist. These two changes are administrative in nature, and are not expected to result in any impacts to the environment or current fishing operations.

DATES: Effective on January 13, 2017.

ADDRESSES: Copies of the supporting documents—the Final Environmental Assessment (EA) for this final action, the 2006 Consolidated Highly Migratory Species (HMS) Fishery Management Plan (FMP) and its amendments, and the annual HMS Stock Assessment and Fishery Evaluation (SAFE) Reports—are available from the HMS Management Division Web site at *http://www.nmfs.noaa.gov/sfa/hms/* or by contacting the HMS Management Division by phone at 301–427–8503.

FOR FURTHER INFORMATION CONTACT: Guý DuBeck, Larry Redd, Cliff Hutt, or Karyl Brewster-Geisz by telephone at 301–427–8503.

SUPPLEMENTARY INFORMATION: Atlantic sharks are directly managed under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and the authority to issue regulations has been delegated from the Secretary of Commerce to the Assistant Administrator (AA) for Fisheries, NOAA. NMFS published in the **Federal Register** (71 FR 59058) final regulations, effective November 1, 2006 implementing the 2006 Consolidated Highly Migratory Species (HMS) Fishery Management Plan (FMP), which details management measures for Atlantic HMS fisheries. The implementing regulations for the 2006 Consolidated HMS FMP and its amendments are at 50 CFR part 635. This final rule establishes a commercial retention limit of eight blacknose sharks per trip in the Atlantic region south of 34°00′ N. latitude.

Background

NMFS published a proposed rule on August 3, 2016 (81 FR 51165), outlining the alternatives analyzed in the Draft EA, identifying the preferred alternative, and soliciting public comments on the measures, which would impact the blacknose shark and non-blacknose SCS fisheries in the Atlantic region. Specifically, the proposed rule proposed establishing a commercial retention limit of eight blacknose sharks in the Atlantic region south of 34°00′ N. latitude but also considered alternatives that would establish a commercial retention limit of non-blacknose SCS for shark directed access permit holders in the Atlantic region south of 34°00′ N. latitude once the blacknose shark quota is reached, as well as two other alternatives regarding potential commercial retention limits for blacknose sharks. The full description of the management and conservation measures considered is included in both the Final EA and the proposed rule and is not repeated here. The comment period for the Draft EA and proposed rule ended on September 20, 2016. The comments received, and responses to those comments, are summarized below under the heading labeled Response to Comments.

This final rule establishes a commercial retention limit of eight blacknose sharks for all Atlantic shark limited access permit holders in the Atlantic region south of 34°00′ N. latitude. This rulemaking only focuses on the Atlantic region south of 34°00′ N. latitude since NMFS prohibited the retention and landings of blacknose sharks in the Gulf of Mexico and north of 34°00′ N. latitude in 2015. This final action should reduce discards of non-blacknose SCS while increasing the utilization of available Atlantic non-blacknose SCS quota and aid in rebuilding and ending overfishing of Atlantic blacknose sharks.

Finally, this rule makes administrative changes to existing regulatory text. Specifically, in two locations in § 635.24(a), the regulations make reference to paragraphs (a)(4)(iv) through (vi); those cross-references are unnecessary because the Commercial Caribbean Small Boat permit under (a)(4)(iv) is a separate permit from the shark limited access permits and there is no (a)(4)(v) and (a)(4)(vi) regulations. This final rule implements changes to the regulations in 50 CFR part 635 to correct those regulatory cross-references.

Response to Comments

During the proposed rule stage, NMFS received 15 written and oral comments. NMFS also received feedback from: The HMS Advisory Panel on September 8, 2016; constituents who attended the conference call/webinar held on August 16, 2016; and constituents who attended the public hearing on August 24, 2016, in Cocoa Beach, FL. Additionally, NMFS consulted with the South Atlantic Fishery Management Council on September 15, 2016. A summary of the comments received on the proposed rule during the public comment period is provided below with NMFS' responses. All written comments submitted during the comment period can be found at *http://www.regulations.gov by searching for NOAA-NMFS-2016-0095.*

Comment 1: NMFS received a number of comments regarding the preferred retention limit of eight blacknose sharks per trip within the Atlantic region south of 34°00′ N. latitude. The South Atlantic Fishery Management Council, a number of HMS Advisory Panel members, and other commenters supported the preferred retention limit of eight blacknose sharks per trip within the Atlantic region south of 34°00′ N. latitude. Some commenters were concerned that the preferred retention limit was not low enough and would still result in the early closure of the non-blacknose SCS fishery. Some commenters suggested that the preferred retention limit of eight blacknose sharks per trip should apply only to directed shark limited access permit holders and that incidental shark limited access permit holders should not be allowed to land blacknose sharks or should have a lower retention limit. Lastly, other

commenters suggested that NMFS should adjust the blacknose shark retention limit on an inseason basis, similar to what is done in the large coastal shark fishery.

Response: In this final action, NMFS is establishing a commercial retention limit of eight blacknose sharks per trip because the retention limit would have moderate beneficial ecological impacts on blacknose sharks, neutral ecological impacts on non-blacknose SCS, and minor beneficial socioeconomic impacts for SCS fishermen because they would be able to continue utilizing the non-blacknose SCS quota. Based on the analyses conducted, NMFS believes this retention limit would allow between 40 and 96 lb dw blacknose sharks to be landed per trip, depending on the average weight of blacknose sharks used. Using these weights landed per trip, the full blacknose shark quota could be landed in approximately 395 to 948 trips. This result is more than double and could be as high as 10 times the number of trips that harvested the blacknose quota from the 2011 to 2015 average. As such, the final retention limit of eight blacknose sharks per trip should allow for the blacknose and non-blacknose SCS quotas to remain open throughout the year and not cause the fisheries to close early. Because the retention limit should allow for the fisheries to remain open and because incidental shark permit holders by definition do not target sharks, NMFS does not believe it is necessary to consider separate blacknose retention limits by permit type. Regarding the comment about inseason adjustments to the retention limit, NMFS did not consider establishing an adjustable retention limit for blacknose sharks because this species should only be landed at incidental levels in order to allow for rebuilding and the final action to establish an eight blacknose shark retention limit should prevent early closure of the SCS fishery. NMFS may revisit inseason adjustments to the blacknose shark retention limit in the future as warranted.

Comment 2: NMFS received a comment suggesting that the average dressed weight for blacknose sharks should be increased from the 5 lb dw used in the latest stock assessment to 10 to 20 lb dw because larger blacknose sharks are more typically landed in the fishery.

Response: In all the calculations in the proposed rule, NMFS used an average dressed weight of 5 lb for blacknose sharks. This average weight is the average weight that was derived for the 2011 stock assessment using a length-weight conversion function. However, based on these public comments, NMFS reviewed data from observed bottom longline and gillnet trips that landed blacknose sharks in the years 2013 through 2015 and found that these data indicate that fishermen are landing blacknose sharks with an average weight of 12 lb dw. As a result, NMFS provided information on both weights in the final EA and final rule. Based on data analysis, using either average weight would support using an eight blacknose shark retention limit and accomplish the goals of the rulemaking.

Comment 3: NMFS received a comment requesting the removal of the quota linkage between the blacknose shark and the South Atlantic non-blacknose SCS quotas so that fishermen would not have to discard non-blacknose SCS after the blacknose quota is filled.

Response: The objectives of this action are to continue rebuilding the Atlantic blacknose shark stock; to aid in ending overfishing of the Atlantic blacknose shark stock; to aid in achieving optimum yield in the blacknose and non-blacknose-SCS fisheries; and to reduce dead discards of small coastal sharks. The quota linkage was established to prevent further overfishing and aid in rebuilding blacknose sharks. Without the quota linkage, fishermen would lose an important incentive for avoiding blacknose sharks, thus jeopardizing the rebuilding plan for blacknose sharks and potentially increasing overfishing of blacknose sharks.

Comment 4: NMFS received a comment suggesting that the SCS season open in September instead of January.

Response: The final action does not reanalyze the overall start date for SCS, which was analyzed in the 2006 Consolidated HMS FMP and its amendments. NMFS could consider this in a future rulemaking.

Comment 5: NMFS received a comment requesting that the 80-percent threshold closure policy for shark fisheries be changed.

Response: NMFS' goal is to allow shark fishermen to harvest the full quota without exceeding it in order to maximize economic benefits to stakeholders while achieving conservation goals, including preventing overfishing. The 80-percent threshold closure policy refers to NMFS calculating that the overall, regional, and/or sub-regional landings for any species and/or management group has reached or is projected to reach 80 percent of the available overall, regional, and/or sub-regional quota and NMFS closing the species and/or management groups for the rest of the season. Based on current experiences with monitoring quotas for all shark species and management groups, NMFS believes that the 80-percent threshold allows for all or almost the entire quota to be harvested without exceeding the quota. As such, NMFS expects that, in general, the quotas would be harvested between the time that the 80-percent threshold is reached and the time that the season actually closes. In addition, NMFS must also account for late reporting by shark dealers even with the improved electronic dealer system and provide a buffer to include landings received after the reporting deadline in an attempt to avoid overharvests. NMFS will continue to evaluate the 80-percent threshold and may consider changes in a future rulemaking.

Comment 6: NMFS received a comment suggesting that an Atlantic blacknose update stock assessment be performed in 2019 along with the Atlantic blacktip benchmark assessment.

Response: Most of the domestic shark stock assessments follow the Southeast Data, Assessment Review (SEDAR) process. This process is also used by the South Atlantic, Gulf of Mexico, and Caribbean Fishery Management Councils and is designed to provide transparency throughout the stock assessment. With regard to the timing of upcoming shark stock assessments, NMFS aims to conduct a number of shark stock assessments every year and to regularly reassess these stocks. The number of species that can be assessed each year depends on whether assessments are establishing baselines or are only updates to previous assessments. Assessments also depend on ensuring there are data available for a particular species. In addition to the shark assessments being conducted by the International Commission for the Conservation of Atlantic Tunas (ICCAT), NMFS intends to conduct, through the SEDAR process, a sandbar shark benchmark assessment in 2017, a Gulf of Mexico blacktip shark update assessment in 2018, and an Atlantic blacktip benchmark assessment in 2019. NMFS will continue to monitor options for future stock assessments, including an assessment for Atlantic blacknose sharks.

Classification

The NMFS Assistant Administrator has determined that the final rule is necessary for the conservation and management of the Atlantic shark fisheries and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

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

A Final Regulatory Flexibility Analysis (FRFA) was prepared for this rule pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 604 (c)(1)–(4)). The 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 responses to those comments, and a summary of the analyses completed to support the action. The full FRFA and analysis of economic and ecological impacts are available from NMFS (see **ADDRESSES**). A summary of the FRFA follows.

Under Section 604(a)(1) of the RFA, the management goals and objectives of the preferred alternative are to provide for the sustainable management of SCS species under authority of the Secretary consistent with the requirements of the Magnuson-Stevens Act and other statutes which may apply to such management, including the Endangered Species Act, Marine Mammal Protection Act, and Atlantic Tunas Convention Act. The Magnuson-Stevens Act mandates that the Secretary provide for the conservation and management of HMS through development of an FMP for species identified for management and to implement the FMP with necessary regulations. In addition, the Magnuson-Stevens Act directs the Secretary, in managing HMS, to prevent overfishing of species while providing for their optimum yield on a continuing basis and to rebuild fish stocks that are considered overfished. The management objective of the preferred alternative is to implement management measures for the Atlantic SCS fishery that will further the objective of preventing overfishing while achieving (on a continuing basis) optimum yield, and aid in rebuilding overfished shark stocks.

Section 604(a)(2) of the RFA requires a summary of the significant issues raised by the public comments in response to the IRFA, a summary of the Agency's assessment of such issues, and a statement of any changes made in the rule as a result of such comments. NMFS received several comments on the proposed rule and Draft EA during the public comment period. Summarized public comments and NMFS' responses to them are included in Appendix A of this document. Section 604(a)(3) of the RFA requires the Agency to respond 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 in the rule as a result of such comments. NMFS did not receive any comments from the Chief Counsel for Advocacy of the SBA nor the public in response to this document.

Section 604(a)(3) of the RFA requires agencies to provide an estimate of the number of small entities to which the rule would apply. The Small Business Administration (SBA) has established size criteria for all major industry sectors in the United States, including fish harvesters. Provision is made under SBA's regulations for an agency to develop its own industry-specific size standards after consultation with Advocacy and an opportunity for public comment (see 13 CFR 121.903(c)). Under this provision, NMFS may establish size standards that differ from those established by the SBA Office of Size Standards, but only for use by NMFS and only for the purpose of conducting an analysis of economic effects in fulfillment of the agency's obligations under the RFA. To utilize this provision, NMFS must publish such size standards in the **Federal Register** (FR), which NMFS did on December 29, 2015 (80 FR 81194, December 29, 2015). In this final rule, effective on July 1, 2016, NMFS established a small business size standard of $11 million in annual gross receipts for all businesses in the commercial fishing industry (NAICS 11411) for RFA compliance purposes (80 FR 81194, December 29, 2015). NMFS considers all HMS permit holders to be small entities because they have average annual receipts of less than $11 million for commercial fishing.

This final rule would apply to the 499 commercial shark permit holders in the Atlantic shark fishery, based on an analysis of permit holders as of November 2015. Of these permit holders, 224 have directed shark permits and 275 hold incidental shark permits. Not all permit holders are active in the fishery in any given year. Active directed permit holders are defined as those with valid permits that landed one shark based on 2015 HMS electronic dealer reports. Of the 499 permit holders, only 27 permit holders landed SCS in the Atlantic region and of those only 13 landed blacknose sharks. NMFS has determined that the final rule would not likely affect any small governmental jurisdictions.

Section 604(a)(4) of the RFA requires Agencies to describe any new reporting, record-keeping and other compliance requirements. The action does not contain any new collection of information, reporting, or record-keeping requirements. The alternatives considered would adjust the commercial retention limits for the SCS fisheries, which would mean new compliance requirements for the shark fishery participants in the Atlantic region south of 34°00′ N. latitude, but which are similar to other compliance requirements the fishermen already follow.

Section 604(a)(5) of the RFA requires a description of the steps the Agency has taken to minimize any significant economic impact on small entities consistent with the stated objectives of applicable statutes. Additionally, the RFA lists four general categories of ''significant'' alternatives that would assist an agency in the development of significant alternatives. These categories of alternatives are: (1) Establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) Clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) Use of performance rather than design standards; and (4) Exemptions from coverage of the rule, or any part thereof, for small entities.

In order to meet the objectives of this final rule, consistent with the Magnuson-Stevens Act and the Endangered Species Act, NMFS cannot establish differing compliance requirements for small entities or exempt small entities from compliance requirements. Thus, there are no alternatives discussed that fall under the first and fourth categories described above. NMFS does not know of any performance or design standards that would satisfy the aforementioned objectives of this rulemaking while, concurrently, complying with the Magnuson-Stevens Act. As described below, NMFS analyzed several different alternatives in this final rulemaking and provides rationales for identifying the preferred alternatives to achieve the desired objectives.

The alternatives considered and analyzed are described below. The FRFA assumes that each vessel will have similar catch and gross revenues to show the relative impact of the final action on vessels.

Alternative 1, the No Action alternative, would not implement any new retention limits for blacknose sharks or non-blacknose SCS in the Atlantic region south of 34°00′ N. latitude beyond those already in effect for current Atlantic shark limited access permit holders. NMFS would continue to allow fishermen with a direct limited access permit to land unlimited sharks per trip and allow fishermen with an incidental permit to land 16 combined SCS and pelagic sharks per vessel per trip. In 2010, Amendment 3 to the 2006

Consolidated HMS FMP established, among other things, a quota for blacknose sharks separate from the SCS quota. The 2011 blacknose shark stock assessment determined that separate stocks of blacknose sharks existed in the Gulf of Mexico and the Atlantic. Amendment 5a to the 2006 Consolidated HMS FMP established, among other things, regional quotas for non-blacknose SCS and blacknose sharks in the Gulf of Mexico and the Atlantic in 2013. These blacknose shark and non-blacknose SCS quotas are linked by region and the regional SCS fishery closes when the blacknose quota is reached. This linkage has resulted in the early closure of the entire SCS fishery due to high abundance of blacknose shark landings. Closure of the fishery as a result of Atlantic blacknose rapid harvest leaves the non-blacknose shark SCS quota underutilized. Between 2014 and 2015, the Atlantic non-blacknose SCS quota was underutilized by an average of 314,625 lb dw, or 54 percent of the quota. This represents an average annual ex-vessel loss of $298,583 for the fishery, assuming an average value for 2014–2015 of $0.74/lb dw for meat and $4.18/lb dw for fins. Based on the 27 vessels that landed SCS in the Atlantic, the individual vessel impact would be an approximate loss of $11,059 per year.

Alternative 2a would remove the quota linkage to blacknose sharks for shark directed limited access permit holders in the Atlantic region south of 34°00′ N. latitude once the blacknose shark quota is reached and would implement a commercial retention limit of 50 non-blacknose SCS per trip at that point. Additionally, this alternative would adjust the blacknose shark quota to 15.0 mt dw (33,069 lb dw) assuming a 5 lb dw carcass, or 11.8 mt dw (26,089 lb dw) assuming a 12 lb dw carcass. Reduction of the blacknose shark quota would result in an average ex-vessel revenue loss of $5,275 for the fishery assuming a 5 lb dw carcass, or $12,660 assuming a 12 lb dw carcass. Conversely, increased landings of non-blacknose SCS would result in an overall estimated average ex-vessel revenue gain of $34,470 for the fishery. NMFS estimates that this bycatch retention limit would result in a net gain of $21,810 to $29,195 in average ex-vessel revenue for the fishery per year depending on the average carcass weight of blacknose sharks, or $808 to $1,081 per vessel for the 27 vessels that targeted non-blacknose SCS in 2015.

Alternative 2b would remove the quota linkage to blacknose sharks for shark directed limited access permit holders in the Atlantic region south of 34°00′ N. latitude once the blacknose shark quota is reached and would implement a commercial retention limit of 150 non-blacknose SCS per trip at that point. Additionally, this alternative would adjust the blacknose shark quota to 10.5 mt dw (23,148 lb dw) assuming a 5 lb dw carcass, or 1.1 mt dw (2,521 lb dw) assuming a 12 lb dw carcass. Reduction of the blacknose shark quota would result in an average ex-vessel revenue loss of $15,783 for the fishery assuming a 5 lb dw carcass, or $37,878 assuming a 12 lb dw carcass. Conversely, increased landings of non-blacknose SCS would result in an overall estimated average ex-vessel revenue gain of $65,139 for the fishery. NMFS estimates that this bycatch retention limit would result in a net gain of $27,261 to $49,357 in average ex-vessel revenue for the fishery per year depending on the average carcass weight of blacknose sharks, or approximately $1,010 to $1,828 per vessel for the 27 vessels that targeted non-blacknose SCS in 2015.

Alternative 2c would remove the quota linkage to blacknose sharks for shark directed limited access permit holders in the Atlantic region south of 34°00′ N. latitude once the blacknose shark quota is reached and would implement a commercial retention limit of 250 non-blacknose SCS per trip at that point. This alternative would also adjust the blacknose shark quota to 6.1 mt dw (13,448 lb dw) assuming a 5 lb dw carcass, or 0.0 mt dw (0.0 lb dw) assuming a 12 lb dw carcass. Reduction of the blacknose shark quota would result in an average ex-vessel revenue loss of $26,295 for the fishery assuming a 5 lb dw carcass, or $40,575 assuming a 12 lb dw carcass. Conversely, increased landings of non-blacknose SCS would result in an estimated average ex-vessel revenue gain of $80,339 for the fishery. NMFS estimates that this bycatch retention limit would result in a net gain of $39,764 to $54,044 in average ex-vessel revenue for the fishery per year depending on the average carcass weight of blacknose sharks, or approximately $1,473 to $2,002 per vessel for the 27 vessels that targeted non-blacknose SCS in 2015.

Alternative 3a would establish a commercial retention limit of 50 blacknose sharks per trip for shark directed limited access permit holders in the Atlantic region south of 34°00′ N. latitude and maintain the quota linkage between blacknose sharks and non-blacknose SCS. This alternative would have minor beneficial to neutral economic impacts as a retention limit of this size would allow an average of 250 to 600 lb dw blacknose sharks per trip and would take an estimated 63 to 152 trips for fishermen to land the full blacknose shark quota. This alternative will prevent targeted take of blacknose sharks as the per trip value of 50 blacknose sharks would range between $270 ($218 for meat and $52 for fins) assuming an average weight of 5 lb dw per blacknose shark, and $642 ($522 for meat and $120 for fins) assuming an average weight of 12 lb dw for the estimated 13 vessels that land blacknose sharks in the Atlantic. Based on 2015 eDealer reports, 106 trips landed blacknose sharks, and between 14 and 33 percent landed blacknose sharks in excess of a commercial retention limit of 50 blacknose sharks depending on the average trip weight used in the calculations (250–600 lb dw). This alternative would likely increase the number of trips needed to fill the blacknose shark quota when compared to the average from 2010 through 2015 under Alternative 1. A retention limit of 50 blacknose sharks could potentially cause the SCS fisheries to close as early as June or July if every trip landing blacknose sharks landed the full retention limit but, since few fishermen land that many blacknose sharks per trip now, NMFS believes a change in behavior as a result of this alternative is unlikely.

Alternative 3b would establish a commercial retention limit of 16 blacknose sharks per trip for all Atlantic shark limited access permit holders in the Atlantic region south of 34°00′ N. latitude and maintain the quota linkage between blacknose sharks and non-blacknose SCS. This alternative would have minor beneficial economic impacts as a retention limit of this size would allow an average of 80 to 192 lb dw blacknose sharks per trip and would take an estimated 198 to 474 trips for fishermen to land the full blacknose shark quota. Based on 2015 eDealer reports, 38 to 55 percent of the overall number of trips landed blacknose sharks in excess of a commercial retention limit of 16 blacknose sharks depending on the average trip weight used in the calculations (80–192 lb dw). This alternative would dramatically increase the number of trips needed to fill the blacknose shark quota when compared to the yearly averages under Alternative 1. Currently, the linkage between the blacknose shark quota and the non-blacknose SCS quota causes the closure of both fisheries once the lower blacknose shark quota is attained. NMFS expects that, under this alternative, the blacknose shark quota would not be filled and the SCS fisheries in the South Atlantic region

would not close early. Thus, this alternative would have minor beneficial economic impacts to the Atlantic SCS fisheries as it would allow for the potential full-utilization of the non-blacknose SCS quota, and potentially increase total ex-vessel revenue by as much as $298,583 a year. However, given the low monthly trip rates occurring to harvest SCS in the Atlantic, the non-blacknose SCS quota is likely to remain underutilized. Using calculations based on observed trip and landings rates of non-blacknose SCS in 2015, a more likely result of this alternative would be additional landings of 104,962 lb dw of non-blacknose SCS valued at $98,664, or approximately $3,654 per vessel for the 27 vessels that participated in the fishery in 2015. Any financial losses due to underutilization of the blacknose shark quota would be minimal in comparison.

Alternative 3c, the preferred alternative, would establish a commercial retention limit of eight blacknose sharks per trip for all Atlantic shark limited access permit holders in the Atlantic region south of 34°00′ N. latitude and maintain the quota linkage between blacknose sharks and non-blacknose SCS. Because this retention limit would be less than the current retention limit for shark incidental limited access permit holders, the retention limit for shark incidental limited access permit holders would need to change slightly. The adjusted retention limit for incidental permit holders would still allow fishermen to land a total of 16 pelagic or small coastal sharks per trip but, of those sharks, no more than eight could be blacknose sharks. This alternative would have moderate beneficial economic impacts as a retention limit of this size would allow an average of 40 to 96 lb dw blacknose sharks per trip and would take an estimated 395 to 948 trips to land the full blacknose shark quota. Based on 2015 eDealer reports, 55 to 70 percent of the overall number of trips landed blacknose sharks in excess of the commercial retention limit of eight blacknose sharks depending on the average trip weight used in the calculations (40–96 lb dw). This alternative would dramatically increase the number of trips needed to fill the blacknose shark quota when compared to the yearly averages under Alternative 1. Currently, the linkage between the blacknose shark quota and the non-blacknose SCS quota causes the closure of both fisheries once the lower blacknose shark quota is attained. NMFS expects that, under this alternative, the blacknose shark quota would not be filled and the SCS fisheries in the South Atlantic region would not close early. Thus, this would have moderate beneficial economic impacts as the fishermen would still be allowed to land blacknose sharks and the fishery would remain open for a longer period of time, significantly increasing non-blacknose SCS revenues by as much as $298,583 a year on average if the non-blacknose SCS quota is fully utilized. However, given current monthly trip rates in the Atlantic the non-blacknose SCS quota is likely to remain underutilized. Using calculations based on observed trip and landings rates of non-blacknose SCS in 2015, a more likely result of this alternative would be additional landings of 104,962 lb dw of non-blacknose SCS valued at $98,664, or approximately $3,654 per vessel for the 27 vessels that participated in the fishery in 2015. Any financial losses due to underutilization of the blacknose shark quota would be minimal in comparison.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a listserv notice to permit holders that also serves as small entity compliance guide (the guide) was prepared. Copies of this final rule are available from the HMS Management Division (see **ADDRESSES**), and the guide, *i.e.,* the listserv notice, will be sent to all fishermen who hold commercial shark limited access permits. The guide and this final rule will be available upon request.

List of Subjects in 50 CFR Part 635

Fisheries, Fishing, Fishing vessels, Foreign relations, Imports, Penalties, Reporting and recordkeeping requirements, Treaties.

Dated: December 7, 2016.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, 50 CFR part 635 is amended as follows:

PART 635—ATLANTIC HIGHLY MIGRATORY SPECIES

■ 1. The authority citation for part 635 continues to read as follows:

Authority: 16 U.S.C. 971 *et seq.;* 16 U.S.C. 1801 *et seq.*

■ 2. In § 635.24, revise paragraphs (a)(2), (a)(3), (a)(4)(ii), and (a)(4)(iii) to read as follows:

§ 635.24 Commercial retention limits for sharks, swordfish, and BAYS tunas.

* * * * *

(a) * * *

(2) The commercial retention limit for LCS other than sandbar sharks for a person who owns or operates a vessel that has been issued a directed LAP for sharks and does not have a valid shark research permit, or a person who owns or operates a vessel that has been issued a directed LAP for sharks and that has been issued a shark research permit but does not have a NMFS-approved observer on board, may range between zero and 55 LCS other than sandbar sharks per vessel per trip if the respective LCS management group(s) is open per §§ 635.27 and 635.28. Such persons may not retain, possess, or land sandbar sharks. At the start of each fishing year, the default commercial retention limit is 45 LCS other than sandbar sharks per vessel per trip unless NMFS determines otherwise and files with the Office of the Federal Register for publication notification of an inseason adjustment. During the fishing year, NMFS may adjust the retention limit per the inseason trip limit adjustment criteria listed in paragraph (a)(8) of this section.

(3) A person who owns or operates a vessel that has been issued an incidental LAP for sharks and does not have a valid shark research permit, or a person who owns or operates a vessel that has been issued an incidental LAP for sharks and that has been issued a valid shark research permit but does not have a NMFS-approved observer on board, may retain, possess, or land no more than 3 LCS other than sandbar sharks per vessel per trip if the respective LCS management group(s) is open per §§ 635.27 and 635.28. Such persons may not retain, possess, or land sandbar sharks.

(4) * * *

(ii) A person who owns or operates a vessel that has been issued a shark LAP and is operating south of 34°00′ N. lat. in the Atlantic region, as defined at § 635.27(b)(1), may retain, possess, land, or sell blacknose and non-blacknose SCS if the respective blacknose and non-blacknose SCS management groups are open per §§ 635.27 and 635.28. Such

persons may retain, possess, land, or sell no more than 8 blacknose sharks per vessel per trip. A person who owns or operates a vessel that has been issued a shark LAP and is operating north of 34°00′ N. lat. in the Atlantic region, as defined at § 635.27(b)(1), or a person who owns or operates a vessel that has been issued a shark LAP and is operating in the Gulf of Mexico region, as defined at § 635.27(b)(1), may not retain, possess, land, or sell any blacknose sharks, but may retain, possess, land, or sell non-blacknose SCS if the respective non-blacknose SCS management group is open per §§ 635.27 and 635.28.

(iii) Consistent with paragraph (a)(4)(ii) of this section, a person who owns or operates a vessel that has been issued an incidental shark LAP may retain, possess, land, or sell no more than 16 SCS and pelagic sharks, combined, per vessel per trip, if the respective fishery is open per §§ 635.27 and 635.28. Of those 16 SCS and pelagic sharks per vessel per trip, no more than 8 shall be blacknose sharks.

* * * * *

[FR Doc. 2016–29984 Filed 12–13–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No.: 160706587–6999–02]

RIN 0648–BG21

Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Amendment 16

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

ACTION: Final rule.

SUMMARY: This final rule implements regulations in Amendment 16 to the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan. Amendment 16 protects deep-sea corals from the effects of commercial fishing gear in the Mid-Atlantic. The management measures implemented in this rule are intended to protect deep-sea coral and deep-sea coral habitat while promoting the sustainable utilization and conservation of several different marine resources managed under the authority of the Mid-Atlantic Fishery Management Council.

DATES: Effective January 13, 2017.

ADDRESSES: Copies of supporting documents used by the Mid-Atlantic Fishery Management Council, including the Environmental Assessment (EA) and Regulatory Impact Review (RIR)/Initial Regulatory Flexibility Analysis (IRFA), are available from: Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, 800 North State Street, Suite 201, Dover, DE 19901, telephone (302) 674–2331. The EA/RIR/IRFA is also accessible online at *http://www.greateratlantic.fisheries.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Peter Christopher, Supervisory Fishery Policy Analyst, (978) 281–9288, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION:

Background

On January 16, 2013, the Council published a Notice of Intent (NOI) to prepare an Environmental Impact Statement (78 FR 3401) for Amendment 16 to the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan (FMP) to consider measures to protect deep-sea corals from the impacts of commercial fishing gear in the Mid-Atlantic. The Council conducted scoping meetings during February 2013 to gather public comments on these issues. Following further development of Amendment 16 through 2013 and 2014, the Council conducted public hearings in January 2015. Following public hearings, and with disagreement about the boundaries of the various alternatives, the Council held a workshop with various stakeholders on April 29–30, 2015, to further refine the deep-sea coral area boundaries. The workshop was an example of effective collaboration among fishery managers, the fishing industry, environmental organizations, and the public to develop management recommendations with widespread support. The Council adopted Amendment 16 on June 10, 2015, and submitted Amendment 16 on August 15, 2016, for final review by NMFS, acting on behalf of the Secretary of Commerce. NMFS published a Notice of Availability (NOA) announcing its review of Amendment 16 on September 2, 2016 (81 FR 60666), and a proposed rule including implementing regulations on September 27, 2016 (81 FR 66245). The public comment period for both the NOA and proposed rule ended on November 1, 2016.

The Council developed the action, and the measures described in this notice, under the discretionary provisions for deep-sea coral protection in section 303(b) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). This provision gives the Regional Fishery Management Councils the authority to:

(A) Designate zones where, and periods when, fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels or with specified types and quantities of fishing gear;

(B) Designate such zones in areas where deep-sea corals are identified under section 408 (this section describes the deep-sea coral research and technology program), to protect deep-sea corals from physical damage from fishing gear or to prevent loss or damage to such fishing gear from interactions with deep-sea corals, after considering long-term sustainable uses of fishery resources in such areas; and

(C) With respect to any closure of an area under the Magnuson-Stevens Act that prohibits all fishing, ensure that such closure:

(i) Is based on the best scientific information available;

(ii) Includes criteria to assess the conservation benefit of the closed area;

(iii) Establishes a timetable for review of the closed area's performance that is consistent with the purposes of the closed area; and

(iv) Is based on an assessment of the benefits and impacts of the closure, including its size, in relation to other management measures (either alone or in combination with such measures), including the benefits and impacts of limiting access to: Users of the area, overall fishing activity, fishery science, and fishery and marine conservation.

Consistent with these provisions, the Council recommended the measures in Amendment 16 to balance the impacts of measures implemented under this discretionary authority with the management objectives of the Mackerel, Squid, and Butterfish FMP and the value of potentially affected commercial fisheries.

Approved Measures

Deep-Sea Coral Protection Area

This final rule creates a deep-sea coral protection area in Mid-Atlantic waters. It consists of a broad zone that starts at a depth contour of approximately 450 meters (m) and extends to the U.S. Exclusive Economic Zone (EEZ) boundary, and to the north and south to the boundaries of the Mid-Atlantic waters (as defined in the Magnuson-Stevens Act). In addition, the deep-sea coral protection area includes 15 discrete zones that outline deep-sea canyons on the continental shelf in Mid-Atlantic waters. The deep-sea coral area, including both broad and discrete zones, is one continuous area.

The broad coral zone is precautionary in nature and is intended to freeze the footprint of fishing to protect corals from future expansion of fishing effort into deeper waters. The broad coral zone has a landward boundary drawn between the 400 m and 500 m contours with the intention to approximate the 450 m depth contour as closely as possible, minimizing the number of vertices in the boundary line. In areas where there is conflict or overlap between this broad zone and any designated discrete zone boundaries, the discrete zone boundaries are prioritized. From the landward boundary, the broad zone boundaries extends along the northern and southern boundaries of the Mid-Atlantic management region, and to the edge of the EEZ as the eastward boundary.

The discrete coral zones are specific submarine canyons and slope areas located in Mid-Atlantic waters. The boundaries were developed collaboratively by participants at the Council's April 29–30, 2015, Deep-sea Corals Workshop in Linthicum, MD. Participants included the Council's Squid, Mackerel, and Butterfish Advisory Panel, the Ecosystems and Ocean Planning Advisory Panel, members of the Deep-sea Corals Fishery Management Action Team, invited deep-sea coral experts, additional fishing industry representatives, and other interested stakeholders. The canyons and slope areas were identified as areas with observed coral presence or highly likely coral presence indicated by modeled suitable habitat. Therefore, prohibiting bottom-tending fishing gear in these areas prevents interaction with and damage to deep-sea corals that either are known through observation to live in these areas or that are likely to live there. The discrete coral zones are: Block Canyon; Ryan and McMaster Canyons; Emery and Uchupi Canyons; Jones and Babylon Canyons; Hudson Canyon; Mey-Lindenkohl Slope; Spencer Canyon; Wilmington Canyon; North Heyes and South Wilmington Canyons; South Vries Canyon; Baltimore Canyon; Warr and Phoenix Canyon Complex; Accomac and Leonard Canyons; Washington Canyon; and Norfolk Canyon.

Gear Restrictions in the Deep-Sea Coral Area

This action prohibits the use of bottom-tending commercial fishing gear within the designated deep-sea coral area, including: Bottom-tending otter trawls; bottom-tending beam trawls; hydraulic dredges; non-hydraulic dredges; bottom-tending seines; bottom-tending longlines; sink or anchored gill nets; and pots and traps except those used to fish for red crab and American lobster. The prohibition on these gears will protect deep-sea corals from interaction with and damage from bottom-tending fishing gear.

Vessels can transit the deep-sea coral area protection area provided the vessels bring bottom-tending fishing gear onboard the vessel, and reel bottom-tending trawl gear onto the net reel. The Council proposed these slightly less restrictive transiting provisions because the majority of transiting will be through the very narrow canyon heads (*i.e.,* the narrow tips of the canyons that extend landward of the broad coral zone landward boundary). The Council determined that the normal gear stowage requirements, and requirements that gear be unavailable for immediate use, (at 50 CFR 648.2) would be too burdensome for commercial vessels within the narrow areas of some of the discrete coral zones.

Administrative Measures

Vessels issued an *Illex* squid moratorium permit are required to have a vessel monitoring system (VMS) installed, and operators of these vessels would have to declare *Illex* squid trips on which 10,000 lb (4.53 mt) or more of *Illex* squid would be harvested. By requiring *Illex* squid vessels to have VMS and declare *Illex* fishing trips prior to leaving port, this measure facilitates enforcement of the deep-sea coral area and gear restrictions. NMFS notes that all *Illex* vessels currently have VMS installed and that all of these vessels are already required to declare trips. Therefore, this provision does not create any new operational requirement for *Illex* squid vessel owners or operators.

This action expands the framework adjustment provisions in the FMP to facilitate future modifications to the deep-sea coral protection measures. The framework measures include:

- Modifications to coral zone boundaries via framework action;
- Modifications to the boundaries of broad or discrete deep-sea coral zones through a framework action;
- Modification of management measures within deep-sea coral protection areas. This provides the Council the option to modify fishing restrictions, exemptions, monitoring requirements, and other management measures within deep-sea coral zones through a framework action. It includes measures directed at gear and species not currently addressed in the FMP to further the FMP's goal of protecting deep-sea corals from physical damage from fishing gear or to prevent loss or damage to such fishing gear from interactions with deep-sea corals. This would also include the ability to add a prohibition on anchoring in deep-sea coral protection areas;
- Addition of discrete coral zones; and
- Implementation of special access program for deep-sea coral protection area. This provides the Council the option to design and implement a special access program for commercial fishery operations in deep-sea coral zones through a framework action.

Formal Naming of the Deep-Sea Coral Protection Area

The Council recommended that the deep-sea coral protection area should be named in honor of the late Senator Frank R. Lautenberg. Senator Lautenberg was responsible for several important pieces of ocean conservation legislation and authored several provisions included in the most recent reauthorized Magnuson-Stevens Act (2007), including the discretionary provision for corals. Therefore, this final rule implements the deep-sea coral protection area as the ''Frank R. Lautenberg Deep-Sea Coral Protection Area.''

Comments and Responses

We received 10 comments on the proposed rule and NOA (8 in general support of the action and 2 against the action), including letters from five individuals, the Garden State Seafood Association, the Maryland Department of Natural Resources, and the Wildlife Conservation Society's New York Aquarium. We also received a joint comment from Oceana, Wildlife Conservation Society's New York Aquarium, Conservation Law Foundation, Earthjustice, Great Egg Harbor Watershed Association, Natural Resource Defense Council, Pew Charitable Trusts, Tycoon Tackle Inc., and Wild Oceans. Supporting this joint comment was a comment the PEW Charitable Trust submitted to the Council prior to final action on Amendment 16. This comment was included to convey the strong and broad public support for the protection of deep-sea corals (including 12,201 signatures). The comment specific to the Amendment 16 proposed rule was supportive of the action. The following summarizes the issues raised in the comments and NMFS's responses.

Comment 1: Garden State Seafood Association opposes the expansion of framework adjustment provisions as currently allowed by the fishery management plan.

Response: In general, the framework alternatives are primarily administrative and intended to simplify and improve the efficiency of future actions related to deep-sea coral protections. The purpose of modifying the list of ''frameworkable items'' in the FMP is to demonstrate that the concepts included on the list have previously been considered in an amendment (*i.e.,* they are not novel) and the applicable measures are included in the fishery management plan or regulations. Adjustment of the measures through the framework process allows for modification of the measures already included in the fishery management plan(s). The effects of any proposed action or future change through the framework adjustment process will be analyzed through a separate NEPA process and developed with public input through the Council process.

Comment 2: The joint comment letter (from Oceana, Wildlife Conservation Society's New York Aquarium, Conservation Law Foundation, Earthjustice, Great Egg Harbor Watershed Association, Natural Resource Defense Council, PEW Charitable Trusts, Tycoon Tackle Inc., and Wild Oceans) requested that the exemptions for lobster and crab pots and traps provided in the action be reexamined in a future action to ensure that they are justified and that the final rule provide a full explanation of how the Council and NOAA will approach reconsideration of the exemption, including evaluation criteria and a detailed description of the information that will be collected over the 2-year period in order to make a better informed decision. The letter requested that NMFS and the Council establish a process to jointly assess the effectiveness in protecting deep-sea corals in the Coral Area, and that the chosen metrics be reviewed periodically to make adjustments.

Response: The Council developed this action under the discretionary provisions for deep-sea coral protection in section 303(b) of the Magnuson-Stevens Act. This provision gives the Council the authority to establish a timetable for review of the closed area's performance that is consistent with the purposes of the closed area. Although the Council did not establish a formal review process for the areas, it clearly indicated its intent to allow review and modification through the framework provisions it included in the amendment. Because the process is not included, and it is not required, NMFS cannot impose a timeline or process on the Council. However, NMFS will continue to work with the Council and remind it of the need to adjust these measures as necessary as new information becomes available.

Comment 3: The joint comment letter recommended that the Council and NMFS consider expanding the boundaries of the discrete zones to better protect deep-sea corals, including stony corals (*Scleractinia*) and sea pens (*Pennatulacea*).

Response: The Council can consider additional action to further expand the protection of deep-sea corals through the framework measures and process it included in this amendment.

Comment 4: The joint comment letter recommended that the transit provision require the full gear stowage provisions as opposed to the slightly less restrictive requirements proposed.

Response: The action allows slightly less restrictive transiting provisions because the majority of transiting will be through the very narrow canyon heads (*i.e.,* the narrow tips of the canyons that extend landward of the broad coral zone landward boundary). The normal gear stowage requirements, and requirements that gear be unavailable for immediate use, (at 50 CFR 648.2), would be burdensome for commercial vessels within the narrow areas of some of the discrete coral zones. The less restrictive gear stowage requirement still prohibits vessels from fishing in the areas and they must have gear onboard; the more restrictive measures would not reduce the potential for fishing.

Comment 5: The joint comment letter requested that the Council consider future prohibitions on mid-water trawl gear.

Response: The Council has the option to consider additional gear prohibitions in the area through a framework.

Comment 6: The joint comment letter opposed the implementation of a special access program for commercial fishing operations in the coral area via framework action. They feel there should be a full amendment to create such a program.

Response: The framework alternatives are primarily administrative and intended to simplify and improve the efficiency of future actions related to deep-sea coral protections. The purpose of modifying the list of frameworkable items in the FMP is to demonstrate that the concepts included on the list have previously been considered in an amendment. Any proposed action or future change will be analyzed through a separate NEPA process and would be developed by the Council through a public process, including Council, Committee, and Advisory Panel meetings that are all open to public participation.

Comment 7: One commenter requested that a large portion of the deep-sea coral protection area be set aside as a permanently protected no-take reserve, to both preserve biodiversity and ensure sustainable fisheries into the future.

Response: The Council did not consider measures that would establish ''no-take reserves.'' Rather, the measures approved as part of this amendment, and the alternatives the Council considered, were meant to prevent fishing in some areas and prevent expansion of fisheries into areas where corals are known or believed to exist. The Council balanced the desire to close these areas under the Magnuson-Stevens Act's discretionary deep-sea coral provision with the need to promote sustainable fisheries as the primary requirement under the Magnuson-Stevens Act. However, if the Council wants to consider expanded protection of biodiversity through no-take reserves or similar measures, it can take an additional action to further expand the protection of deep-sea corals.

Comment 8: One commenter stated that during the development of this action the Council led the fishing industry to believe that all existing fisheries operating in the areas protected under this action would be allowed to continue and that no new fisheries would be allowed to use the area, (*i.e.,* the action would freeze the footprint of fishing). He stated that removing all bottom tending mobile gear from these areas will have ''devastating impacts on current fisheries that have historically taken place near/in the coral zones.''

Response: We disagree that the Council misled the fishing industry. The Council held a workshop with various stakeholders (including fishing industry participants) because of disagreement about how to set the coral protection area boundaries so that it would limit fishing but not have a high negative impact on fisheries. Environmental advocates, and deep-sea coral experts, as well as the Atlantic Mackerel, Squid, and Butterfish Advisory Panel and the Ecosystems and Ocean Planning Advisory Panel attended the workshop. The workshop resulted in stakeholders working together to compromise on a set of boundaries for the 15 discrete deep-sea coral zones, which the Council subsequently selected as its preferred alternative. During the workshop to refine boundaries for coral zones, advisors assisted in developing boundaries that would allow for continued fishing just outside the gear restricted areas. As a result, the Council determined the economic impacts of this action will result in overall neutral

to moderate negative economic impacts for fishing businesses, depending on the fishery and assuming vessels will redistribute effort to offset impacts of the prohibition on fishing in some areas where they traditionally fished.

Comment 9: One commenter stated that the Council has never provided any justification for the decision to allow fixed gear in the area when data show that fixed gear poses a greater threat to deep-sea coral than mobile gear.

Response: The Council recommended the exemption for the red crab fishery because of the small size of the red crab fleet (three vessels) and because all red crab effort takes place at depths entirely within all of the proposed broad zone areas. Prohibiting red crab fishing in the coral protection area would have severely limited the red crab fishery and would have had excessively high negative economic impacts on red crab vessels.

Comment 10: One commenter stated that there should be names on all fishing equipment assigned to fishing boats and loss of such equipment should require a fine of a million dollars if equipment is lost because it is causing massive marine death.

Response: Lobster and red crab gear are already required to be marked to identify the vessel. Further, both of these gears are required to be compliant with the Atlantic Large Whale Take Reduction Plan to reduce injuries and deaths of large whales due to incidental entanglement in fishing gear. Details on the Atlantic Large Whale Take Reduction Plan can be found here: *https://www.greateratlantic.fisheries.noaa.gov/Protected/whaletrp/.*

Changes From Proposed Rule to Final Rule

There are no changes from the proposed rule.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

The Office of Management and Budget (OMB) has determined that this final rule is not significant according to Executive Order (E.O.) 12866.

This final rule does not contain policies with federalism or ''takings'' implications, as those terms are defined in E.O. 13132 and E.O. 12630, respectively.

This action does not contain any collection-of-information requirements subject the Paperwork Reduction Act (PRA).

NMFS, pursuant to section 604 of the Regulatory Flexibility Act (RFA), has completed a final regulatory flexibility analysis (FRFA) in support of Amendment 16 in this final rule. The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, NMFS responses to those comments, a summary of the analyses completed in the Amendment 16 EA, and this portion of the preamble. A summary of the IRFA was published in the proposed rule for this action and is not repeated here. A description of why this action was considered, the objectives of, and the legal basis for this rule is contained in Amendment 16 and in the preamble to the proposed and this final rule, and is not repeated here. All of the documents that constitute the FRFA are available from NMFS and a copy of the IRFA, the Regulatory Impact Review (RIR), and the EA are available upon request (see **ADDRESSES**).

A Summary of the Significant Issues Raised by the Public in Response to the IRFA, a Summary of the Agency's Assessment of Such Issues, and a Statement of Any Changes Made in the Final Rule as a Result of Such Comments

There were no specific comments on the IRFA. The Comments and Responses section summarizes the comments that highlight concerns about the economic impacts and implications of impacts on small businesses (*i.e.,* comment 8). No comments were received from the Office of Advocacy for the Small Business Administration.

Description and Estimate of the Number of Small Entities To Which This Rule Would Apply

On December 29, 2015, NMFS issued a final rule establishing a small business size standard of $11 million in annual gross receipts for all businesses primarily engaged in the commercial fishing industry (NAICS 11411) for RFA compliance purposes only (80 FR 81194; December 29, 2015). The $11 million standard became effective on July 1, 2016, and is to be used in place of the U.S. Small Business Administration's (SBA) current standards of $20.5 million, $5.5 million, and $7.5 million for the finfish (NAICS 114111), shellfish (NAICS 114112), and other marine fishing (NAICS 114119) sectors of the U.S. commercial fishing industry in all NMFS rules subject to the RFA after July 1, 2016 (Id. at 81194).

The Council prepared the IRFA under the SBA standards and submitted the action for initial NMFS review in March 2016, prior to the July 1, 2016, effective date of NMFS' new size standard for commercial fishing businesses, under the assumption that the proposed rule would also publish prior to the July 1, 2016, effective date. However, NMFS has reviewed the analyses prepared for this regulatory action in light of the new size standard. The new size standard could result in some of the large businesses being considered small, but, as explained below, this does not affect the conclusions of the analysis. The following summarizes the IRFA using the SBA definitions of small businesses.

The deep-sea coral zones measures in association with other management measures within the coral zones could affect any business entity that has an active Federal fishing permit and fishes in the zone/gear restricted areas. In order to identify firms, vessel ownership data, which have been added to the permit database, were used to identify all the individuals who own fishing vessels. With this information, vessels were grouped together according to common owners. The resulting groupings were then treated as a fishing business (firm, affiliate, or entity), for purposes of identifying small and large firms. According to the ownership database, a total of 113 finfish firms (all small entities) fished in the Council's preferred broad and discrete zones during 2014. Also in 2014, there were 184 small and 16 large shellfish entities. The ownership database shows that small finfish firms that operated in the Council's preferred broad and discrete zones generated average revenues that ranged from $18,344 (in 2013) to $21,055 (in 2014). The ownership database shows that small shellfish firms that operated in the Council's preferred broad and discrete zones generated average revenues that ranged from $35,276 (in 2014) to $58,723 (in 2012). The ownership database shows that large shellfish firms that operated in the Council's preferred broad and discrete zones generated average revenues that ranged from $146,901 (in 2013) to $314,223 (in 2012).

Description of the Projected Reporting, Record-Keeping, and Other Compliance Requirements

This action contains no new collection-of-information requirements subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). This action requires *Illex* squid vessels to install and operate VMS, and to declare *Illex* squid trips. However, NMFS has determined that all *Illex* squid vessels that will be affected by this action already have VMS. Because every *Illex* vessel has VMS,

they are already required to enter a trip declaration for every trip. Therefore, there is no additional reporting burden imposed by this action.

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

During the development of Amendment 16, the Council considered several alternatives to the deep-sea coral protection measures it ultimately recommended. While some alternatives would have closed less area (smaller discrete zone areas and broad zone area starting at a deeper depth) and other alternatives would have allowed more fishing (an exemption for tilefish gear), NMFS has does not have the authority to implement measures that were not recommended by the Council as part of its preferred action. Rather, NMFS can only approve or disapprove Council recommendations in an amendment. NMFS, therefore, is implementing the Council's preferred action, but the action includes some measures that reduce the economic impact inherent in closing areas to fishing. Specifically, this final rule exempts red crab pot gear from the prohibition on fishing with bottom-tending fishing gear in the deep-sea coral protection area. The red crab fishery exists entirely within the boundaries of the deep-sea coral protection area in the Mid-Atlantic. The exemption allows the fishery to continue to operate in the Mid-Atlantic and gain revenue from its catch. In addition, vessels are allowed to transit the deep-sea coral protection area, which is particularly important at the heads of the discrete zone canyons (where the boundaries come to a point). Because vessels fish with bottom-tending gear along the edges of the canyons, they would have to transit around them to fish on both sides of the canyon. This would cost fuel and could ultimately impact trip duration and catch if vessel operators would have had to spend time transiting around the canyon heads rather than across them. Both the red crab pot gear exemption and the transiting provision therefore reduces cost and time and minimizes the economic impact of the measures implemented under this final rule.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a final regulatory flexibility analysis, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. The preamble to the proposed rule (81 FR 66245, September 27, 2016) and the preamble to this final rule serve as the small entity compliance guide. This final rule does not require any additional compliance from small entities that is not described in the preamble to the proposed rule and this final rule. Copies of the proposed rule and this final rule are available from NMFS at the following Web site: *https://www.greateratlantic.fisheries.noaa.gov/sustainable/species/scallop/.*

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: December 7, 2016.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. In § 648.10, add paragraphs (b)(11) and (p) to read as follows:

§ 648.10 VMS and DAS requirements for vessel owners/operators.

* * * * *

(b) * * *

(11) Vessels issued an *Illex* squid moratorium permit.

* * * * *

(p) *Illex squid VMS notification requirement.* A vessel issued an *Illex* squid moratorium permit intending to declare into the *Illex* squid fishery must notify NMFS by declaring an *Illex* squid trip prior to leaving port at the start of each trip in order to harvest, possess, or land 10,000 lb (4,535.9 kg) or more of *Illex* squid on that trip.

■ 3. In § 648.14, add paragraph (b)(10) and revise paragraphs (g)(2)(v) heading and (g)(2)(v)(A) to read as follows:

§ 648.14 Prohibitions.

* * * * *

(b) * * *

(10) Fish with bottom-tending gear within the Frank R. Lautenberg Deep-sea Coral Protection Area described at § 648.27, unless transiting pursuant to § 648.27(d), fishing lobster trap gear in accordance with § 697.21 of this chapter, or fishing red crab trap gear in accordance with § 648.264. Bottom-tending gear includes but is not limited to bottom-tending otter trawls, bottom-tending beam trawls, hydraulic dredges, non-hydraulic dredges, bottom-tending seines, bottom longlines, pots and traps, and sink or anchored gill nets.

* * * * *

(g) * * *

(2) * * *

(v) *Reporting requirements in the limited access Atlantic mackerel, longfin squid/butterfish, and Illex squid moratorium fisheries.* (A) Fail to declare via VMS into the mackerel, longfin squid/butterfish, or Illex squid fisheries by entering the fishery code prior to leaving port at the start of each trip, if the vessel will harvest, possess, or land Atlantic mackerel, more than 2,500 lb (1,134 kg) of longfin squid, or more than 10,000 lb (4,535.9 kg) of Illex squid, and is issued a Limited Access Atlantic mackerel permit, longfin squid/butterfish moratorium permit, or Illex squid moratorium permit, pursuant to § 648.10.

* * * * *

■ 4. In § 648.25:

■ a. Revise paragraph (a)(1);

■ b. Redesignate paragraphs (a)(2), (a)(3), and (a)(4) as paragraphs (a)(3), (a)(4), and (a)(5); and

■ c. Add new paragraph (a)(2).

The revisions and addition read as follows:

§ 648.25 Atlantic Mackerel, squid, and butterfish framework adjustments to management measures.

(a) * * *

(1) *Adjustment process.* The MAFMC shall develop and analyze appropriate management actions over the span of at least two MAFMC meetings. The MAFMC must provide the public with advance notice of the availability of the recommendation(s), appropriate justification(s) and economic and biological analyses, and the opportunity to comment on the proposed adjustment(s) at the first meeting and prior to and at the second MAFMC meeting. The MAFMC's recommendations on adjustments or additions to management measures must come from one or more of the following categories:

(i) Adjustments within existing ABC control rule levels;

(ii) Adjustments to the existing MAFMC risk policy;

(iii) Introduction of new AMs, including sub-ACTs;

(iv) Minimum and maximum fish size;

(v) Gear restrictions, gear requirements or prohibitions;

(vi) Permitting restrictions;

(vii) Recreational possession limit, recreational seasons, and recreational harvest limit;

(viii) Closed areas;

(ix) Commercial seasons, commercial trip limits, commercial quota system, including commercial quota allocation procedure and possible quota set-asides to mitigate bycatch;

(x) Annual specification quota setting process;

(xi) FMP Monitoring Committee composition and process;

(xii) Description and identification of EFH (and fishing gear management measures that impact EFH);

(xiii) Description and identification of habitat areas of particular concern;

(xiv) Overfishing definition and related thresholds and targets;

(xv) Regional gear restrictions, regional season restrictions (including option to split seasons), regional management;

(xvi) Restrictions on vessel size (LOA and GRT) or shaft horsepower;

(xvii) Changes to the SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, the process for prioritizing observer sea-day allocations, reports, and/or industry-funded observers or observer set aside programs;

(xviii) Set aside quota for scientific research;

(xix) Process for inseason adjustment to the annual specification;

(xx) Mortality caps for river herring and shad species, time/area management for river herring and shad species, and provisions for river herring and shad incidental catch avoidance program, including adjustments to the mechanism and process for tracking fleet activity, reporting incidental catch events, compiling data, and notifying the fleet of changes to the area(s);

(xxi) The definition/duration of 'test tows,' if test tows would be utilized to determine the extent of river herring incidental catch in a particular area(s);

(xxii) The threshold for river herring incidental catch that would trigger the need for vessels to be alerted and move out of the area(s), the distance that vessels would be required to move from the area(s), and the time that vessels would be required to remain out of the area(s);

(xxiii) Modifications to the broad and discrete deep-sea coral zone boundaries and the addition of discrete deep-sea coral zones;

(xxiv) Modifications to the management measures within the Frank R. Lautenberg Deep-sea Coral Protection Area and implementation of special access programs to the Frank R. Lautenberg Deep-sea Coral Protection Area; and

(xxv) Any other management measures currently included in the FMP.

(2) Measures contained within this list that require significant departures from previously contemplated measures or that are otherwise introducing new concepts may require amendment of the FMP instead of a framework adjustment.

* * * * *

■ 5. Add § 648.27 to subpart B to read as follows:

§ 648.27 Frank R. Lautenberg Deep-Sea Coral Protection Area.

(a) No vessel may fish with bottom-tending gear within the Frank R. Lautenberg Deep-Sea Coral Protection Area described in this section, unless transiting pursuant to paragraph (d) of this section, fishing lobster trap gear in accordance with § 697.21 of this chapter, or fishing red crab trap gear in accordance with § 648.264. Bottom-tending gear includes but is not limited to bottom-tending otter trawls, bottom-tending beam trawls, hydraulic dredges, non-hydraulic dredges, bottom-tending seines, bottom longlines, pots and traps, and sink or anchored gillnets. The Frank R. Lautenberg Deep-Sea Coral Protection Area consists of the Broad and Discrete Deep-Sea Coral Zones defined in paragraphs (b) and (c) of this section.

(b) *Broad Deep-Sea Coral Zone.* The Broad Deep-Sea Coral Zone is bounded on the east by the outer limit of the U.S. Exclusive Economic Zone, and bounded on all other sides by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request). An asterisk (*) in the Discrete Zone column means the point is shared with a Discrete Deep-Sea Coral Zone, as defined in paragraph (c) of this section.

BROAD ZONE

Point	Latitude	Longitude	Discrete zone
1	36°33.02′ N.	71°29.33′ W.	
2	36°33.02′ N.	72°00′ W.	
3	36°33.02′ N.	73°00′ W.	
4	36°33.02′ N.	74°00′ W.	
5	36°33.02′ N.	74°42.14′ W.	
6	36°34.44′ N.	74°42.23′ W.	
7	36°35.53′ N.	74°41.59′ W.	
8	36°37.69′ N.	74°41.51′ W.	
9	36°42.09′ N.	74°39.07′ W.	
10	36°45.18′ N.	74°38′ W.	
11	36°45.69′ N.	74°38.55′ W.	
12	36°49.17′ N.	74°38.31′ W.	

BROAD ZONE—Continued

Point	Latitude	Longitude	Discrete zone
13	36°49.56′ N.	74°37.77′ W.	
14	36°51.21′ N.	74°37.81′ W.	
15	36°51.78′ N.	74°37.43′ W.	
16	36°58.51′ N.	74°36.51′ W.	*
17	36°58.62′ N.	74°36.97′ W.	*
18	37°4.43′ N.	74°41.03′ W.	*
19	37°5.83′ N.	74°45.57′ W.	*
20	37°6.97′ N.	74°40.8′ W.	*
21	37°4.52′ N.	74°37.77′ W.	*
22	37°4.02′ N.	74°33.83′ W.	*
23	37°4.52′ N.	74°33.51′ W.	*
24	37°4.4′ N.	74°33.11′ W.	*
25	37°7.38′ N.	74°31.95′ W.	
26	37°8.32′ N.	74°32.4′ W.	
27	37°8.51′ N.	74°31.38′ W.	
28	37°9.44′ N.	74°31.5′ W.	
29	37°16.83′ N.	74°28.58′ W.	
30	37°17.81′ N.	74°27.67′ W.	
31	37°18.72′ N.	74°28.22′ W.	
32	37°22.74′ N.	74°26.24′ W.	*
33	37°22.87′ N.	74°26.16′ W.	*
34	37°24.44′ N.	74°28.57′ W.	*
35	37°24.67′ N.	74°29.71′ W.	*
36	37°25.93′ N.	74°30.13′ W.	*
37	37°27.25′ N.	74°30.2′ W.	*
38	37°28.6′ N.	74°30.6′ W.	*
39	37°29.43′ N.	74°30.29′ W.	*
40	37°29.53′ N.	74°29.95′ W.	*
41	37°27.68′ N.	74°28.82′ W.	*
42	37°27.06′ N.	74°28.76′ W.	*
43	37°26.39′ N.	74°27.76′ W.	*
44	37°26.3′ N.	74°26.87′ W.	*
45	37°25.69′ N.	74°25.63′ W.	*
46	37°25.83′ N.	74°24.22′ W.	*
47	37°25.68′ N.	74°24.03′ W.	*
48	37°28.04′ N.	74°23.17′ W.	
49	37°27.72′ N.	74°22.34′ W.	
50	37°30.13′ N.	74°17.77′ W.	
51	37°33.83′ N.	74°17.47′ W.	
52	37°35.48′ N.	74°14.84′ W.	
53	37°36.99′ N.	74°14.01′ W.	
54	37°37.23′ N.	74°13.02′ W.	
55	37°42.85′ N.	74°9.97′ W.	
56	37°43.5′ N.	74°8.79′ W.	
57	37°45.22′ N.	74°9.2′ W.	
58	37°45.15′ N.	74°7.24′ W.	*
59	37°45.88′ N.	74°7.44′ W.	*
60	37°46.7′ N.	74°5.98′ W.	*
61	37°49.62′ N.	74°6.03′ W.	*
62	37°51.25′ N.	74°5.48′ W.	*
63	37°51.99′ N.	74°4.51′ W.	*
64	37°51.37′ N.	74°3.3′ W.	*
65	37°50.63′ N.	74°2.69′ W.	*
66	37°49.62′ N.	74°2.28′ W.	*
67	37°50.28′ N.	74°0.67′ W.	*
68	37°53.68′ N.	73°57.41′ W.	*
69	37°55.07′ N.	73°57.27′ W.	*
70	38°3.29′ N.	73°49.1′ W.	*
71	38°6.19′ N.	73°51.59′ W.	*
72	38°7.67′ N.	73°52.19′ W.	*
73	38°9.04′ N.	73°52.39′ W.	*
74	38°10.1′ N.	73°52.32′ W.	*
75	38°11.98′ N.	73°52.65′ W.	*
76	38°13.74′ N.	73°50.73′ W.	*
77	38°13.15′ N.	73°49.77′ W.	*
78	38°10.92′ N.	73°50.37′ W.	*
79	38°10.2′ N.	73°49.63′ W.	*
80	38°9.26′ N.	73°49.68′ W.	*
81	38°8.38′ N.	73°49.51′ W.	*
82	38°7.59′ N.	73°47.91′ W.	*
83	38°6.96′ N.	73°47.25′ W.	*
84	38°6.51′ N.	73°46.99′ W.	*
85	38°5.69′ N.	73°45.56′ W.	*
86	38°6.35′ N.	73°44.8′ W.	*
87	38°7.5′ N.	73°45.2′ W.	*
88	38°9.24′ N.	73°42.61′ W.	*
89	38°9.41′ N.	73°41.63′ W.	
90	38°15.13′ N.	73°37.58′ W.	
91	38°15.25′ N.	73°36.2′ W.	*
92	38°16.19′ N.	73°36.91′ W.	*

BROAD ZONE—Continued

Point	Latitude	Longitude	Discrete zone
93	38°16.89′ N.	73°36.66′ W.	*
94	38°16.91′ N.	73°36.35′ W.	*
95	38°17.63′ N.	73°35.35′ W.	*
96	38°18.55′ N.	73°34.44′ W.	*
97	38°18.38′ N.	73°33.4′ W.	*
98	38°19.04′ N.	73°33.02′ W.	*
99	38°25.08′ N.	73°34.99′ W.	*
100	38°26.32′ N.	73°33.44′ W.	*
101	38°29.72′ N.	73°30.65′ W.	*
102	38°28.65′ N.	73°29.37′ W.	*
103	38°25.53′ N.	73°30.94′ W.	*
104	38°25.26′ N.	73°29.97′ W.	*
105	38°23.75′ N.	73°30.16′ W.	*
106	38°23.47′ N.	73°29.7′ W.	*
107	38°22.76′ N.	73°29.34′ W.	*
108	38°22.5′ N.	73°27.63′ W.	*
109	38°21.59′ N.	73°26.87′ W.	*
110	38°23.07′ N.	73°24.11′ W.	.....
111	38°25.83′ N.	73°22.39′ W.	.....
112	38°25.97′ N.	73°21.43′ W.	.....
113	38°34.14′ N.	73°11.14′ W.	*
114	38°35.1′ N.	73°10.43′ W.	*
115	38°35.94′ N.	73°11.25′ W.	*
116	38°37.57′ N.	73°10.49′ W.	*
117	38°37.21′ N.	73°9.41′ W.	*
118	38°36.72′ N.	73°8.85′ W.	*
119	38°43′ N.	73°1.24′ W.	*
120	38°43.66′ N.	73°0.36′ W.	*
121	38°45′ N.	73°0.27′ W.	*
122	38°46.68′ N.	73°1.07′ W.	*
123	38°47.54′ N.	73°2.24′ W.	*
124	38°47.84′ N.	73°2.24′ W.	*
125	38°49.03′ N.	73°1.53′ W.	*
126	38°48.45′ N.	73°1′ W.	*
127	38°49.15′ N.	72°58.98′ W.	*
128	38°48.03′ N.	72°56.7′ W.	*
129	38°49.84′ N.	72°55.54′ W.	*
130	38°52.4′ N.	72°52.5′ W.	*
131	38°53.87′ N.	72°53.36′ W.	*
132	38°54.17′ N.	72°52.58′ W.	*
133	38°54.7′ N.	72°50.26′ W.	*
134	38°57.2′ N.	72°47.74′ W.	*
135	38°58.64′ N.	72°48.35′ W.	*
136	38°59.3′ N.	72°47.86′ W.	*
137	38°59.22′ N.	72°46.69′ W.	*
138	39°0.13′ N.	72°45.47′ W.	*
139	39°1.69′ N.	72°45.74′ W.	*
140	39°1.49′ N.	72°43.67′ W.	*
141	39°3.9′ N.	72°40.83′ W.	*
142	39°7.35′ N.	72°41.26′ W.	*
143	39°7.16′ N.	72°37.21′ W.	*
144	39°6.52′ N.	72°35.78′ W.	*
145	39°11.73′ N.	72°25.4′ W.	*
146	39°11.76′ N.	72°22.33′ W.	.....
147	39°19.08′ N.	72°9.56′ W.	*
148	39°25.17′ N.	72°13.03′ W.	*
149	39°28.8′ N.	72°17.39′ W.	*
150	39°30.16′ N.	72°20.41′ W.	*
151	39°31.38′ N.	72°23.86′ W.	*
152	39°32.55′ N.	72°25.07′ W.	*
153	39°34.57′ N.	72°25.18′ W.	*
154	39°34.53′ N.	72°24.23′ W.	*
155	39°33.17′ N.	72°24.1′ W.	*
156	39°32.07′ N.	72°22.77′ W.	*
157	39°32.17′ N.	72°22.08′ W.	*
158	39°30.3′ N.	72°15.71′ W.	*
159	39°29.49′ N.	72°14.3′ W.	*
160	39°29.44′ N.	72°13.24′ W.	*
161	39°27.63′ N.	72°5.87′ W.	*
162	39°28.26′ N.	72°2.2′ W.	*
163	39°29.88′ N.	72°3.51′ W.	*
164	39°30.57′ N.	72°3.47′ W.	*
165	39°31.28′ N.	72°2.63′ W.	*
166	39°31.46′ N.	72°1.41′ W.	*
167	39°37.15′ N.	71°55.85′ W.	*
168	39°39.77′ N.	71°53.7′ W.	*
169	39°41.5′ N.	71°51.89′ W.	.....
170	39°43.84′ N.	71°44.85′ W.	*
171	39°48.01′ N.	71°45.19′ W.	*
172	39°49.97′ N.	71°39.29′ W.	*

BROAD ZONE—Continued

Point	Latitude	Longitude	Discrete zone
173	39°55.08′ N.	71°18.62′ W.	*
174	39°55.99′ N.	71°16.07′ W.	*
175	39°57.04′ N.	70°50.01′ W.	.....
176	39°55.07′ N.	70°32.42′ W.	.....
177	39°50.24′ N.	70°27.78′ W.	.....
178	39°42.18′ N.	70°20.09′ W.	.....
179	39°34.11′ N.	70°12.42′ W.	.....
180	39°26.04′ N.	70°4.78′ W.	.....
181	39°17.96′ N.	69°57.18′ W.	.....
182	39°9.87′ N.	69°49.6′ W.	.....
183	39°1.77′ N.	69°42.05′ W.	.....
184	38°53.66′ N.	69°34.53′ W.	.....
185	38°45.54′ N.	69°27.03′ W.	.....
186	38°37.42′ N.	69°19.57′ W.	.....
187	38°29.29′ N.	69°12.13′ W.	.....
188	38°21.15′ N.	69°4.73′ W.	.....
189	38°13′ N.	68°57.35′ W.	.....
190	38°4.84′ N.	68°49.99′ W.	.....
191	38°2.21′ N.	68°47.62′ W.	.....

(c) *Discrete Deep-Sea Coral Zones.* (1) *Block Canyon.* Block Canyon discrete deep-sea coral zone is defined by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request). An asterisk (*) in the Broad Zone column means the point is shared with the Broad Deep-Sea Coral Zone, as defined in paragraph (b) of this section.

BLOCK CANYON

Point	Latitude	Longitude	Broad zone
1	39°55.08′ N.	71°18.62′ W.	*
2	39°55.99′ N.	71°16.07′ W.	*
3	39°49.51′ N.	71°12.12′ W.	.....
4	39°38.09′ N.	71°9.5′ W.	.....
5	39°37.4′ N.	71°11.87′ W.	.....
6	39°47.26′ N.	71°17.38′ W.	.....
7	39°52.6′ N.	71°17.51′ W.	.....
1	39°55.08′ N.	71°18.62′ W.	*

(2) *Ryan and McMaster Canyons.* Ryan and McMaster Canyons discrete deep-sea coral zone is defined by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request). An asterisk (*) in the Broad Zone column means the point is shared with the Broad Deep-sea Coral Zone, as defined in paragraph (b) of this section.

RYAN AND MCMASTER CANYONS

Point	Latitude	Longitude	Broad zone
1	39°43.84′ N.	71°44.85′ W.	*
2	39°48.01′ N.	71°45.19′ W.	*
3	39°49.97′ N.	71°39.29′ W.	*
4	39°48.29′ N.	71°37.18′ W.	.....
5	39°42.96′ N.	71°35.01′ W.	.....
6	39°33.43′ N.	71°27.91′ W.	.....
7	39°31.75′ N.	71°30.77′ W.	.....
8	39°34.46′ N.	71°35.68′ W.	.....
9	39°40.12′ N.	71°42.36′ W.	.....
1	39°43.84′ N.	71°44.85′ W.	*

(3) *Emery and Uchupi Canyons.* Emery and Uchupi Canyons discrete deep-sea coral zone is defined by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request). An asterisk (*) in the Broad Zone column means the point is shared with the Broad Deep-sea Coral Zone, as defined in paragraph (b) of this section.

EMERY AND UCHUPI CANYONS

Point	Latitude	Longitude	Broad zone
1	39°37.15′ N.	71°55.85′ W.	*
2	39°39.77′ N.	71°53.7′ W.	*
3	39°39.55′ N.	71°47.68′ W.	.....
4	39°30.78′ N.	71°36.24′ W.	.....
5	39°27.26′ N.	71°39.13′ W.	.....
6	39°28.99′ N.	71°45.47′ W.	.....
7	39°33.91′ N.	71°52.61′ W.	.....
1	39°37.15′ N.	71°55.85′ W.	*

(4) *Jones and Babylon Canyons.* Jones and Babylon Canyons discrete deep-sea coral zone is defined by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request). An asterisk (*) in the Broad Zone column means the point is shared with the Broad Deep-sea Coral Zone, as defined in paragraph (b) of this section.

JONES AND BABYLON CANYONS

Point	Latitude	Longitude	Broad zone
1	39°28.26′ N.	72°2.2′ W.	*
2	39°29.88′ N.	72°3.51′ W.	*
3	39°30.57′ N.	72°3.47′ W.	*
4	39°31.28′ N.	72°2.63′ W.	*
5	39°31.46′ N.	72°1.41′ W.	*
6	39°30.37′ N.	71°57.72′ W.	.....
7	39°30.63′ N.	71°55.13′ W.	.....
8	39°23.81′ N.	71°48.15′ W.	.....
9	39°23′ N.	71°52.48′ W.	.....
1	39°28.26′ N.	72°2.2′ W.	*

(5) *Hudson Canyon.* Hudson Canyon discrete deep-sea coral zone is defined by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request). An asterisk (*) in the Broad Zone column means the point is shared with the Broad Deep-Sea Coral Zone, as defined in paragraph (b) of this section.

HUDSON CANYON

Point	Latitude	Longitude	Broad zone
1	39°19.08′ N.	72°9.56′ W.	*
2	39°25.17′ N.	72°13.03′ W.	*
3	39°28.8′ N.	72°17.39′ W.	*
4	39°30.16′ N.	72°20.41′ W.	*
5	39°31.38′ N.	72°23.86′ W.	*

HUDSON CANYON—Continued

Point	Latitude	Longitude	Broad zone
6	39°32.55′ N.	72°25.07′ W.	*
7	39°34.57′ N.	72°25.18′ W.	*
8	39°34.53′ N.	72°24.23′ W.	*
9	39°33.17′ N.	72°24.1′ W.	*
10	39°32.07′ N.	72°22.77′ W.	*
11	39°32.17′ N.	72°22.08′ W.	*
12	39°30.3′ N.	72°15.71′ W.	*
13	39°29.49′ N.	72°14.3′ W.	*
14	39°29.44′ N.	72°13.24′ W.	*
15	39°27.63′ N.	72°5.87′ W.	*
16	39°13.93′ N.	71°48.44′ W.	
17	39°10.39′ N.	71°52.98′ W.	
18	39°14.27′ N.	72°3.09′ W.	
1	39°19.08′ N.	72°9.56′ W.	*

(6) *Mey-Lindenkohl Slope.* Mey-Lindenkohl Slope discrete deep-sea coral zone is defined by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request). An asterisk (*) in the Broad Zone column means the point is shared with the Broad Deep-Sea Coral Zone, as defined in paragraph (b) of this section.

MEY-LINDENKOHL SLOPE

Point	Latitude	Longitude	Broad zone
1	38°43′ N.	73°1.24′ W.	*
2	38°43.66′ N.	73°0.36′ W.	*
3	38°45′ N.	73°0.27′ W.	*
4	38°46.68′ N.	73°1.07′ W.	*
5	38°47.54′ N.	73°2.24′ W.	*
6	38°47.84′ N.	73°2.24′ W.	*
7	38°49.03′ N.	73°1.53′ W.	*
8	38°48.45′ N.	73°1′ W.	*
9	38°49.15′ N.	72°58.98′ W.	*
10	38°48.03′ N.	72°56.7′ W.	*
11	38°49.84′ N.	72°55.54′ W.	*
12	38°52.4′ N.	72°52.5′ W.	*
13	38°53.87′ N.	72°53.36′ W.	*
14	38°54.17′ N.	72°52.58′ W.	*
15	38°54.7′ N.	72°50.26′ W.	*
16	38°57.2′ N.	72°47.74′ W.	*
17	38°58.64′ N.	72°48.35′ W.	*
18	38°59.3′ N.	72°47.86′ W.	*
19	38°59.22′ N.	72°46.69′ W.	*
20	39°0.13′ N.	72°45.47′ W.	*
21	39°1.69′ N.	72°45.74′ W.	*
22	39°1.49′ N.	72°43.67′ W.	*
23	39°3.9′ N.	72°40.83′ W.	*
24	39°7.35′ N.	72°41.26′ W.	*
25	39°7.16′ N.	72°37.21′ W.	*
26	39°6.52′ N.	72°35.78′ W.	*
27	39°11.73′ N.	72°25.4′ W.	*
28	38°58.85′ N.	72°11.78′ W.	
29	38°32.39′ N.	72°47.69′ W.	
30	38°34.88′ N.	72°53.78′ W.	
1	38°43′ N.	73°1.24′ W.	*

(7) *Spencer Canyon.* Spencer Canyon discrete deep-sea coral zone is defined by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request). An asterisk (*) in the Broad Zone column means the point is shared with the Broad Deep-Sea Coral Zone, as defined in paragraph (b) of this section.

SPENCER CANYON

Point	Latitude	Longitude	Broad zone
1	38°34.14′ N.	73°11.14′ W.	*
2	38°35.1′ N.	73°10.43′ W.	*
3	38°35.94′ N.	73°11.25′ W.	*
4	38°37.57′ N.	73°10.49′ W.	*
5	38°37.21′ N.	73°9.41′ W.	*
6	38°36.72′ N.	73°8.85′ W.	*
7	38°36.59′ N.	73°8.25′ W.	
8	38°28.94′ N.	72°58.96′ W.	
9	38°26.45′ N.	73°3.24′ W.	
1	38°34.14′ N.	73°11.14′ W.	*

(8) *Wilmington Canyon.* Wilmington Canyon discrete deep-sea coral zone is defined by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request). An asterisk (*) in the Broad Zone column means the point is shared with the Broad Deep-sea Coral Zone, as defined in paragraph (b) of this section.

WILMINGTON CANYON

Point	Latitude	Longitude	Broad zone
1	38°19.04′ N.	73°33.02′ W.	*
2	38°25.08′ N.	73°34.99′ W.	*
3	38°26.32′ N.	73°33.44′ W.	*
4	38°29.72′ N.	73°30.65′ W.	*
5	38°28.65′ N.	73°29.37′ W.	*
6	38°25.53′ N.	73°30.94′ W.	*
7	38°25.26′ N.	73°29.97′ W.	*
8	38°23.75′ N.	73°30.16′ W.	*
9	38°23.47′ N.	73°29.7′ W.	*
10	38°22.76′ N.	73°29.34′ W.	*
11	38°22.5′ N.	73°27.63′ W.	*
12	38°21.59′ N.	73°26.87′ W.	*
13	38°18.52′ N.	73°22.95′ W.	
14	38°14.41′ N.	73°16.64′ W.	
15	38°13.23′ N.	73°17.32′ W.	
16	38°15.79′ N.	73°26.38′ W.	
1	38°19.04′ N.	73°33.02′ W.	*

(9) *North Heyes and South Wilmington Canyons.* North Heyes and South Wilmington Canyons discrete deep-sea coral zone is defined by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request). An asterisk (*) in the Broad Zone column means the point is shared with the Broad Deep-Sea Coral Zone, as defined in paragraph (b) of this section.

NORTH HEYES AND SOUTH WILMINGTON CANYONS

Point	Latitude	Longitude	Broad zone
1	38°15.25′ N.	73°36.2′ W.	*
2	38°16.19′ N.	73°36.91′ W.	*
3	38°16.89′ N.	73°36.66′ W.	*
4	38°16.91′ N.	73°36.35′ W.	*
5	38°17.63′ N.	73°35.35′ W.	*
6	38°18.55′ N.	73°34.44′ W.	*
7	38°18.38′ N.	73°33.4′ W.	*
8	38°19.04′ N.	73°33.02′ W.	*

NORTH HEYES AND SOUTH WILMINGTON CANYONS—Continued

Point	Latitude	Longitude	Broad zone
9	38°15.79′ N.	73°26.38′ W.	
10	38°14.98′ N.	73°24.73′ W.	
11	38°12.32′ N.	73°21.22′ W.	
12	38°11.06′ N.	73°22.21′ W.	
13	38°11.13′ N.	73°28.72′ W.	
1	38°15.25′ N.	73°36.2′ W.	*

(10) *South Vries Canyon.* South Vries Canyon discrete deep-sea coral zone is defined by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request). An asterisk (*) in the Broad Zone column means the point is shared with the Broad Deep-Sea Coral Zone, as defined in paragraph (b) of this section.

SOUTH VRIES CANYON

Point	Latitude	Longitude	Broad zone
1	38°6.35′ N.	73°44.8′ W.	*
2	38°7.5′ N.	73°45.2′ W.	*
3	38°9.24′ N.	73°42.61′ W.	*
4	38°3.22′ N.	73°29.22′ W.	
5	38°2.38′ N.	73°29.78′ W.	
6	38°2.54′ N.	73°36.73′ W.	
1	38°6.35′ N.	73°44.8′ W.	*

(11) *Baltimore Canyon.* Baltimore Canyon discrete deep-sea coral zone is defined by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request). An asterisk (*) in the Broad Zone column means the point is shared with the Broad Deep-Sea Coral Zone, as defined in paragraph (b) of this section.

BALTIMORE CANYON

Point	Latitude	Longitude	Broad zone
1	38°3.29′ N.	73°49.1′ W.	*
2	38°6.19′ N.	73°51.59′ W.	*
3	38°7.67′ N.	73°52.19′ W.	*
4	38°9.04′ N.	73°52.39′ W.	*
5	38°10.1′ N.	73°52.32′ W.	*
6	38°11.98′ N.	73°52.65′ W.	*
7	38°13.74′ N.	73°50.73′ W.	*
8	38°13.15′ N.	73°49.77′ W.	*
9	38°10.92′ N.	73°50.37′ W.	*
10	38°10.2′ N.	73°49.63′ W.	*
11	38°9.26′ N.	73°49.68′ W.	*
12	38°8.38′ N.	73°49.51′ W.	*
13	38°7.59′ N.	73°47.91′ W.	*
14	38°6.96′ N.	73°47.25′ W.	*
15	38°6.51′ N.	73°46.99′ W.	*
16	38°5.69′ N.	73°45.56′ W.	*
17	38°6.35′ N.	73°44.8′ W.	*
18	38°2.54′ N.	73°36.73′ W.	
19	37°59.19′ N.	73°40.67′ W.	
1	38°3.29′ N.	73°49.1′ W.	*

(12) *Warr and Phoenix Canyon Complex.* Warr and Phoenix Canyon

Complex discrete deep-sea coral zone is defined by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request). An asterisk (*) in the Broad Zone column means the point is shared with the Broad Deep-Sea Coral Zone, as defined in paragraph (b) of this section.

WARR AND PHOENIX CANYON COMPLEX

Point	Latitude	Longitude	Broad zone
1	37°53.68′ N.	73°57.41′ W.	*
2	37°55.07′ N.	73°57.27′ W.	*
3	38°3.29′ N.	73°49.1′ W.	*
4	37°59.19′ N.	73°40.67′ W.	
5	37°52.5′ N.	73°35.28′ W.	
6	37°50.92′ N.	73°36.59′ W.	
7	37°49.84′ N.	73°47.11′ W.	
1	37°53.68′ N.	73°57.41′ W.	*

(13) *Accomac and Leonard Canyons.* Accomac and Leonard Canyons discrete deep-sea coral zone is defined by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request). An asterisk (*) in the Broad Zone column means the point is shared with the Broad Deep-Sea Coral Zone, as defined in paragraph (b) of this section.

ACCOMAC AND LEONARD CANYONS

Point	Latitude	Longitude	Broad zone
1	37°45.15′ N.	74°7.24′ W.	*
2	37°45.88′ N.	74°7.44′ W.	*
3	37°46.7′ N.	74°5.98′ W.	*
4	37°49.62′ N.	74°6.03′ W.	*
5	37°51.25′ N.	74°5.48′ W.	*
6	37°51.99′ N.	74°4.51′ W.	*
7	37°51.37′ N.	74°3.3′ W.	*
8	37°50.63′ N.	74°2.69′ W.	*
9	37°49.62′ N.	74°2.28′ W.	*

ACCOMAC AND LEONARD CANYONS—Continued

Point	Latitude	Longitude	Broad zone
10	37°50.28′ N.	74°0.67′ W.	*
11	37°50.2′ N.	74°0.17′ W.	
12	37°50.52′ N.	73°58.59′ W.	
13	37°50.99′ N.	73°57.17′ W.	
14	37°50.4′ N.	73°52.35′ W.	
15	37°42.76′ N.	73°44.86′ W.	
16	37°39.96′ N.	73°48.32′ W.	
17	37°40.04′ N.	73°58.25′ W.	
18	37°44.14′ N.	74°6.96′ W.	
1	37°45.15′ N.	74°7.24′ W.	*

(14) *Washington Canyon.* Washington Canyon discrete deep-sea coral zone is defined by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request). An asterisk (*) in the Broad Zone column means the point is shared with the Broad Deep-Sea Coral Zone, as defined in paragraph (b) of this section.

WASHINGTON CANYON

Point	Latitude	Longitude	Broad zone
1	37°22.74′ N.	74°26.24′ W.	*
2	37°22.87′ N.	74°26.16′ W.	*
3	37°24.44′ N.	74°28.57′ W.	*
4	37°24.67′ N.	74°29.71′ W.	*
5	37°25.93′ N.	74°30.13′ W.	*
6	37°27.25′ N.	74°30.2′ W.	*
7	37°28.6′ N.	74°30.6′ W.	*
8	37°29.43′ N.	74°30.29′ W.	*
9	37°29.53′ N.	74°29.95′ W.	*
10	37°27.68′ N.	74°28.82′ W.	*
11	37°27.06′ N.	74°28.76′ W.	*
12	37°26.39′ N.	74°27.76′ W.	*
13	37°26.3′ N.	74°26.87′ W.	*
14	37°25.69′ N.	74°25.63′ W.	*
15	37°25.83′ N.	74°24.22′ W.	*
16	37°25.68′ N.	74°24.03′ W.	*
17	37°25.08′ N.	74°23.29′ W.	
18	37°16.81′ N.	73°52.13′ W.	
19	37°11.27′ N.	73°54.05′ W.	
20	37°15.73′ N.	74°12.2′ W.	
1	37°22.74′ N.	74°26.24′ W.	*

(15) *Norfolk Canyon.* Norfolk Canyon discrete deep-sea coral zone is defined by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request). An asterisk (*) in the Broad Zone column means the point is shared with the Broad Deep-Sea Coral Zone, as defined in paragraph (b) of this section.

NORFOLK CANYON

Point	Latitude	Longitude	Broad zone
1	36°58.51′ N.	74°36.51′ W.	*
2	36°58.62′ N.	74°36.97′ W.	*
3	37°4.43′ N.	74°41.03′ W.	*
4	37°5.83′ N.	74°45.57′ W.	*
5	37°6.97′ N.	74°40.8′ W.	*
6	37°4.52′ N.	74°37.77′ W.	*
7	37°4.02′ N.	74°33.83′ W.	*
8	37°4.52′ N.	74°33.51′ W.	*
9	37°4.40′ N.	74°33.11′ W.	*
10	37°4.16′ N.	74°32.37′ W.	
11	37°4.40′ N.	74°30.58′ W.	
12	37°3.65′ N.	74°3.66′ W.	
13	36°57.75′ N.	74°3.61′ W.	
14	36°59.77′ N.	74°30′ W.	
15	36°58.23′ N.	74°32.95′ W.	
16	36°57.99′ N.	74°34.18′ W.	
1	36°58.51′ N.	74°36.51′ W.	*

(d) *Transiting.* Vessels may transit the Broad and Discrete Deep-Sea Coral Zones defined in paragraphs (b) and (c) of this section, provided bottom-tending trawl nets are out of the water and stowed on the reel and any other fishing gear that is prohibited in these areas is onboard, out of the water, and not deployed. Fishing gear is not required to meet the definition of ''not available for immediate use'' in § 648.2, when a vessel transits the Broad and Discrete Deep-Sea Coral Zones.

[FR Doc. 2016–29811 Filed 12–13–16; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 81, No. 240
Wednesday, December 14, 2016

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 46

[Document Number AMS–FV–15–0045]

RIN 0581–AD50

Regulations Under the Perishable Agricultural Commodities Act (PACA): Growers' Trust Protection Eligibility and Clarification of ''Written Notification''

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: The U. S. Department of Agriculture (USDA), Agricultural Marketing Service (AMS), is proposing to amend the regulations under the Perishable Agricultural Commodities Act (PACA or Act) to enhance clarity and improve the administration and enforcement of the PACA. The proposed revisions to the regulations would provide greater direction to the industry of how growers and other principals that employ selling agents may preserve their PACA trust rights. The proposed revisions would further provide greater direction to the industry on the definition of ''written notification'' and the jurisdiction of USDA to investigate alleged PACA violations.

DATES: Written or electronic comments received by February 13, 2017 will be considered prior to issuance of a final rule.

ADDRESSES: You may submit written or electronic comments to ''PACA Regulatory Enhancements,'' AMS, Specialty Crops Program, PACA Division, 1400 Independence Avenue SW., Room 1510–S, Stop 0242, Washington, DC 20250–0242; Internet: *http://www.regulations.gov;* or fax: 202–690–4413.

FOR FURTHER INFORMATION CONTACT: Josephine E. Jenkins, Chief, Investigative Enforcement Branch, 202–720–6873; or *PACAinvestigations@ams.usda.gov*.

SUPPLEMENTARY INFORMATION: The Perishable Agricultural Commodities Act (PACA) was enacted in 1930 to promote fair-trading in the marketing of fresh and frozen fruits and vegetables in interstate and foreign commerce. It protects growers, shippers, distributors, and retailers dealing in those commodities by prohibiting unfair and fraudulent trade practices. The PACA also provides a forum to adjudicate or mediate commercial disputes. Licensees who violate the PACA may have their license suspended or revoked, and individuals determined to be responsibly connected to such licensees are restricted from being employed or operating in the produce industry for a period.

Growers' Trust Protection Eligibility

Growing, harvesting, packing, and shipping perishables involve risk: Costs are high; capital is tied up in farmland and machinery; and returns are delayed until the crop is sold. Because of the highly perishable nature of the commodities and distance from selling markets, produce trading is fast moving and often informal. Transactions are often consummated in a matter of minutes, frequently while the commodities are in route to their destination. Under such conditions, it is often difficult to check the credit rating of the buyer.

Congress examined the sufficiency of the PACA fifty years after its inception and determined that prevalent financing practices in the perishable agricultural commodities industry were placing the industry in jeopardy. Particularly, Congress focused on the increase in the number of buyers who failed to pay, or were slow in paying their suppliers, and the impact of such payment practices on small suppliers who could not withstand a significant loss or delay in receipt of monies owed. Congress was also troubled by the common practice of produce buyers granting liens on their inventories to their lenders, which covered all proceeds and receivables from the sales of perishable agricultural commodities, while produce suppliers remained unpaid. This practice elevated the lenders to a secured creditor position in the case of the buyer's insolvency, while the sellers of perishable agricultural commodities remained unsecured creditors with little or no legal protection or means of recovery in a suit for damages.

Deeming this situation a ''burden on commerce,'' Congress amended the PACA in 1984 to include a statutory trust provision, which provides increased credit security in the absence of prompt payment for perishable agricultural commodities. The 1984 amendment to the PACA states in relevant part:

> It is hereby found that a burden on commerce in perishable agricultural commodities is caused by financing arrangements under which commission merchants, dealers, or brokers, who have not made payment for perishable agricultural commodities purchased, contracted to be purchased, or otherwise handled by them on behalf of another person, encumber or give lenders a security interest in such commodities, or on inventories of food or other products derived from such commodities, and any receivables or proceeds from the sale of such commodities or products, and that such arrangements are contrary to the public interest. This subsection is intended to remedy such burden on commerce in perishable agricultural commodities and to protect the public interest.

(7 U.S.C. 499e(c)(1))

Under the 1984 amendment, perishable agricultural commodities, inventories of food or other derivative products, and any receivables or proceeds from the sale of such commodities or products are to be held in a non-segregated floating trust for the benefit of unpaid sellers. This trust is created by operation of law upon the purchase of such goods, and the produce buyer is the statutory trustee for the benefit of the produce seller. To preserve its trust benefits, the unpaid supplier, seller, or agent must give the buyer written notice of intent to preserve its rights under the trust within 30 calendar days after payment was due. Alternatively, as provided in the 1995 amendments to the PACA (Pub. L. 104–48), a PACA licensee may provide notice of intent to preserve its trust rights by including specific language as part of its ordinary and usual billing or invoice statements.

The trust is a non-segregated ''floating trust'' made up of all of a buyer's commodity-related assets, under which there may be a commingling of trust assets. There is no need to identify specific trust assets through each step of

the accrual and disposal process. Since commingling is contemplated, all trust assets would be subject to the claims of unpaid sellers, suppliers and agents to the extent of the amount owed them. As each supplier gives ownership, possession, or control of perishable agricultural commodities to a buyer, and preserves its trust rights, that supplier becomes a participant in the trust. Section 5(c)(2) of the PACA states in relevant part:

> Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents.

(7 U.S.C. 499e(c)(2))

Thus, trust participants remain trust beneficiaries until they have been paid in full.

Under the statute, the District Courts of the United States are vested with jurisdiction to entertain actions by trust beneficiaries to enforce payment from the trust. (7 U.S.C. 499e(c)(5)).

Thus, in the event of a business failure, produce creditors may enforce their trust rights by suing the buyer in federal district court. It is common in this type of trust enforcement action for unpaid sellers to seek a temporary restraining order (TRO) that freezes the bank accounts of a buyer until the trust creditors are paid. Many unpaid sellers have found this to be a very effective tool to recover payment for produce. Often, a trust enforcement action with a TRO will be the defining moment for the future of a buyer-debtor firm. Since the TRO freezes the bank accounts of the buyer, the buyer must either pay the trust creditors or attempt to operate a business without access to its bank accounts. This aggressive course of action by unpaid sellers is generally pursued when the sellers are concerned that trust assets are being dissipated.

In the event of a bankruptcy by a produce buyer, that is, the produce ''debtor,'' the debtor's trust assets are not property of the bankruptcy estate and are not available for distribution to secured lenders and other creditors until all valid PACA trust claims have been satisfied. The trust creditors can petition the court for the turnover of the debtor's trust-related assets or alternatively request that the court oversee the liquidation of the inventory and collection of the receivables and disburse the trust proceeds to qualified PACA trust creditors.

Because of the statutory trust provision, produce creditors, including sellers outside the United States, have a far greater chance of recovering money owed them when a buyer goes out of business. However, because attorney's fees are incurred in trust enforcement cases, it is not always practical to pursue small claims that remain unpaid. Nonetheless, because of the PACA trust provisions, unpaid sellers, including those outside the United States, have recovered hundreds of millions of dollars that most likely would not otherwise have been collected.

The PACA trust provisions protect not only growers, but also other firms trading in fruits and vegetables since each buyer in the marketing chain becomes a seller in its own turn and can preserve its own trust eligibility accordingly. Because each creditor that buys produce can preserve trust rights for the benefit of its own suppliers, any money recovered from a buyer that goes out of business is passed back through preceding sellers until ultimately the grower also realizes the financial benefits of the trust provisions. This is particularly important in the produce industry due to the highly perishable nature of the commodities as well as the many hands such commodities customarily pass through to the end customer.

In 1995, Congress amended the PACA (Pub. L. 104–48), changing several requirements of the PACA trust. Changes include no longer requiring sellers or suppliers to file notices of intent to preserve trust benefits with USDA, and allowing PACA licensees to have their invoices or other billing documents serve as the trust notice. The primary reason for removing the notice filing requirement was to reduce the paperwork burden on sellers and suppliers and eliminate USDA's expense in processing trust notices and administrating the provision.

To preserve trust protection under the PACA, the law offers two approaches to unpaid sellers, suppliers, and agents. One option allows PACA licensees to declare at the time of sale that the produce is sold subject to the PACA trust, providing protection in the event that payment is late or the payment instrument is not honored. This option allows PACA licensees to protect their trust rights by including the following language on invoices or other billing statements:

> The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received.

(7 U.S.C. 499(c)(4))

The second option for a PACA licensee to preserve its trust rights, and the sole method for all non-licensed sellers requires the seller to provide a separate, independent notice to the buyer of its intent to preserve its trust benefits. The notice must include sufficient details to identify each transaction and be received by the buyer within 30 days after payment becomes due.

Under current 7 CFR 46.46(e)(2), only transactions with payment terms of 30 days from receipt and acceptance, or less, are eligible for trust protection. Section 46.46(e)(1) of the regulations (7 CFR 46.46(e)(1)) requires that any payment terms beyond ''prompt'' payment as defined by the regulations, usually 10 days after receipt and acceptance in a customary purchase and sale transaction, must be expressly agreed to in writing before entering into the transaction. A copy of the agreement must be retained in the files of each party and the payment due date must be disclosed on the invoice or billing statement.

Since 1984, the district courts have had jurisdiction to entertain actions by trust beneficiaries to enforce payment from the trust. Recent court decisions have invalidated the trust claims of unpaid growers against their growers' agent because the growers did not file a trust notice directly with the growers' agent. Growers' agents sell and distribute produce for or on behalf of growers and may provide such services as financing, planting, harvesting, grading, packing, labor, seed, and containers. The growers have argued that it is not necessary to file a trust notice with their growers' agent because growers' agents are required to preserve the growers' rights as a trust beneficiary against the buyer (7 CFR 46.46(d)(2)). Some courts have ruled that while the growers' agent is required to preserve the growers' trust benefits with the buyer of the produce, the grower has the responsibility to preserve its trust benefits with the growers' agent.

AMS proposes that section 46.46 of the regulations be amended by revising paragraphs (d)(1) and (d)(2), redesignating paragraph (d)(2) as (d)(3), adding a new paragraph (d)(2) and revising (f)(1)(iv). These amendments

would clarify that growers, or other types of principals, who employ agents to sell perishable agricultural commodities on their behalf are among the class of ''suppliers or sellers'' referenced in section 5(c) of the PACA (7 U.S.C. 499e) and as such must preserve their trust benefits against their agents. The revision of (f)(1)(iv) would identify additional types of documents that can be used in a notice of intent to preserve trust benefits.

If licensed under the PACA, the grower may choose to preserve its trust rights by invoicing the growers' agent based on shipping and/or billing documents. The shipping and/or billing documents must include the requisite trust language provided in section 5(c)4 of the PACA. Non-licensed growers may choose to preserve their trust rights by issuing a notice of intent to preserve trust benefits as outlined under section 46.46 of the PACA regulations.

Clarification of ''Written Notification''

The PACA was amended in 1995 to require written notification as a precursor to investigations of alleged violations of the PACA. Within recent years, produce entities have challenged the USDA's jurisdiction to conduct investigations based their narrow reading of the definition of ''written notification'' stated in section 46.49 of the Regulations (7 CFR 46.49). The proposed amendment of section 46.49 is needed to make clear that public filings such as bankruptcy petitions, civil trust actions, and judgments constitute written notification. Moreover, AMS proposes to clarify that the filing of a written notification with USDA may be accomplished by myriad means, including, but not limited to, delivery by: Regular or commercial mail service, hand delivery, or electronic means such as email, text, or facsimile message. Furthermore, a written notification published in any public forum, including, but not limited to, a newspaper or internet Web site, will be considered filed with USDA upon its visual inspection by any office or official of USDA responsible for administering the Act. Clarification of the meaning of ''written notification'' would ensure that PACA licensees and entities operating subject to the PACA understand the breadth of documentation that could trigger USDA's authority to initiate an investigation of alleged PACA violations.

Section 46.49 would be amended by revising paragraphs (a), (b), (c) and (d) to clarify the meaning of ''written notification'' as the term is used in section 6(b) of the PACA. Further, to reflect current industry practices and advancements in electronic communication, section 46.49(d) would be amended to allow the Secretary to serve a notice or response, as it relates to paragraph (d), by any electronic means such as registered email that provides proof of receipt to the electronic mail address or phone number of the subject of the investigation.

Executive Orders 12866 and 13563

The proposed rule has been reviewed under Executive Order 12866 supplemented by Executive Order 13563 and it has been determined that this proposed rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, it was not reviewed by the Office of Management and Budget.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform, and is not intended to have retroactive effect. This proposed rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this proposed rule.

Effects on Small Businesses

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. *601 et seq.*), USDA has considered the economic impact of this proposed rule on small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Small agricultural service firms are defined by the Small Business Administration (SBA) as those having annual receipts of less than $7,500,000, and small agricultural producers are defined as those having annual receipts of less than $750,000 (13 CFR 121.201). There are approximately 14,500 firms licensed under the PACA, a majority of which could be classified as small entities. Historically, the produce industry has been an entry-level job market. There is a constant turnover involving the closing and opening of businesses. Produce firms generally start as small business entities.

The Agricultural Marketing Service (AMS) believes that the proposed amendments to the PACA regulations would help growers and other sellers and suppliers of produce protect their rights under the PACA trust, and the potential recovery of millions of dollars in unpaid produce debt. Moreover, AMS believes that the proposed amendments more accurately reflect the intent of Congress when it amended the PACA to require written notification as a precursor to investigations by the Secretary of Agriculture. The proposed revisions include language that clarifies a grower's responsibility to preserve its benefits under the PACA trust, as well as language that clarifies what constitutes ''written notification'' for purposes of investigating alleged violations of the PACA.

AMS believes the proposed revisions would increase the clarity of the PACA regulations and improve AMS's enforcement of the PACA. AMS believes that this proposed rule would not have a significant economic impact on a substantial number of small entities.

Executive Order 13175

This proposed rule has been reviewed in accordance with the requirements of Executive Order 13175, consultation and Coordination with Indian Tribal governments. The review reveals that this proposed regulation will not have substantial and direct effects on Tribal governments and will not have significant Tribal implications.

Paperwork Reduction Act

In accordance with OMB regulations (5 CFR part 1320) that implement the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements that are covered by this proposed rule are currently approved under OMB number 0581–0031.

E-Government Act Compliance

USDA is committed to complying with 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. Forms are available on our PACA Web site at *http://www.ams.usda.gov/rules-regulations/paca* and can be printed, completed, and faxed. Currently, forms are transmitted by fax machine, postal delivery and can be accepted by email.

List of Subjects in 7 CFR Part 46

Agricultural commodities, Brokers, Penalties, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, AMS proposes to amend 7 CFR part 46 as follows:

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

■ 1. The authority citation for part 46 continues to read as follows:

Authority: 7 U.S.C. 499a–499t.

■ 2. Amend § 46.46 by revising paragraphs (d) and (f)(1)(iv) to read as follows:

§ 46.46 Statutory trust.

* * * * *

(d) *Trust maintenance.* (1) Licensees and persons subject to license are required to maintain trust assets in a manner so that the trust assets are freely available to satisfy outstanding obligations to sellers of perishable agricultural commodities. Any act or omission which is inconsistent with this responsibility, including dissipation of trust assets, is unlawful and in violation of section 2 of the Act (7 U.S.C. 499b). Growers, licensees, and persons subject to license may file trust actions against licensees and persons operating subject to license. Licensees and persons subject to license are bound by the trust provisions of the Act (7 U.S.C. 499(e)).

(2) Principals, including growers, who employ agents to sell perishable agricultural commodities on their behalf are ''suppliers'' and/or ''sellers'' as those words are used in section 5(c)(2) and (3) of the Act (7 U.S.C. 499e(c)(2) and (3)) and therefore must preserve their trust rights against their agents by filing a notice of intent to preserve trust rights with their agents as set forth in paragraph (f) of this section.

(3) Agents who sell perishable agricultural commodities on behalf of their principals must preserve their principals' trust benefits against the buyers by filing a notice of intent to preserve trust rights with the buyers. Any act or omission which is inconsistent with this responsibility, including failure to give timely notice of intent to preserve trust benefits, is unlawful and in violation of section 2 of the Act (7 U.S.C. 499b).

* * * * *

(f) * * *

(1) * * *

(iv) The amount past due and unpaid; except that if a supplier, seller or agent engages a commission merchant or growers' agent to sell or market their produce, the supplier, seller or agent that has not received a final accounting from the commission merchant or growers' agent shall only be required to provide information in sufficient detail to identify the transaction subject to the trust.

* * * * *

■ 3. Revise § 46.49 to read as follows:

§ 46.49 Written notifications and complaints.

(a) Written notification, as used in section 6(b) of the Act (7 U.S.C. 499f (b)), means:

(1) Any written statement reporting or complaining of a violation of the Act made by any officer or agency of any State or Territory having jurisdiction over licensees or persons subject to license, or a person filing a complaint under section 6(a), or any other interested person who has knowledge of or information regarding a possible violation of the Act, other than an employee of an agency of USDA administering the Act;

(2) Any written notice of intent to preserve the benefits of, or any claim for payment from, the trust established under section 5 of the Act (7 U.S.C. 499e);

(3) Any official certificate(s) of the United States Government or States or Territories of the United States; or

(4) Any public legal filing or other published document describing or alleging a violation of the Act.

(b) Any written notification may be filed by delivering the written notification to any office of USDA or any official of USDA responsible for administering the Act. Any written notification published in any public forum, including, but not limited to, a newspaper or an internet Web site shall be deemed filed upon visual inspection by any office of USDA or any official of USDA responsible for administering the Act. A written notification which is so filed, or any expansion of an investigation resulting from any indication of additional violations of the Act found as a consequence of an investigation based on written notification or complaint, also shall be deemed to constitute a complaint under section 13(a) of the Act (7 U.S.C. 499m(a)).

(c) Upon becoming aware of a complaint under section 6(a) or written notification under 6(b) of the Act (7 U.S.C. 499f (a) or (b)) by means described in paragraph (a) and (b) of this section, the Secretary will determine if reasonable grounds exist to conduct an investigation of such complaint or written notification for disciplinary action. If the investigation substantiates the existence of violations of the Act, a formal disciplinary complaint may be issued by the Secretary as described in section 6(c)(2) of the Act (7 U.S.C. 499f(c)(2)).

(d) Whenever an investigation, initiated as described in section 6(c) of the Act (7 U.S.C. 499f(c)(2)), is commenced, or expanded to include new violations of the Act, notice shall be given by the Secretary to the subject of the investigation within thirty (30) days of the commencement or expansion of the investigation. Within one hundred and eighty (180) days after giving initial notice, the Secretary shall provide the subject of the investigation with notice of the status of the investigation, including whether the Secretary intends to issue a complaint under section 6(c)(2) of the Act (7 U.S.C. 499f(e)(2)), terminate the investigation, or continue or expand the investigation. Thereafter, the subject of the investigation may request in writing, no more frequently than every ninety (90) days, a status report from the Director of the PACA Division who shall respond to the written request within fourteen (14) days of receiving the request. When an investigation is terminated, the Secretary shall, within fourteen (14) days, notify the subject of the termination of the investigation. In every case in which notice or response is required under this paragraph, such notice or response shall be accomplished by personal service; or by posting the notice or response by certified or registered mail, or commercial or private delivery service to the last known address of the subject of the investigation; or by sending the notice or response by any electronic means such as registered email, that provides proof of receipt to the electronic mail address or phone number of the subject of the investigation.

Dated: December 8, 2016.

Elanor Starmer,

Administrator, Agricultural Marketing Service.

[FR Doc. 2016–29983 Filed 12–13–16; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 260

[Docket No. DOT–OST–2014–0002]

RIN 2105–AE30

Use of Mobile Wireless Devices for Voice Calls on Aircraft

AGENCY: Office of the Secretary (OST), Department of Transportation (DOT).

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: The Department of Transportation (DOT or the Department) is proposing to protect airline

passengers from being unwillingly exposed to voice calls within the confines of an aircraft. Specifically, the Department proposes to require sellers of air transportation to provide adequate advance notice to passengers if the carrier operating the flight allows passengers to make voice calls using mobile wireless devices. The Department also seeks comment on whether to prohibit airlines from allowing voice calls via passenger mobile wireless devices on domestic and/or international flights.

DATES: Comments should be filed by February 13, 2017. Late-filed comments will be considered to the extent practicable.

ADDRESSES: You may file comments identified by the docket number DOT–OST–2014–0002 by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Ave. SE., between 9:00 a.m. and 5:00 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Instructions: You must include the agency name and docket number DOT–OST–2014–0002 or the Regulation Identifier Number (RIN) for the rulemaking at the beginning of your comment. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Privacy Act: Anyone is able to search the electronic form of all comments received in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *https://www.transportation.gov/dot-Web site-privacy-policy.*

Docket: For access to the docket to read background documents and comments received, go to *http://www.regulations.gov* or to the street address listed above. Follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT: Robert Gorman, Senior Trial Attorney, or Blane A. Workie, Assistant General Counsel, Office of Aviation Enforcement and Proceedings, U.S. Department of Transportation, 1200 New Jersey Ave. SE., Washington, DC 20590, 202–366–9342, 202–366–7152 (fax), *robert.gorman@dot.gov* or *blane.workie@dot.gov* (email).

SUPPLEMENTARY INFORMATION:

Executive Summary

1. Purpose of the Regulatory Action

The purpose of this action is to propose a method for regulating voice calls on passengers' mobile wireless devices on flights to, from, and within the United States. Permitting passengers to make voice calls onboard aircraft may create an environment that is unfair and deceptive to those passengers. While the Federal Communications Commission (FCC) currently prohibits the use of certain commercial mobile bands onboard aircraft, that ban does not cover Wi-Fi and other means by which it is possible to make voice calls. Moreover, in 2013, the FCC proposed lifting its existing ban, so long as certain conditions are met, as described in detail below. As technologies advance, the cost of making voice calls may decrease and the quality of voice call service may increase, leading to a higher prevalence of voice calls and greater risk of passenger harm.

For these reasons, the Department proposes to require sellers of air transportation to provide adequate advance notice to passengers if the carrier operating the flight allows passengers to make voice calls using mobile wireless devices. Under this proposed rule, carriers would be free to set their own voice call policies, to the extent otherwise permitted by law, so long as carriers provide adequate advance notice when voice calls will be allowed. The requirement for airlines to provide advance notice when voice calls are allowed would not apply to small airlines (*i.e.,* U.S. and foreign air carriers that provide air transportation only with aircraft having a designed seating capacity of less than 60 seats) or ticket agents that qualify as a small business. No advance notice is required if the carrier prohibits voice calls. The Department also seeks comment on whether to prohibit airlines from allowing voice calls via passenger mobile wireless devices on domestic and/or international flights.

The Department takes this action under its authority to prohibit unfair and deceptive practices in air transportation or the sale of air transportation, and under its authority to ensure adequate air transportation, as further described herein.

2. Summary of Costs and Benefits

The proposed rule would require airlines and ticket agents that are not small entities to disclose the airline's voice call policy if the airline chooses to permit voice calls. The Department's Preliminary Regulatory Impact Analysis (PRIA), found in the docket, examined the costs that ticket agents and airlines would incur to implement any disclosure requirements that would arise from allowing voice calls. For the period of 2017–2026, the PRIA estimated the cost to carriers to be $41 million and the cost to ticket agent costs to be $46 million. The PRIA found qualitative benefits to passengers in the form of improved information for those who wish to avoid (or make) voice calls. These costs and benefits are summarized in the chart below.

SUMMARY OF BENEFITS AND COSTS

Proposed option	Nature of benefits	Quantitative measure	Nature of costs	Quantitative measure
Require disclosure of possible voice call exposure prior to ticket purchase.	Improved information for those who wish to avoid (or make) voice calls.	Tickets purchased for 10.2 billion enplanements, 2017–2026.	Web site programming and call center labor hours for large carriers, ticket agents.	Carrier costs of $41 million and ticket agent costs of $46 million, 2017–2026

Background

On February 24, 2014, the Department issued an Advance Notice of Proposed Rulemaking (ANPRM) in Docket DOT–OST–2014–0002 titled ''Use of Mobile Wireless Devices for Voice Calls on Aircraft.'' The ANPRM was published in the **Federal Register** on February 24, 2014.[1] We announced in the ANPRM

[1] Department of Transportation, Office of the Secretary, 14 CFR part 251 [Docket No. DOT–OST–

Continued

our intent to gather information on whether to propose a rule to ban voice calls on passengers' mobile wireless devices on commercial aircraft. We sought comment on the effects and implications of such a proposed rule. The ANPRM was issued in light of the FCC's proposed rule, published on December 13, 2013, that if adopted would make it possible for aircraft operators to permit passengers to make or receive calls onboard aircraft using commercial mobile spectrum bands.[2]

Currently, FCC rules restrict airborne use of mobile devices that can operate on certain commercial mobile frequencies.[3] As a result, U.S. airlines require that passengers disable their mobile devices or use ''airplane mode''[4] while an aircraft is airborne. The FCC's ban was adopted in 1991 based on the threat of widespread interference with terrestrial networks from airborne use of cell phones. With advances in technology and increasing public interest in using mobile communications services on airborne aircraft, the FCC issued its 2013 NPRM proposing to revise what it described as outdated rules. The FCC proposes a regulatory framework that would allow airlines, subject to application of DOT regulations (of both the Office of the Secretary of Transportation (OST) and the Federal Aviation Administration (FAA)), the ability to allow passengers to use commercial mobile spectrum bands on their mobile wireless devices while in flight.[5] The FCC's proposal would not require airlines to permit any new airborne mobile services; rather, it would provide a regulatory pathway for airlines to enable such services using an Airborne Access System (AAS).[6] An AAS likely would consist of a base station (typically a picocell) and a network control unit. The system would receive low-powered signals from passengers' mobile wireless devices and transmit those signals through an onboard antenna either to a satellite or to dedicated terrestrial receivers. In either case, the system would be designed to minimize the potential for interference with terrestrial networks that prompted the FCC's original ban.[7] The FCC's proposal notes that more than 40 jurisdictions throughout the world, including the European Union (EU), Australia, and jurisdictions in Asia, have authorized the use of mobile communication services on aircraft without any known interference issues.[8]

The FCC's proposal is technology-neutral, in that it does not intend to limit the use of mobile communications to non-voice applications. The FCC states that any modifications to the AAS would be at the discretion of individual airlines, in addition to any rules or guidelines adopted by the DOT.[9] The FCC explains that Airborne Access Systems will provide airlines with the flexibility to deploy or not deploy various mobile communications services.[10] For instance, an airline could program the new equipment to block voice calls while permitting data and text services.[11]

In the Department's ANPRM, we explained that DOT and the FCC have distinct areas of responsibilities with respect to the use of cell phones or other mobile devices for voice calls on aircraft. The FCC has authority over various technical issues (as described above); the FAA, a component of DOT, has authority over safety issues; and DOT's OST has authority over aviation consumer protection issues.

The FAA, pursuant to its aviation safety oversight authority in 49 U.S.C. 106(f) and 44701(a), has authority to determine whether portable electronic devices (PEDs)[12] can be safely used on aircraft. In October 2013, the FAA provided information to airlines on expanding passenger use of PEDs during all phases of flight without compromising the continued safe operation of the aircraft.[13] However, the FAA guidance did *not explicitly address the use of cell phones for voice calls, in light of the FCC's continued ban on such calls.*[14] Cell phones differ from most PEDs in that they are designed to send out signals strong enough to be received at great distances. Nevertheless, the FAA's safety authority over cell phones is similar to its authority over other PEDs and includes technical elements (*e.g.,* whether cell phones would interfere with avionics systems), operational elements (*e.g.,* whether the use of cell phones would interfere with effective flight safety instructions), and security elements (*e.g.,* whether the use of cell phones creates a security threat that in turn impacts aviation safety). Pursuant to FAA regulations, before allowing passengers to use PEDs, aircraft operators must first determine that those devices will not interfere with the aircraft's navigation or communication systems. This determination includes assessing the risks of potential cellular-induced avionics problems.[15] According to FAA policy and guidance, expanding passenger PED use requires an aircraft operator to revise applicable policies, procedures, and programs, and to institute mitigation strategies for passenger disruptions to crewmember safety briefings and announcements and potential passenger conflicts. Therefore, even if the FCC revises its ban, any installed equipment such as an AAS would be subject to FAA certification, just like other hardware.

Many U.S. airlines currently offer Wi-Fi connectivity to passengers' mobile devices using FAA-approved in-flight connectivity systems. Like Airborne Access Systems, airborne Wi-Fi systems receive signals from passengers' mobile devices and relay those signals to satellites or dedicated ground towers. Wi-Fi spectrum is capable of transmitting voice calls as well as other types of data, such as video and text messages. The FCC does not prohibit voice calls over Wi-Fi; the FCC's current ban relates to the use of certain commercial mobile spectrum bands.

2014–0002], RIN 2105–AE30, 79 FR 10049 (Feb. 24, 2014) (*DOT ANPRM*).

[2] Expanding Access to Mobile Wireless Services Onboard Aircraft, *Notice of Proposed Rulemaking,* WT Docket No. 13–301, FCC 13–157 (Dec. 13, 2013) (*FCC Mobile Wireless NPRM);* 79 FR 2615 (January 15, 2014). *See http://www.fcc.gov/document/review-rules-wireless-services-onboard-aircraft-nprm.*

[3] *See* 47 CFR 22.925, 90.423. The FCC prohibits use of the 800 MHz Cellular Radiotelephone band while aircraft is in flight at any altitude. The FCC also prohibits the use of 800 and 900 MHz Specialized Mobile Radio frequencies on aircraft that typically fly at altitudes over one mile. There are no current restrictions on airborne use of the other bands used to provide typical mobile voice and data service, although the FCC's NPRM seeks comment on whether to extend restrictions to other frequencies. *FCC Mobile Wireless NPRM* at ¶ 5.

[4] This requirement does not apply to Wi-Fi use.

[5] *FCC Mobile Wireless NPRM* at 2–4.

[6] *Id.* at 2 ¶ 1.

[7] On May 9, 2013, the FCC issued an NPRM proposing to create new air-to-ground mobile broadband service in the 14 GHz band in the contiguous United States that would provide significantly greater data transmission capacity than exists in current services. Expanding Access to Broadband and Encouraging Innovation Through Establishment of an Air-Ground Mobile Broadband Secondary Service for Passengers Aboard Aircraft in the 14.0–14.5 GHz Band, *Notice of Proposed Rulemaking,* FCC 13–66, GN Docket 13–114, published at 78 FR 41343 (July 10, 2013).

[8] *FCC Mobile Wireless NPRM* at 2 ¶ 3.

[9] *Id.* at 4 ¶ 4.

[10] *Id.* at 17–18 ¶ 41.

[11] *Id.*

[12] A portable electronic device is ''any piece of lightweight, electrically-powered equipment. These devices are typically consumer electronic devices capable of communications, data processing and/or utility. Examples range from handheld, lightweight electronic devices such as tablets, e-readers and smartphones to small devices such as MP3 players and electronic toys.'' See FAA Fact Sheet—Portable Electronic Devices Aviation Rulemaking Committee Report (October 8, 2013).

[13] ''Expanding the Use of Passenger Portable Electronic Devices (PED),'' available at *http://www.faa.gov/other_visit/aviation_industry/airline_operators/airline_safety/info/all_infos/media/2013/InFO13010.pdf (''InFO 13010'').*

[14] *Nevertheless, we do not anticipate that the FAA will determine that the use of cell phones for voice calls would interfere with avionics systems.*

[15] *See* 14 CFR 91.21, 121.306, 125.204.

Thus, many U.S. carriers currently have the capability of allowing their passengers to make and receive voice calls in-flight over Wi-Fi. It should be noted that the Department is unaware of any U.S. carrier that currently permits voice calls; airlines and their Wi-Fi providers typically do not offer voice service.

To summarize, the current proposed rulemaking would regulate voice calls onboard aircraft as a matter of consumer protection, rather than as a matter of ensuring aviation safety or preventing cellular interference with ground networks. Moreover, it would apply to voice calls on passenger-supplied cellular telephones and other passenger-supplied mobile wireless devices, regardless of whether the call is made on a commercial mobile frequency, Wi-Fi, or other means. Under this proposal, the Department would not prohibit voice calls (although we seek further comment on that issue), but airlines would remain subject to any technical, safety, or security rules that do prohibit or restrict voice calls. Airlines would be required to disclose their voice call policies to the extent that they permit voice calls; those policies, in turn, will be based both on the airline's own choices and on any existing rules affecting such calls.

The OST's 2014 ANPRM

The DOT sought comment in the February 2014 ANPRM on whether permitting voice calls on aircraft constitutes an unfair practice to consumers pursuant to 49 U.S.C. 41712, and/or is inconsistent with adequate air transportation pursuant to 49 U.S.C. 41702, and if so, whether such calls should be banned. More specifically, it solicited comment on a number of questions, including, but not limited to: (1) Whether the Department should refrain from rulemaking and allow the airlines to develop their own policies; (2) whether a voice call ban should apply to all mobile wireless devices; (3) whether any proposed ban on voice calls should be extended to foreign air carriers; and (4) whether exceptions should apply for emergencies, certain areas of the aircraft, certain types of flights, or certain individuals (such as flight attendants and air marshals). It did not seek comment on the technical or safety aspects of voice calls, because those fall under the regulatory authority of the FCC and the FAA, respectively.

Comments on the ANPRM

The comment period was open from February 24, 2014, to March 26, 2014. During that time, the Department received over 1,700 comments from individuals. The vast majority of commenters, 96%, favored a ban on voice calls. An additional 2% favored bans on voice calls, but indicated that they would be open to exceptions, such as for (unspecified) ''emergencies.'' Most commenters used strong language to express the view that voice calls in the presence of others are disturbing in general, and even more so in a confined space. Individuals also commented that voice calls would create ''air rage'' incidents by disgruntled passengers, place additional strains on flight attendants, and intrude upon privacy and opportunities to sleep. Only 2% of individuals opposed a voice call ban. These commenters generally took the position that airlines should be able to set their own policies.

Consumer advocacy organizations (Consumers Union and the Global Business Travel Association) stated that they favored a ban on voice calls, for the same reasons identified by the majority of individuals. Global Business Travel Association favored a ban on voice calls and stated that ''quiet sections'' are not feasible on aircraft.

Unions (the Air Line Pilots Association (ALPA), the Association of Professional Flight Attendants (APFA), the Association of Flight Attendants—CWA (AFA–CWA), the Teamsters, and the Transportation Trades Department) expressed safety concerns arising from permitting voice calls on aircraft, including an increased number of ''air rage'' incidents and a decrease in the ability to hear crewmember instructions. These organizations also cited security concerns, such as the possibility that voice call capability could be exploited by terrorists.

In contrast, the major airline organizations, Airlines for America (A4A) and the International Air Transport Association (IATA), expressed the view that airlines should be permitted to develop their own policies on voice calls. They recognized that their member airlines may take differing positions on whether they would allow voice calls on their flights. A4A and IATA stressed, however, that each airline should be free to respond to its own consumers' demand. They also argued that the Department lacks the statutory authority under 49 U.S.C. 41702 or 41712 to ban voice calls. Finally, these organizations contended that a voice call ban would stifle innovation in this area.

One U.S. airline, Spirit Airlines, Inc., echoed IATA's free-market position, but added that the Department would have the authority to require airlines to disclose their voice call policies.

Certain foreign airlines (Emirates and Virgin Atlantic), along with suppliers of onboard voice call equipment (Panasonic, OnAir Switzerland, and the Telecommunications Industry Association/Information Technology Industry Council), commented that foreign airlines increasingly permit voice calls, with few reports of consumer complaints. They stated that voice calls are rarely placed, and are of short duration because they are quite expensive (several dollars per minute, akin to ''roaming'' charges). They also note that voice calls may be easily disabled at any time during flight by one of the pilots. Finally, they report that crewmembers are adequately trained to handle any incidents that may arise as a result of voice calls.

One commenter, the Business Travel Coalition, suggested that the Department should permit voice calls in an ''inbound, listen-only'' mode for participating passively in conference calls. Another commenter, GoGo, Inc., suggested that any ban on voice calls should apply to regularly-scheduled commercial flights, and not to private aircraft or charter flights.

Response to ANPRM Comments

First, we recognize the safety and security concerns expressed by pilots' and flight attendants' unions. Without discounting those concerns in any way, we note that the proposed rule is not based on considerations of safety or security. Nevertheless the Department is actively coordinating this proposed rulemaking with all relevant Federal authorities that have jurisdiction over aviation safety and security.[16]

Next, we understand the significant concerns expressed by individual commenters about the degree of hardship that may arise from an enclosed airline cabin environment in which voice calls are unrestricted. Under the proposed rule, airlines remain free to respond to those concerns by banning voice calls as a matter of policy, allowing voice calls only on certain flights (such as those frequently used by business travelers) or only

[16] In January 2016, the DOT and FCC entered into an agreement to establish a Federal Interagency Working Group to more effectively collaborate and coordinate with other relevant agencies on issues that intersect their respective domains, including the safe and secure use of consumer communications onboard domestic commercial aviation. This agreement builds on the interagency coordination efforts in recent years as aviation communications safety and security concerns have emerged. The FAA and the FCC co-chair the Working Group, with the Public Safety and Homeland Security Bureau coordinating efforts within the FCC. See *http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0129/DA-16-110A1.pdf.*

during certain portions of flights (such as non-sleeping hours), creating ''voice call free zones'' where voice calls are not permitted, or through other means. As we explain further below, permitting carriers to allow voice calls onboard aircraft may create an environment that is both unfair and deceptive to consumers, and inconsistent with adequate air transportation. The Department has the statutory authority to prohibit unfair and deceptive practices in air transportation, and to ensure adequate air transportation. As such, the Department disagrees with the airline organizations, which contend that the Department lacks statutory authority to ban voice calls under sections 41702 and 41712. The Department also disagrees with the individual commenters and airline organizations who contend that voice calls should be entirely unregulated.

We recognize that certain foreign airlines permit voice calls when outside U.S. airspace, and that these airlines have reported few consumer complaints. This experience of foreign airlines suggests that voice calls do not, at present, create a significant degree of consumer harm. Our review of the individual comments to the ANPRM suggests, however, that U.S. consumers have come to expect a voice-call-free cabin environment and that they may generally hold a different view from foreign consumers on the issue of voice calls. Moreover, as we note in the regulatory evaluation to the proposed rule, the Department anticipates that airlines' technical capacity to allow voice calls will increase significantly in the near future, with corresponding potential reductions in the price of individual voice calls. These factors could result in an environment in which voice calls increase in both number and length, raising passenger discomfort to a degree that passengers on foreign airlines do not currently experience. As such, this proposal would require sellers of air transportation that are not small entities to provide adequate notice to passengers if voice calls are permitted on a ''flight within, to, or from the United States.'' We recognize that a ''flight to or from the United States'' may be a continuous journey including one flight segment beginning or ending in the United States (*e.g.,* New York to Frankfurt), and a second segment between two foreign points (*e.g.,* Frankfurt to Prague). We solicit comment on whether the disclosure requirements for ''flights to or from the United States'' should be limited to flight *segments* to or from the United States, or should apply to the entire continuous journey, in the same aircraft or using the same flight number, that begins or ends in the United States.

The Department appreciates the comments we received from business travelers, some of whom have advocated for the ability to participate in ''listen-only'' calls, such as lengthy conference calls, on airplanes. This NPRM does not propose a ban on voice calls on aircraft, although we seek further comment on that issue. As a result, airlines would be free, under this proposal, to develop policies to prohibit, restrict or allow voice calls, and airlines would have the flexibility to provide these types of ''listen-only'' or other exceptions if they so choose. With that being said, DOT continues to seek comment on whether a ban on voice calls would be the more appropriate regulatory approach and whether any exceptions, such as a ''listen-only'' exception, should apply.

With respect to GoGo's comment that any ban on voice calls should apply to regularly-scheduled commercial flights, and not to private aircraft or charter flights, we again note that we are not proposing to ban voice calls at this time.

Finally, we agree with Spirit Airlines' comment that the Department has the authority to require carriers to disclose their voice-call policies, if the airline does allow them. While the major airline organizations did not comment on the disclosure approach, we believe that it is a well-established means of regulation that falls squarely within the Department's authority under 49 U.S.C. 41712. At this point in time, the Department is proposing this method of regulation, which is structured similarly to the Department's existing code-share disclosure rule. This proposed rule would require airlines that permit voice calls to provide early notice to consumers so that they may know prior to purchasing a ticket that a particular flight permits voice calls. This proposal provides a means of regulating voice calls without banning them outright.

Advisory Committee on Aviation Consumer Protection

On October 29, 2014, the sixth meeting of the Secretary's Advisory Committee on Aviation Consumer Protection (ACACP) convened to discuss a number of issues, including regulation of voice calls on aircraft.[17] At the meeting, representatives of DOT and FCC discussed the history and current status of voice call regulation. A representative from AeroMobile Communications, Inc., a company that installs communication systems onboard aircraft, noted that a number of foreign airlines offer voice call service, and asserted that passengers have experienced no adverse impacts from the service. A representative of the Association of Professional Flight Attendants expressed strong opposition to allowing voice calls, citing, among other concerns, safety, security, and adverse impacts on flight attendants who would have to intervene in passenger conflicts arising from voice calls. A representative of FlyersRights, a group representing airline passengers, expressed opposition to allowing voice calls, citing similar concerns and potential impacts on the passenger in-flight experience. An ACACP member representing consumer interests indicated that he was undecided on the issue and stated that there may be room for compromise. On September 1, 2015, the ACACP recommended that the Department allow airlines to decide whether to permit passengers to use mobile devices for voice calls, if such use is safe and secure. In a related recommendation, the ACACP urged the Department to continue to participate in the interagency task force relating to the safety and security of mobile wireless devices onboard aircraft. Our proposed rule, which would permit the sale of air transportation where voice calls are allowed so long as the airline's voice call policy is properly disclosed, is consistent with the ACACP's recommendation.

This NPRM

Legal Analysis

After reviewing the comments, the Department finds that allowing the use of mobile wireless devices for voice calls without providing adequate notice to all passengers is an ''unfair'' and ''deceptive'' practice in air transportation under 49 U.S.C. 41712. A practice is unfair if it causes or is likely to cause substantial injury to consumers which cannot be reasonably avoided and which is not outweighed by countervailing benefits to consumers or competition that the practice produces. The Department relied upon 49 U.S.C. 41712 when promulgating the ''Tarmac Delay Rule'' (14 CFR 259.4), in which the Department addressed the harm to consumers when aircraft sit for hours on the airport tarmac without an opportunity for passengers to deplane.[18] In doing so, the Department considered the degree of hardship and inconvenience to consumers, along with the fact that the harm was unavoidable because the passengers could not deplane. Similar to a tarmac delay

[17] DOT–OST–2012–0087–0257.

[18] *See* 74 FR 68983 (Dec. 30, 2009) and 76 FR 23110 (April 25, 2011).

without an opportunity for passengers to deplane, permitting voice calls on aircraft without adequate notice would harm consumers because of the confined environment and the inability of passengers to avoid the hardship and disruption created by voice calls. The vast majority of individual commenters believe that permitting voice calls would create unavoidable harm. Most individuals spoke of the significant discomfort, invasion of privacy, lack of sleep, and other harmful effects that would arise from being placed for hours in an enclosed environment with other passengers speaking loudly on their mobile devices. Some commenters remarked that individuals speaking on mobile devices tend to be louder than individuals engaging in a live conversation. We are also aware of a 2012 survey indicating that 51% of respondents expressed negative feelings about cell phone use during flight, while 47% expressed generally positive feelings; in a separate survey question, 61% of respondents expressed support for restricting cell phone calls during flight.[19] In light of the support for a voice call ban expressed by members of the public in response to the ANPRM, the Department believes that these hardships, when encountered without adequate notice, are not outweighed by countervailing benefits to consumers or to competition and are an unfair practice.

We also believe that permitting voice calls on aircraft without adequate disclosure is a deceptive practice. A practice is deceptive if it misleads or is likely to mislead a consumer acting reasonably under the circumstances with respect to a material issue (*i.e.,* one that is likely to affect the consumer's decision with regard to a product or service). As noted above, the Department is unaware of any U.S. carrier that permits voice calls on its flights; moreover, foreign carriers disable voice call capability within U.S. airspace. Thus, at present, consumers purchase tickets with the reasonable expectation that voice calls will not be permitted on flights within the United States. Given the overwhelmingly negative tenor of the public comments submitted to the docket, it is reasonable to conclude that consumers may choose a flight based at least in part on whether the carrier has taken the unusual step of permitting voice calls on that flight. Under these circumstances, we conclude that consumers would be unfairly surprised if they learned for the first time, after purchasing the ticket, that their chosen flight permits voice calls. The proposed requirements are designed to ensure that consumers are adequately informed, in advance, that voice calls will be permitted.

A number of individuals and organizations expressed significant concern over the many safety and security issues that arise from permitting voice calls on aircraft. Recognizing the multi-jurisdictional scope of the voice call issue, numerous members of Congress[20] have urged the DOT to coordinate its efforts with the Department of Justice, the Department of Homeland Security, and the FCC. The proposed rule necessarily falls within the scope of the Department's consumer protection authority, and does not extend to certain security and safety concerns over which OST lacks jurisdiction. Nevertheless, commenters should be assured that the Department is engaged in active coordination with those agencies on this issue.

Before discussing the proposed rule text, we note that we seek further comment on whether the Department should ban voice calls on domestic and/or international flights. We recognize that we have already received considerable feedback on this topic during the comment period to the ANPRM; individuals and organizations need not re-submit those same comments during the comment period to this NPRM. Here, we particularly solicit comment on whether there is any market failure or other reason to support a Federal ban on voice calls during flights, as well as the costs and benefits of any such ban. For example, is there evidence of a market failure or other problems based on the experience of countries that permit carriers to allow passengers to make voice calls during flights? What are the different types of policies and practices being used by carriers that permit some degree of voice calls? Will the price of voice calls go down as technology improves, and if so, will the volume of voice calls increase? What would be the costs and benefits of any such increase in voice call usage? What are the quantifiable benefits to consumers from being able to make a voice call onboard an aircraft? What are the quantifiable benefits of being able to listen to a conference call on a ''listen-only'' call? Would carriers and/or consumers benefit from airlines offering either ''voice call zones'' or ''voice call free zones'' onboard aircraft? Would carriers charge a specific fee for being able to make voice calls, or would the fee for voice calls be bundled with the general charges for Wi-Fi, and/or in-flight entertainment? Would carriers have an economic incentive to provide electronic devices to passengers independent of the portable electronic devices that passengers themselves already bring onboard the aircraft? What are the quantifiable costs to consumers from being exposed to unwanted voice calls onboard aircraft? What is the proper method of measuring such costs? Is a voice call ban justified even if the Department requires disclosure of a carrier's voice call policy? Should any such ban apply to international as well as domestic flights? Should any such ban apply to small carriers, air taxis, or charter operations? In general, are market forces sufficient or insufficient to moderate voice call use without Departmental regulation? Are there alternative regulatory approaches, in addition to disclosure and bans, that the Department should consider?

Discussion of Proposed Rule Text

In the NPRM, we define ''mobile wireless device'' to mean any portable wireless telecommunications device not provided by the covered airline that is used for the transmission or reception of voice calls. The term includes, but is not limited to, passengers' cellular telephones, computers, tablets, and other portable electronic devices using radio frequency (RF) signals, including Voice over Internet Protocol (VoIP) via aircraft Wi-Fi. We define ''voice call'' to mean an oral communication made or received by a passenger using a mobile wireless device. The Department seeks comment on the proposed definitions of ''mobile wireless device'' and ''voice call.''

The proposed rule applies to passenger flights in scheduled or charter air transportation by U.S. and foreign air carriers that are not small entities (*i.e.,*

[19] These findings were part of a comprehensive survey to study airline passengers' usage of, and attitude toward, PEDs. The survey, conducted by the Airline Passenger Experience Association (APEX) and the Consumer Electronics Association (APEX), can be found at Appendix H to the September 30, 2013, final report of the Portable Electronic Devices Aviation Rulemaking Committee (PED ARC) to the Federal Aviation Administration. *https://www.faa.gov/about/initiatives/ped/media/PED_ARC_FINAL_REPORT.pdf.* The PED ARC reviewed, but did not commission, the survey. The PED ARC further found that 68% of commenters to its **Federal Register** notice ''did not desire cell phone usage (interpreted by the ARC to mean cell phone voice calls)'', while a different international survey found 68% acceptance of onboard phone service. Id. at 4. The PED ARC ultimately declined to make recommendations to the FAA regarding voice call use, because this issue was outside the scope of the PED ARC charter. Id.

[20] Ex Parte Correspondence to Members of Congress, available at DOT–OST–2014–0002–1792. *See also* Explanatory Statement Submitted by Mr. Rodgers of Kentucky, Chairman of the House Committee on Appropriations Regarding the House Amendment to the Senate Amendment on H.R. 3547, Consolidated Appropriations Act of 2014, 160 Cong. Rec. H475, H512–13, H906, H927 (daily ed. Jan. 15, 2014).

U.S. and foreign air carriers that provide air transportation only with aircraft having a designed seating capacity of less than 60 seats). We solicit comment on whether and to what extent the proposed rule should or should not apply to small aircraft, commuter carrier flights, single-entity charter flights, air ambulances, and on-demand air taxi operations.

Under this proposed rule, if an airline permits voice calls on a specific flight that is offered to a prospective consumer, then the seller of the air transportation (*e.g.,* an airline or ticket agent) would be required to disclose that fact contemporaneously with the offer. The purpose of such a disclosure requirement would be to give consumers the opportunity to learn in advance that they are considering a flight on which voice calls are permitted. This option would apply to schedule listings and oral communications with prospective consumers by U.S. and foreign air carriers except for those that provide air transportation only with aircraft having a designed seating capacity of less than 60 seats, and to ticket agents except for those that qualify as a small business pursuant to 13 CFR part 121.[21] Bearing in mind the Department's responsibilities under the Regulatory Flexibility Act, the Department is of the tentative view that this exception is appropriate in order to avoid undue administrative burdens on small businesses and small carriers. We solicit comment on whether the requirement to provide advance notice that voice calls are permitted on flight should apply to all airlines and ticket agents regardless of size.[22]

The proposed rule is modeled on the code-share disclosure rule, 14 CFR 257.5. Code-sharing is an arrangement whereby a flight is operated by a carrier other than the airline whose designator code or identity is used in schedules and on tickets. Based on the statutory prohibition against unfair and deceptive practices in the sale of air transportation, 49 U.S.C. 41712, the purpose of the disclosure requirement in section 257.5 is to ensure that consumers are aware of the identity of the airline actually operating their flight in code-sharing and long-term wet lease arrangements in domestic and international air transportation. *See* 64 FR 12838 (March 15, 1999). Code-share disclosure is important because the identity of the operating carrier is a factor that affects many consumers' purchasing decisions.

Similarly, the Department believes that a carrier's voice call policy is an important factor that may affect consumers' purchasing decisions. Prospective consumers should be aware, from the beginning of a prospective purchase, whether a carrier permits voice calls on its flights. As noted above, the comments to the ANPRM reflected an overwhelmingly negative public reaction to the prospect of permitting voice calls on aircraft. Based on these comments, the Department believes that consumers should be informed, from the beginning of the process, whether a carrier permits voice calls. Similarly, the Department believes that consumers would be unfairly surprised and harmed if they learned only after the purchase of a ticket (or, worse, after boarding the aircraft) that the carrier permits voice calls on its flights. While some carriers or ticket agents may voluntarily or sporadically provide notice of a carrier's voice call policy in the absence of regulation, the Department believes that the systematic and comprehensive notice requirements of proposed Part 260 provide the most effective means of avoiding consumer harm.

The Department proposes that disclosure take place under Part 260 only if the carrier *permits* voice calls; if the carrier chooses to ban such calls, then no disclosure of that fact would be required. The Department reasons that at present, passengers are generally not permitted to make or receive voice calls (whether because of the FCC's rule or otherwise). In other words, the commonly understood status quo is that voice calls are not permitted onboard flights. The Department does not believe it is necessary for carriers to notify the public if they will follow that status quo.

As proposed, the rule would exempt carriers that operate exclusively with aircraft having a designed seating capacity of less than 60 seats and ticket agents defined as ''small businesses'' (*i.e.,* ticket agents with $20.5 million or less in annual revenues, or that qualify as a small business pursuant to 13 CFR part 121). We note that large ticket agents and tour operators that account for a significant portion (more than 60%) of industry revenue would be covered, as would the vast majority of flights booked directly with airlines. The Department seeks comment on whether to apply a notice rule to small businesses, and particularly seeks comments on the costs and benefits of doing so.

The specific notice requirements are set forth in section 260.9. Section 260.9 requires disclosure in two areas: flight itinerary and schedule displays, and oral communications.[23] We will briefly address each subsection in turn.

(a) Flight Itinerary and Schedule Displays

Subsection (a) would require voice call disclosure on flight itinerary and schedule displays, including on the Web sites and mobile applications of both carriers and ticket agents with respect to flights in, to, or from the United States. The inclusion of ticket agents reflects the fact that, through the growth and development of the internet and related technologies, more and more ticket agents, especially online travel agencies (OTAs), are able to provide flight schedules and itinerary search functions to the public. Also, we view any ticket agent that markets and is compensated for the sale of air transportation to consumers in the United States, either from a brick-and-mortar office located in the United States or via an internet Web site that is marketed towards consumers in the United States, as ''doing business in the United States.'' This interpretation would cover any travel agent or ticket agent that does not have a physical presence in the United States but has a Web site that is marketed to consumers in the United States for purchasing tickets for flights within, to, or from the United States. We also note that with the usage of mobile devices gaining popularity among consumers, our voice call disclosure requirement with respect to flight schedule and itinerary displays covers not only conventional internet Web sites under the control of carriers and ticket agents, but also those Web sites and applications specifically designed for mobile devices, such as mobile phones and tablets.

Furthermore, the text of section 260.9(a) states that voice call policies (*i.e.,* carrier policies where voice calls are permitted) must be disclosed in flight schedules provided to the public in the United States, which include electronic schedules on Web sites

[21] Currently, ticket agents qualify as a small business if they have $20.5 million or less in annual revenues. 13 CFR 121.201 (effective January 7, 2013).

[22] We note that the code-share disclosure rule, 14 CFR part 257, on which this rule is based, contains no exceptions for small businesses and small carriers. Thus, carriers and ticket agents of any size that hold out or sell air transportation involving a code-sharing arrangement must provide adequate advance notice of the code-sharing arrangement.

[23] The code-share disclosure rule also requires written disclosure to consumers at the time of the purchase, and disclosure in written advertisements distributed in or mailed to or from the United States (including those that appear on internet Web sites). This proposed voice-call disclosure rule contains no such requirements. We solicit comment as to whether these additional disclosures should be required, and the scope thereof.

marketed to the public in the United States, by an asterisk or other easily identifiable mark. For schedules posted on a Web site in response to an itinerary search, disclosure through a rollover, pop-up window, or hyperlink is not sufficient. Moreover, as stated in the rationale behind our recently amended price advertising rule, 14 CFR 399.84, which ended the practice of permitting sellers of air transportation to disclose additional airfare taxes and mandatory fees through rollovers and pop-up windows, we believe that the extra step a consumer must take by clicking on a hyperlink or using a rollover to find out about voice call policies is cumbersome and may cause some consumers to miss this important disclosure.

Our proposal reflects the requirement of 49 U.S.C. 41712(c)(2) on Internet offers, which requires that on a Web site fare/schedule search engine, code-share disclosure must appear on the first display following an itinerary search. Further, section 41712(c)(2) requires that the disclosure on a Web site must be ''in a format that is easily visible to a viewer.'' Similarly, we are proposing that the voice call policy disclosure must appear in text format immediately adjacent to each flight where voice calls are permitted, in response to an itinerary request by a consumer. We ask whether the proposed voice-call disclosure format would be clear and prominent to the passenger. As an alternative to the proposed standard, we ask whether a voice call disclosure appearing immediately adjacent to the entire itinerary as opposed to appearing immediately adjacent to each flight would be clear and prominent to the passenger. We also ask whether a symbol, such a picture of cell phone, would be sufficient, rather than disclosure in text format.

With regard to flight schedules provided to the public (whether the schedules are in paper or electronic format), we propose that the voice call disclosure be provided by an asterisk or other identifiable mark that clearly indicates the existence of a voice call policy and directs the reader's attention to another prominent location on the same page indicating in words that the carrier permits voice calls. We seek public comment on whether we should impose the same standard for flight schedules as for flight itineraries provided on the internet in response to an itinerary search, *i.e.,* requiring that the disclosure be provided immediately adjacent to each applicable flight.

(b) Disclosure to Prospective Consumers in Oral Communications

Proposed section 260.9(b) requires that in any direct oral communication in the United States with a prospective consumer, and in any telephone call placed from the United States by a prospective consumer, concerning a flight within, to, or from the United States where voice calls are permitted, a ticket agent doing business in the United States or a carrier shall inform the consumer, the first time that such a flight is offered to the consumer, that voice calls are permitted. This rule requires carriers and ticket agents to disclose the voice call policy the first time the carrier or ticket agent offers a flight where voice calls are allowed, or, if no such offer was made, the first time a consumer inquires about such a flight. As with the remaining subsections of section 260.9, the purpose of this subsection is to ensure that a prospective consumer understands that voice calls would be permitted on a flight from the beginning of the decisionmaking process, and regardless of whether the consumer ultimately makes a reservation. Because carriers are already required to provide code-share disclosure, the Department believes that there is only a small additional burden to requiring disclosure of voice call policies as well. Subsection (b) requires disclosure only the first time that such a flight is offered to the consumer; the agent need not repeat the voice call policy at every mention of the flight, but should be prepared to repeat the voice call disclosure information upon request. The rule also requires disclosure if no such offer was made, the first time a consumer inquires about such a flight.

The phrase ''ticket agent doing business in the United States'' is used in the same manner as described in the discussion of that phrase in section 260.9(a) above. Consequently, a ticket agent that sells air transportation via a Web site marketed toward U.S. consumers (or that distributes other marketing material in the United States) is covered by section 260.9(b) even if the agent does not have a physical location in the United States, and such an agent must provide the disclosure required by section 260.9(b) during a telephone call placed from the United States even if the call is to the agent's foreign location.

While the Department has proposed a disclosure that is based on the code-share disclosure model, we seek comment on other approaches, including whether and to what extent it should require disclosure of voice call policies to consumers. For example, should the Department require airlines that permit voice calls on aircraft to disclose that fact on their general Web site, outside of the booking path? What information may need to be moved or deleted to make room for this disclosure? Should ticket agents be required to identify airlines that permit voice calls and disclose that information on their Web site? If so, where on the Web site should such disclosure appear? Would a general link to a policy be sufficient, or should disclosure take place on the screen where passengers construct itineraries and/or purchase tickets? Should disclosure take place during telephone reservation and inquiry calls? At all points of sale? Should such disclosure be provided on itinerary or e-ticket documents? If a passenger wishes to learn the full extent of a carrier's voice call policy, beyond the mere disclosure that calls ''are permitted,'' should carriers or ticket agents be required to provide that information on request? If so, how? The Department specifically seeks comments on the costs and benefits of all of these approaches.

Effective Date

The Department proposes that the rule becomes effective 30 days after publication in the **Federal Register**. We do not anticipate significant concerns with a 30-day effective date; this proposed rule does not require airlines to adopt or alter voice call policies within a specific time frame. Rather, airlines would be permitted to allow voice calls onboard aircraft [24] so long as the airline and its ticket agents properly disclose the airline's voice call policies. To the extent that airlines choose not to permit voice calls, they would not be affected by the 30-day effective date. We seek comment on the costs and benefits of a 30-day effective date.

Regulatory Analyses and Notices

A. Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

This action has been determined to be significant under Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. A copy of the Preliminary Regulatory Impact Analysis (PRIA) has been placed in the docket.

[24] We again stress that DOT's qualified permission of voice calls under this proposed rule would not trump any bans on voice calls issued by other federal agencies. Thus, for example, if the FCC continues to prohibit the use of certain commercial mobile spectrum bands, that prohibition would apply even if the DOT adopts this proposed rule.

The PRIA found qualitative consumer benefits in the form of having readily-available flight-specific information regarding a carrier's voice call policy before making air travel purchase decisions. The PRIA did not quantify this benefit. The PRIA estimated aggregate costs for compliance with the proposed rule for 2017–2026 (including costs for revising Web sites and for training personnel) to be $41 million for carriers and $46 million for ticket agents. A summary of these findings is set forth below.

SUMMARY OF BENEFITS AND COSTS

Proposed option	Nature of benefits	Quantitative measure	Nature of costs	Quantitative measure
Require disclosure of possible voice call exposure prior to ticket purchase.	Improved information for those who wish to avoid (or make) voice calls.	Tickets purchased for 10.2 billion enplanements, 2017–2026.	Web site programming and call center labor hours for large carriers, ticket agents.	Carrier costs of $41 million and ticket agent costs of $46 million, 2017–2026.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities. DOT defines small carriers based on the standard published in 14 CFR 399.73 as carriers that provide air transportation exclusively with aircraft that seat no more than 60 passengers. Ticket agents qualify as a small business if they have $20.5 million or less in annual revenues. 13 CFR 121.201.

The Department does not expect this rule to have a significant economic impact on a substantial number of small entities. The proposed rule contains an exemption for small carriers and small ticket agents. On the basis of the analysis provided in the PRIA and IRFA, I hereby certify that this rulemaking will not have a significant economic impact on a substantial number of small entities.

C. Executive Order 13132 (Federalism)

This rulemaking has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). This rulemaking does not include any provision that: (1) Has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibility among the various levels of government; (2) imposes substantial direct compliance costs on State and local governments; or (3) preempts State law. States are already preempted from regulating in this area by the Airline Deregulation Act, 49 U.S.C. 41713. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

D. Executive Order 13084

This rulemaking has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 (''Consultation and Coordination with Indian Tribal Governments''). Because this rulemaking does not significantly or uniquely affect the communities of the Indian Tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13084 do not apply.

E. Paperwork Reduction Act

The Department has determined that this proposed rule is subject to the requirements of the Paperwork Reduction Act (PRA) because it adopts new information gathering requirements on airlines and ticket agents. The Department will publish a separate 30 day and 60 day notice in the **Federal Register** inviting comment on the new information collection requirements contained in this document. As prescribed by the PRA, the requirements will not go into effect until the Office of Management and Budget (OMB) has approved them and the Department has published a notice announcing the effective date of the information collection requirements.

F. Unfunded Mandates Reform Act

The Department has determined that the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply to this rule.

G. National Environmental Policy Act

The Department has analyzed the environmental impacts of this proposed action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). *See* 40 CFR 1508.4. In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. Id. Paragraph 3.c.6.i of DOT Order 5610.1C categorically excludes ''[a]ctions relating to consumer protection, including regulations.'' As noted above, this rulemaking relates to consumer protection. The Department does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

List of Subjects in 14 CFR Part 260

Air carriers, Foreign air carriers, Ticket agents, Voice calls, Mobile wireless devices, Consumer protection. Disclosure when voice calls are permitted.

Proposed Rule Text

■ For the reasons set forth in the preamble, the Department of Transportation proposes to amend title 14 of the Code of Federal Regulations by adding part 260 to read as follows:

Part 260—DISCLOSURE ABOUT VOICE CALLS ONBOARD AIRCRAFT

Sec.
260.1 Purpose.
260.3 Applicability.
260.5 Definitions.
260.7 Unfair and Deceptive Practice.
260.9 Notice Requirement.
260.11 Exceptions.

Authority: 49 U.S.C. 41712.

§ 260.1 Purpose.

The purpose of this part is to ensure that ticket agents doing business in the United States, air carriers, and foreign air carriers inform consumers clearly when the air transportation they are buying or considering buying permits passengers to use their mobile wireless devices for voice calls onboard the flight.

§ 260.3 Applicability.

Except as noted in § 260.11, this part applies to the following:

(a) U.S. and foreign air carriers marketing scheduled or charter air transportation where voice calls are permitted onboard flights; and

(b) Ticket agents doing business in the United States that market scheduled or charter air transportation where voice calls are permitted onboard flights.

§ 260.5 Definitions.

As used in this part:

Air transportation means foreign air transportation or intrastate or interstate air transportation.

Carrier means any air carrier or foreign air carrier as defined in 49 U.S.C. 40102(a)(2) or 49 U.S.C. 40102(a)(21), respectively, that is marketing scheduled or charter passenger air transportation.

Mobile wireless device means any portable wireless telecommunications device not provided by the covered carrier that is used for the transmission or reception of voice calls. The term includes, but is not limited to, passenger cellular telephones, computers, tablets, and other portable electronic devices using radio signals or Voice over Internet Protocol.

Ticket agent has the meaning ascribed to it in 49 U.S.C. 40102(a)(45), and DOT regulations.

Voice call means an oral communication made or received by a passenger using a mobile wireless device.

§ 260.7 Unfair and deceptive practice.

The holding out or sale of scheduled or charter passenger air transportation is prohibited as unfair and deceptive in violation of 49 U.S.C. 41712 unless, in conjunction with such holding out or sale, carriers and ticket agents follow the requirements of this part.

§ 260.9 Notice requirement.

(a) *Notice in flight itineraries and schedules.* Each air carrier, foreign air carrier, or ticket agent providing flight itineraries and/or schedules for scheduled or charter passenger air transportation to the public in the United States shall ensure that each flight within, to, or from the United States on which voice calls are permitted is clearly and prominently identified and contains the following disclosures.

(1) In flight schedule information provided to U.S. consumers on desktop browser-based or mobile browser-based internet Web sites or applications in response to any requested itinerary search, for each flight on which voice calls are permitted, notice that voice calls are permitted must appear prominently in text format on the first display following the input of a search query, immediately adjacent to each flight in that search-results list. Roll-over, pop-up and linked disclosures do not comply with this paragraph.

(2) For static written schedules, each flight in passenger air transportation where voice calls are permitted shall be identified by an asterisk or other easily identifiable mark that leads to disclosure of notification that voice calls are permitted.

(b) *Notice in oral communications with prospective consumers.* In any direct oral communication in the United States with a prospective consumer, and in any telephone call placed from the United States by a prospective consumer, concerning a flight within, to, or from the United States where voice calls are permitted, a ticket agent doing business in the United States or a carrier shall inform the consumer, the first time that such a flight is offered to the consumer, or, if no such offer was made, the first time a consumer inquires about such a flight, that voice calls are permitted.

(c) Each air carrier and foreign air carrier that permits voice calls via passenger devices shall provide notification to all ticket agents that receive and distribute the U.S. or foreign carrier's fare, schedule, and availability information of the fact that voice calls via passenger devices are permitted during the flight. This notification shall be useable, current, and accurate, and suitable for providing the notices to prospective air travelers required by paragraphs (a) and (b) of this section.

§ 260.11 Exceptions.

This Part does not apply to:

(a) Air carriers or foreign air carriers providing air transportation only with aircraft having a designed passenger capacity of less than 60 seats.

(b) Ticket agents with $20.5 million or less in annual revenues, or that qualify as a small business pursuant to 13 CFR part 121.

Issued in Washington, DC, on December 7, 2016.

Anthony R. Foxx,

Secretary of Transportation.

[FR Doc. 2016–29830 Filed 12–13–16; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 73

[Docket No. FDA–2016–D–4120]

Fruit Juice and Vegetable Juice as Color Additives in Food; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notification of availability.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing the availability of a draft guidance for industry entitled ''Fruit Juice and Vegetable Juice as Color Additives in Food.'' The draft guidance, when finalized, will help manufacturers determine whether a color additive derived from a plant material meets the specifications under certain FDA color additive regulations.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that we consider your comment on the draft guidance before we begin work on the final version of the guidance, submit either electronic or written comments on the draft guidance by February 13, 2017.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://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 *http://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):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, 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–2016–D–4120 for the draft guidance for industry entitled ''Fruit Juice and Vegetable Juice as Color Additives in Food.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management 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.'' We will review this copy, including the claimed confidential information, in our 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 *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. 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: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://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 Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the draft guidance to the Office of Food Additive Safety, Center for Food Safety and Applied Nutrition (HFS–265), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740. Send two self-addressed adhesive labels to assist that office in processing your request. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance.

FOR FURTHER INFORMATION CONTACT:

With regard to the draft guidance: Laura A. Dye, Center for Food Safety and Applied Nutrition (HFS–265), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–1275.

With regard to the proposed collection of information: Ila Mizrachi, Office of Operations, Food and Drug Administration, Three White Flint North (3WFN), 10A63, 11601 Landsdown St., North Bethesda, MD 20852.

SUPPLEMENTARY INFORMATION:

I. Background

We are announcing the availability of a draft guidance for industry entitled ''Fruit Juice and Vegetable Juice as Color Additives in Food.'' We are issuing the draft guidance consistent with our good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on this topic. 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.

When a food substance, including plant material, is deliberately used as a color, it is a color additive (see 21 CFR 70.3(f)). We have a statutory obligation to ensure that authorized (or listed) color additives are suitable and safe for their intended use. FDA has authorized the use of the color additive ''fruit juice,'' under § 73.250 (21 CFR 73.250), that is prepared either by expressing the juice from mature varieties of fresh, edible fruits, or by the water infusion of the dried fruit. Similarly, § 73.260 establishes that the color additive ''vegetable juice'' is prepared either by expressing the juice from mature varieties of fresh, edible vegetables or by the water infusion of the dried vegetable. The underlying premise of §§ 73.250 and 73.260 is that the safety of fruit juice and vegetable juice as color additives for use in food is assured by the fact that the fruit or vegetable from which the color additive is derived has been safely consumed as food, such that there would not be safety concerns in using the juice or water soluble color components from the fruit or vegetable as a color additive. The fact that plant material can be eaten does not necessarily mean that juice from such plant material meets the specifications of these regulations. We also note that, in addition to the color additive regulations for fruit juice in § 73.250 and vegetable juice in § 73.260, we have authorized color additives derived from plant materials in separate color additive regulations, including § 73.169 (grape skin extract) and § 73.500 (saffron).

The draft guidance, when finalized, is intended to help manufacturers determine whether a color additive derived from a plant material meets the specifications for fruit juice under § 73.250 or vegetable juice under § 73.260. The draft guidance, including our interpretation of the terms used in §§ 73.250 and 73.260, is limited to these color additive regulations. The draft guidance does not address the use of fruit- or vegetable-derived color additives that are authorized under different color additive regulations or that are the subject of a color additive petition.

Since we issued the color additive regulations for fruit juice and vegetable juice, we have received inquiries from industry regarding whether certain plant materials are covered by these color additive regulations. The draft guidance provides the criteria that should be used to determine if a plant material is a mature, fresh, edible fruit or a mature, fresh, edible vegetable under §§ 73.250 and 73.260. The draft guidance also encourages firms to consult us if they are unsure of the regulatory status of a substance that they propose to derive from plant materials for use as a color additive for food. Separately, we have posted on our Web site a summary table of the informal opinions that we have issued in response to the specific inquiries we have received regarding the applicability of §§ 73.250 and 73.260. The draft guidance document contains the Web site link to the summary table.

II. Paperwork Reduction Act of 1995

The draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of

Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520). The collections of information in 21 CFR 71.1 have been approved under OMB control number 0910–0016.

The draft guidance also refers to new collections of information found in FDA regulations. Under the PRA, Federal Agencies must obtain approval from OMB for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the information to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed new collection of information set forth in this document.

With respect to the following collection of information, we invite comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Title: Fruit Juice and Vegetable Juice as Color Additives in Food; Draft Guidance for Industry—OMB Control Number 0910—NEW

The draft guidance, when finalized, will help manufacturers determine whether a color additive derived from a plant material meets the specifications for fruit juice under § 73.250 or vegetable juice under § 73.260. Information in the draft guidance regarding submission of a color additive petition has been previously approved by OMB in accordance with the PRA under OMB control number 0910–0016.

The proposed new information collection provides manufacturers the opportunity to request a meeting with FDA if they are unsure whether a color additive that is derived from plant material and that is intended for use in food meets the identity for fruit juice or vegetable juice in § 73.250 or § 73.260. When manufacturers request a meeting, the draft guidance suggests that they provide the scientific name, common name(s), origin, cultivation state, and life-stage of the plant material from which they wish to derive the color additive, and which plant structure will be declared the mature, fresh, edible fruit or vegetable, as well as a complete description of the manufacturing process for the color additive. Manufacturers also may provide information to us to verify that the plant material can be consumed for its taste, aroma, or nutrient properties in its fresh state and to document the amount and frequency of consumption and the history of safe consumption. If we determine that a proposed color additive does not meet the specifications for fruit juice or vegetable juice under § 73.250 or § 73.260, the manufacturer may submit a color additive petition, the collection of information for which has been approved under OMB control number 0910–0016.

Description of respondents: The respondents to this collection of information are manufacturers who are trying to determine whether a color additive derived from a plant material meets the specifications for fruit juice under § 73.250 or vegetable juice under § 73.260.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Color manufacturer's request for meeting and identification of fruit juice or vegetable juice information	5	1	5	1	5
Manufacturer's collection of data supporting the plant material as a consumable food, amount and frequency of consumption, and history of safe consumption by humans	5	1	5	24	120
Total					125

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

FDA's estimate of the number of respondents and number of responses in table 1 is based on the average number of meetings that are expected to be requested annually by manufacturers over the next 3 years. Based on past experience, we expect the request for a meeting and the submission of fruit juice or vegetable juice information can be completed by a qualified plant taxonomist in less than 1 hour. We also expect that some manufacturers may want to provide research supporting the plant material as a consumable food, the amount and frequency of consumption, and the history of safe consumption of the mature fruit or vegetable by humans. We estimate that, in these cases, it would take a qualified toxicologist up to 3 days (24 working hours) to perform a thorough literature and plant database search. This estimate includes the time we expect it would take for a submitter to compile the information for submission to FDA.

To be conservative, the total number of annual burden hours, therefore, would be 125 hours, which would include 5 hours to complete the initial request for a meeting and of the submission of associated information to FDA, and 120 hours to complete a literature and database search and to present this information for submission to FDA.

Before the proposed information collection provisions contained in the draft guidance become effective, we will publish a notice in the **Federal Register** announcing OMB's decision to approve, modify, or disapprove the information collection provisions. 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.

III. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/FoodGuidances* or *http://www.regulations.gov.* Use the FDA Web site listed in the previous sentence to find the most current version of the draft guidance.

Dated: December 8, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–29968 Filed 12–13–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF DEFENSE

Department of the Army

32 CFR Part 516

[Docket No. USA–2015–0016]

RIN 0702–AA69

Release of Official Information and Appearance of Witnesses in Litigation

AGENCY: Department of the Army, DoD.

ACTION: Proposed rule.

SUMMARY: The Department of the Army proposes to amend its regulation concerning policies and procedures for release of official information and testimony of Army witnesses in federal and state courts where the Army or Department of Defense (DoD) has an interest in the matter. This regulation was last published in the **Federal Register** on July 29, 1994 (59 FR 38236). At that time, a complete Army Regulation was codified. This revision removes a large portion of the currently codified part that does not apply to the public, and is now included in DoD internal guidance. Army Regulation 27–40, *Litigation,* dated 19 September 1994, is the corresponding document where the internal guidance is located.

DATES: Consideration will be given to all comments received by: February 13, 2017.

ADDRESSES: You may submit comments, identified by 32 CFR part 516, Docket No. USA–2015–0016 and or RIN 0702–AA69, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Department of Defense, Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, ATTN: Box 24, Alexandria, VA 22350–1700.

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

FOR FURTHER INFORMATION CONTACT: Major Thomas S. Hong, (703) 693–1093; *thomas.s.hong.mil@mail.mil.*

SUPPLEMENTARY INFORMATION:

Executive Summary

The rule discusses departmental responsibilities, procedures for service of process, procedures for government officials sued in their official capacities, and procedures for requests for release of official information, to include witness testimony. The rule also discusses the release of official information and the appearance of present and former Army personnel as witnesses in response to requests for interviews, notices of depositions, subpoenas, and other requests or orders related to judicial or quasi-judicial proceedings.

For the purposes of this rule, Army personnel include the following:

- Present, former and retired Army military personnel, including the U.S. Army Reserve, regardless of current status.
- Present, former and retired civilian employees of the U.S. Army, regardless of current status.
- Soldiers of the Army National Guard of the United States (Title 10, U.S.C.) and, when specified by statute or where a Federal interest is involved, Soldiers in the Army National Guard (Title 32, U.S.C.).
- Technicians under 32 U.S.C. 709.
- USMA cadets.
- Nonappropriated fund employees.
- Foreign nationals who perform services for the Army overseas.
- Other individuals hired by or for the Army, including individuals hired through contractual agreements by or on behalf of the Army.

Background

This regulation was most recently published in the **Federal Register** on July 29, 1994 (59 FR 38236). It implements 32 CFR part 97. Department of Defense Directive 5405.2, ''Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/540502p.pdf*) is where DoD's internal guidance that corresponds to 32 CFR part 97 is located. The proposed revision also removes a large portion of the currently codified part that does not apply to the public, such as items that solely deal with internal Army procedures and actions, *e.g.,* annual reporting requirements to Headquarters, Department of the Army.

Authority for This Action

Authorities for this rulemaking include the following:

- The Freedom of Information Act at 5 U.S.C. 552 which provides the public with a right to request access to federal agency records or information, except to the extent the records are protected from disclosure by any of nine exemptions or by one of three special law enforcement record exclusions.
- The Privacy Act of 1974 at 5 U.S.C. 552a, which establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of information about individuals that is maintained in systems of records by federal agencies.
- Confidentiality of records at 42 U.S.C. 290 which requires certain medical records shall be confidential and disclosed only for authorized purposes.
- Executive Order No. 12988, Civil Justice Reform (add a link to the E.O.) which establishes several requirements on Federal agencies involved in litigation or contemplating filing an action on behalf of the United States.

Costs and Benefits

The proposed revisions benefit the Department of the Army agencies, Army support to the Department of Justice, and interaction with state courts in affirmative and defensive litigation information. With the updates to the CFR for statutory and other changes since the document was published in 1994, Army's support of federal litigation and response to requests to support state and private litigation will be improved.

Although no formal study or collection of data are available, a review of the closed Touhy requests for FY 2016 shows that hundreds of hours were expended by Army personnel responding to these requests. Similar to costs in Freedom of Information Act processing, there are substantial costs for searching, reviewing, and producing Army records and personnel for depositions and trial.

This rule will be included in DoD's retrospective plan, completed in August 2011, and will be reported in future

status updates of DoD's retrospective review in accordance with the requirements in Executive Order 13563. DoD's full plan can be accessed at: *http://www.regulations.gov/#!docketDetail;D=DoD-2011-OS-0036.*

B. Regulatory Flexibility Act

The Department of the Army has determined that the Regulatory Flexibility Act does not apply because the proposed rule does not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612.

C. Unfunded Mandates Reform Act

The Department of the Army has determined that the Unfunded Mandates Reform Act does not apply because the proposed rule does not include a mandate that may result in estimated costs to State, local or tribal governments in the aggregate, or the private sector, of $100 million or more.

D. National Environmental Policy Act

The Department of the Army has determined that the National Environmental Policy Act does not apply because the proposed rule does not have an adverse impact on the environment.

E. Paperwork Reduction Act

This proposed rule does not impose any new recordkeeping, reporting, or other information collection requirements on the public. The proposed rule sets forth procedures by which litigants may serve summonses, complaints, subpoenas, and other legal process, demands, and requests upon the DA. The proposed rule imposes special procedural requirements for those who seek to serve third-party subpoenas upon the DA in accordance with *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951). These requirements may increase the time and burden associated with obtaining records of the DA in response to such third-party subpoenas.

F. Executive Order 12630 (Government Actions and Interference With Constitutionally Protected Property Rights)

The Department of the Army has determined that Executive Order 12630 does not apply because the proposed rule does not impair private property rights.

G. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

The Department of the Army has determined that, although this rule is not ''economically significant'' because it does not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, it is ''other significant'' for raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive Orders. For that reason, it has been reviewed by the Office of Management and Budget (OMB).

H. Executive Order 13045 (Protection of Children From Environmental Health Risk and Safety Risks)

The Department of the Army has determined that according to the criteria defined in Executive Order 13045. This proposed rule does not apply since it does not implement or require actions impacting environmental health or safety risks to children.

I. Executive Order 13132 (Federalism)

The Department of the Army has determined that according to the criteria defined in Executive Order 13132 this proposed rule does not apply because it will not have a substantial effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government.

List of Subjects in 32 CFR Part 516

Litigation, Service of process, Witnesses, Official information, Discovery requests, Expert testimony.

■ For reasons stated in the preamble, the Department of the Army proposes to revise 32 CFR part 516 to read as follows:

PART 516—RELEASE OF OFFICIAL INFORMATION AND APPEARANCE OF WITNESSES IN LITIGATION

Sec.

516.1 General.
516.2 Release authority.
516.3 Release determination.
516.4 Requestor responsibilities.
516.5 Classified, Privacy Act Protected, Sensitive or Privileged Information.
516.6 Releasing official information to the Department of Justice.
516.7 Complying with requests for official information, subpoenas, and witness testimony.
516.8 Testimony in private civil litigation.
516.9 Department of Justice witness requests in litigation involving the United States.
516.10 Expert or opinion testimony by DA personnel.
516.11 Witnesses before foreign tribunals.
516.12 Fees and expenses.
516.13 News media and other inquiries.

Authority: 5 U.S.C. 552; 5 U.S.C. 552a; 42 U.S.C. 290; Executive Order No. 12988.

§ 516.1 General.

(a) *Responsibilities.*—(1) *Litigating Divisions.* (i) Chief, Litigation Division, United States Army Legal Services Agency (USALSA), is responsible for the following:

(A) Supervising litigation in which the Army has an interest, except as outlined in paragraphs (a)(1)(A)(ii)–(iv) of this section.

(B) Acting for The Judge Advocate General (TJAG) and the Secretary of the Army on litigation issues, including the authority to settle or compromise cases.

(C) Delegating responsibility for cases if appropriate.

(D) Serving as primary contact with the Department of Justice (DOJ) on litigation.

(E) Accepting service of process for the Department of the Army (DA) and for the Secretary of the Army in his or her official capacity. (See 32 CFR 257.5.)

(F) Approval of the appointment of Special Assistant United States Attorneys (SAUSAs) and DOJ special trial attorneys to represent the Army and DOD in civil litigation.

(ii) Chief, Contract and Fiscal Law Division, USALSA, is responsible for supervising Armed Services Board of Contract Appeals (ASBCA) and Government Accountability Office (GAO) litigation. The Chief Trial Attorney, attorneys assigned to the Contract and Fiscal Law Division, and attorneys designated by the Chief Trial Attorney, will represent DA before the ASBCA for contract appeals. They also represent DA before the GAO for bid protests in cases not falling under the purview of either the U.S. Army Corps of Engineers (USACE) or Army Materiel Command. They will maintain direct liaison with DOJ and represent DA in appeals from ASBCA decisions. The Chief Trial Attorney has designated USACE attorneys to act as trial attorneys in connection with USACE contract appeals.

(iii) Chief, Environmental Law Division, USALSA, is responsible for the following:

(A) Supervising defensive environmental civil litigation and administrative proceedings involving missions and functions of DA, its major and subordinate commands, and

installations currently or previously managed by DA in which the Army has an interest, except as otherwise specifically provided in this part.

(B) Supervising affirmative cost recovery actions, brought pursuant to Federal or State environmental laws, in which the Army has an interest.

(C) Acting for TJAG and the Secretary of the Army on the assertion and defense of Army water rights, and environmental litigation and affirmative cost recovery issues, including the authority to settle or compromise cases.

(D) Delegating responsibility for cases as appropriate.

(E) Serving as primary contact with DOJ on environmental litigation and cost recovery.

(iv) Chief, Regulatory Law and Intellectual Property (RL & IP) Division, USALSA, is responsible for the following:

(A) Supervising the attorneys assigned to the Regulatory Law and Intellectual Property Division (RL & IP) and other attorneys designated by the Chief, RL & IP, who represent DA consumer interests in regulatory matters before State and Federal administrative agencies and commissions, including but not limited to proceedings involving rates and conditions for the purchase of services for communications (except long-distance telephone), transportation, and utilities (gas, electric, water and sewer). Those attorneys will maintain direct liaison with DOJ for communications, transportation, and utilities litigation as authorized by the Chief, RL & IP.

(B) Supervising attorneys assigned to the RL & IP Division, and other attorneys designated by the Chief RL & IP who represent DA in matters pertaining to patents, copyrights, and trademarks. Those attorneys will maintain direct liaison with DOJ and represent the DA in intellectual property issues as authorized by the Chief, RL & IP.

(v) Chief, Procurement Fraud Division (PFD), is responsible for supervising all attorneys designated to represent the DA in all procurement fraud and corruption matters before the Army suspension and debarment authority and before any civil fraud recovery administrative body. Those attorneys will maintain liaison and coordinate remedies with DOJ and other agencies in matters of procurement fraud and corruption.

(vi) Legal Representatives of the Chief of Engineers. The U.S. Army Corps of Engineers (USACE) Office of Chief Counsel, attorneys assigned thereto, and other attorneys designated by the Chief Counsel will maintain direct liaison with DOJ and represent DA in litigation and administrative proceedings arising from the navigation, civil works, Clean Water Act 404 permit authority, environmental response activities, real property functions of the (USACE).

(b) *Applicability.* (1) This part implements 32 CFR part 97 as further implemented by DOD Directive 5405.2, ''Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/540502p.pdf*). It governs the release of official information and the appearance of present and former DA personnel as witnesses in response to requests for interviews, notices of depositions, subpoenas, and other requests or orders related to judicial or quasi-judicial proceedings (*e.g.,* a proceeding conducted by an administrative or executive official that is similar to a trial, like a hearing.). Army's internal guidance for this part is available in Army Regulation 27–40 *Litigation,* dated 19 September 1994 (available at *http://www.apd.army.mil/Search/ePubsSearch/ePubsSearchForm.aspx?x=AR*). The Army observes a policy of strict neutrality in all private litigation unless the United States has an interest. This part pertains to any request for witnesses, documents, or information for all types of litigation, including requests by private litigants, requests by State or U.S. attorneys, requests by foreign officials or tribunals. This part also pertains to subpoenas for records or testimony, notices of depositions, and interview requests all stemming from civil or criminal proceedings or any litigation in which the United States has an interest.

(2) This part does not apply to releasing official information or testimony by Army personnel in the following situations:

(i) Before courts-martial convened by military departments or in administrative proceedings conducted by or on behalf of a DOD component.

(ii) In administrative proceedings for:

(A) The Equal Employment Opportunity Commission.

(B) The Merit Systems Protection Board.

(C) The Federal Labor Relations Authority.

(D) A negotiated grievance procedure under a collective bargaining agreement to which the government is a party.

(iii) In response to requests by Federal Government counsel in litigation conducted on behalf of the United States.

(iv) Pursuant to disclosure of information to Federal, State, and local prosecuting and law enforcement authorities, in conjunction with an investigation conducted by a DoD criminal investigative organization.

(b) *Policy.* Official information generally should be made reasonably available for use in federal and state courts and by other governmental bodies unless the information is classified, privileged, or otherwise protected from public disclosure. Current or former DA personnel must receive approval from the local SJA, legal advisor, or Litigation Division prior to disclosing official information in response to subpoenas, court orders, or requests. The local SJA or legal advisor should seek to resolve all requests for official information at their level. In complex cases, responding offices should consult with the appropriate litigating division. If questions arise, refer the matter to the appropriate litigating division as described in § 516.1(d). All other matters, including cases involving classified information will be referred to the General Litigation Branch, Litigation Division.

(c) *Definitions.* (1) *Official information.* Official information includes all information of any kind, however stored, that is in the custody and control of the Department of the Army, relates to information in the custody and control of the Department, or was acquired by DA personnel as part of their official duties or because of their official status within the Department while such personnel were employed by or on behalf of the Department or on active duty with the US Army. Official Information that is the property of the Army but is in the possession, custody or control of another Federal, State, or local agency or a Government contractor is also included in this definition. Generally, official information includes, but is not limited to paper, photographic or electronic records obtained, generated, or maintained for the Army, to include the personal observations and testimony of any kind by Army personnel, about:

(i) Classified or sensitive information of any kind;

(ii) Privileged information of any kind;

(iii) The acquisition, funding, construction, operation, maintenance, physical condition or readiness, as applicable, of DOD, Army, or other Federal government programs, systems, properties, facilities, equipment, data management systems or personnel;

(iv) Unit records, training records, individual personnel or medical records, investigative reports of any kind, scientific or financial data, official Army publications, and records

generated during military operations; and

(v) Army personnel, their family members, contractors, and other related third parties.

(2) *Litigation.* Litigation includes all pretrial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before civilian courts, commissions, boards, or other tribunals, foreign and domestic, and state legislative proceedings. This includes:

(i) Responses to discovery requests, depositions, and other pretrial proceedings.

(ii) Responses to formal or informal requests by attorneys or others in existing or reasonably anticipated litigation matters.

(3) *Private Litigation.* (i) In which the Army has no interest. Litigation in which neither the United States, nor an employee in an official capacity, is a party and in which the United States has no identifiable direct or indirect legal, contractual, financial, administrative, mission-related or other interest. Examples of litigation likely to be considered private include personal bankruptcy; civil consumer, divorce and custody proceedings; or landlord-tenant or similar litigation of individual Army civilian or military personnel, past or present. State or local criminal litigation not involving prosecution of Army personnel, contractors, or manufacturers of Army equipment or property may also qualify. The SJA or legal advisor will determine whether a particular case qualifies as private litigation where the Army has no interest.

(ii) In which the Army has an interest. In cases where the Army is not a named party, the Army may still have an interest. These may include: Cases where the Army may incur costs as a result of the litigation; cases where Army operations or policies are implicated; cases which could impact Army property or water rights; disclosure of information harmful to national security or otherwise protected from disclosure; litigation involving Army contractors or manufacturers of Army equipment and property; incidents arising from Department of Defense or Army activities; litigation involving the personal injury of Army personnel or family members, or the personal injury of third parties by Army personnel; the foreign or civilian criminal prosecution of Army personnel, family members, contractors, or manufacturers of Army equipment or property; or civil or family law litigation which may overlap or relate to the foreign or civilian criminal prosecution of Army personnel or family members. If an SJA or legal advisor cannot clearly determine whether Army interests are implicated in a particular case, consult with the appropriate litigating division.

(4) *DA Personnel.* DA Personnel includes the following:

(i) Present, former and retired Army military personnel, including the U.S. Army Reserve, regardless of current status.

(ii) Present, former and retired civilian employees of the U.S. Army, regardless of current status.

(iii) Soldiers of the Army National Guard of the United States (title 10 U.S.C.) and, when specified by statute or where a Federal interest is involved, Soldiers in the Army National Guard (title 32, U.S.C.). It also includes technicians under 32 U.S.C. 709.

(iv) USMA cadets.

(v) Nonappropriated fund employees.

(vi) Foreign nationals who perform services for DA overseas.

(vii) Other individuals hired by or for the Army, including individuals hired through contractual agreements by or on behalf of the Army.

(5) Demand. Subpoena, order, or other demand of a court of competent jurisdiction, or other specific authority, to produce, disclose, or release official Army information (or other official federal agency information subject to release under this chapter) or which require that DA Personnel testify or appear as witnesses.

§ 516.2 Release authority.

(a) *Release Authorities for Official Information.* The following personnel are the release authorities for official Army information in the following litigation situations (See figure 1):

(1) United States is a party or has an interest. The appropriate litigating division is the release authority for all official, unclassified Army information in cases in which the United States is a party or has a direct interest; they also make all such release decisions for cases in which the information could be used in a claim or litigation against the United States. If uncertainty exists as to whether a given situation constitutes private litigation, forward the request to the appropriate litigating division (See § 516.1(d)).

(2) Non-classified information where the United States has no interest. SJAs and legal advisors are the release authorities for official, unclassified factual information held by their respective commands or organizations in cases of private litigation.

(3) Classified information. Litigation Division is the release authority for official information or appearance of DA personnel as witnesses in litigation involving terrorism, espionage, nuclear weapons, intelligence sources and methods, or involving records otherwise privileged from release, including classified information. Refer any requests involving such information to the General Litigation Branch, Litigation Division.

(4) Medical treatment records. Army Medical Center or Command Judge Advocates or supporting SJAs are the release authorities for official, unclassified factual information in private litigation which involves the release of medical and other records and information within the custody, control or knowledge of the Center or Command Judge Advocates' or supporting SJAs'permanent station hospital and its personnel. Medical records may only be released in compliance with the Health Insurance Portability and Accountability Act (HIPAA) regulations published at 45 CFR parts 160, 162, and 164. Upon court order or subpoena, if appropriate under §§ 516.3–4 (Release Determination and Requestor Responsibilities), and if compliant under the HIPAA regulations, Center or Command Judge Advocates, SJAs and legal advisors may furnish to the attorney for the injured party or the tortfeasor's attorney or insurance company a copy of the narrative summary of medical care that relates to a claim initiated by the United States for recovery of costs for medical care or property claims, pursuant to the Federal Medical Care Recovery Act (42 U.S.C. 2651), the Federal Claims Collection Act (31 U.S.C. 3711), the Third Party Collection Program (10 U.S.C. 1095), or Executive Order No. 12988, Civil Justice Reform. If additional medical records are requested by subpoena or court order, only those that are relevant and necessary to the litigation or pending action will be furnished. If furnishing copies of medical records would prejudice the cause of action, the matter will be reported to Litigation Division.

(5) Substance abuse treatment records. Subpoenas for alcohol abuse or drug abuse treatment records must be processed under 42 U.S.C. 290dd–3 and 290ee–3, and Public Health Service regulations published at 42 CFR 2.1–2.67.

(6) Armed Services Board of Contract Appeals cases. Contracting officers, in consultation with the appropriate servicing SJA, are authorized to release official information to be used in litigation before the Armed Services Board of Contract Appeals, per the Federal Acquisition Regulation (FAR), subpart 5.4., and applicable DOD directives and Army instructions.

Responses to such requests must be coordinated with the assigned trial attorney at the USALSA Contract and Fiscal Law Division.

(b) *Approval Authorities for Witness Testimony.* The following personnel are the approval authorities for witness testimony by former, retired and current Army personnel in the following litigation situations:

(1) Cases where the United States has an interest. The appropriate litigating division, as identified in § 516.1, is the approval authority for personnel who may appear and testify as witnesses in contemplated or pending litigation where the United States is a party or has an interest.

(2) Classified, sensitive, or privileged information. Litigation Division is the approval authority for the appearance of DA personnel as witnesses in litigation involving terrorism, espionage, nuclear weapons, intelligence sources and methods, or involving records otherwise privileged from release, including classified information. (See § 516.1(b)). Refer any requests involving such information to the General Litigation Branch, Litigation Division.

(3) Non-classified Information where the United States has no interest. SJAs, Chief Counsel, or their equivalent, are the approval authorities for individuals within their organizations or commands who may appear for witness testimony, depositions, or interviews or make declarations on factual matters within their personal knowledge when it involves private litigation where the United States has no interest.

(4) Medical Information. Commanders of Medical Commands, in consultation with their legal advisors, are the approval authorities for medical providers and other hospital personnel assigned to their command. This includes witness testimony, depositions, interviews or declarations on factual matters within their personal knowledge when it involves private litigation where the United States has no interest.

(5) Expert testimony. Litigation Division is the approval authority for expert testimony. (See § 516.10).

(6) Former and Retired DA Personnel. The appropriate litigating division is the approval authority for witness testimony relating to official information. (See § 516.2).

(c) *Referral to the Appropriate Litigating Division.* When the local Release Authority does not have the authority to resolve the matter, it will be referred to the appropriate litigating division. (See § 516.1a.).

(1) *Nature of the Request.* (i) Refer affirmative litigation initiated by the United States for recovery of costs for medical care or property claims (*e.g.,* medical care recovery or Army property damage or loss cases) to the Tort Litigation Branch, Litigation Division.

(ii) Refer matters concerning patents, copyrights, trade secrets, or trademarks to the Regulatory Law and Intellectual Property Division.

(iii) Refer taxation matters to the Contract and Fiscal Law Division.

(iv) Refer matters concerning communication, transportation, or utility service proceedings to the Regulatory Law and Intellectual Property Division.

(v) Refer environmental matters, to include water rights and affirmative environmental cost recovery to the Environmental Law Division.

(vi) Refer matters arising from the navigation, civil works, Clean Water Act 404 permit authority, environmental response activities, and real property functions of the U.S. Army Corps of Engineers (USACE) Office of Chief Counsel.

(vii) Refer all bid protests, and contract appeals cases before the ASBCA and GAO to the Contract and Fiscal Law Division.

(viii) Refer procurement fraud matters, including *qui tam* cases, to the Procurement Fraud Division, OTJAG.

(ix) Refer all other matters to the General Litigation Branch, Litigation Division.

(2) Information to Submit with Referrals. Provide the following data when referring matters pursuant to § 516.2(c):

(i) Copy of the request for official information and all available relevant pleadings (*e.g.,* complaint, motions, court rulings).

(ii) Parties (named or prospective) to the proceeding, their attorneys, and case number.

(iii) Party making the request (if a subpoena, indicate moving party) and his or her attorney.

(iv) Name of tribunal in which the proceeding is pending.

(v) Nature of the proceeding.

(vi) Date of receipt of request or date and place of service of subpoena.

(vii) Name, grade, position, and organization of person receiving request or served with subpoena.

(viii) Date, time, and place designated in request or subpoena for production of information or appearance of witness.

(xi) Nature of information sought or document requested, and place where document is maintained.

(x) A copy of each document requested. Contact the appropriate litigating division if this would be burdensome and unnecessary to a decision whether to release, redact, or withhold a particular document.

(xi) Name of requested witness, expected testimony, requested appearance time and date, and whether witness is reasonably available.

(xii) Analysis of the request with recommendations.

FIGURE 1

RELEASE AUTHORITIES FOR OFFICIAL ARMY INFORMATION IN PRIVATE LITIGATION

United States and Army are NOT a party and have NO interest in the litigation

Local SJA/Legal Advisor	• Unclassified/Non-medicalDocuments • Unclassified/Non-medical testimony by current DA personnel
Commanders of Medical Commands	• Official, unclassified factual information which involves the release of medical and other records and information within the custody and control of their station hospital and its personnel
U.S. Army Litigation Division	• Testimony or documents that are classified, sensitive, privileged, or related to terrorism, espionage, nuclear weapons, and intelligence sources and methods • All expert testimony • All fact testimony by former/retired DA personnel

United States and Army are NOT a party BUT DO HAVE an interest in the litigation

Appropriate USALSA Litigating Division	• Unclassified/Non-medical Documents • Unclassified/Non-medical Testimony by current DA personnel • Non-expert testimony by current DA personnel
U.S. Army Litigation Division	• All expert testimony • All fact testimony by former/retired DA personnel • Testimony or documents that are classified, sensitive, privileged, or related to terrorism, espionage, nuclear weapons, and intelligence sources and methods

§ 516.3 Release determination.

(a) Release authorities must ensure requestors state in writing the nature and relevance of the official information they want and include the documentation required by § 516.4. The appropriate release authority should evaluate the request in light of 32 CFR part 97 and *United States, ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951) and other relevant case law. Release authorities must consider the following factors when determining whether to approve or deny a request for official information:

(1) Whether the request is unduly burdensome, inappropriate under the applicable court rules or otherwise irrelevant. Considerations include the size and scope of the request; amount of preparation and transportation time for the witness; mission impact of requiring the witness to be pulled away from current duties to participate; mission impact of requiring responding office personnel to be pulled away from their current assignments to respond to document search, review and production requests; and the potential cumulative burden upon the agency in granting similar requests.

(2) Whether the disclosure is inappropriate under the rules of procedure governing the matter in which the request arose.

(3) Whether the disclosure violates a statute, executive order, regulation, or directive.

(4) Whether the disclosure (including release *in camera*) is inappropriate under the relevant substantive law concerning privilege.

(5) Whether the disclosure reveals information properly classified pursuant to the DOD Information Security Program under AR 380–5, unclassified technical data withheld from public release pursuant to 32 CFR 250 and DOD Directive 5230.25 or other sensitive or privileged information exempt from disclosure.

(6) Whether the disclosure would interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, disclose trade secrets or confidential, commercial, or financial information, or would otherwise be inappropriate under the circumstances.

(7) Whether disclosure violates any person's expectation of confidentiality or privacy.

(8) Whether any other factor or consideration relevant to the circumstances warrants approving or denying the request.

§ 516.4 Requestor responsibilities.

(a) Individuals seeking official information must submit, at least 14 days before the desired date of production, a detailed written request setting forth the nature and relevance to the litigation or proceeding of the official information sought. Requests for official information involving an employee's appearance and/or production of documents must comply with 32 CFR part 97 and this part. At a minimum, requests must include:

(1) Copy of the complaint or criminal charges and relevant pleadings;

(2) Date of the requested appearance or production;

(3) Party for whom the request is made;

(4) Reason why official information sought is relevant and necessary to requestor and litigation;

(5) For witness requests, name, grade, position, and organization of the witness if known, and substance of the expected testimony. Requestors should not contact potential witnesses without first coordinating with the witness' SJA or legal advisor, or the appropriate litigating division.

(b) Requests from DOJ for DA personnel as witnesses need not follow the requirements above. See § 516.6 for the witness request procedures for DOJ.

§ 516.5 Classified, Privacy Act Protected, Sensitive or Privileged Information.

(a) *Classified information.* Only Litigation Division may authorize the release of information or appearance of DA personnel as witnesses in litigation involving classified matters. Refer any requests involving such information to the General Litigation Branch, Litigation Division.

(b) *Information Protected by the Privacy Act.*

(1) Privacy Act (5 U.S.C. 552a) records include any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

(2) A demand (see definition in *§ 516.1)* signed by an attorney or clerk of court for records protected by the Privacy Act, 5 U.S.C. 552a, does not justify the release of the protected records. This includes a subpoena issued on behalf of a Federal or State Grand Jury. The release authority should explain to the requestor that the Privacy Act precludes disclosure of records in a system of records without the written consent of the subject of the records or ''pursuant to the order of a court of competent jurisdiction'' (See fig 7–2 and fig 7–3 Sample *Touhy* Compliance response).

(3) In connection with discovery in federal or state litigation, Privacy Act records will only be released with consent of the individual or under a court order specifically signed by a judge or magistrate of a court of competent jurisdiction. (*See* 5 U.S.C. 552a(b)(11); *Doe* v. *DiGenova,* 779 F.2d 74 (DC Cir 1985); *Bosaw* v. *NTEU,* 887 F. Supp. 1199 (S.D. Ind. 1995); and *Boron Oil Co.* v. *Downie,* 873 F. 2d 67 (4th Cir. 1989).) More specifically, unclassified Privacy Act records otherwise protected from release, may be released under the following conditions:

(i) Release by Court Order. The court order must state that the court finds that the law authorizes release of the records and the records should be released. If the order or subpoena does not contain these findings the release authority may release the records to a clerk of the court empowered by local statute or practice to receive the records under seal subject to the release authority's request that the clerk of court withhold the records from the parties until the court issues an order determining that the records should be released.

(ii) Release to the Requestor. Privacy Act records may be released to the requestor if a valid Privacy Act consent waiver from the individual to whom the record(s) pertain is submitted with the request. Otherwise, Privacy Act records should only be released pursuant to court order as set forth in (i) above.

(c) *Inspector General (IG) records or testimony.* IG records, and information obtained through performance of IG duties, are official information under the exclusive control of the Secretary of the Army. (see AR 20–1, Chapter 3.) IG records frequently contain sensitive official information that may be classified or obtained under guarantees of confidentiality. Army personnel will not release IG records or disclose information obtained through performance of IG duties without the approval of the Secretary of the Army, The Inspector General (TIG), TIG Legal Advisor, or the Chief, Litigation Division.

(d) *Safety records, information, and witnesses.* Safety records and information produced by commands, installation safety offices, and the U.S. Army Combat Readiness Command and Safety Center (USACRC) (and other DOD Service Components) may contain ''privileged safety information.'' See

DOD Instruction 6055.07 and AR 385–10.

(1) Litigation Division and the USACRC Command Judge Advocate will consult with the appropriate United States Attorney's Office regarding assertion of appropriate privileges. To assess the appropriate privilege, safety reports and records will be provided to Litigation Division in complete unredacted form along with a separate copy reflecting identification of all privileged portions.

(2) When requested, contact information for safety personnel witnesses and technical experts will be provided to Litigation Division. As needed, Litigation Division will provide safety records, information, and witness contact information to the U.S. Attorney's Office for evaluation.

(3) Providing safety records, information, and access to safety personnel to Litigation Division or the U.S. Attorney's Office is not considered a ''release,'' under DOD safety regulations.

(4) All parties handling privileged safety information are obligated to observe confidentiality, protected safety-use requirements, and all other privileges against public disclosure. Privileged safety reports, records, information, or testimony will not be used in litigation without appropriate disclosure safeguards, such as a protective order, agreement, or order to seal.

(e) *Technical Data.* Commands should refer requests for unclassified technical data with military or space application which should be withheld from public release pursuant to 32 CFR 250 and DOD Directive 5230.25, Withholding of Unclassified Technical Data from Public Disclosure, November 6, 1984 (including Change 1, August 18, 1995) to the General Litigation Branch, Litigation Division.

(f) *Other privileged information.* Unless otherwise specified, all questions and issues regarding privileged information will be referred for consultation to General Litigation Branch, Litigation Division.

BILLING CODE 5001–03–P

FIGURE 2 (Sample subpoena duces tecum Response)

DEPARTMENT OF THE ARMY
OFFICE OF THE STAFF JUDGE ADVOCATE
123 STANDARD STREET
FORT SMITH, NORTH DAKOTA 84165

January 2, 2017

Administrative Law Branch

Ms. Shelly Baltimore
Attorney At Law
300 H Street
Coldfront, ND 84167

Dear Ms. Baltimore:

We are in receipt of your subpoena *duces tecum* dated January 1, 2017, demanding the production of documents for use in the case of *Jones v. Jones*, currently filed in state court. **[*Include the subject matter of the subpoena or request.*]** Your request is denied because your subpoena does not meet the regulatory requirements discussed below.*

[If there are Privacy Act issues include the paragraph below]

Further, the requested documents contain information protected by the Privacy Act, 5 U.S.C. § 552a. To comply with the Privacy Act, you must provide either a written release authorization signed by the individual to whom the documents pertain or a court ordered release signed by a judge of a court of competent jurisdiction. A subpoena signed by a clerk of court, notary, or other official is insufficient. *See Doe v. DiGenova*, 779 F.2d 74 (D.C. Cir. 1985).

In order to obtain official information you must submit a request that complies with Department of Defense Directives found at *32 C.F.R. § 97* and Army Regulations found at *32 C.F.R. § 516.* We must receive your request at least 14 days before the desired date of production. The request must set forth the nature of the proceeding and the nature and relevance of the official information sought. We will act on your request once we receive the required information. *See United States ex rel. Touhy v. Ragen,* 340 U.S. 462 (1951); *Boron Oil Co. v. Downie,* 873 F.2d 67 (4th Cir. 1989); *United States v. Bizzard,* 674 F.2d 1382 (11th Cir. 1982); *United States v. Marino,* 658 F.2d 1120 (6th Cir. 1981); *United States v. Allen,* 554 F.2d 398 (10th Cir 1977).

[If the requestors indicate that they will file a motion to compel production without submitting a Touhy request or before the Army can respond to the Touhy request insert the following.]

** SJAs and legal advisors should keep in mind that the Army should never ignore subpoenas.*

Please be advised that should you seek to enforce this subpoena (without first submitting a Touhy request) this office may request that the Department of Justice inform the court or tribunal that you have not complied with the applicable law and regulations and seek to stay or quash the subpoena in federal court.

In accordance with the authorities set forth in 32 C.F.R. §516, you must confirm your willingness to pay reasonable fees and set the maximum fee that you are willing to pay for the time and resources necessary to process this request. A copy of the fee schedule can be found in 32 C.F.R. §204. Our response will include the actual cost. The fee is payable regardless of the decision or availability of the requested material or witness.**

If you have any questions, please call Captain Clayton at xxx-xxx-xxxx.

Sincerely,

(Signature)

Robert A. Black
Lieutenant Colonel, U.S. Army
Chief, Administrative Law

CF:
Litigation Division

*** Requestor should make checks payable to the U.S. Treasury. Upon receipt of the funds forward them to DFAS Vendor Pay Army-Indianapolis, Department 3400, 8899 East 56th Street, Indianapolis, IN 46249-3800.*

FIGURE 3 (Sample *Touhy* Compliance Response)

DEPARTMENT OF THE ARMY
OFFICE OF THE STAFF JUDGE ADVOCATE
123 STANDARD STREET
FORT SMITH, NORTH DAKOTA 84165

January 3, 2017

Administrative Law Branch

Ms. T. Hudson Taylor
Attorney At Law
300 H Street
Coldfront, ND 84167

Dear Ms. Taylor:

We are in receipt of your subpoena dated January 2, 2017, for Major Keme Wills to testify and produce documents at a deposition in the case of *Jones v. Jones*, currently filed in state court. **[*Include the subject matter of the subpoena or request.*]** Your request is denied because your subpoena **[*or request*]** does not meet the regulatory requirements discussed below.

The Army must authorize the appearance of its personnel or the production of official documents in private litigation. To obtain authorization, you must make a written request in accordance with applicable Department of Defense Directives found at *32 C.F.R. § 97* and Army Regulations found at *32 C.F.R. § 516*. The request must include the nature of the proceeding, and the nature and relevance of the official information sought. We will act on your request once we receive the required information. *See United States ex rel. Touhy v. Ragen,* 340 U.S. 462 (1951); *Boron Oil Co. v. Downie,* 873 F.2d 67 (4th Cir. 1989); *United States v. Bizzard,* 674 F.2d 1382 (11th Cir. 1982); *United States v. Marino,* 658 F.2d 1120 (6th Cir. 1981); *United States v. Allen,* 554 F.2d 398 (10th Cir 1977).

In accordance with the authorities set forth in 32 C.F.R. §516, you must confirm your willingness to pay reasonable fees and set the maximum fee which you are willing to pay for the time and resources necessary to process this request. A copy of the fee schedule can be found in 32 C.F.R. §204. Our response will include the actual cost. The fee is payable regardless of the decision or availability of the requested material or witness.*

[If there are Privacy Act issues include the paragraph below]

Further, the requested documents contain information protected by the Privacy Act, 5 U.S.C. § 552a. To comply with the Privacy Act, you must provide either a written release authorization signed by the individual to whom the documents pertain or a court order signed by a judge of a court of competent jurisdiction. A subpoena signed by a clerk of court, notary, or other official is insufficient. *See Doe v. DiGenova*, 779 F.2d 74 (D.C. Cir. 1985).

** Requestor should make checks payable to the U.S. Treasury. Upon receipt of the funds forward them to DFAS Vendor Pay Army-Indianapolis, Department 3400, 8899 East 56th Street, Indianapolis, IN 46249-3800.*

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[If there are attorney-client privilege issues include the paragraph below]

It appears that an attorney-client relationship exists between Major Wills and Staff Sergeant Jones. Major Wills may not divulge such information without Staff Sergeant Jones' consent. *See*, Army Regulation 27-26, Rule of Professional Conduct for Army Lawyers 1.6(a). This privilege protects both documents and testimony.

If you have any questions, please call Captain Clayton at xxx-xxx-xxxx.

Sincerely,

(***Signature)***

Robert A. Black
Lieutenant Colonel, U.S. Army
Chief, Administrative Law

CF:
Litigation Division

BILLING CODE 5001–03–C

§ 516.6 Releasing official information to the Department of Justice.

In routine cases where the Department of the Army is neither a party nor has an interest in the litigation, SJAs may release unclassified and unprivileged official information to DOJ or the U.S. Attorney's Office on request. In connection with any such release, DOJ or the U.S. Attorney's Office must be provided sufficient information to determine whether the requested information is classified, privileged or protected by the Privacy Act or other applicable confidentiality laws, to ensure for its proper handling. DOJ or U.S. Attorney requests for classified information will be coordinated through Litigation Division prior to action. Prior to pursuing declassification of official information, Litigation Division will coordinate with the requesting DOJ attorney to determine whether declassification of the information is appropriate or advisable under the circumstances.

§ 516.7 Complying with requests or demands for official information, subpoenas, and witness testimony.

(a) Request or demand for official information and witness testimony will be resolved by the SJA or legal advisor pursuant to this subpart. The appropriate litigating division will be

consulted on issues that cannot be resolved by the SJA or legal advisor or when multiple release authorities are involved.

(b) Local SJAs and command legal advisors will assist DA personnel within their commands and in their geographic area regarding compliance with subpoenas for official information and witness testimony. Such assistance should include providing advice and attending interviews, depositions, and trial testimony.

(c) Where an immediate response is required. A demand, including a subpoena or court order, should never be ignored. If a response to a subpoena or court order is required before a release determination can be made, the SJA or legal advisor will do the following:

(1) Attempt to resolve the issue through informal efforts. Inform the requestor that the demand is under review and, if applicable, that the requestor must provide additional information in accordance with this part in order for a release determination to be made. Seek additional time to respond to the demand and to have the requestor voluntarily withdraw the subpoena or stay the court order.

(2) If informal efforts to resolve the issue are unsuccessful or if time does not permit attempting informal efforts, contact the appropriate litigating division. When the appropriate litigating division is not available, contact the appropriate USAO directly. Request that the USAO seek to stay the subpoena or court order pending the requestor's compliance with this part.

(3) If efforts to stay the subpoena or court order are unsuccessful, seek to quash the subpoena or court order through coordination with the appropriate litigating division or USAO.

(4) If the USAO is challenging the subpoena or court order, the SJA or legal advisor will direct the affected personnel to respectfully decline to comply with the subpoena or court order pending resolution of the challenge.

(d) Subpoenas seeking protected or privileged information. When privilege, statute, or regulation prohibits releasing the subpoenaed information, the SJA or legal advisor should attempt to resolve the matter with the requestor, or, after consultation with the appropriate litigating division and with the assistance of the local U.S. Attorney's Office, appear through counsel and explain the matter to the court. To resolve the matter, SJAs or legal advisors should:

(1) Communicate with the counsel requesting the subpoena. (See sample letter at fig 7–3).

(2) Explain the restrictions on release.

(3) Provide any releasable information.

(4) Suggest withdrawing the subpoena.

(e) Coordination with the US Attorney concerning subpoenas for protected or privileged information. If informal efforts to resolve the situation are unsuccessful, the appropriate litigating division may ask the local U.S. Attorney's Office to file a motion to quash or a motion for a protective order or other appropriate legal recourse. The records privileged or otherwise protected from release should be retained by the custodian pending the court's ruling.

(f) Release of Information through Witness Testimony. If the approval authority determines that the official information may be released, DA personnel may be interviewed, deposed, or appear as a witness in court provided such interview or appearance is consistent with the requirements of this subpart. An Army attorney should ordinarily be present, as the legal representative of the Army, during any interview or testimony. If a question seeks information not previously authorized for release, the legal representative will advise the witness not to answer. If necessary to avoid release of the information, the legal representative will advise the witness to terminate the interview or deposition, or by the Assistant U.S. Attorney in the case of testimony in court, advise the judge that DOD directives and Army regulations preclude the witness from answering without approval from the appropriate litigating division. Every effort should be made, however, to substitute releasable information and to continue the interview or testimony.

(1) If the absence of a witness from duty will interfere seriously with the accomplishment of a military mission, the SJA or legal advisor will advise the requesting party and attempt to make alternative arrangements. If these efforts fail, the SJA or legal advisor will consult on the matter with appropriate litigating division.

(2) When requested by the U.S. Attorney's Office, the SJA or legal advisor will ensure that no witnesses involved in litigation are reassigned from the judicial district without first advising the U.S. Attorney's Office. If this is not feasible, or if a satisfactory arrangement cannot be reached with the U.S. Attorney's Office, the SJA or legal advisor should notify the Litigation Division.

(g) Release of Records. If the Release Authority, after considering the factors set forth in § 516.3, determines that all or part of requested official records are releasable, copies of the records should be furnished to the requestor. In absence of a protective order issued by a court of competent jurisdiction, records protected by the Privacy Act should only be released to the court issuing the applicable subpoena or order, or pursuant to a signed Privacy Act Waiver from the individual to whom the records pertain. (See § 516.5(b))

(h) Authenticating Records. Records custodians should authenticate official Army documents for civil litigation through written certification, rather than personally appearing and testifying. DA personnel will submit authenticated copies rather than originals of documents or records for use in legal proceedings, unless directed otherwise by the appropriate litigating division (See 28 U.S.C. 1733.) The DA Form 4, Department of the Army Certification for Authentication of Records is used to authenticate Army records or documents. (See Figure 5). Documents attached to a properly prepared and sealed DA Form 4 are self-authenticating. (See Fed. R. Evid. 902). A DA Form 4 need not be prepared until the trial attorney presenting the Government's case identifies documents maintained at the installation level that he or she will need at trial. Once documents are identified, the custodian of the documents will execute his or her portion of the DA Form 4. The custodian certifies that the documents attached to the DA Form 4 are true copies of official documents. Documents attached to each form should be identified generally; each document need not be mentioned specifically. Only the upper portion of the form should be executed at the local level. Upon receipt of the DA Form 4 with documents attached thereto, HQDA will affix a ribbon and seal and deliver it to The Office of The Administrative Assistant to The Secretary of the Army or the Chief, Litigation Division. Either The Office of The Administrative Assistant to The Secretary of the Army or the Chief, Litigation Division will place the official Army seal on the packet. Use the simplest authentication procedure permissible, including any suitable alternative suggested by the court.

(i) SJAs or legal advisors should promptly report any subpoenas from foreign courts requiring records, files, or documents to Litigation Division, and comply with the guidance in § 516.7.

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FIGURE 4 (Sample deposition witness approval response)

DEPARTMENT OF THE ARMY
OFFICE OF THE STAFF JUDGE ADVOCATE
123 STANDARD STREET
FORT SMITH, NORTH DAKOTA 84165

January 4, 2017

SUBJECT: Request for depositions of John Smith and Jane Jackson, in the case of *Plaintiff v. Defendant*, Civil Action File No.: XXX, Superior Court of Fulton County, Georgia

O. Wendell Holmes, Jr.
Hughes, Van Devanter, & Assoc.
1 First St. NE
Washington, DC 20543

Dear Mr. Holmes:

This letter responds to your letter of January 3, 2017, requesting the deposition testimony of John Smith and Jane Jackson in the above-referenced case. Subject to the following conditions, your request to depose these individuals is approved. Pursuant to 32 C.F.R. § 516, these individuals may provide official information during a deposition. Based on your request, they may release official information regarding their personal knowledge in the following general areas, subject to the caveats that follow:

Caveats and Reservations: The Deponents may only provide factual information related to their involvement in the events that gave rise to the present litigation. They may not be qualified as expert witnesses or be asked for personal opinions relating to official information. *See* 32 C.F.R. § 516. Deponents are prohibited from offering testimony that falls into the following general, non-exhaustive, areas:

a. Any information that is classified, privileged, or otherwise protected from public disclosure. 32 C.F.R. § 516.

b. Any information the disclosure of which would violate the Privacy Act, absent a written release authorization signed by the individual to whom the information pertains or a court ordered release signed by a judge of a court of competent jurisdiction. 5 USC § 552a.

c. Any information the disclosure of which would interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, disclose trade secrets or similarly confidential commercial or financial information, or otherwise be inappropriate under the circumstances. 32 C.F.R. § 516. *See, e.g., Am. Mgmt. Servs., LLC v. Dep't of*

the Army, 703 F.3d 724, 729 (4th Cir. 2013) *cert. denied*, 12-1233, 2013 WL 1499158 (U.S. Oct. 7, 2013).

d. Information that is protected by the deliberative process privilege; that relates to the process by which policies are formulated; and/or is or was at the time predecisional in nature. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (stating that "[t]he cases uniformly rest the [deliberative process] privilege on the policy of protecting the 'decision making processes of government agencies'" (quoting *Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657, 660 (6th Cir. 1972))); *Dudman Communications Corp. v. Department of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

The following conditions apply to this authorization. First, an Army-designated attorney must be present during the deposition. 32 C.F.R. § 516. Second, the witnesses' participation must be at no expense to the United States. 32 C.F.R. § 516. Third, the Army must be provided a copy of the deposition transcript at no expense to the United States. 32 C.F.R. § 516. Finally, this approval is limited to the requested deposition and subject areas and does not extend to any other forum or format. If the testimony of any of the individuals is later requested for trial, a new *Touhy* request must be submitted.

Our sole concern in this matter is to protect the interests of the United States Army. The Army will not block access to witnesses or documents to which you are lawfully entitled. We look forward to working with you to find mutually acceptable dates for the testimony of the individuals. If you should have any questions, please feel free to contact me at (xxx) xxx-xxx or xxx.mil@mail.mil.

Sincerely,

(Signature)

W.J. Brennan Jr.
Major, U.S. Army
Administrative Law Attorney

FIGURE 5 (Sample DA Form 4)

United States of America

DEPARTMENT OF THE ARMY

Washington, DC — PLACE
1 July 2012 — DATE

I HEREBY CERTIFY that
the attached constitute true and accurate copies of files pertaining to John Doe, a former member of the United States Army. Copies of the Official Military Personnel File (OMPF) are maintained by the U.S. Army Human Resources Command, Fort Knox, Kentucky; copies of documents from the Army Board for Correction of Military Records are maintained in Arlington, Virginia. The original personnel records and copies of other records are in the official temporary custody of the Military Personnel Litigation Branch, Litigation Division, Office of The Judge Advocate General of the Army.

JANE E. DOE
Lieutenant Colonel, U.S. Army
Chief, Military Personnel Litigation Branch

I HEREBY CERTIFY that Lieutenant Colonel Jane E. Doe, who signed the foregoing certificate, is the Chief of the Military Personnel Branch, Litigation Division, Office of The Judge Advocate General of the Army, and that full faith and credit should be given to his certification.

IN TESTIMONY WHEREOF I, John H. Smith,
The Administrative Assistant to the Secretary of the Army,
have hereunto caused the seal of the Department of the
Army to be affixed this 1st day of
July, 2012

By DIGITAL SIGNATURE 123456789
Administrative Assistant

DA FORM 4, FEB 1998 EDITION OF 1 MAR 66 IS OBSOLETE APD PE v1.10

SAMPLE

BILLING CODE 5001–03–C

§ 516.8 Testimony in private civil litigation.

(a) *Capacity.* Funding and duty status are determined by the capacity in which the personnel testifies and whether the individual is a Soldier or a civilian employee.

(1) *Official capacity.* DA personnel testify in their official capacity when:

(i) They testify regarding their official duties or produce official records on behalf of the U.S.; or

(ii) They testify on matters that relate to their official duties or produce official records on behalf of a party other than the U.S.

(iii) They produce official records on behalf of a party other than the government.

(b) *Unofficial capacity.* DA personnel testify in an unofficial capacity when they testify on behalf of the U.S. or another party on a matter unrelated to their official duties.

(c) *Funding Availability.* 28 U.S.C. 1821, the Joint Ethics Regulation (JER), the Joint Travel Regulations (JTR), 28 CFR part 21, and Army regulations govern travel allowances for DA personnel appearing as witnesses in litigation. The general guidelines for funding witness travel are:

(1) DA personnel are entitled to government funded travel expenses when testifying in an official capacity on behalf of the U.S.

(2) DA personnel are entitled to government funded travel expenses when testifying in an unofficial capacity on behalf of the U.S.

(3) DA uniformed personnel are entitled to government funded travel expenses when testifying in an official capacity for non-federal government agencies when:

(i) The case is directly related to an agency or agency employee, and

(ii) The case is one in which the agency has a particularly strong, compelling and genuine interest.

(4) DA personnel are not entitled to government funded travel expenses when testifying in an official or unofficial capacity on behalf of a party other than the U.S.

(5) See the JTR for exceptions to these general guidelines and for current guidance regarding funding responsibilities for witness travel.

§ 516.9 Department of Justice witness request in litigation involving the United States.

(a) Department of Justice request for DA personnel as witnesses must be coordinated through the General Litigation Branch, Litigation Division. DA personnel receiving a subpoena or witness request from DOJ should contact the General Litigation Branch for assistance.

(b) Cases in which the Army is a party to the litigation. When DOJ requests current DA personnel to appear as witnesses and in cases involving an activity connected to their employment, the travel expenses are payable by the employing command or activity. (See 28 CFR 21.2).

(1) DOJ initiates a witness request by sending a subpoena and a Request for Personnel to Testify as Government Witness form to the General Litigation Branch. The notice should include the witness' name, social security number, residence or duty station address, phone number, email address or fax number, the location, hour and date of appearance, and number of days needed. DOJ should also include the purpose of the testimony.

(2) The General Litigation Branch will notify the witness and the SJA or legal advisor at the employing command or activity and provide them with travel instructions. If the case does not involve the employee's command or activity, the command or activity represented in the litigation will fund the travel expenses, issue a travel authorization/order for the required travel, and provide the necessary line of accounting. (28 CFR 21.2(d)(1) (JTR C4975–C4H–2)).

(c) Cases in which the Army is not a party to the litigation. When DOJ requests current DA personnel to appear as a witness on behalf of the U.S. in an unofficial capacity, the employee's travel expenses are payable by DOJ. The General Litigation Branch will coordinate with the witness and the witness' command or activity to provide travel instructions and DOJ's line of accounting.

(1) DOJ initiates a witness request by sending a subpoena and a Request for Personnel to Testify as Government Witness form to the General Litigation Branch. The notice should include the witnesses' name, social security number, residence or duty station address, phone number, email address or fax number, the location, hour and date of appearance, and number of days needed. The requestor should also include the purpose of the testimony.

(2) The General Litigation Branch will notify the witness and the SJA or legal advisor at the employing command or activity and provide them with travel instructions and a DOJ line of accounting. The witnesses' command prepares travel orders. Upon completion of the travel the witness will seek reimbursement from DOJ.

§ 516.10 Expert or opinion testimony by DA personnel.

(a) *General rule.* Former and current DA personnel will not provide, with or without compensation, opinion or expert testimony either in private litigation or in litigation in which the United States has an interest for a party other than the United States. (See fig 7–6, Sample Expert Witness Denial Letter.) An SJA or legal advisor must coordinate all requests for expert testimony with the appropriate litigating division. The Chief, Litigation Division is the approval authority for all expert testimony requests.

(b) *Exception to the general prohibition.* If a requestor can show exceptional need or unique circumstances, and the anticipated testimony will not be adverse to the interests of the United States, the Chief, Litigation Division, or designee, may grant special written authorization for current or former DA personnel to testify as expert or opinion witnesses at no expense to the United States. In no event may current or former DA personnel furnish expert or opinion testimony for a party whose interests are adverse to the interests of the United States in a case in which the United States has an interest.

(c) *AMEDD personnel.* Members of the Army medical department or other qualified specialists may testify in private litigation (see fig 7–7, Sample of Doctor Approval Letter) under the following conditions:

(1) The litigation involves patients they have treated, investigations they have made, laboratory tests they have conducted, or other actions they have taken in the regular course of their duties; and

(2) Written authorization is obtained under § 516.1(b). AMEDD personnel must limit their testimony to factual matters such as: Their observations of the patient or other operative facts; the treatment prescribed or corrective action taken; course of recovery or steps required for repair of damage suffered; and, contemplated future treatment; and

(3) Their testimony may not extend to expert or opinion testimony, to hypothetical questions, or to a prognosis not formed at the time of examination or treatment.

(d) *Court-ordered expert or opinion testimony.* If a court or other appropriate authority orders expert or opinion testimony, the witness will notify the appropriate litigating division immediately. If the appropriate litigating division determines it will not challenge the subpoena or order, the witness will comply with the subpoena or order. The appropriate litigating

division, through the local United States Attorney's Office, will immediately communicate with the court on the matter (See *United States ex. rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951)).

(e) *Expert witness fees.* Provisions of the Joint Ethics Regulation and Federal law may limit the ability of DA personnel to retain expert or opinion witness fees. As a general rule, all such fees tendered to DA personnel, to the extent they exceed actual witness travel, meals, and lodging expenses, will be remitted to the Treasurer of the United States.

(f) *Requests from DOJ.* Requests for present or former DA personnel as expert or opinion witnesses from DOJ or other attorneys representing the United States will be referred to Litigation Division unless the request involves a matter that has been delegated by the Litigation Division to an SJA or legal advisor. Current and former DA personnel may not furnish expert or opinion testimony for a party whose interests are adverse to the interests of the United States in a case in which the United States has an interest.

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FIGURE 6 (Sample expert witness response)

DEPARTMENT OF THE ARMY
OFFICE OF THE STAFF JUDGE ADVOCATE
123 STANDARD STREET
FORT SMITH, NORTH DAKOTA 84165

January 6, 2017

SUBJECT: Request for Expert Witness Major Shelly Gibson, in the case of *Plaintiff v. Defendant*, Civil Action File No.: XXX, Superior Court of Fulton County, Georgia

Ms. Sandy McAllister, Esquire
1400 U Blvd.
Fort Washington, MD 20744

Dear Ms. McAllister:

This letter responds to your request dated January 5, 2017, for Major Shelly Gibson to appear as an expert witness in the case of Plaintiff v. Defendant. Your request is denied for the reasons below.

Army Regulations prohibit Army personnel from providing opinion or expert testimony in private litigation, with or without compensation, except when there is an exceptional need or unique circumstance. See 32 C.F.R. § 516. Your request did not meet these requirements.

It is Army policy to exercise strict control over expert witness appearances. The Army observes a policy of strict neutrality in litigation in which the Army is not a party or in which the Army does not have an interest. When a witness with an official connection with the Army testifies, a natural tendency exists to assume that the testimony represents the official view of the Army, despite express disclaimers to the contrary. Further, the Army seeks to prevent the unnecessary loss of the services of its personnel in connection with matters unrelated to their official responsibilities.

If Army personnel testify as expert witnesses in private litigation, their official duties are invariably disrupted, often at the expense of the Army's mission and the federal taxpayer. Finally, the Army must guard against the potential for conflicts of interest inherent in the unrestricted appearance of its personnel as expert witnesses on behalf of parties other than the United States. Even the appearance of such conflicts of interest seriously undermines the public trust and confidence in the integrity of our Government.

This case does not present the facts necessary to justify the requested expert's testimony.* You have not demonstrated an exceptional need or unique circumstance that warrants her appearance. The desired expert testimony can be secured from

** The SJA or legal advisor may deny requests for expert witness testimony; however, only the Chief, Litigation Division may approve requests for expert testimony.*

non-Army sources. Consequently, we are unable to grant an exception to the Army's policy.

Our sole concern in this matter is to protect the interests of the United States Army. If you should have any questions, please feel free to contact me at (xxx) xxx-xxx or xxx.mil@mail.mil.

Sincerely,

(***Signature)***

Robert A. Black
Colonel, U.S. Army
Staff Judge Advocate

FIGURE 7 (Sample doctor approval response)

DEPARTMENT OF THE ARMY
OFFICE OF THE STAFF JUDGE ADVOCATE
123 STANDARD STREET
FORT SMITH, NORTH DAKOTA 84165

January 7, 2017

SUBJECT: Request for Medical Personnel Witness Dr. (Major) John Rhule, in the case of *Plaintiff v. Defendant*, Civil Action File No.: XXX, Superior Court of Fulton County, Georgia

Ms. Janet Smith, Esquire
901 N Street
Roaming, WV 92121

Dear Ms. Smith:

This letter responds to your request, dated January 6, 2017, to depose Dr. (Major) John Rhule from the Fort Smith Medical Treatment Facility in the case of Plaintiff v. Defendant. Pursuant to 32 C.F.R. § 516, you may depose him subject to the conditions discussed below.*

He may testify about his treatment of his patient, Sergeant Ian Rock, and laboratory tests ordered or other actions he took in the regular course of his duties. He may testify about factual matters such as his observations of the patient, the treatment prescribed, the corrective actions taken, the recommended courses of recovery, the steps required for treatment of injuries suffered, or the contemplated future treatment.

He may not testify as an expert or provide opinion testimony. His testimony may not extend to hypothetical questions or to a prognosis. Department of Defense and Army policy prohibits present or former Army personnel from providing opinion or expert testimony concerning official information, subjects, or activities in private litigation. Furthermore, Dr. Rhule cannot provide official information that is classified, privileged, or otherwise protected from public disclosure. Finally, in order to protect the Army's interests, an Army attorney must be present for the deposition.

The decision to participate is within the witness' discretion, subject to supervisory approval. The witness' participation must be at no expense to the United States. See 32 C.F.R. § 516.

This authorization only extends to the deposition of Dr. Rhule. A subsequent request and approval is required for Dr. Rhule to appear at trial and provide testimony.

** The legal advisor may use this format to approve a request for trial testimony. Ensure that the request for trial testimony complies with the Army's requirements for release of official information in connection with litigation.*

- 2 -

Our sole concern in this matter is to protect the interests of the United States Army. If you should have any questions, please feel free to contact me at (xxx) xxx-xxx or xxx.mil@mail.mil.

Sincerely,

(***Signature)***

Stephanie J. Dee
Lieutenant Colonel, U.S. Army
Command Judge Advocate

BILLING CODE 5001–03–C

§ 516.11 Witnesses before foreign tribunals.

(a) *Referral to the SJA.* Requests or subpoenas from a foreign government or tribunal for present DA personnel stationed or employed within that country to be interviewed or to appear as witnesses will be forwarded to the SJA of the command exercising general court-martial jurisdiction over the unit to which the individual is assigned, attached, or employed. The SJA will determine the following:

(1) Whether a consideration listed in §§ 516.3 (a)(1)–(7) above applies.

(2) Whether the information requested is releasable under the principles established in this subpart.

(3) Whether the approval of the American Embassy should be obtained because the person is attached to the Embassy staff or a question of diplomatic immunity may be involved.

(4) Whether coordination with OTJAG International Law office is necessary to respond to the request.

(b) *United States has an interest in the litigation.* If the SJA determines that the United States has an interest in the litigation, the commander may authorize the interview or order the individual's attendance in a temporary duty status. The United States will be deemed to have an interest in the litigation if it is bound by treaty or other international agreement to ensure the attendance of such personnel.

(c) *United States has no interest in the litigation.* If the SJA determines that the United States does not have an interest in the litigation, the commander may authorize the interview or the appearance of the witness under the principles established in § 516.8.

(d) *Witnesses located outside the requestor's country.* If the requested witness is stationed in a country other than the requestor's, the matter will be referred to the General Litigation Branch, Litigation Division.

§ 516.12 Fees and expenses.

(a) *Fees and charges.* DA personnel who respond to requests for official information may collect fees from the requestor for the direct costs of the search, duplication, and review of responsive information pursuant to the authority granted in 31 U.S.C. 9701 and according to the fee schedule and processing guidance outlined in DOD Instruction 7000.14, *DOD Financial Management Policy and Procedures,* Volume 11, Chapter 4 of DOD 7000.14–R, Financial Management Regulation, OMB Circular A–25 ''User Charges'', and 32 CFR 204 ''User Fees.''

(b) *Fee estimate.* When a requestor is assessed fees for processing a request, the responding office must provide an estimate of assessable fees if requested.

(c) *Requestor.* Requestors should indicate a willingness to pay fees associated with the processing of their request before the responding office begins processing the request for official information. No work on a request for official information should begin if: A requestor is unwilling to pay fees associated with a request; the requestor is past due in the payment of fees from a previous request for official information; or the requestor disagrees with the fee estimate. If fees are assessed, responding offices should receive payment before releasing the documents.

(d) *Computation of fees.* The Schedule of Fees and Rates in 32 CFR 204.9 will be used to compute the direct costs of the search, review, and duplication associated with processing a given request for official information. Fees should reflect direct costs (*i.e.,* expenditures actually incurred) for search, review, and duplication of responsive documents. DA Personnel will ensure that no fee is assessed for the benefits listed in 32 CFR 204.8 or where otherwise prohibited.

(e) *Search.* The term ''search'' includes all time spent looking, both manually and electronically, for material that is responsive to a request. Search also includes a page-by-page or line-by-line identification (if necessary) of material in the record to determine if it, or portions *thereof* are responsive to the request. Responding offices should ensure that searches are done in the most efficient and least expensive manner so as to minimize costs for both the responding office and the requestor.

(f) *Review.* The term ''review'' refers to the process of examining documents located in response to a request for official information to determine whether release is appropriate under this subpart. It also includes processing the documents for disclosure, such as redaction prior to release. Review does not include the time spent resolving general legal or policy issues regarding the release determination.

(g) *Duplication.* The term ''duplication'' refers to the process of making a copy of a document in response to a request for official information. For duplication of electronic information for delivery in an electronic format, the actual cost, including the operator's time, will be charged, but not a ''per page'' charge unless hardcopy documents were duplicated and handled in order to reduce them to an electronic format for delivery.

(h) *Release of records of other agencies.* An individual requesting records originating in agencies outside DA (*e.g.,* FBI reports, local police reports, civilian hospital records) that are also included in Army records should be advised to direct his or her inquiry to the originating agency. Nevertheless, referring requesters to other agencies does not absolve DA personnel of the requirements to respond to court orders or subpoenas.

§ 516.13 News media and other inquiries.

News media inquiries regarding litigation or potential litigation will be referred to the appropriate public affairs office. DA personnel will not comment on any matter currently or potentially in litigation without proper clearance. Local public affairs officers will refer press inquiries to HQDA (SAPA–OSR), WASHINGTON, DC 20310–1500, with appropriate recommendations for review and approval by the Office of the Chief of Public Affairs. All releases of information regarding actual or potential litigation will be coordinated with Litigation Division prior to release. Normally, DOJ is responsible for responding to media inquiries regarding cases in federal litigation.

For the Judge Advocate General.

Francis P. King,

Colonel, Judge Advocate, Executive Officer.

[FR Doc. 2016–29835 Filed 12–13–16; 8:45 am]

BILLING CODE 5001–03–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 334

East Pearl River, Within the Acoustic Buffer Area of the John C. Stennis Space Center, and Adjacent to Lands, in Hancock County, Mississippi; Danger Zone

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

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is proposing to revise the existing regulations for a danger zone at the Naval Special Warfare Center (NSWC) N31 Branch within the acoustic buffer of the John C. Stennis Space Center on the East Pearl River, in Hancock County, Mississippi. The Navy requested establishment of a danger zone on waterways and tributaries of the

East Pearl that are used by Naval Special Warfare units to conduct riverine training. The purpose of the proposed danger zone is to ensure public safety by restricting access within the danger zone during training events. This amendment to the existing regulation is necessary to minimizing potential conflicts between local populace activities and ongoing military training in the subject area.

DATES: Written comments must be submitted on or before January 13, 2017.

ADDRESSES: You may submit comments, identified by docket number COE–2016–0014, by any of the following methods:

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

Email: david.b.olson@usace.army.mil. Include the docket number, COE–2016–0014, in the subject line of the message.

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

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

Instructions: Direct your comments to docket number COE–2016–0014. All comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through regulations.gov or email. The *regulations.gov* Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to the Corps without going through *regulations.gov*, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, we recommend that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

Docket: For access to the docket to read background documents or comments received, go to *www.regulations.gov.* All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson, Headquarters, Operations and Regulatory Community of Practice, Washington, DC at 202–761–4922 or Ms. Kristi Hall, U.S. Army Corps of Engineers, Vicksburg District, Regulatory Branch at 601–631–7528.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to its authorities in Section 7 of the Rivers and Harbors Act of 1917 (40 Stat 266; 33 U.S.C. 1) and Chapter XIX of the Army Appropriations Act of 1919 (40 Stat 892; 33 U.S.C. 3) the Corps is proposing to revise the regulations at 33 CFR part 334 by establishing a danger zone along the East Pearl River. The amendment to this regulation will allow the Commanding Officer of the Naval Construction Battalion Center, Gulfport, MS to restrict passage of persons, watercraft, and vessels in the waters within the danger zone during Department of Defense training for conducting coastal and riverine special operations in support of global military missions. This area is referred to as a danger zone due to the use of short-range tactical ammunition within riverine areas.

Procedural Requirements

a. *Review Under Executive Order 12866.* The proposed rule is issued with respect to a military function of the Department of Defense and the provisions of Executive Order 12866 do not apply.

b. *Review Under the Regulatory Flexibility Act.* This proposed rule has been reviewed under the Regulatory Flexibility Act (Pub. L. 96–354). The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (*i.e.,* small businesses and small governments). The danger zone is necessary to protect public safety during training exercises. Small entities can utilize navigable waters outside of the danger zone when the danger zone is activated. Unless information is obtained to the contrary during the comment period, the Corps certifies that the proposed rule would have no significant economic impact on the public. After considering the economic impacts of this proposed danger zone regulation on small entities, I certify that this action will not have a significant impact on a substantial number of small entities.

c. *Review Under the National Environmental Policy Act.* Due to the administrative nature of this action and because there is no intended change in the use of the area, the Corps expects that this regulation, if adopted, will not have a significant impact on the quality of the human environment and, therefore, preparation of an environmental impact statement will not be required. An environmental assessment will be prepared after the public notice period is closed and all comments have been received and considered.

d. *Unfunded Mandates Act.* This proposed rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. Therefore, this proposed rule is not subject to the requirements of Sections 202 and 205 of the Unfunded Mandates Reform Act (UMRA). The proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the proposed rule is not subject to the requirements of Section 203 of UMRA.

List of Subjects in 33 CFR Part 334

Danger zones, Navigation (water), Restricted areas, Waterways.

For the reasons set out in the preamble, the Corps proposes to amend 33 CFR part 334 as follows:

PART 334—DANGER ZONE AND RESTRICTED AREA REGULATIONS

■ 1. The authority citation for part 334 continues to read as follows:

Authority: 40 Stat. 266 (33 U.S.C. 1) and 40 Stat. 892 (33 U.S.C. 3).

■ 2. Add § 334.784 to read as follows:

§ 334.784 East Pearl River, within the acoustic buffer area of the John C. Stennis Space Center, and adjacent to lands, in Hancock County, Mississippi; danger zone.

(a) *The area.* A danger zone is established in and to the extent of waters of the United States, as defined in 33 CFR part 329, in the following reaches of the East Pearl River south of a point, on the left descending bank, located at latitude 30.4030° N., longitude −89.6815° W., to a point below the confluence of Mikes River, located at latitude 30.3561° N., longitude −89.6514° W. The datum is NAD83.

(b) *The regulation.* (1) No person, vessel, or other watercraft, other than a vessel owned and operated by the United States, shall enter or remain in the danger zone, or within a portion or portions thereof, when closed to public access, as provided in paragraph (b)(2) of this section, below, except by permission of Commander, Naval Construction Battalion Center, Gulfport or such other person(s) as he or she may designate.

(2) The danger zone, or a portion or portions thereof, will be closed, for riverine, weapons, or other dangerous naval training, by placement of Government picket boats at the northern and southern boundaries in the East Pearl River, or at such other location(s) within the danger zone as may be determined to be sufficient to protect the public. Prior to closure, picket boats will transit the area(s) to be closed, to ensure that no persons, vessels, or other watercraft are present. Once the danger zone, or location(s) within the zone, has been cleared, picket boats will remain in position, upstream and downstream, until it is safe to re-open the area(s) to public access.

(3) Riverine, weapons, and other dangerous naval training may occur on any day of the week, typically, but not exclusively, in periods of two to eight hours, between 6 a.m. and 6 p.m. Training may occur at night, in darkness.

(c) *Enforcement.* The restrictions on public access in this section shall be enforced by Commander, Naval Construction Battalion Center, Gulfport or by such other person(s) as he or she may designate.

Dated: December 1, 2016.

Susan S. Whittington,

Chief, Operations and Regulatory Division, Directorate of Civil Works.

[FR Doc. 2016–30013 Filed 12–13–16; 8:45 am]

BILLING CODE 3720–58–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 79 and 80

[EPA–HQ–OAR–2016–0041; FRL–9956–44–OAR]

RIN 2060–AS66

Notice of Data Availability Concerning the Renewables Enhancement and Growth Support Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of data availability.

SUMMARY: This Notice provides an opportunity to comment on new information that pertains to the proposed provisions for ethanol flex fuel contained in the Renewables Enhancement and Growth Support (REGS) rule which was published in the **Federal Register** on November 16, 2016. The new information is contained in the report titled ''Property Analysis of Ethanol—Natural Gasoline—BOB Blends to Make Flex Fuel'' that has been placed in the public docket for this action. In the proposed REGS rule, the EPA proposed volatility standards for ethanol flex fuel (EFF) to prevent excessive evaporative emissions that could adversely affect the emissions control systems of flexible fuel vehicles (FFVs) and human health. The EPA proposed a fuel volatility compliance tool for use by regulated entities to demonstrate compliance with the proposed volatility standards for EFF. The new information being made available by this notice indicates that the proposed compliance tool may need to be modified to adequately estimate the volatility of EFF when natural gasoline is used as a blendstock.

DATES: *Comments.* Comments must be received on or before January 17, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2016–0041, to the *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Julia MacAllister, Assessment and Standards Division, Office of Transportation and Air Quality, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: (734) 214–4131; email address: *macallister.julia@epa.gov.*

Outline of This Preamble

I. General Information
- A. Does this action apply to me?
- B. What is the Agency's authority for taking this action?

II. Request for Comment
- A. Background
- B. Potential Changes to the Proposed Ethanol Flex Fuel Volatility Compliance Tool

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action relates to provisions in a previously promulgated Proposed Rule that would potentially affect companies involved with the production, distribution, and sale of blends of ethanol and gasoline. Potentially regulated categories include:

Category	NAICS [1] code	Examples of potentially affected entities
Industry	211112	Natural gas liquids extraction and fractionation.
Industry	211112, 324110	Ethanol denaturant manufacturers.
Industry	324110	Petroleum refineries (including importers).
Industry	325110	Butane and pentane manufacturers.
Industry	325193	Ethyl alcohol manufacturing.
Industry	424710, 424720	Petroleum Bulk Stations and Terminals; Petroleum and Petroleum Products Wholesalers.

Category	NAICS [1] code	Examples of potentially affected entities
Industry	447110, 447190	Fuel Retailers.
Industry	454310	Other fuel dealers.
Industry	486910	Natural gas liquids pipelines, refined petroleum products pipelines.
Industry	493190	Other warehousing and storage—bulk petroleum storage.

[1] 2012 North American Industry Classification System (NAICS).

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that the EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria in the referenced regulations. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

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

This action is issued under the authority of CAA sections 208, 211 and 301.

II. Request for Comment

A. Background

In the Renewables Enhancement and Growth Support (REGS) Rule,[1] EPA is proposing enhancements to its Renewable Fuel Standards (RFS) program and other related fuel regulations to support market growth of ethanol and other renewable fuels in the U.S. These proposed changes will provide the opportunity for increasing the production and use of renewable fuels by allowing the market to operate in the most efficient and economical way to introduce greater volumes of renewable fuels under the program. The proposed provisions for ethanol flex fuel (EFF) [2] in the REGS rule would provide additional flexibility to use natural gasoline as an EFF blendstock while maintaining the environmental performance of these fuels. The use of lower cost natural gasoline to make EFF may reduce the price to consumers of these fuels, thereby encouraging the use of additional ethanol and furthering the goals for the RFS program.

B. Request for Comment

To support the use of natural gasoline as an EFF blendstock while meeting the EPA's evaporative emission control and public health protection goals, the EPA proposed that a fuel volatility compliance tool could be used to demonstrate compliance with the proposed volatility standards for EFF. The proposed compliance tool was based on a fuel volatility model that was developed using data on the volatility of gasoline—ethanol fuel blends.[3] This fuel volatility model, which is well accepted by industry, is used to estimate the volatility of ethanol blends made with gasoline and/or blendstock for oxygenate blending.[4] At proposal, we explained why we believed that the proposed compliance tool would also be a satisfactory means of estimating ethanol blend volatility when natural gasoline is used as a blendstock even though we only had limited data that evaluated its suitability for this purpose. In sum, we reasoned that blendstock for oxygenate blending and natural gasoline blend linearly and would thus, behave as a single component in compliance tool calculations. The report that this notice adds to the docket for the REGS proposed rule, and for which we seek public comment, contains the results of a test program that compares empirical data on E51–83 blend volatility when natural gasoline is used as a blendstock to the volatility estimated by the proposed compliance tool.[5] These test data in this report indicate that the proposed compliance tool may significantly underestimate the volatility of some higher level ethanol blends when natural gasoline is used as a blendstock. These data, therefore, contradict the assumption that blendstock for oxygenate blending and natural gasoline blend linearly and behave as a single component in compliance tool calculations. The report also suggests that other aspects of the final blend may need to be taken into account for the compliance tool to provide a satisfactory estimate of ethanol blend volatility when natural gasoline is used as a blendstock. The EPA requests comment on all aspects of this report and the proposed fuel volatility compliance tool as well as how it might be modified to better estimate the effect of natural gasoline on the volatility of ethanol fuel blends. The EPA will consider the information contained in the report made available by this notice and the resulting public comments from this notice in developing a final rule from the REGS proposed rule.

Dated: December 1, 2016.

Christopher Grundler,

Director, Office of Transportation and Air Quality.

[FR Doc. 2016–29896 Filed 12–13–16; 8:45 am]

BILLING CODE 6560–50–P

[1] 81 FR 80828, November 16, 2016.

[2] In the REGS rule, EPA is proposing that all EFF blends that contain 16 to 83 volume percent ethanol (E16–E83) would be subject to the same set of regulatory controls rather than continuing to treat E16–E50 blends as gasoline. E85 is a trade name that has historically been used for blends that contain 51 to 83 volume percent ethanol (E51–E83).

[3] SAE technical paper 2007–01–4006, ''A Model for Estimating Vapor Pressures of Commingled Ethanol Fuels,'' Sam R. Reddy. See the discussion in Section IV.F.3. of the REGS proposed rule beginning on page 81 FR 80867.

[4] A blendstock for oxygenate blending (BOB) is formulated to manufacture compliant gasoline after the addition of ethanol.

[5] Property Analysis of Ethanol—Natural Gasoline—BOB Blends to Make Flex Fuel, National Renewable Energy Laboratory (NREL) technical report 5400–67243, November 2016.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 88

[NIOSH Docket 094]

World Trade Center Health Program; Petition 012—Atherosclerosis; Finding of Insufficient Evidence

AGENCY: Centers for Disease Control and Prevention, HHS.

ACTION: Denial of petition for addition of a health condition.

SUMMARY: On April 11, 2016, the Administrator of the World Trade Center (WTC) Health Program received two petitions (combined into Petition 012) to add atherosclerosis to the List of WTC-Related Health Conditions (List). The Program conducted a literature search for the term in response to the Petition and found no relevant studies regarding atherosclerosis among 9/11-exposed populations. Accordingly, the Administrator finds that insufficient evidence exists to request a recommendation of the WTC Health Program Scientific/Technical Advisory Committee (STAC), to publish a proposed rule, or to publish a

determination not to publish a proposed rule.

DATES: The Administrator of the WTC Health Program is denying this petition for the addition of a health condition as of December 14, 2016.

FOR FURTHER INFORMATION CONTACT: Rachel Weiss, Program Analyst, 1090 Tusculum Avenue, MS: C–46, Cincinnati, OH 45226; telephone (855) 818–1629 (this is a toll-free number); email *NIOSHregs@cdc.gov.*

SUPPLEMENTARY INFORMATION:

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A. WTC Health Program Statutory Authority
B. Petition 012
C. Review of Scientific and Medical Information and Administrator Determination
D. Administrator's Final Decision on Whether To Propose the Addition of Atherosclerosis to the List
E. Approval To Submit Document to the Office of the Federal Register

A. WTC Health Program Statutory Authority

Title I of the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111–347, as amended by Pub. L. 114–113), added Title XXXIII to the Public Health Service (PHS) Act,[1] establishing the WTC Health Program within the Department of Health and Human Services (HHS). The WTC Health Program provides medical monitoring and treatment benefits to eligible firefighters and related personnel, law enforcement officers, and rescue, recovery, and cleanup workers who responded to the September 11, 2001, terrorist attacks in New York City, at the Pentagon, and in Shanksville, Pennsylvania (responders), and to eligible persons who were present in the dust or dust cloud on September 11, 2001, or who worked, resided, or attended school, childcare, or adult daycare in the New York City disaster area (survivors).

All references to the Administrator of the WTC Health Program (Administrator) in this notice mean the Director of the National Institute for Occupational Safety and Health (NIOSH) or his or her designee.

Pursuant to section 3312(a)(6)(B) of the PHS Act, interested parties may petition the Administrator to add a health condition to the List in 42 CFR 88.1. Within 90 days after receipt of a petition to add a condition to the List, the Administrator must take one of the following four actions described in section 3312(a)(6)(B) and 42 CFR 88.17: (1) Request a recommendation of the STAC; (2) publish a proposed rule in the **Federal Register** to add such health condition; (3) publish in the **Federal Register** the Administrator's determination not to publish such a proposed rule and the basis for such determination; or (4) publish in the **Federal Register** a determination that insufficient evidence exists to take action under (1) through (3) above. However, in accordance with 42 CFR 88.17(a)(4), the Administrator is required to consider a new petition for a previously-evaluated health condition determined not to qualify for addition to the List only if the new petition presents a new medical basis—evidence not previously reviewed by the Administrator—for the association between 9/11 exposures and the condition to be added.

In addition to the regulatory provisions, the WTC Health Program has developed policies to guide the review of submissions and petitions[2] and the analysis of evidence supporting the potential addition of a non-cancer health condition to the List.[3] In accordance with the aforementioned non-cancer health condition addition policy, the Administrator directs the WTC Health Program to conduct a review of the scientific literature to determine if the available scientific information has the potential to provide a basis for a decision on whether to add the health condition to the List. A literature review includes a search for peer-reviewed, published epidemiologic studies (including direct observational studies in the case of health conditions such as injuries) about the health condition among 9/11-exposed populations; such studies are considered ''relevant.'' Relevant studies identified in the literature search are further reviewed for their quantity and quality to provide a basis for deciding whether to propose adding the health condition to the List. Where the available evidence has the potential to provide a basis for a decision, the scientific and medical evidence is further assessed to determine whether a causal relationship between 9/11 exposures and the health condition is supported. A health condition may be added to the List if peer-reviewed, published, direct observational or epidemiologic studies provide substantial support[4] for a causal relationship between 9/11 exposures and the health condition in 9/11-exposed populations. If the evidence assessment provides only modest support[5] for a causal relationship between 9/11 exposures and the health condition, the Administrator may then evaluate additional peer-reviewed, published epidemiologic studies, conducted among non-9/11-exposed populations, evaluating associations between the health condition of interest and 9/11 agents.[6] If that additional assessment establishes substantial support for a causal relationship between a 9/11 agent or agents and the health condition, the health condition may be added to the List.

B. Petition 012

On April 11, 2016, the Administrator received a petition from a New York City Police Department (NYPD) responder who worked at Ground Zero, and a second, related petition which requested the addition of ''atherosclerosis (plaque in arteries),'' and ''atherosclerosis—arterial plaque,'' respectively, to the List; the petitions provided references to the same medical basis, a study by Mani *et al.* [2013]. The petitions together are considered Petition 012 as permitted by 42 CFR 88.17(a)(3).[7]

In accordance with WTC Health Program policy, the medical basis for a potential addition to the List may be demonstrated by reference to a peer-reviewed, published, epidemiologic study about the health condition among 9/11-exposed populations or to clinical case reports of health conditions in WTC responders or survivors.[8] Both of

[1] Title XXXIII of the PHS Act is codified at 42 U.S.C. 300mm to 300mm-61. Those portions of the James Zadroga 9/11 Health and Compensation Act of 2010 found in Titles II and III of Public Law 111–347 do not pertain to the WTC Health Program and are codified elsewhere.

[2] *See* WTC Health Program [2014], *Policy and Procedures for Handling Submissions and Petitions to Add a Health Condition to the List of WTC-Related Health Conditions,* May 14, *http://www.cdc.gov/wtc/pdfs/WTCHPPPPetitionHandlingProcedures14May2014.pdf.*

[3] *See* WTC Health Program [2016], *Policy and Procedures for Adding Non-Cancer Conditions to the List of WTC-Related Health Conditions,* May 11, *http://www.cdc.gov/wtc/pdfs/WTCHP_PP_Adding_NonCancer_Conditions_Revision_11_May_2016.pdf.*

[4] The substantial evidence standard is met when the Program assesses all of the available, relevant information and determines with high confidence that the evidence supports its findings regarding a causal association between the 9/11 exposure(s) and the health condition.

[5] The modest evidence standard is met when the Program assesses all of the available, relevant information and determines with moderate confidence that the evidence supports its findings regarding a causal association between the 9/11 exposure(s) and the health condition.

[6] 9/11 agents are chemical, physical, biological, or other agents or hazards reported in a published, peer-reviewed exposure assessment study of responders or survivors who were present in the New York City disaster area, at the Pentagon site, or at the Shanksville, Pennsylvania site, as those locations are defined in 42 CFR 88.1.

[7] *See* Petition 012, WTC Health Program: Petitions Received, *http://www.cdc.gov/wtc/received.html.*

[8] *See supra* note 2.

the submissions considered in the current petition, Petition 012, presented the same single reference to support the request to add ''Atherosclerosis (plaque in arteries)'' to the List. The reference, a study by Mani *et al.* [2013],[9] is a pilot study of the ability of diagnostic imaging to evaluate differences in atherosclerosis profiles in WTC responders exposed to high levels (as found in the initial dust cloud) and low levels (found after September 13, 2001) of particulate matter. The study evaluated the feasibility of using dynamic contrast enhanced MRI, a relatively new imaging method, to evaluate atherosclerosis among 31 law enforcement personnel who responded at Ground Zero (19 with self-reported high exposures and 12 with self-reported low exposures). The study population examined in Mani *et al.* [2013] is small and is not fully representative of the greater 9/11 population, including other non-law enforcement responders and survivors. Although the study has attributes of an epidemiologic study, the small subset of law enforcement personnel sampled and the non-random manner in which the sample was obtained prevent extrapolation of the findings of Mani *et al.* [2013] to the whole 9/11-exposed population. Moreover, the study does not investigate the causal link between 9/11 exposures and atherosclerosis. Therefore, the Administrator has determined that while the inclusion of this peer-reviewed and published study in the submissions provides sufficient medical basis to be considered a valid petition, Mani *et al.* [2013] is not an epidemiologic study, cannot be considered relevant, and is not further reviewed below.

C. Review of Scientific and Medical Information and Administrator Determination

In response to Petition 012, and pursuant to Program policy,[10] the Program conducted a review of the scientific literature on atherosclerosis to determine if the available evidence has the potential to provide a basis for a decision on whether to add atherosclerosis to the List.[11] The literature search identified one citation for atherosclerosis;[12] upon review, however, it was found not to be relevant because it was not a study of atherosclerosis among the 9/11-exposed population.

Since the literature review did not identify any relevant studies of atherosclerosis in the 9/11-exposed population, in accordance with the Program policy discussed above, the Program was unable to further evaluate Petition 012.

D. Administrator's Final Decision on Whether To Propose the Addition of Atherosclerosis to the List

Finding no relevant studies with regard to Petition 012, the Administrator has accordingly determined that insufficient evidence is available to take further action at this time, including either proposing the addition of atherosclerosis to the List (pursuant to PHS Act, sec. 3312(a)(6)(B)(ii) and 42 CFR 88.17(a)(2)(ii)) or publishing a determination not to publish a proposed rule in the **Federal Register** (pursuant to PHS Act, sec. 3312(a)(6)(B)(iii) and 42 CFR 88.17(a)(2)(iii)). The Administrator has also determined that requesting a recommendation from the STAC (pursuant to PHS Act, sec. 3312(a)(6)(B)(i) and 42 CFR 88.17(a)(2)(i)) is unwarranted.

For the reasons discussed above, the request made in Petition 012 to add atherosclerosis to the List of WTC-Related Health Conditions is denied.

Studies have not yet demonstrated whether 9/11 exposures, including inhalational dust/debris exposures or psychological exposures of the duration and magnitude experienced on and in the aftermath of September 11, 2001, could cause the development of atherosclerosis in an individual WTC responder or survivor several years later. The Administrator looks forward to more definitive studies that directly evaluate the causal association between 9/11 exposures, especially inhalational dust exposures, and atherosclerosis.

E. Approval To Submit Document to the Office of the Federal Register

The Secretary, HHS, or her designee, the Director, Centers for Disease Control and Prevention (CDC) and Administrator, Agency for Toxic Substances and Disease Registry (ATSDR), authorized the undersigned, the Administrator of the WTC Health Program, to sign and submit the document to the Office of the Federal Register for publication as an official document of the WTC Health Program. Thomas R. Frieden, M.D., M.P.H., Director, CDC, and Administrator, ATSDR, approved this document for publication on December 2, 2016.

Dated: December 8, 2016.

John Howard,

Administrator, World Trade Center Health Program and Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, Department of Health and Human Services.

[FR Doc. 2016–29816 Filed 12–13–16; 8:45 am]

BILLING CODE 4163–18–P

[9] Mani V, Wong S, Sawit S, *et al.* [2013], *Relationship between Particulate Matter Exposure and Atherogenic Profile in ''Ground Zero'' Workers as Shown by Dynamic Contrast Enhanced MR Imaging,* Int J Cardiovasc Imaging 29:827–833.

[10] *Supra* note 3.

[11] Databases searched include: CINAHL, Embase, PsycINFO, PubMed, and Scopus.

[12] Landrigan PJ, Wright RO, Cordero JF, *et al.* [2015], *The NIEHS Superfund Research Program: 25 Years of Translational Research for Public Health,* Environ Health Perspect 123(10):909–918. This manuscript describes the successes of the Superfund Research Program; although the key terms ''atherosclerosis'' and ''World Trade Center'' are both mentioned, they are not discussed in relation to each other.

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–HQ–ES–2016–0076; 4500030115]

RIN 1018–BB33

Endangered and Threatened Wildlife and Plants; Listing Determinations for Five Poecilotheria Tarantula Species From Sri Lanka

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a proposal to list the following five tarantula species under the Endangered Species Act of 1973, as amended (Act): *Poecilotheria fasciata, P. ornata, P. smithi, P. subfusca,* and *P. vittata.* This document also serves as the 12-month finding on a petition to list these species. After review of the best available scientific and commercial information, we find that listing each of these species is warranted and propose listing all of them as endangered species.

DATES: We will accept comments received or postmarked on or before February 13, 2017. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by January 30, 2017.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box,

enter FWS–HQ–ES–2016–0076, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–HQ–ES–2016–0076; U.S. Fish & Wildlife Service Headquarters, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803. We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see *Public Comments* below for more information).

FOR FURTHER INFORMATION CONTACT: Janine Van Norman, Chief, Branch of Foreign Species, Ecological Services, U.S. Fish and Wildlife Service, MS: ES, 5275 Leesburg Pike, Falls Church, VA 22041–3803; telephone, 703–358–2171; facsimile, 703–358–1735. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, if a species is determined to be an endangered or threatened species throughout all or a significant portion of its range, we are required to promptly publish a proposal in the **Federal Register** and make a determination on our proposal within 1 year. Listing a species as an endangered or threatened species can only be completed by issuing a rule.

This document proposes the listing of the tarantula species *Poecilotheria fasciata, P. ornata, P. smithi, P. subfusca,* and *P. vittata* as endangered species. This proposed rule assesses the best available information regarding status of and threats to these named species.

The basis for our action. Under the Act, we can determine that a species is an endangered or threatened species based on any one or more of five factors or the cumulative effects thereof: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence. We have determined that *P. fasciata, P. ornata, P. smithi, P. subfusca,* and *P. vittata* are in danger of extinction due to ongoing habitat loss and degradation and the cumulative effects of this and other threat factors. One species, *P. smithi,* is also in danger of extinction due to the effects of stochastic (random) processes.

We will seek peer review. We will seek comments from independent specialists to ensure that our designation is based on scientifically sound data, assumptions, and analyses. We will invite these peer reviewers to comment on our listing proposal. Because we will consider all comments and information received during the comment period, our final determinations may differ from this proposal.

Information Requested

Public Comments

Our intent, as required by the Act, is to use the best available scientific and commercial data as the foundation for all endangered and threatened species classification decisions. Further, we want any final rule resulting from this proposal to be as accurate and effective as possible. Therefore, we invite the range country, tribal and governmental agencies, the scientific community, industry, and other interested parties to submit comments regarding this Proposed Rule. Comments should be as specific as possible.

Before issuing a final rule to implement this proposed action, we will take into account all comments and any additional relevant information we receive. Such communications may lead to a final rule that differs from our proposal. For example, new information provided may lead to a threatened status instead of an endangered status for some or all of the species addressed in this proposed rule, or we may determine that one or more of these species do not warrant listing based on the best available information when we make our determination. All comments, including commenters' names and addresses, if provided to us, will become part of the administrative record. For each of the five species, we particularly seek comments concerning:

(1) The species' biology, ranges, and population trends, including:

(a) Biological or ecological requirements of the species, including habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range including distribution patterns;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the species, its habitat or both.

(2) Factors that may affect the continued existence of the species, which may include habitat modification or destruction, overutilization, disease, predation, the inadequacy of existing regulatory mechanisms, or other natural or manmade factors.

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to the species and existing regulations that may be addressing those threats.

(4) Additional information concerning the historical and current status, range, distribution, and population size of the species, including the locations of any additional populations of the species.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made ''solely on the basis of the best scientific and commercial data available.''

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Headquarters Office (see **FOR FURTHER INFORMATION CONTACT**).

Public Hearing

Section 4(b)(5) of the Act provides for one or more public hearings on this

proposal, if requested. Requests must be received within 45 days after the date of publication of this proposed rule in the **Federal Register**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

Peer Review

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will solicit the expert opinion of at least three appropriate and independent specialists for peer review of this proposed rule. The purpose of peer review is to ensure that our listing determinations are based on scientifically sound data, assumptions, and analyses. We will send peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed listing status of each of the five tarantula species. We will summarize the opinions of these reviewers in the final decision document, and we will consider their input and any additional information we receive, as part of our process of making a final decision on the proposal.

Previous Federal Action

We received a petition, dated October 29, 2010, from WildEarth Guardians requesting that the following 11 tarantula species in the genus *Poecilotheria* be listed under the Act as endangered or threatened: *Poecilotheria fasciata, P. formosa, P. hanumavilasumica, P. metallica, P. miranda, P. ornata, P. pederseni, P. rufilata, P. smithi, P. striata,* and *P. subfusca.* The petition identified itself as such and included the information as required by 50 CFR 424.14(a). We published a 90-day finding on December 3, 2013 (78 FR 72622), indicating that the petition presents substantial scientific and commercial information indicating that listing these 11 species may be warranted. At that time we also (1) notified the public that we were initiating a review of the status of these species to determine if listing them is warranted, (2) requested from the public scientific and commercial data and other information regarding the species, and (3) notified the public that at the conclusion of our review of the status of these species, we would issue a 12-month finding on the petition, as provided in section 4(b)(3)(B) of the Act. This document represents our review and determinations of the status of the five petitioned species that are endemic to Sri Lanka (*Poecilotheria fasciata, P. ornata, P. pederseni, P. smithi,* and *P. subfusca*), our publication of our 12-month finding on these five species, and our proposed rule to list these species. We will issue our determinations on other tarantula species in the genus *Poecilotheria* separately after we complete our review.

Background

Taxonomy and Species Descriptions

Poecilotheria is a genus of arboreal spiders endemic to Sri Lanka and India. The genus belongs to the family *Theraphosidae,* often referred to as tarantulas, within the infraorder *Mygalomorphae* (Table 1). As with most theraphosid genera, *Poecilotheria* is a poorly understood genus. The taxonomy has never been studied using modern DNA technology; therefore, species descriptions are based solely on morphological characteristics. Consequently, there have been several revisions, additions, and subtractions to the list of *Poecilotheria* species over the last 20 years (Nanayakkara 2014a, pp. 71–72; Gabriel and Gallon 2013, entire).

The World Spider Catalog (2016, unpaginated) currently recognizes 14 species of *Poecilotheria.* The Integrated Taxonomic Information System currently identifies 16 species in the genus, based on the 2011 version of the same catalog. Because the World Spider Catalog is the widely accepted authority on spider taxonomy, we consider the *Poecilotheria* species recognized by the most recent (2016) version of this catalog to be valid. Based on the World Spider Catalog, all five of the petitioned species are considered valid taxon, though *P. pederseni* is now considered a junior synonym to the currently accepted name *P. vittata* (Table 1). Therefore, in the remainder of this document we refer to this species as *P. vittata.* Further, all five of these species have multiple common names (see WildEarth Guardians 2010, p. 4) and are, therefore, referred to by their scientific names throughout this document.

TABLE 1—SCIENTIFIC CLASSIFICATION OF FIVE SRI LANKAN POECILOTHERIA SPECIES PETITIONED FOR LISTING AS ENDANGERED OR THREATENED UNDER THE ACT

[See 78 FR 72662, December 3, 2013]
[Synonyms are in parentheses]

Scientific Classification	
KINGDOM	Animalia.
PHYLUM	Arthropoda.
SUBPHYLUM	Chelicerata.
CLASS	Arachnida.
ORDER	Araneae.
INFRAORDER	Mygalomorphae.
FAMILY	Theraphosidae.
GENUS	Poecilotheria.
SPECIES	*P. fasciata*, *P. ornata*, *P. smithi* (*P. pococki*), *P. subfusca* (*P. bara, P. uniformis*), *P. vittata* (*P. pederseni*).

Poecilotheria species are among the largest spiders in the world, with body lengths of 4 to 9 centimeters (1.5 to 3.5 inches) and maximum adult leg spans varying from 15 to 25 centimeters (6 to 10 inches) (Nanayakkara 2014a, pp. 94–129; Molur *et al.* 2006, p. 23). They are known for their very fast movements and potent venom that, in humans, typically causes extended muscle cramps and severe pain (Fuchs 2014, p. 75; Nanayakkara and Adikaram 2013, p. 53). They are hairy spiders and have striking coloration, with dorsal color patterns of gray, black, brown, and in one case, a metallic blue. Ventral coloration of either sex is typically more of the same with the exception of the first pair of legs, which often bear bright yellow to orange aposematic (warning) markings that are visible when the spider presents a defensive display. Mature spiders exhibit some sexual dimorphism with mature males having a more drab coloration and being significantly smaller than the adult females (Nanayakkara 2014a, entire; Pocock 1899, pp. 84–86).

The primary characteristics used to distinguish *Poecilotheria* species are ventral leg markings (Gabriel 2010 p. 13, citing several authors). Some authors indicate that identification via leg markings is straightforward for most *Poecilotheria* species (Nanayakkara 2014a, pp. 74–75; Gabriel 2011a, p. 25). However, the apparent consistent leg patterns observed in adults of a species could also be a function of specimens being collected from a limited number of locations (Morra 2013, p. 129). During field surveys, researchers found more variation than suggested by published

species descriptions and indicated that identifying *Poecilotheria* species is not as straightforward as suggested by current descriptions (Molur *et al.* 2003, unpaginated). Reports of inadvertent production of hybrids within the tarantula trade (see Gabriel 2011a, p. 26) also indicate a degree of difficulty in identification of adult specimens. Immature spiders (juveniles) lack the variation in coloring found in adults. As a result, they are difficult to differentiate visually; genetic analysis may be the only way to reliably identify juveniles to species (Longhorn 2014a, unpaginated).

Captive Poecilotheria

Poecilotheria species are commonly bred in captivity by amateur hobbyists as well as vendors, and are available as captive-bred young in the pet trade in the United States, Europe, and elsewhere (see *Trade*). However, while rearing and keeping of captive individuals by hobbyists and vendors has provided information on life history of these species, these captive individuals hold limited conservation value to the species in the wild. Individuals in the pet trade descend from wild individuals from unknown locations, have undocumented lineages, come from limited stock (*e.g.,* see Gabriel 2012, p. 18) and are bred without knowledge or consideration of their genetics. They also likely include an unknown number of hybrid individuals resulting from intentional crosses, or unintentional crosses resulting from confusion and difficulty in species taxonomy and identification (Gabriel 2011a, pp. 25–26; Gabriel *et al.* 2005, p. 4; Gabriel 2003, pp. 89–90). Further, many are likely several generations removed from wild ancestors and thus may be inbred or maladapted to conditions in the wild. In short, captive individuals held or sold as pets do not adhere to the IUCN guidelines for reintroductions and other conservation translocations (IUCN 2013, entire). Further, we are not aware of any captive-breeding programs for *Poecilotheria* that adhere to IUCN guidelines. Because (1) the purpose of our status assessments is to determine the status of the species in the wild, and (2) captive individuals in the hobby or pet trade have low value for conservation programs or for reintroduction purposes, we place little weight on the status of captive individuals in our assessment of the status of the five petitioned *Poecilotheria* species endemic to Sri Lanka.

Tarantula General Biology

Tarantulas possess life-history traits markedly different from most spiders and other arthropods (Bond *et al.* 2006, p. 145). They are long-lived, have delayed sexual maturity, and most are habitat specialists that are extremely sedentary. They also have poor dispersal ability because their mode of travel is limited to walking, and they typically do not move far from the area in which they are born. As a result, the distribution of individuals tends to be highly clumped in suitable microhabitats (a smaller habitat within a larger habitat), populations are extremely genetically structured, and the group shows a high level of endemism (species restricted to a particular geographical location) (Ferreti *et al.* 2014, p. 2; Hedin *et al.* 2012, p. 509, citing several sources; Bond *et al.* 2006, pp. 145–146, citing several sources).

Tarantulas are primarily nocturnal and typically lead a hidden life, spending much of their time concealed inside burrows or crevices (retreats) that provide protection from predators and the elements (Foelix 2011, p. 14; Molur *et al.* 2003, unpaginated; Gallon 2000, unpaginated). They are very sensitive to vibrations and climatic conditions, and usually don't come out of their retreats in conditions like rains, wind, movement, or excessive light (Molur *et al.* 2003, unpaginated). Tarantulas are generalist predators that sit and wait for passing prey near the entrance of their retreats (Gallon 2000, unpaginated). With the exception of reproductive males that wander in search of females during the breeding season, they leave their retreat only briefly for capturing prey, and quickly return to it at the slightest vibration or disturbance (Foelix 2011, p. 14; Stotley and Shillington 2009, pp. 1210–1211; Molur *et al.* 2003, unpaginated). Tarantulas generally inhabit a suitable retreat for extended periods and may use the same retreat for years (Stotley and Shilling 2009, pp. 1210–1211; Stradling 1994, p. 87). Most tarantulas are solitary, with one spider occupying a retreat (Gallon 2000, unpaginated).

The lifestyle of adult male tarantulas differs from that of adult females and juveniles. Females and juveniles are sedentary, spending most of their time in or near their retreat. Adult females are also long-lived, and continue to grow, molt, and reproduce for several years after reaching maturity (Ferreti *et al.* 2014, p. 2, citing several sources; Costa and Perez-Miles 2002, p. 585, citing several sources; Gallon 2000, unpaginated). They are capable of producing one brood per year although they do not always do so (Ferreti *et al.* 2014, p. 2; Stradling 1994, pp. 92–96). Males have shorter lifespans than females and, after reaching maturity, no longer molt and usually only live one or two breeding seasons (Costa and Perez-Miles 2002, p. 585, Gallon 2000, unpaginated). Further, on reaching maturity, males leave their retreats to wander in search of receptive females with which to mate (Stotley and Shillington 2009, pp. 1210–1211). Males appear to search the landscape for females randomly and, at short range, may be able to detect females through contact sex-pheromones on silk deposited by the female at the entrance of her retreat (Ferreti *et al.* 2013, pp. 88, 90; Janowski-Bell and Hommer 1999, pp. 506, 509; Yanez *et al.* 1999, pp. 165–167; Stradling 1994, p. 96). Males may cover relatively large areas when searching for females. Males of a ground-dwelling temperate species (*Aphonopelma anax*) are reported covering search areas up to 29 ha (72 acres), though the mean size of areas searched is much smaller (1.1 ± 0.5 ha one year and 8.8 ± 2.5 ha another year) (Stotley and Shillington 2009, p. 1216).

When a male locates a receptive female, the two will mate in or near the entrance to the female's retreat. After mating, the female returns to her retreat where she eventually lays eggs within an egg-sac and tends the eggs until they hatch. Spiderlings reach maturity in one or more years (Gallon 2000, unpaginated).

Poecilotheria Biology

Limited information is available on *Poecilotheria* species in the wild. However, they appear to be typical tarantulas in many respects. However, they differ from most tarantulas in that they are somewhat social (discussed below) and reside in trees rather than ground burrows (see Microhabitat).

Poecilotheria species are patchily distributed (Siliwal *et al.* 2008, p. 8) and prey on a variety of insects, including winged termites, beetles, grasshoppers, and moths, and occasionally small vertebrates (Das *et al.* 2012, entire; Molur *et al.* 2006, p. 31; Smith *et al.* 2001, p. 57).

We are not aware of any information regarding the reproductive success of wild *Poecilotheria* species. However, reproduction may be greatly reduced during droughts (Smith *et al.* 2001, pp. 46, 49). Additionally, given the apparently random searching for females by male tarantulas, successful mating of females likely depends on the density of males in the vicinity. In the only field study conducted on an

arboreal tropical tarantula (*Avicularia avicularia* in Trinidad), less than half of adult females produced eggs in the same year despite the fact that they were in close proximity to each other and exhibited the same weight gain, possibly due to a failure to mate (Stradling 1994, p. 96).

Time to maturity in *Poecilotheria* species varies and is influenced by the temperature at which the young are raised and amount of food provided (Gabriel 2006, entire). Based on observations of captive *Poecilotheria,* males mature from spiderlings to adults in 11 to16 months (Gabriel 2011b, P. 101; Gabriel 2005, entire). Females can mature within 14 months and generally live an additional 60 to 85 months after maturing (Gabriel 2012, p. 19; Government of Sri Lanka and Government of the United States 2000, p. 3), although they have been reported living up to 14 years (Gallon 2012, p. 69). Females lay about 50 to 100 eggs, 5 to 6 months after mating (Nanayakarra 2014a, p. 79; Gabriel 2011b, entire; Gabriel 2005, p. 101). In captivity, generation time appears to be roughly 2–3 years (see Gabriel 2011b, entire; Gabriel 2006, p. 96; Gabriel 2005, entire). While captive individuals provide some indication of potential growth, longevity, and reproductive capacity of wild individuals, these variables are likely to vary with conditions in the wild. *Poecilotheria* are ectotherms and, as such, their physiological and developmental processes including growth and reproduction are strongly influenced by body temperature and it is likely that captive-rearing of these species is primarily done under ideal environmental conditions for reproduction and growth.

Unlike most tarantulas, which are solitary, most *Poecilotheria* species display a degree of sociality. Adult females often share their retreat with their spiderlings. Eventually as the young mature, they disperse to find denning areas of their own. Occasionally young remain on their natal tree to breed, or three to four adult females will share the same retreat (Nanayakkara 2014a, pp. 74, 80). These semi-social behaviors are believed to be a response to a lack of availability of suitable habitat (trees) in which individuals can reside (Nanayakkara 2014a, pp. 74, 80; Gallon 2000, unpaginated).

Poecilotheria Habitat

Microhabitat

Poecilotheria occupy preexisting holes or crevices in trees or behind loose tree bark (Molur *et al.* 2006, p. 31; Samarawckrama *et al.* 2005; Molur *et al.* 2003 unpaginated; Kirk 1996, pp. 22–23). Individuals of some species are also occasionally found in grooves or crevices in or on other substrates such as rocks or buildings that are close to wooded areas (Samarawckrama *et al.* 2005, pp. 76, 83; Molur *et al.* 2003, unpaginated). In a survey in Sri Lanka, 89 percent (31) of *Poecilotheria* spiders were found in or on trees, while 11 percent (4) were found in or on buildings (Samarawckrama *et al.* 2005, p. 76). *Poecilotheria* species are said to have a preference for residing in old, established trees with naturally occurring burrows (Nanayakkara 2014a, p. 86). Some species also appear to prefer particular tree species (Nanayakkara 2014a, p. 84; Samarawckrama *et al.* 2005, p. 76).

Macrohabitat

Most *Poecilotheria* species occur in forested areas, although some occasionally occur in other treed habitats such as plantations (Nanayakkara 2014a, p. 86; Molur *et al.* 2006, p. 10; Molur et al 2003, entire; Smith *et al.* 2001, entire). *Poecilotheria* are less abundant in degraded forest (Molur *et al.* 2004, p. 1665). Less complex, degraded forests may contain fewer trees that provide adequate retreats for these species and less cover for protection from predators and the elements. Trees with broad, dense canopy cover likely provide *Poecilotheria* in hotter, dryer habitats protection from heat and desiccation (Siliwal 2008, pp. 12, 15). We provide additional, species-specific information on habitat below.

Sri Lanka

Sri Lanka is an island nation about 65,610 square kilometers (km^2) (25,332 square miles (mi^2)) in area (Weerakoon 2012, p. xvii), or about the size of West Virginia (Fig. 1). The variation in topography, soils, and rainfall on the island has resulted in a diversity of ecosystems with high levels of species endemism (Government of Sri Lanka (GOSL) 2014, pp. xiv–xv). Sri Lanka, together with the Western Ghats of India, is identified as a global biodiversity hotspot, and is among the eight ''hottest hotspots,'' (Myers *et al.* 2000, entire).

Sri Lanka consists of a mountainous region (central highlands), reaching 2,500 m in elevation, in the south-central part of the island surrounded by broad lowland plains (GOSL 2012, p. 2a–3–141) (Fig. 2). The country has a tropical climate characterized by two major monsoon periods: The southwest monsoon from May to September and the northeast monsoon from December to February (GOSL 2012, pp. 7–8).

Sri Lanka's central highlands create a rain shadow effect that gives rise to two pronounced climate zones—the wet zone and dry zone—and a less extensive intermediate zone between the two (Ministry of Environment—Sri Lanka (MOE) 2010, pp. 21–22) (Fig. 2). Small arid zones also occur on the northwestern and southeastern ends of the country (Nanayakkara 2014a, p. 22). Annual rainfall ranges from less than 1,000 millimeters (mm) (39.4 inches (in)) in the arid zone to over 5,000 mm (197 in) in the central highlands (Jayatillake *et al.* 2005, pp. 66–67). Mean annual temperature ranges from 27 degrees Celsius (°C) (80.6 degrees Fahrenheit (°F)) in the lowlands to 15 °C (59 °F) in the highlands (Eriyagama *et al.* 2010, p. 2).

The wet zone is located in the southwestern quarter of the island, where high annual rainfall is maintained throughout the year by rain received during both monsoons and during inter-monsoonal periods (MOE 2010, pp. 21–22) (Fig. 2). The wet zone is divided into low, mid, and montane regions based on altitude (Table 2). The dry zone, in which most of the land area of Sri Lanka occurs, is spread over much of the lowland plains and is subjected to several months of drought (MOE 2010, pp. 21–22) (Table 2) (Fig. 2). Most of the rain in this zone comes from the northeast monsoon and inter-monsoonal rains (MOE 2010, pp. 21–22; Malgrem 2003, p. 1236). Characteristic forest types occur within each of the different climate zones (Table 2).

TABLE 2—CLIMATE ZONES AND ELEVATION OF SRI LANKA AND ASSOCIATED FOREST TYPES

[Based on Information in FAO (2015a, pp. 6–7), Nanayakkara (2014a, pp. 22–25), and GOSL (2012, p. 51)]

Zone	Percent of Sri Lanka's land area	Mean annual rainfall (mm)	Elevation (meters)	Forest type
Wet Zone	23	2,500–>5,000	0–2,500	
Low			0–1,000	Lowland rainforest.
Mid			1,000–1,500	Submontane forest.
Montane			1,500–2,500	Montane forest.
Intermediate Zone	12	1,900–2,500	0–1,000	Moist monsoon forest.
Dry Zone	60	1,250–1,900	0–500	Dry monsoon forest; riverine forest; open-canopy forest.
Arid Zone	5	<1,250		Thorny scrub forest.

Species-Specific Information

Each of the five petitioned species addressed in this finding is endemic to Sri Lanka and has a range restricted to a particular region and one or two of Sri Lanka's climate zones (Nanayakkara 2014a, pp. 84–85) (Fig. 1, Fig. 2). Due to their secretive and nocturnal habits, sensitivity to vibrations, and their occurrence in structurally complex habitat (forest), *Poecilotheria* species are difficult to detect (Molur *et al.* 2003, unpaginated). Therefore, it is possible that reported ranges are smaller than the actual ranges of these species. However, distribution surveys for these species were conducted at many locations throughout the country during 2009–2012 by Nanayakkara *et al.* (2012, entire), and we consider the locations reported in Nanayakkara (2014a, entire) to reflect the best available information concerning the ranges of these species.

Historical ranges for the five petitioned Sri Lankan species are unknown. Further, population information is not available on any of the five petitioned Sri Lankan species; therefore, population trends are unknown. However, experts believe populations are declining, and that these species are very likely to go extinct within the next two or three decades (Nanayakkara and Adikaram 2013, p. 54). We are not aware of any existing conservation programs for these species. All five species are categorized on the National Red List of Sri Lanka as Endangered or Critically Endangered based on their area of occupancy (Critically Endangered: Less than 10 km^2; Endangered: Less than 500 km^2) and distribution (Critically Endangered: Severely fragmented or known to exist at only a single location; Endangered: Severely fragmented or known to exist at no more than five locations), and the status (continuing decline, observed, inferred or projected, in the area, extent, or quality, or any combination of the three) of their habitat (MOE 2012, p. 55; IUCN 2001, entire).

For locations discussed in species-specific information below, see Fig. 1. For locations of the ranges of the different species, see Fig. 2.

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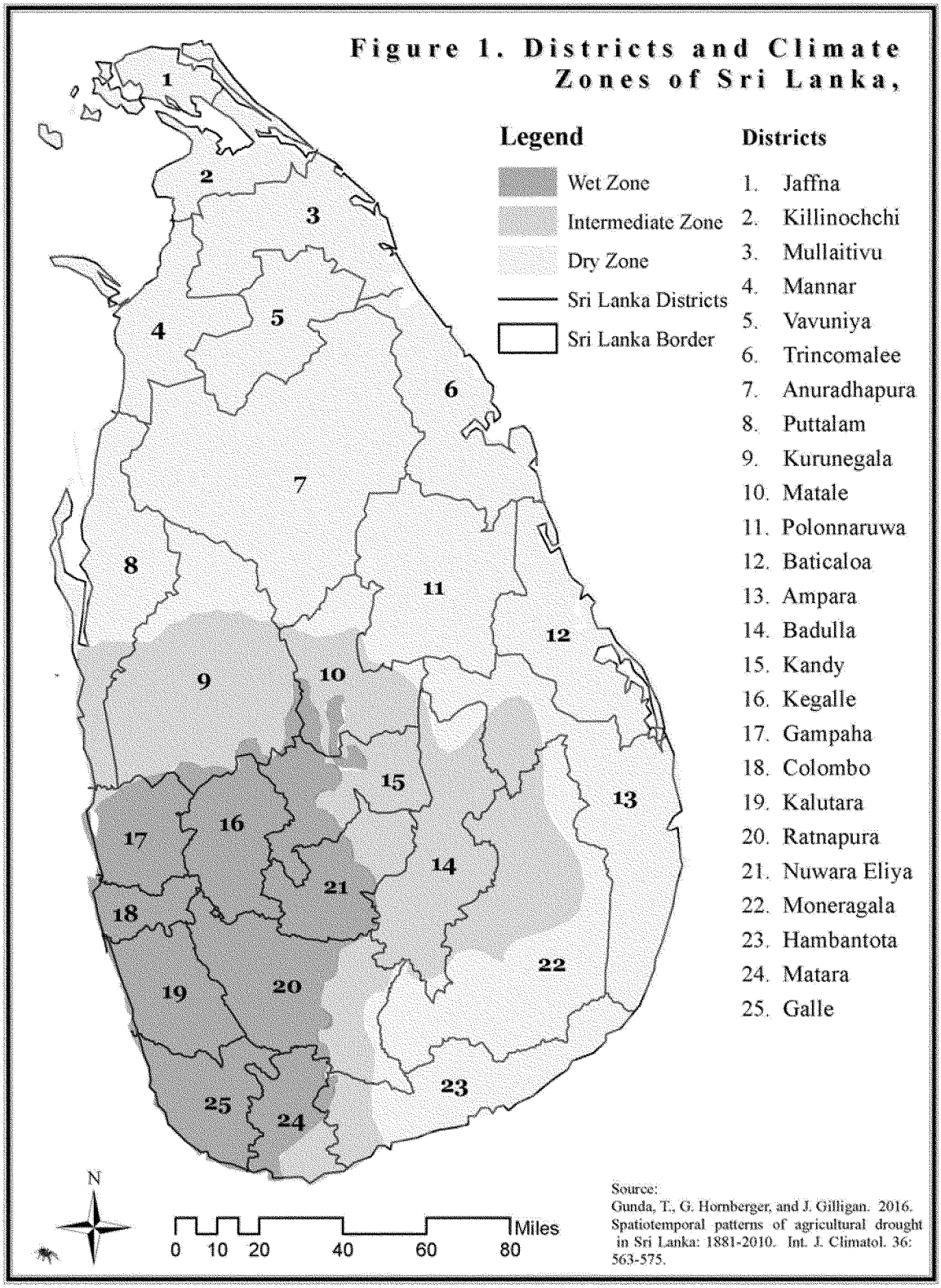
Figure 1. Districts and Climate Zones of Sri Lanka,
Legend
Wet Zone
Intermediate Zone
Dry Zone
Sri Lanka Districts
Sri Lanka Border
Districts
1. Jaffna
2. Killinochchi
3. Mullaitivu
4. Mannar
5. Vavuniya
6. Trincomalee
7. Anuradhapura
8. Puttalam
9. Kurunegala
10. Matale
11. Polonnaruwa
12. Baticaloa
13. Ampara
14. Badulla
15. Kandy
16. Kegalle
17. Gampaha
18. Colombo
19. Kalutara
20. Ratnapura
21. Nuwara Eliya
22. Moneragala
23. Hambantota
24. Matara
25. Galle
N
0 10 20 40 60 80 Miles
Source:
Gunda, T., G. Hornberger, and J. Gilligan. 2016. Spatiotemporal patterns of agricultural drought in Sri Lanka: 1881-2010. Int. J. Climatol. 36: 563-575.

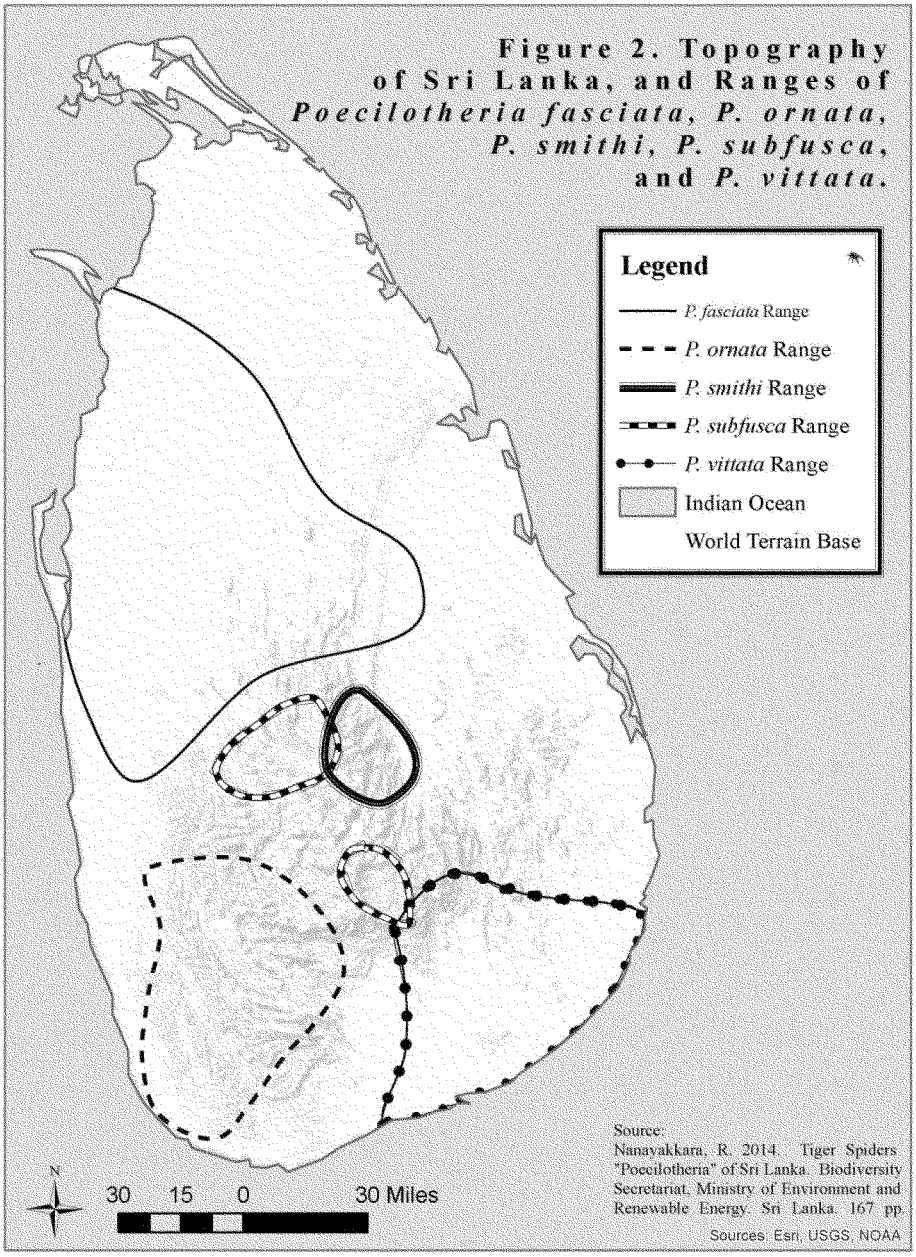

Figure 2. Topography of Sri Lanka, and Ranges of *Poecilotheria fasciata*, *P. ornata*, *P. smithi*, *P. subfusca*, and *P. vittata*.

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P. fasciata

Poecilotheria fasciata occurs in forests below 200-m elevation in Sri Lanka's dry and intermediate zones north of Colombo and is also sometimes found in coconut plantations in this region (Nanayakkara 2014a, p. 96; Nanayakkara 2014b, unpublished data; Smith *et al.* 2001, entire). The species has a broad but patchy distribution and is estimated to occupy less than 500 km² (193 mi²) of its range (MOE 2012, p. 55; Smith *et al.* 2001, p. 48). The area, extent, or quality (or a combination thereof) of *P. fasciata's* habitat is considered to be in continuing decline, and the species is categorized on the National Red List of Sri Lanka as Endangered (MOE 2012, p. 55).

The only detailed record of the species' occurrence in a coconut plantation is provided by Smith *et al.* (2001, entire). *Poecilotheria fasciata* is reported to have colonized the coconut plantation following a prolonged drought. While *P. fasciata* in dry and intermediate zone forests, including those surrounding the coconut plantation, were found to be emaciated and without spiderlings, those in the irrigated plantation were found to have spiderlings in their retreats and wider abdomens. Smith *et al.* argue that *P. fasciata* was able to colonize the plantation due to the occurrence of *P. fasciata* in the adjacent remnant forest, the presence of coconut trees that were infested with weevils and subsequently fed on by woodpeckers that created holes suitable for *P. fasciata* retreats, and plantation irrigation that resulted in an abundant prey base for the species. The *P. fasciata* population in the plantation was apparently established in the 1980s and persisted until at least 2000 (Smith *et al.* 2001, pp. 49, 52).

During recent surveys, *P. fasciata* were detected at nine locations—two in coconut plantations and seven in forest locations. Greater than 20 adults and 100 juveniles were found in coconut plantations, and greater than 30 adults and no juveniles were found in forest locations (Nanayakkara 2014b, unpublished data). Although no

juveniles were detected in forest habitats during these surveys, recent observations of *P. fasciata* juveniles in forest habitat have been reported (Nanayakkara 2014a, p. 96; Kumarasinghe *et al.* 2013, p. 10). Therefore, based on the observations of Smith *et al.* described above, it is possible that the lack of juveniles detected in forests during recent surveys was due to drought conditions during the survey period. As indicated above, island-wide surveys for *Poecilotheria* were conducted during 2009–2012, and droughts occurred in 2010 and 2012 in the region in which *P. fasciata* occurs (Integrated Regional Information Network 2012, unpaginated; Disaster Management Center, Sri Lanka 2010, p. 12). However, while juveniles were detected only in coconut plantations during these surveys, numbers found in coconut and forest habitat cannot be directly compared because surveys were designed for determining distribution rather than species abundance or density. For instance, juveniles may be more difficult to detect in forest habitat than in coconut plantations, or a greater area of coconut plantations may have been searched compared to forest habitat.

P. ornata

Poecilotheria ornata is found in the plains and hills of the lowland wet zone in southwestern Sri Lanka (Nanayakkara 2014a, pp. 112–113; Smith *et al.* 2002, p. 90). It is one of the few solitary species in the genus (Nanayakkara 2014a, p. 112). In recent surveys, 23 adults and no juveniles were detected at 4 locations (Nanayakkara 2014b, unpublished data). *Poecilotheria ornata* is estimated to occupy less than 500 km² (193 mi²) of its range (MOE 2012, p. 55), and the area, extent, or quality (or a combination thereof) of the species' habitat is considered to be in continuing decline. *Poecilotheria ornata* is categorized on the National Red List of Sri Lanka as Endangered (MOE 2012, p. 55).

P. smithi

Poecilotherai smithi is found in the central highlands, in Kandy and Matale districts (Nanayakkara *et al.* 2013, pp. 73–74). It was originally found in the wet zone at mid elevations (Kirk 1996, p. 23), though it is described as a montane species (Jacobi 2005, entire; Smith *et al.* 2002, p. 92). *Poecilotheria smithi* appears to be very rare and is considered highly threatened (Nanayakkara *et al.* 2013, p. 73; Gabriel *et al.* 2005, p. 4). The species was described in 1996, and, despite several efforts to locate the species during the past 20 years, few individuals have been found (Nanayakkara *et al.* 2013, pp. 73–74; Gabriel *et al.* 2005, pp. 6–7). In 2005, three adult females and four spiderlings were reported in the Haragama, Kandy district, an area described as severely impacted by several anthropogenic factors (Nanayakkara *et al.* 2013, p. 74; Gabriel *et al.* 2005, pp. 6–7). During surveys conducted in several areas of the country during 2003–2005, no *P. smithi* were found (Samarawckrama *et al.* 2005, entire). Finally, during recent surveys, the species was found at two locations with seven adults and nine juveniles detected (Nanayakkara 2014b, unpublished data). Prior to these recent surveys, the species was known only from the Haragama, Kandy district. However, the species was recently found about 31 km (19.3 mi) away from Haragama, in three trees within a 5-km² (1.9-mi²) area of highly disturbed habitat (Nanayakkara *et al.* 2013, p. 74).

Poecilotheria smithi was estimated to occupy less than 10 km² (3.9 mi²) of its range (MOE 2012, p. 55) but a recently reported location in Matale district increases the known area of occupancy by 5 km² (1.9 mi²). The area, extent, or quality (or a combination thereof) of the species' habitat is considered to be in continuing decline, and the species is categorized on the National Red List of Sri Lanka as Critically Endangered (MOE 2012, p. 55).

P. subfusca

Poecilotheria subfusca occurs in the wet zone of the central highlands of Sri Lanka, in two disjunct regions: The montane region above 1,500-m elevation in Nuwara Eliya and Badulla districts; and at 500 to 600 m (1,640 to 1,968 ft) elevation in Kegalla, Kandy, and Matale districts (Nanayakkara 2014a, pp. 101–102, 116; Smith *et al.* 2002, entire). One author (Nanayakkara 2014a, pp. 116–117) identifies individuals in the latter region as *P. bara,* which was first described as a species in 1917 (Chamberlin 1917, in Kirk 1996, p. 21). However, in the 1990s *P. bara* was determined to be a junior synonym of *P. subfusca* (Kirk 1996, p. 21; also see *Taxonomy and Species Descriptions*). Therefore, all reference in this finding to *P. subfusca* refers to individuals in both the high-elevation and mid-elevation regions.

During recent surveys, *P. subfusca* was found at 10 locations, and a total of 25 adult and 56 juvenile *P. subfusca* were detected (Nanayakkara 2014b, unpublished data). The area of the range occupied by *P. subfusca* is less than 500 km² (193 mi²) (MOE 2012, p. 55). Further, the area, extent, or quality (or a combination thereof) of *P. subfusca's* habitat is considered to be in continuing decline throughout its range, and the species is categorized on the National Red List of Sri Lanka as Endangered (MOE 2012, p. 55).

P. vittata

Poecilotheria vittata occurs in the arid, dry, and intermediate zones of Hambantota and Monaragala districts in southeastern Sri Lanka (Kekulandala and Goonatilake 2015, unpaginated; Nanayakkara 2014a, pp. 106–107). The species' preferred habitat is said to be *Manilkara hexandra* (Palu) trees (Nanayakkara 2014a, p. 106), a dominant canopy tree species in Sri Lanka's dry forest (Gunarathne and Perera 2014, p. 15). In recent surveys, the species was found at 4 locations, and 15 adults and 7 juveniles of *P. fasciata* were detected (Nanayakkara 2014b, unpublished data). *Poecilotheria vittata* is estimated to occupy less than 500 km² (193 mi²) of its range (MOE 2012, p. 55), and the area, extent, or quality (or a combination thereof) of the species' habitat is considered to be in continuing decline. *Poecilotheria vittata* is categorized on the National Red List of Sri Lanka as Endangered (MOE 2012, p. 55).

Summary of Biological Status and Threats

The Act directs us to determine whether any species is an endangered species or a threatened species because of any one or more of five factors or the cumulative effects thereof: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence. In this section, we summarize the biological condition of the species and its resources, and the influences on such to assess the species' overall viability and the risks to that viability.

Habitat Loss and Degradation

Habitat loss and degradation are considered primary factors negatively affecting *Poecilotheria* species (Nanayakkara and Adikaram 2013, pp. 53–54; MOE 2012, p. 55; Molur *et al.* 2008, pp. 1–2). Forest loss and degradation are likely to negatively impact the five petitioned species in several ways. First, forest loss and degradation directly eliminate or reduce the availability of trees required by *Poecilotheria* species for reproduction, foraging, and protection

(Samarawckrama *et al.* 2005, p. 76; Smith *et al.* 2002, entire). Second, due to the limited ability of *Poecilotheria* species to travel far, as well as their sedentary habits, forest loss and degradation are also likely to result in direct mortality of individuals or populations, via physical trauma caused by the activities that result in forest loss and degradation, or the intentional killing of these spiders when they are encountered by humans during these activities (see *Intentional Killing*). Such mortality not only has the potential to affect these species' abundances and distributions, but also their genetic diversity. Tarantulas have highly structured populations (See *Tarantula General Biology*), and, consequently, the loss of a local population of a species—due to habitat loss or any other factor—equates to a loss of unique genetic diversity (Bond *et al.* 2006, p. 154, citing several sources). Finally, the loss of forest also often results in fragmented habitat. Due to their limited dispersal ability, forest fragmentation is likely to isolate *Poecilotheria* populations, which increases their vulnerability to stochastic processes (see *Stochastic Processes*), and may also expose wandering males and dispersing juveniles to increased mortality from intentional killing or predation when they attempt to cross between forest fragments (Bond *et al.* 2006, p. 155) (see *Intentional Killing*).

Natural Forest

Natural forests covered almost the entire island of Sri Lanka a few centuries ago (Mattsson *et al.* 2012, p. 31). However, extensive deforestation occurred during the British colonial period (1815–1948) as a result of forest-clearing for establishment of plantation crops such as tea and coffee, and also exploitation for timber, slash-and-burn agriculture (a method of agriculture in which natural vegetation is cut down and burned to clear the land for planting), and land settlement. In 1884, about midway through the British colonial period, closed-canopy (dense) forest covered 84 percent of the country and was reduced to 44 percent by 1956 (GOSL 2012, p. 2a–3–145; Nanayakkara 1996, in Mattson *et al.* 2012, p. 31). Deforestation continued after independence as the result of timber extraction, slash-and-burn agriculture, human settlements, national development projects, and encroachment (GOSL 2012, pp. 2a–3–144–145; Perera *et al.* 2012, p. 165). As a result, dense forest cover (canopy density greater than 70 percent) declined by half in about 50 years, to 22 percent in 2010 (GOSL 2012, pp. 51, 2a–3–145; Nanayakkara 1996, in Mattson *et al.* 2012, p. 31). Open-canopy forest (canopy density less than 70 percent) covered an additional 6.8 percent of the country in 2010 for an overall forest cover of 28.6 percent (GOSL 2012, p. 51).

The extent of past deforestation differed in the three climate zones of the country. The impacts of anthropogenic factors on forests in the wetter regions of the island have been more extensive due to the higher density of the human population in these regions. The human population density in the wet zone is 650 people per km^2 (1,684 per mi^2) compared to 170 people per km^2 (440 per km^2) in the dry zone and 329 per km^2 (852 per mi^2) nationally (GOSL 2012, p. 8). Currently about 13 percent of the wet zone, 15 percent of the intermediate zone, and 29 percent of the dry zone are densely forested (Table 3).

Recent information on forest cover in the different climate zones is provided in GOSL 2015, GOSL 2012, and FAO 2015a, all of which provide information from the Forest Department of Sri Lanka. The GOSL 2015 report provides a map of the change in forest cover between 1992 and 2010 and a qualitative assessment of these changes. The GOSL 2012 and FAO 2015a reports provide quantitative information on the area of forest cover by forest type for 1992, 1999, and 2010 and contain identical data from the Forest Department. The relevant forest cover information in these two reports is provided in Table 4. However, the Forest Department of Sri Lanka used different rainfall criteria to separate dry and intermediate zone forests, and different altitude criteria to separate montane and submontane forests, in different years (see climate zone and forest definitions in FAO 2015a, p. 6; GOSL 2012, p. 51; FAO 2005, p. 7; FAO 2001, pp. 16, 53). Therefore, we combine the information on intermediate and dry zone forests, and the information on montane and submontane forests in Table 4. We discuss the information on forest cover from the various sources by climate zone below.

Wet Zone Forest

Very little wet zone forest remains in Sri Lanka. Currently, the area of montane and submontane forests combined is only about 733 km^2 (283 mi^2) and is severely fragmented (GOSL 2012, pp. 51, 2a–3–142). According to GOSL (2012, p. 51), these forests remained relatively stable from 1992 to 2010 (Table 4). However, satellite imagery shows deforestation occurred in these forests during this period, although at low levels (GOSL 2015, unpaginated). Further, more recent evidence indicates these forests are currently declining. A recent report indicates that activities such as firewood collection, cutting of trees for other domestic purposes, and gem mining are ongoing in these forests, and that large areas were recently illegally cleared for vegetable cultivation (Wijesundara 2012, p. 182). While these forests are protected in Sri Lanka, administering agencies do not appear to have sufficient resources to prevent these activities (Wijesundara 2012, p. 182).

The area of lowland wet zone forests (lowland rainforest) declined from 1992 to 2010 (Table 4). Remaining lowland rainforests are severely fragmented, exist primarily as small, isolated patches, and declined by 182 km^2 (70 mi^2) during the 18-year period, though the rate of loss slowed considerably during the latter half of this period (GOSL 2012, p. 2a–3–142; Lindstrom *et al.* 2012, p. 681) (Table 4). GOSL (2015, unpaginated) shows low levels of deforestation throughout the lowland rainforest region from 1992 to 2010, and identifies a deforestation ''hotspot'' on the border of Kalutara and Ratnapura districts, which is within the range of *P. ornata* (Fig. 1, Fig. 2).

Dry and Intermediate Zone Forests

Dry and intermediate zone forests, which include most open-canopy forest (Mattsson *et al.* 2012, p. 30), declined by 1,372 km^2 (530 mi^2) between 1992 and 2010 (Table 4). According to GOSL (2015, unpaginated), the rate of deforestation nationwide during this period was highest in Anuradhapura and Moneragala districts, in which large portions of the ranges of *P. fasciata* and *P. vittata* occur (see Fig. 1, Fig. 2). GOSL (2015, unpaginated) also report deforestation hotspots in other districts (for instance Puttalam and Hambantota) in which these species occur. Natural regeneration of dry forest species is reported to be very poor, and dry zone forests are heavily degraded as a result of activities such as frequent shifting cultivation and timber logging (Perera 2012, p. 165, citing several sources).

TABLE 3—THE TOTAL AREA OF SRI LANKA'S CLIMATE ZONES, AND THE COVERAGE OF DENSE FOREST

[(Canopy cover greater than 70 percent) within each zone in 2010, based on information provided in Table 2 and GOSL 2012, p. 51.]

Climate zones of Sri Lanka	Area [1] (km^2)	Area covered with dense forest (canopy cover greater than 70 percent) closed-canopy forest in 2010 (km^2)	Proportion (percent) with dense forest [2]
Wet Zone	15,090	1,966	13
Intermediate Zone	7,873	1,179	15
Dry Zone	39,366	[3] 11,238	29
Arid Zone	3,281	.....	.....

[1] Calculated based on proportion of land area in each climate zone as provided in Table 2, and a total land area of 65,610 km^2.

[2] Original natural extent of forest cover in each zone is unknown. However, it is likely each zone was close to 100% forested because, as indicated above (see Natural Forest), in 1884, after several decades of deforestation during the British colonial period, dense forest covered 84% of the island.

[3] Figure is for dry monsoon forest and riverine forest. It does not include mangrove forests.

TABLE 4—AREA OF SRI LANKA FOREST COVER IN 1992, 1999, AND 2010 IN KM^2

[(Based on GOSL 2012, p. 51 and FAO 2015a, pp. 8–9). Forest cover for specific forest types are for dense (canopy density greater than 70 percent) forest. Area of open-canopy forest (canopy density less than 70 percent) is provided separately.]

Forest types (climate zone)	1992	1996	2010
Lowland Rainforest (Wet)	1,416	1,243	1,233
Submontane and montane Forest (Wet)	719	689	733
Moist monsoon + dry monsoon + riverine forest (Dry and Intermediate)	13,606	12,679	12,417
Open-canopy forest (Dry)	4,638	4,716	4,455

Forest Conservation Measures

Sri Lanka has taken several steps in recent decades to conserve its forests, and these efforts have contributed to the slowing of deforestation in the country (GOSL 2012, pp. 54–55). In 1990 the country imposed a moratorium, which is still in effect, on logging in all natural forests, has marked most forest and wildlife reserve boundaries to stem encroachments, and prepared and implemented management plans for forest and wildlife reserves, which became legal requirements under the Forest Ordinance Amendment Act No. 65 of 2009 and the Fauna and Flora Ordinance Amendment Act No. 22 of 2009 (GOSL 2014, p. 26). The government also encourages community participation in forest and protected area management, has implemented programs to engage residents in community forestry to reduce encroachment of cash crops and tea in the wet zone and slash-and-burn agriculture in the dry zone, and encourages use of non-forest lands and private woodlots for meeting the demands for wood and wood products (GOSL 2014, p. 26). In addition to these efforts, between 12 percent (GOSL 2015, unpaginated) and 28 percent (GOSL 2014, pp. xvi, 23) of the country's land area is reported to be under protected area status.

Although considerable efforts have been undertaken in Sri Lanka in recent years to stop deforestation and forest degradation, these processes are ongoing (see Current and Future Forest Trends). The assessment of the status of natural forests during the Species Red List assessments in 2012 indicate that, despite advances in forest conservation in the country, many existing threats continue to impact forest habitats (GOSL 2014, p. 26). While laws and regulations are in place to address deforestation, issues exist regarding their implementation (GOSL 2012, pp. 55, 2a–3–148–150). For instance, lack of financial assistance for protected area management, increasing demand for land, and regularization of land encroachments, result in further loss of the forest habitat of the five species addressed in this finding (GOSL 2014, p. 22; GOSL 2011, unpaginated). Also, there is poor coordination between government agencies with respect to forest conservation—conservation agencies are not always adequately consulted on initiatives to develop forested land (GOSL 2014, p. 22; MOE 2010, p. 31). In addition, many protected areas within the wet zone are small, degraded, and isolated (GOSL 2014, p. 31).

Current and Future Forest Trends

The current drivers of deforestation and forest degradation in Sri Lanka include a variety of factors such as small-scale encroachments, illicit timber harvesting, forest fires, destructive mining practices, and clearing of forest for developments, settlements, and agriculture (GOSL 2012, p. 12). These are exacerbated by a large, dense human population that is projected to increase from 20.7 million in 2015 to 21.5 million in 2030 (United Nations 2015, p. 22). While the majority of forested areas are protected areas, further population growth is likely to result in reduction of forested areas because (1) Sri Lanka already has a very high human density (329 people per km^2 (852 per mi^2)), (2) increases in the population will elevate an already high demand for land, and (3) little non-forested land is available for expansion of housing, development, cash crops, or subsistence agriculture (GOSL 2012, pp. 8, 14, 58). Most (72%) of the population of Sri Lanka is rural, dependence on agriculture for subsistence is widespread, and the rate of population growth is higher in rural areas resulting in an increasing demand for land for subsistence (Lindstrom *et al.* 2012, p. 680; GOSL 2011, unpaginated).

The current drivers of deforestation and forest degradation are also exacerbated by high economic returns

from illicit land conversions, lack of alternative livelihood opportunities for those practicing slash-and-burn agriculture, and, in the dry zone, weak implementation of land-use policy, and poverty (GOSL 2012, pp. 14–15). Further, for the 30 years prior to 2009, Sri Lanka was engaged in a civil war and, although the war took place primarily in the dry zone of the northern and eastern regions of the country, limited deforestation rates during the past few decades are attributed not only to the inaccessibility of many areas of the dry zone during the war, but also to the slow pace of development in the country as a whole during this period (GOSL 2012, pp. 48, 56–57).

Overall, deforestation and forest degradation in Sri Lanka are ongoing, although recent rates of deforestation are much lower than during the mid- to late- 20th century—the rate of deforestation during 1992–2010 was 71 km² (27.4 mi²) per year, compared to 400 km² (154 mi²) per year during 1956–1992 (GOSL 2015, unpaginated). However, since the end of Sri Lanka's civil war in 2009, the government has been implementing an extensive 10-year development plan with the goal of transforming the country into a global economic and industrial hub (Buthpitiya 2013, p. ii; Central Bank of Sri Lanka 2012, p. 67; Ministry of Finance and Planning—Sri Lanka (MOFP) 2010, entire). The plan includes large infrastructure projects throughout the country (MOFP 2010, entire). Projects include, among other things, development of seaports, airports, expressways, railways, industrial parks, power plants, and water management systems that will allow for planned expansion of agriculture, and many of these projects have already started (Buthpitiya 2013, pp. 5–6; Central Bank of Sri Lanka 2012, p. 67; MOFP 2010, entire). They also include projects located within the ranges of all five species addressed in this finding, although the plan does not provide the amount of area that will be impacted by these projects (Fig. 2 and MOFP 2010, pp. 63, 93, 101, 202–298). The rate of loss of natural forest (primary forest and other naturally regenerated forest) increased from 60 km² (23 mi²) per year during 2000–2010 to 86 km² (33 mi²) per year during 2010–2015 (FAO 2015b, pp. 44, 50). As post-war reconstruction and development continues in Sri Lanka, deforestation and forest degradation can be expected to rise (GOSL 2012, p. 2a–3–146).

Coconut Plantations

Coconut is grown throughout Sri Lanka. Most (57 percent) of the area under coconut cultivation is in the intermediate and wet zones north of Colombo (MOE 2011, p. 14), which overlaps with the southern portion of the range of *P. fasciata.* As indicated above, *P. fasciata* are sometimes found in coconut plantations in Sri Lanka, although the extent to which coconut plantations contribute to sustaining viable populations of these species is unknown. This is particularly the case because (1) tarantulas are poor dispersers (see *Tarantula General Biology*), (2) colonization of coconut plantations by the species appears to depend on the occurrence of occupied natural forest in relatively close proximity to coconut plantations (Smith *et al.* 2001, entire), and (3) very little natural forest remains in the coconut growing region in which *P. fasciata* occurs (Fig. 2 and GOSL 2015, unpaginated; MOE 2014, p. 94).

The aerial extent of coconut cultivation in Sri Lanka has varied between about 3,630 and 4,200 km² (1,402 and 1,622 mi²) since 2005 (Central Bank of Sri Lanka 2014, Statistical Appendix, Table 13), with no clear directional trend. However, due to the rising human population and resulting escalating demand for land in Sri Lanka, plantations have become increasingly fragmented due to conversion of these lands to housing (GOSL 2014, pp. 26–27). As indicated above, due to their limited dispersal ability, forest fragmentation is likely to isolate *Poecilotheria* populations, which increases their vulnerability to stochastic processes (see *Stochastic Processes*), and may also expose wandering males and dispersing juveniles to increased mortality from intentional killing or predation when they attempt to cross between forest fragments (Bond *et al.* 2006, p. 155) (see *Intentional Killing*). Thus, even though *P. fasciata* uses coconut plantations to some extent, fragmentation of this habitat is likely to isolate populations and increase their vulnerability to stochastic processes, intentional killing, and predation.

Summary

Sri Lanka has lost most of its forest cover due to a variety of factors over the past several decades. Very little (1,966 km² (759 mi²)) wet zone forest—in which the ranges of *P. ornata, P. smithi,* and *P. subfusca* occur—remains in the country, the remainder is highly fragmented, and continues to be lost. Only about 35 percent (16,872 km² (6,514 mi²)) of dense and open canopy dry and intermediate zone forests—in which the ranges of *P. fasciata* and *P. vittata* occur—remain, deforestation in these forests is ongoing, and recent rates of deforestation in the country have been highest in regions constituting large portions of the ranges of these two species. Forest cover continues to decline at a rate of 86 km² (33 mi²) per year and the rate of loss is higher in the dry zone than the wet zone. While the current rate of forest loss is much lower than in the previous century, the rate of loss of natural forest is increasing and is anticipated to increase in the future with the country's emphasis on development and the projected population increase of 800,000 people. While coconut plantations provide additional habitat for one species (*P. fasciata*) in some areas, they are becoming increasingly fragmented due to demand for housing.

Tarantulas have sedentary habits, limited dispersal ability, and highly structured populations. Therefore, loss of habitat has likely resulted in direct loss of individuals or populations and, consequently, a reduction in the distribution and genetic diversity of these species. The distribution of these species is already limited—each currently occupies less than 500 km² (193 mi²) or, for *P. smithi,* less than 10 to 15 km² (3.9 to 5.8 mi²) of its range—and deforestation continues within the ranges of all five species discussed in this finding. Further, the limited distribution of these species is likely continuing to decline with ongoing loss of habitat. While the specific amount of habitat area required to maintain the long term viability of each of these species is unknown, given that (1) these species' have very small distributions, (2) there is little forest remaining in Sri Lanka, (3) remaining habitat is fragmented, and (4) deforestation is ongoing within these species' ranges, we conclude that habitat loss is likely currently having significant negative impacts on the viability of these species.

Pesticides

Pesticides are identified as a threat to *Poecilotheria* species in Sri Lanka (Nanayakkara 2014b, unpublished data; Gabriel 2014, unpaginated). The five species addressed in this finding could potentially be exposed to pesticides via pesticide drift into forests that are adjacent to crop-growing areas; by traveling over pesticide treated land when dispersing between forest patches; or by consuming prey that have been exposed to pesticides. Populations of these species could potentially be directly affected by pesticides through

increased mortality or through sub-lethal effects such as reduced fecundity, fertility, and offspring viability, and changes in sex ratio, behavior, and dispersal (Nash *et al.* 2010, p. 1694, citing several sources). *Poecilotheria* species may also be indirectly affected by pesticides if pesticides result in a reduction or depletion of available prey.

There are over 100 pesticide (herbicide, fungicide, and insecticide) active ingredients registered for use in Sri Lanka. Among the most commonly used insecticides are carbofuran, diazinon, and chloropyrifos (Padmajani *et al.* 2014, pp. 11–12). These are broad spectrum, neurotoxic insecticides, which tend to have very negative effects on non-target organisms (Pekar 2013, p. 415). Further, sit-and-wait predators appear to be more sensitive to insecticide applications than web-making spiders (Pekar 1999, pp. 1077).

The use of pesticides in Sri Lanka has been increasing steadily since the 1950s (Selvarajah and Thiruchelvam 2007, p. 381). Pesticide imports into Sri Lanka increased by 50 percent in 2011 compared to 2006 (Padmajani *et al.* 2014, p. 11). The level of misuse and overuse of pesticides in Sri Lanka is high. Depending on region and crop species, 33 to 60 percent of Sri Lankan farmers use greater amounts, higher concentrations, or more frequent applications of pesticides (or a combination of these) than is recommended (Padmajani *et al.* 2014, pp. 13, 31, citing several sources).

The susceptibility of spiders to the direct effects of different pesticides varies with pesticide type and formulation, spider species, development stage, sex, and abiotic and biotic conditions at the time of pesticide application (Pekar 2013, pp. 416–417). Further, different classes of pesticides can cause different sub-lethal effects. For instance, activities such as movement, prey capture, reproduction, development, and defense are particularly disrupted by neurotoxic formulations because they are governed by complex neural interactions. However, spiders can potentially recover from sub-lethal effects over several days (Pekar 2013, p. 417), although the effects are complicated by the potential for cumulative effects of multiple applications across a season (Nash *et al.* 2010, p. 1694).

We are not aware of any information on the population level effects of pesticides on *Poecilotheria* species. However, given the large proportion of Sri Lanka's human population that is reliant on farming, the high level of misuse and overuse of pesticides in the country, and the broad-spectrum and high level of toxicity of the insecticides commonly used in the country, it is likely that the species addressed in this finding are directly or indirectly negatively affected by pesticides to some extent. Therefore, while the population level effects of pesticides on the five species addressed in this finding are uncertain, the effects of pesticides likely exacerbate the effects of other threats acting on these species.

Climate Change

The Intergovernmental Panel on Climate Change (IPCC) concluded that warming of the climate system is unequivocal (IPCC 2013, p. 4). Numerous long-term climate changes have been observed including changes in land surface temperatures, precipitation patterns, ocean temperature and salinity, sea ice extent, and sea level (IPCC 2013, pp. 4–12). Various types of changes in climate can have direct or indirect effects on species. These effects may be positive, neutral, or negative and they may change over time, depending on the species and other relevant considerations, such as the effects of interactions of climate with other variables (*e.g.,* habitat fragmentation) (IPCC 2007, pp. 8–14, 18–19). However, a large fraction of terrestrial and freshwater species face increased extinction risk under projected climate change during and beyond the current century, especially as climate change interacts with habitat modification and other factors such as overexploitation, pollution, and invasive species (Settele *et al.* 2014, p. 275).

Maintenance of body temperature and water relations by spiders is critical to their survival. All spiders, including *Poecilotheria,* are ectotherms and, therefore, their body temperature varies with that of their environment. While spiders keep body temperature within tolerable limits through behaviors such as moving into shade when temperatures rise (Pulz 1987, pp. 27, 34–35), they are susceptible to rapid fluctuations in body temperature and severe depletion of body water stores due to their relatively low body mass and high surface to volume ratio (Pulz 1987, p. 27).

Tropical ectotherms evolved in an environment of relatively low inter- and intra-annual climate variability, and already live near their upper thermal limits (Settele *et al.* 2014, p. 301; Deutsch *et al.* 2008, p. 6669). Their capacity to acclimate is generally low. They have small thermal safety margins, and small amounts of warming may decrease their ability to perform basic physiological functions such as development, growth, and reproduction (Deutsch *et al.* 2008, pp. 6668–6669, 6671). Evidence also indicates they may have low potential to increase their resistance to desiccation (Schilthuizen and Kellerman 2014, p. 61, citing several sources).

While observed and projected changes in temperature and precipitation could potentially be within the tolerance limits of the *Poecilotheria* species addressed in this finding, it is possible that climate change could directly negatively affect these species through rising land surface temperatures, changes in the amount and pattern of precipitation, and increases in the frequency and intensity of extreme climate events such as heat waves or droughts. It is also possible that climate change could indirectly negatively affect these species, by negatively impacting populations of their insect prey species, which are also tropical ectotherms. In the only detailed observations of a Sri Lankan *Poecilotheria* species, Smith *et al.* (2001, entire) indicate that *P. fasciata* found in natural forest were emaciated and without spiderlings during an extended drought, while those found in an irrigated plantation had wider girths and spiderlings (see *Species –Specific Information*). These observations indicate that the lack of reproduction in natural forest during the drought may have been due either to desiccation stress or lack of available prey, or both, as a result of low moisture levels.

The general trend in temperature in Sri Lanka over the past several decades is that of increasing temperature, though with considerable variation between locations in rates and magnitudes of change (De Costa 2008, p. 87; De Silva *et al.* 2007, p. 21, citing several sources). Over the six to ten decades prior to 2007, temperatures have increased within all climate zones of the country, although rates of increase vary from 0.065 °C (0.117 °F) per decade in Ratnapura (an increase of 0.65 °C (1.17 °F) during the 97-year period analyzed) in the lowland wet zone, to 0.195 °C (0.351 °F) per decade in Anuradhapura (an increase of 1.50 °C (2.70 °F) during the 77-year period analyzed) in the dry zone. In the montane region, temperatures increased at a rate of 0.141 °C (0.254 °F) per decade at Nuwara Eliya to 0.191 °C (0.344 °F) per decade at Badulla (increases of 1.09 and 1.47 °C (1.96 and 2.65 °F) during the 77-year period analyzed, respectively) (De Costa 2008, p. 68). The rate of warming has increased in more recent years—overall temperature in the country increased at a rate of 0.003 °C (0.005 °F) per year during 1896–1996, 0.016 °C (0.029 °F)

per year during 1961–1990, and 0.025 °C (0.045 °F) per year during 1987–1996 (Eriyagama *et al.* 2010, p. 2, citing several sources). Depending on future climate scenarios, temperatures are projected to increase by 2.93 to 5.44 °C (5.27 to 9.49 °F) by the end of the current century in South Asia (Cruz *et al.* 2007, in Eriyagama *et al.* 2010, p. 6). Downscaled projections for Sri Lanka using regional climate models report increases of 2.0 to 4.0 °C (3.6 to 7.2 °F) by 2100, while statistical downscaling of global climate models report increases of 0.9 to 3 °C (1.62 to 5.4 °F) by 2100 and 1.2 to 1.3 °C (2.16 to 2.34 °F) by 2050 (Eriyagama *et al.* 2010, p. 6, citing several sources).

Studies show a decreasing trend in rainfall in Sri Lanka over the past several decades (see De Costa 2008, p. 87; De Silva *et al.* 2007, p. 21, citing several sources) although, according to the Climate Change Secretariat of Sri Lanka (2015, p. 19) there is no consensus on this fact. However, authors appear to agree that the intensity and frequency of extreme events such as droughts and floods have increased (Imbulana et al 2016 and Ratnayake and Herath 2005, in Climate Change Secretariate of Sri Lanka 2015, p. 19).

Rainfall in Sri Lanka is highly variable from year to year, across seasons and across locations within any given year (Jayatillake *et al.* 2005, p. 70). Statistically significant declines in rainfall have been observed for the period 1869–2007 at Anuradhapura in the northern dry zone (12.92 mm (5.08 in) per decade), and Badulla, Kandy, and Nuwara Eliya (19.16, 30.50, and 51.60 mm (0.75, 1.20, and 2.03 in) per decade, respectively) in the central highlands (De Costa 2008, p. 77). Significant declines have also been observed in more recent decades at Kurunegala in western Sri Lanka's intermediate zone (120.57 mm (4.75 in) per decade during 1970–2007) and Ratnapura (41.02 mm (1.61 in) per decade during 1920–2007) (De Costa 2008, p. 77). Further, a significant trend of decreasing rainfall with increasing temperature exists at Anuradhapura, Kurunegala, and Nuwara Eliya (De Costa 2008, pp. 79–81). Patterns of future rainfall in the country are highly uncertain—studies provide variable and conflicting projections (Eriyagama *et al.* p. 6, citing several sources). However, an increased frequency of dry periods and droughts are expected (MOE 2010, p. 35).

While at least one of the species addressed in this finding appears to be vulnerable to drought, the responses of the five petitioned *Poecilotheria* species to observed and projected climate change in Sri Lanka are largely unknown. However, the climate in Sri Lanka has already changed considerably in all climate zones of the country, and continues to change at an increasing rate. These species evolved in specific, relatively stable climates and, because they are tropical ectotherms, may be sensitive to changing environmental conditions, particularly temperature and moisture (Deutsch *et al.* 2008, pp. 6668–6669; Schilthuizen and Kellerman 2014, pp. 59–61, citing several sources). Moreover, because they have poor dispersal ability, *Peocilotheria* are unlikely to be able to escape changing climate conditions via range shifts. Therefore, while population level responses of the five species addressed in this finding to observed and projected changes in climate are not certain, the stress imposed on these species by increasing temperatures and changing patterns of precipitation is likely exacerbating the effects of other factors acting on these species such as habitat loss and degradation, and stochastic processes. This is especially the case for *P. fasciata* because (1) the frequency and intensity of droughts has increased and are expected to continue increasing, (2) based on the best available information, the species fails to reproduce in natural forest during extended droughts, and (3) most populations have been found in natural forest.

Trade

Poecilotheria species are popular in trade due to their striking coloration and large size (Nanayakkara 2014a, p. 86; Molur *et al.* 2006, p. 23). In 2000, concerned about increasing trade in these species, Sri Lanka and the United States co-sponsored a proposal to include the genus in Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (Government of Sri Lanka and Government of the United States 2000, entire). However, at the 11th Conference of the Parties, the proposal was criticized as containing too little information on international trade and species' distribution limits. It was further noted that the genus was primarily threatened by habitat destruction, and was not protected by domestic legislation in India. No consensus was reached on the proposal—there were 49 votes in favor, 30 against, and 27 abstentions—and the proposal was therefore rejected (Convention on International Trade in Endangered Species 2000, p. 50).

Collection of *Poecilotheria* specimens from the wild could potentially have significant negative impacts on *Poecilotheria* populations. Due to the patchy distributions and poor dispersal abilities of tarantulas, collection of several individuals from a single location could potentially reduce the abundance or distribution of a species, especially those with restricted distributions (Molur *et al.* 2006, p. 14; West *et al.* 2001, unpaginated). Further, because tarantula populations are highly structured, loss of individuals from a single location could result in significant loss of that species' genetic diversity (Bond 2006, p. 154). Collection of a relatively large number of individuals from a single population could also alter population demographics such that the survival of a species or population is more vulnerable to the effects of other factors, such as habitat loss.

Collection of species from the wild for trade often begins when a new species is described or when a rare species has been rediscovered. Alerted to a new or novel species, collectors arrive at the reported location and set out collecting the species from the wild (Molur *et al.* 2006, p. 15; Stuart *et al.* 2006, entire). For tarantulas, adult females may be especially vulnerable to collection pressures as collectors often attempt to capture females, which produce young that can be sold (Capannini 2003, p. 107). Collectors then sell the collected specimens or their offspring to hobbyists who captive-rear the species and provide the pet trade with captive-bred specimens (Gabriel 2014, unpaginated; Molur *et al.* 2006, p. 16). Thus, more individuals are likely to be captured from the wild during the period in which captive-breeding stocks are being established, in other words, prior to the species becoming broadly available in trade (Gabriel 2014, unpaginated).

All five of the petitioned endemic Sri Lankan species are bred by hobbyists and vendors and are available in the pet trade as captive-bred individuals in the United States, Europe, and elsewhere (see Herndon 2014, *pers. comm.;* Elowsky 2014, unpaginated; Gabriel 2014, unpaginated; Longhorn 2014a, unpaginated; Longhorn 2014b; Mugleston 2014, unpaginated; U.S. Fish and Wildlife Service Division of Management Authority 2012, *in litt.*). Captive-bred individuals appear to supply the majority of the current legal trade in these species, at least in the United States. The Service's Law Enforcement Management Information System contains information on U.S. international trade in three of these species—*P. fasciata, P. ornata,* and *P. vittata* (it does not currently collect information on *P. smithi* or *P. subfusca*).

Of the 400 individuals of these species that were legally imported into, or exported or re-exported from, the United States during 2007–2012, 392 (98 percent) were declared as captive-bred (U.S. Fish and Wildlife Service Division of Management Authority 2012, *in litt.*). However, wild individuals of at least some of the petitioned species are still being collected (Nanayakkara 2014a, p. 86; Nanayakkara 2014b, unpublished data; U.S. Fish and Wildlife Service Division of Management Authority 2012, *in litt.*). Nanayakkara (2014, p. 85) and Samarawckrama *et al.* (2005, p. 76) indicate that there is evidence of illegal smuggling from Sri Lanka, although they do not provide details. Further, of the 400 individuals of Sri Lankan *Poecilotheria* imported into, or exported or re-exported from, the United States during 2007–2012, 8 *P. vittata* were declared as wild-caught. It is possible that additional wild-caught individuals of the Sri Lankan petitioned species were (or are) not included in this total because they are imported into the United States illegally, or imported into other countries. However, we are not aware of any information indicating whether, or to what extent, that activity occurs.

Sri Lanka prohibits the commercial collection and exportation of all *Poecilotheria* species, under the Sri Lanka Flora and Fauna Protection (Amendment) Act, No. 22 of 2009, which is part of the Fauna and Flora Protection Ordinance No. 2 (1937) (DLA Piper 2015, p. 392; Government of Sri Lanka and Government of the United States 2000, p. 5). However, enforcement is weak and influenced by corruption (DLA Piper 2015, p. 392; GOSL 2012, p. 2a–3–149)

In sum, individuals of at least some of these species are currently being collected from the wild. However, the extent to which this activity is occurring is unknown, as is the extent to which these species have been, or are being, affected by collection. Based on the available information on U.S. imports, a small amount of trade occurs in wild specimens of these species. However, it is likely that more wild specimens enter Europe or Asia than the United States due to the closer proximity of Sri Lanka to Europe and Asia and consequent increased ease of travel and transport of specimens. Further, even small amounts of collection of species with small populations can have a negative impact on the species. Given that evidence indicates that low levels of collection of at least some of these species from the wild continues to occur, it is likely that collection for trade is exacerbating population effects of other factors negatively impacting these species, such as habitat loss and degradation, and stochastic processes.

Intentional Killing

Poecilotheria spiders are feared by humans in Sri Lanka and, as a result, are usually killed when encountered (Kekulandala and Goonatilake 2015, unpaginated; Nanayakkara 2014a, p. 86; Gabriel 2014, unpaginated; Smith *et al.* 2001, p. 49). Intentional killing of *Poecilotheria* spiders may negatively impact the five petitioned species by raising mortality rates in these species' populations to such an extent that populations decline or are more vulnerable to the effects of other factors, such as habitat loss. Adult male *Poecilotheria* are probably more vulnerable to being intentionally killed because they wander in search of females during the breeding season (see *Tarantula General Biology*) and thus are more likely to be encountered by people. Consequently, intentional killing could potentially reduce the density of males in an area. Because the mating of a female depends on a male finding her, and males search for females randomly, a reduction in the density of males could result in a reduction in the percent of females laying eggs in any given year (Stradling 1994, p. 96) and, consequently, a lower population growth rate.

We are not aware of any information on the number of individuals of the petitioned species that are intentionally killed by people. However, in areas where these species occur, higher human densities are likely to result in higher human contact with these species and, consequently, higher numbers of spiders killed. The human population density in Sri Lanka is much higher in the wet zone (see *Habitat Loss and Degradation*). Therefore, it is likely that *P. ornata, P. smithi,* and *P. subfusca* are affected by intentional killing more than *P. fasciata* and *P. vittata.* Although we are not aware of any information indicating the numbers of individuals of these species that are intentionally killed each year, it is likely that such killing is exacerbating the negative effects of other factors, such as habitat loss and degradation, on these species' populations.

Stochastic (Random) Events and Processes

Species endemic to small regions, or known from few, widely dispersed locations, are inherently more vulnerable to extinction than widespread species because of the higher risks from localized stochastic (random) events and processes, such as floods, fire, landslides, and drought (Brooks *et al.* 2008, pp. 455–456; Mangel and Tier 1994, entire; Pimm *et al.* 1988, p. 757). These problems can be further magnified when populations are very small, due to genetic bottlenecks (reduced genetic diversity resulting from fewer individuals contributing to the species' overall gene pool) and random demographic fluctuations (Lande 1988, p. 1455–1458; Pimm *et al.* 1988, p. 757). Species with few populations, limited geographic area, and a small number of individuals face an increased likelihood of stochastic extinction due to changes in demography, the environment, genetics, or other factors, in a process described as an extinction vortex (a mutual reinforcement that occurs among biotic and abiotic processes that drives population size downward to extinction) (Gilpin and Soule´ 1986, pp. 24–25). The negative impacts associated with small population size and vulnerability to random demographic fluctuations or natural catastrophes can be further magnified by synergistic interactions with other threats.

P. smithi is known from very few widely dispersed locations and is likely very rare (see *Species—Specific Information*). Therefore, it is highly likely that *P. smithi* is extremely vulnerable to stochastic processes and that the species is highly likely negatively impacted by these processes. The remaining four petitioned Sri Lankan species have narrow ranges within specific climate zones of Sri Lanka. It is unclear whether the range sizes of these four are so small that stochastic processes on their own are likely to have significant negative impacts on these species. However, stochastic processes may have negative impacts on these species in combination with other factors such as habitat loss, because habitat loss can further fragment and isolate populations.

Determinations

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species based on (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence. Listing

actions may be warranted based on any of the above threat factors, singly or in combination.

We have carefully assessed the best scientific and commercial information available on *P. fasciata, P. ornata, P. subfusca, P. smithi,* and *P. vittata.* While population information is not available on these species, the best available information indicates these species' populations have experienced extensive declines in the past and their populations continue to decline. Tarantulas have limited dispersal ability and sedentary habits, and, therefore, the loss of habitat (Factor A) likely results in direct loss of individuals or populations and, consequently, a reduction in the distribution of the species. As a result, it is highly likely that the extensive loss of forest (71 percent in the dry zone, 85 percent in the intermediate zone, and 87 percent in the wet zone) over historical levels resulted in extensive reductions in these species' populations, and that their populations continue to decline with ongoing deforestation. Further, because these species likely have highly structured populations, reductions in these species' populations have likely resulted in coincident loss of these species' unique genetic diversities, eroding the adaptive and evolutionary potential of these species (Bond 2006, p. 154).

All five of the petitioned Sri Lankan species have restricted ranges within specific regions and climates of Sri Lanka and are currently estimated to occupy areas of less than 500 km^2 (193 mi^2), and less than 10–15 km^2 (4–6 mi^2) for *P. smithi.* Due to the life-history traits of tarantulas—restricted range, sedentary habits, poor dispersal ability, and structured populations—these species are vulnerable to habitat loss. Extensive habitat loss (Factor A) has already occurred in all the climate zones in which these species occur, and deforestation is ongoing in the country. Further, the cumulative effects of changing climate, intentional killing, pesticides, capture for the pet trade, and stochastic processes are likely significantly exacerbating the effects of habitat loss.

Therefore, for the following reasons we conclude that these species' resiliency, redundancy, and representation have been and continue to be significantly reduced to the extent that the viability of each of these five species is significantly compromised:

(1) These species are closely tied to their habitats, little of their forest habitat remains, deforestation is ongoing in these habitats, and these species are vulnerable to habitat loss;

(2) these species' have poor dispersal ability, are unlikely to be able to escape changing climate conditions via range shifts, and Sri Lanka's climate is changing at increasing rates;

(3) the cumulative effects of climate change, intentional killing, pesticides, capture for the pet trade, and stochastic processes are likely significantly exacerbating the effects of habitat loss; and

(4) *P. smithi* is known from few locations, is likely rare, and very likely vulnerable to stochastic processes.

The Act defines an endangered species in section 3(6) of the Act as any species that is ''in danger of extinction throughout all or a significant portion of its range'' and a threatened species in section 3(20) of the Act as any species that is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' We find that *P. fasciata, P. ornata, P. smithi, P. subfusca,* and *P. vittata* are presently in danger of extinction throughout their ranges based on the likely severity and immediacy of threats currently impacting these species. The populations and distributions of these species have likely been significantly reduced; the remaining habitat and populations are threatened by a variety of factors acting alone and in combination to reduce the overall viability of the species.

Based on the factors described above and their impacts on *P. fasciata, P. ornata, P. smithi, P. subfusca,* and *P. vittata,* we find the following factors to be threats to these species (*i.e.,* factors contributing to the risk of extinction of this species): Loss of habitat (Factor A; all five species), stochastic processes (Factor E; *P. smithi*), and the cumulative effects (Factor E; all five species) of these and other threats including climate change, intentional killing, pesticide use, and capture for the pet trade. Furthermore, despite laws in place to protect these five species and the forest and other habitat they depend on, these threats continue (Factor D). We consider the risk of extinction of these five species to be high because these species are vulnerable to habitat loss, this process is ongoing, and these species have limited potential to recolonize reforested areas or move to more favorable climate. Therefore, on the basis of the best available scientific and commercial information, we propose listing *P. fasciata, P. ornata, P. smithi, P. subfusca,* and *P. vittata* as endangered in accordance with sections 3(6) and 4(a)(1) of the Act. We find that a threatened species status is not appropriate for these species because of their restricted ranges, limited distributions, and vulnerability to extinction; and because the threats are ongoing throughout their ranges at a level which places these species in danger of extinction now.

Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. Because we have determined that *P. fasciata, P. ornata, P. smithi, P. subfusca,* and *P. vittata* are endangered throughout all of their ranges, no portion of its range can be ''significant'' for purposes of the definitions of ''endangered species'' and ''threatened species.'' See the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (79 FR 37577, July 1, 2014).

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition of conservation status, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in public awareness and conservation actions by Federal and State governments in the United States, foreign governments, private agencies and groups, and individuals.

Section 7(a) of the Act, as amended, and as implemented by regulations at 50 CFR part 402, requires Federal agencies to evaluate their actions that are to be conducted within the United States or upon the high seas, with respect to any species that is proposed to be listed or is listed as endangered or threatened. Because *P. fasciata, P. ornata, P. smithi, P. subfusca,* and *P. vittata* are not native to the United States, no critical habitat is being proposed for designation with this rule. Regulations implementing the interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat. If a proposed Federal action may adversely affect a listed species, the responsible Federal agency must enter into formal consultation with the Service. Currently, with respect to *P. fasciata, P. ornata, P. smithi, P. subfusca,* and *P. vittata,* no Federal activities are known that would require consultation.

Section 8(a) of the Act authorizes the provision of limited financial assistance for the development and management of

programs that the Secretary of the Interior determines to be necessary or useful for the conservation of endangered or threatened species in foreign countries. Sections 8(b) and 8(c) of the Act authorize the Secretary to encourage conservation programs for foreign listed species, and to provide assistance for such programs, in the form of personnel and the training of personnel.

Section 9 of the Act and our implementing regulations at 50 CFR 17.21 set forth a series of general prohibitions that apply to all endangered wildlife. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to ''take'' (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these) endangered wildlife within the United States or upon the high seas. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. In addition, it is illegal for any person subject to the jurisdiction of the United States to import; export; deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce any listed species. Certain exceptions apply to employees of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits for endangered species are codified at 50 CFR 17.22. With regard to endangered wildlife, a permit may be issued for the following purposes: for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

Required Determinations

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with listing a species as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and upon request from the Branch of Foreign Species, Ecological Services (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Branch of Foreign Species, Ecological Services, Falls Church, VA.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245; unless otherwise noted.

■ 2. In § 17.11(h), add the following five entries to the List of Endangered and Threatened Wildlife in alphabetical order under Arachnids to read as set forth below:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	*
Arachnids.				
*	*	*	*	*
Spider, ivory ornamental tiger.	*Poecilotheria subfusca* ..	Wherever found	E	[*Insert* **Federal Register** *citation when published as a final rule*]
*	*	*	*	*
Spider, ornate tiger	*Poecilotheria ornata*	Wherever found	E	[*Insert* **Federal Register** *citation when published as a final rule*]
Spider, Pedersen's tiger	*Poecilotheria vittata*	Wherever found	E	[*Insert* **Federal Register** *citation when published as a final rule*]
Spider, Smith's tiger	*Poecilotheria smithi*	Wherever found	E	[*Insert* **Federal Register** *citation when published as a final rule*]
*	*	*	*	*
Spider, Sri Lanka ornamental tiger.	*Poecilotheria fasciata*	Wherever found	E	[*Insert* **Federal Register** *citation when published as a final rule*]

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	*

* * * * *

Dated: December 5, 2016.

Stephen Guertin,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2016–30059 Filed 12–13–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

RIN 0648–BG03

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources in the Gulf of Mexico and Atlantic Region; Amendment 26

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

ACTION: Notice of availability; request for comments.

SUMMARY: The South Atlantic Fishery Management Council (South Atlantic Council) and Gulf of Mexico Fishery Management Council (Gulf Council) have jointly submitted Amendment 26 to the Fishery Management Plan for the Coastal Migratory Pelagics Fishery of the Gulf of Mexico and Atlantic Region (FMP) for review, approval, and implementation by NMFS. Amendment 26 would adjust the management boundary for the Gulf of Mexico (Gulf) and Atlantic migratory groups of king mackerel; revise management reference points, stock and sector annual catch limits (ACLs), commercial quotas, and recreational annual catch targets (ACTs) for Atlantic migratory group king mackerel; allow limited retention and sale of Atlantic migratory group king mackerel incidentally caught in the shark gillnet fishery; establish a commercial split season for Atlantic migratory group king mackerel in the Atlantic southern zone; establish a commercial trip limit system for Atlantic migratory group king mackerel in the Atlantic southern zone; revise reference points and stock and sector ACLs for Gulf migratory group king mackerel; revise commercial zone quotas for Gulf migratory group king mackerel; and modify the recreational bag limit for Gulf migratory group king mackerel. The purpose of Amendment 26 is to ensure that king mackerel management is based on the best scientific information available, while increasing the social and economic benefits of the fishery.

DATES: Written comments must be received on or before February 13, 2017.

ADDRESSES: You may submit comments on Amendment 26 identified by ''NOAA–NMFS–2016–0120,'' by either of the following methods:

- *Electronic submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal: *http://www.regulations.gov.* Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2016-0120, click the ''Comment Now!''* icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Karla Gore, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in required fields if you wish to remain anonymous).

Electronic copies of Amendment 26 may be obtained from the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov.* Amendment 26 includes a draft environmental assessment, a Regulatory Flexibility Act analysis, and a regulatory impact review.

FOR FURTHER INFORMATION CONTACT: Karla Gore, telephone: 727–551–5753, or email: *karla.gore@noaa.gov.*

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires each regional fishery management council to submit any FMP or FMP amendment to NMFS for review and approval, partial approval, or disapproval. The Magnuson-Stevens Act also requires that NMFS, upon receiving a plan or amendment, publish an announcement in the **Federal Register** notifying the public that the plan or amendment is available for review and comment.

The FMP being revised by Amendment 26 was prepared jointly by the South Atlantic and the Gulf Councils (Councils) and implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Act.

Background

In September of 2014, the Southeast Data, Assessment, and Review 38 stock assessment (SEDAR 38) was completed for both the Gulf migratory group and Atlantic migratory group of king mackerel. SEDAR 38 determined that both the Gulf migratory group and Atlantic migratory group of king mackerel are not overfished and are not undergoing overfishing. The Gulf Council's and South Atlantic Council's Scientific and Statistical Committees (SSCs) reviewed the assessment and concluded that SEDAR 38 should form the basis for revisions to reference points such as the overfishing limit (OFL) and acceptable biological catch (ABC), and the ACLs for the two migratory groups of king mackerel. SEDAR 38 also provided genetic information on king mackerel, which indicated that the winter mixing zone for the two migratory groups was smaller than previously thought and that the management boundary for these migratory groups should be revised.

Actions Contained in Amendment 26

Amendment 26 includes actions to adjust the management boundary of the Gulf and Atlantic migratory groups of king mackerel; revise reference points, stock and sector ACLs, commercial quotas, and recreational ACTs for Atlantic migratory group king mackerel; allow limited retention and sale of Atlantic migratory group king mackerel incidentally caught in the shark gillnet fishery; establish a commercial split season for Atlantic migratory group king mackerel in the Atlantic southern zone; establish a commercial trip limit system for Atlantic migratory group king mackerel in the Atlantic southern zone; establish a commercial trip limit system for Atlantic migratory group king mackerel in the Atlantic southern zone;

revise reference points and stock and sector ACLs for the Gulf migratory group of king mackerel; revise commercial zone quotas for Gulf migratory group king mackerel; and modify the recreational bag limit for Gulf migratory group king mackerel.

Management Boundary and Zone Descriptions for the Gulf and Atlantic Migratory Groups of King Mackerel

Currently management boundaries change seasonally for the Gulf and Atlantic migratory groups of king mackerel based on the historical understanding that the two migratory groups mixed seasonally off the east coast of Florida and in Monroe County, Florida. However, in 2014, SEDAR 38 determined the mixing zone between the two migratory groups now exists only in the portion of the EEZ off Monroe County, Florida, south of the Florida Keys. Amendment 26 would set a single year-round regulatory boundary (Gulf/Atlantic group boundary) separating management of the two migratory groups of king mackerel, based on the genetic analysis used in SEDAR 38. This new year-round Gulf/Atlantic group boundary would be set at a line extending east of the Miami-Dade/Monroe County, FL boundary, to better represent the area where the two migratory groups primarily exist. The newly defined mixing zone off of the Florida Keys would be included in the Gulf migratory group and managed by the Gulf Council.

Through Amendment 26, the Gulf migratory group's current eastern zone-northern subzone and eastern zone-southern subzone would be renamed the northern zone and southern zone, respectively. The southern zone would include the new mixing zone, extending east to the new Gulf/Atlantic group boundary. The name and dimensions of the Gulf migratory group's western zone would remain the same. The Atlantic migratory group's northern zone would also remain unchanged. The southern boundary of the Atlantic migratory group's southern zone would shift to the new Gulf/Atlantic group boundary. Due to this shift, the current Florida east coast subzone would no longer exist under Amendment 26. Instead, that area would be included in the Atlantic migratory group's southern zone year-round.

This action would not change the current Federal fishing permits requirements for fishing for king mackerel in the Gulf and Atlantic areas as defined in Federal regulations.

Atlantic Migratory Group King Mackerel Reference Points, ACLs, Commercial Quotas and Recreational ACTs

Amendment 18 to the FMP established reference points, ACLs, and accountability measures for both migratory groups of king mackerel (76 FR 82058, December 29, 2011). The current ABC of 10.46 million lb (4.74 million kg) for the Atlantic migratory group king mackerel was set in Amendment 18. In Amendment 26, the Councils chose revisions of the OFLs and ABCs for Atlantic migratory group king mackerel based on SEDAR 38 and the South Atlantic Council's SSC ABC recommendation based on a high recruitment scenario. The Atlantic migratory group ABC would gradually decrease from 17.4 million lb (7.89 million kg) in the 2016–2017 fishing year to 12.7 million lb (5.76 million kg) in the 2019–2020 fishing year.

Amendment 26 would also set the stock ACL equal to OY and the ABC. The Atlantic migratory group's sector allocation (37.1 percent of the ACL to the commercial sector and 62.9 percent of the ACL to the recreational sector) will not change through Amendment 26. Amendment 26 would revise the commercial ACLs for Atlantic migratory group king mackerel to be 6.5 million lb (2.9 million kg) for the 2016–2017 fishing year, 5.9 million lb (2.7 million kg) for the 2017–2018 fishing year, 5.2 million lb (2.4 million kg) for the 2018–2019 fishing year, and 4.7 million lb (2.1 million kg) for the 2019–2020 fishing year and subsequent fishing years. The recreational ACLs for Atlantic migratory group king mackerel would be set at 10.9 million lb (4.9 million kg) for the 2016–2017 fishing year, 9.9 million lb (4.5 million kg) for the 2017–2018 fishing year, 8.9 million lb (4.0 million kg) for the 2018–2019 fishing year, and 8.0 million lb (3.6 million kg) for the 2019–2020 fishing year and subsequent fishing years. The recreational sector ACTs for Atlantic migratory group kind mackerel would be set at 10.1 million lb (4.6 million kg) for the 2016–2017 fishing year, 9.2 million lb (4.2 million kg) for the 2017–2018 fishing year, 8.3 million lb (3.8 million kg) for the 2018–2019 fishing year and 7.4 million lb (3.4 million kg) for the 2019–2020 fishing year and subsequent fishing years.

The commercial ACLs for Atlantic migratory group king mackerel would be divided each fishing year between the northern zone (23.04 percent) and the southern zone (76.96 percent) into their respective commercial quotas. The proposed commercial quotas for the Atlantic northern zone would be 1,497,600 lb (679,300 kg) for the 2016–2017 fishing year, 1,259,360 lb (616,595 kg) for the 2017–2018 fishing year, 1,198,080 lb (543,440 kg) for the 2018–2019 fishing year, and 1,082,880 lb (491,186 kg) for the 2019–2020 fishing year and subsequent years. Proposed commercial quotas for the Atlantic southern zone would be 5,002,400 lb (2,269,050 kg) for the 2016–2017 fishing year, 4,540,640 lb (2,059,600 kg) for the 2017–2018 fishing year, 4,001,920 lb (1,815,240 kg) for the 2018–2019 fishing year, and 3,617,120 lb (1,640,698 kg) for the 2019–2020 fishing year and subsequent fishing years.

Incidental Catch of Atlantic Migratory Group King Mackerel Caught in the Shark Gillnet Fishery

Amendment 20A to the FMP prohibited recreational bag limit sales of king mackerel by commercially permitted king mackerel fishers in South Atlantic Council jurisdictional waters, which included king mackerel incidentally caught on directed commercial shark trips (79 FR 34246, June 16, 2014).

In Amendment 26, the Councils determined that, as a result of the mesh size used and the nature of the shark gillnet fishery, most king mackerel are already dead when the shark gillnets are retrieved. The Councils decided that some incidental catch of Atlantic migratory group king mackerel should be allowed for retention and sale if it is incidentally caught in the commercial shark gillnet fishery on vessels with a Federal king mackerel commercial permit.

If Amendment 26 is approved and implemented, a vessel in the Atlantic Exclusive Economic Zone that is engaged in directed shark fishing with gillnets, and that has both a valid Federal shark directed commercial permit and a valid Federal king mackerel commercial permit, would be allowed to retain and sell a limited number of king mackerel. In the Atlantic northern zone, no more than three king mackerel per crew member could be retained or sold per trip. In the Atlantic southern zone, no more than two king mackerel per crew member could be retained or sold per trip. The incidental catch allowance would not apply to commercial shark trips that are using an authorized gillnet for Atlantic migratory group king mackerel north of Cape Lookout Light. In that area the existing commercial trip limit of 3,500 lb (1,588 kg) would apply. No type of gillnet is an allowable gear for Atlantic migratory group king mackerel south of Cape Lookout Light. These incidentally caught king mackerel would have to be retained or sold to a dealer with a valid

Federal Gulf and South Atlantic dealer permit. This action is intended to reduce king mackerel discards and allow for the limited retention and sale of king mackerel, while not encouraging direct harvest of king mackerel on these shark fishing trips.

Commercial Split Seasons for Atlantic Migratory Group King Mackerel in Atlantic Southern Zone

Currently, the commercial fishing year for Atlantic migratory group king mackerel is March 1 through the end of February, and the commercial ACLs for the Atlantic northern zone and southern zone are allocated for the entire fishing year. Amendment 26 would divide the annual Atlantic migratory group kind mackerel commercial quota for the Atlantic southern zone into two commercial seasons. The Atlantic northern zone quota would not be split. Amendment 26 would divide the commercial quotas for the Atlantic southern zone by allocating 60 percent to the first season of March 1 through September 30, and 40 percent to the second season of October 1 through the end of February. This commercial split season for the Atlantic southern zone quota is intended to ensure that a portion of the southern zone's quota is available in later months of the fishing year, which will allow for increased fishing opportunities during more of the fishing year.

The proposed seasonal commercial quotas for the first season of March 1 through September 30 each fishing year in the southern zone would be: 3,001,440 lb (1,361,430 kg) for the 2016–2017 fishing year, 2,724,384 lb (1,235,760 kg) for the 2017–2018 fishing year, 2,401,152 lb (1,089,144 kg) for the 2018–2019 fishing year, and 2,170,272 lb (984,419 kg) for the 2019–2020 fishing year and subsequent fishing years. The proposed seasonal commercial quotas for the second season of October 1 through the end of February each fishing year in the southern zone would be: 2,000,960 lb (907,620 kg) for the 2016–2017 fishing year, 1,816,256 lb (823,840 kg) for the 2017–2018 fishing year, 1,600,768 lb (726,096 kg) for the 2018–2019 fishing year, and 1,446,848 lb (656,279 kg) for the 2019–2020 fishing year and subsequent years.

Commercial Trip Limit System for the Atlantic Migratory Group of King Mackerel in the Atlantic Southern Zone

Commercial trip limits for Atlantic migratory group king mackerel are limits on the amount of that species that may be possessed on board or landed, purchased or sold from a federally permitted king mackerel vessel per day. Several commercial trip limits currently exist in the Atlantic southern zone. North of 29°25′ N. lat., which is a line directly east from the Flagler/Volusia County, FL, boundary, the trip limit for Atlantic migratory group king mackerel is 3,500 lb (1,588 kg) year-round. In the area between the Flagler/Volusia County, FL, boundary (29°25′ N. lat.) and 28°47.8′ N. lat., which is a line extending directly east from the Volusia/Brevard County, FL, boundary, the trip limit is 3,500 lb (1,588 kg) from April 1 through October 31. In the area between the Volusia/Brevard County, FL, boundary (28°47.8′ N. lat.) and 25°20.4′ N. lat., which is a line directly east from the Miami-Dade/Monroe County, FL boundary, the trip limit is 75 fish from April 1 through October 31. In the area between the Miami-Dade/Monroe County, FL, boundary, and 25°48″ N. lat., which is a line directly west from Monroe/Collier County, FL, boundary, the trip limit is 1,250 lb (567 kg) from April 1 through October 31.

Amendment 26 would revise the commercial trip limits for Atlantic migratory group king mackerel in the Atlantic southern zone, based on the revised management boundary and split commercial season. During the first commercial season (March 1 through September 30), in the area between the Flagler/Volusia County, FL, boundary (29°25′ N. lat.), and the Miami-Dade/Monroe County, FL boundary (25°20.24″ N. lat.), the trip limit would be 50 fish during March. From April 1 through September 30, the trip limit would be 75 fish, unless NMFS determines that 75 percent or more of the Atlantic southern zone quota for the first season has been landed, then the trip limit would be 50 fish. During the second commercial season (October 1 through the end of February), the trip limit would be 50 fish for the area between the Flagler/Volusia County, FL, boundary, and the the Miami-Dade/Monroe County, FL boundary. During the month of February, the trip limit would remain 50 fish, unless NMFS determines that less than 70 percent of the commercial quota for the southern zone's second season has been landed, then the trip limit would be 75 fish.

Amendment 26 would not revise the 3,500 lb (1,588 kg) year-round trip limit for Atlantic migratory group king mackerel, north of the Flagler/Volusia County, FL boundary.

In Amendment 26, the Councils determined that these changes to the commercial season and commercial trip limits for the Atlantic southern zone would ensure the longest possible commercial fishing season for Atlantic migratory group king mackerel.

Gulf Migratory Group King Mackerel ACLs

The current ABC and total ACL for Gulf migratory group king mackerel is 10.8 million lb (4.89 million kg). Based on its review of SEDAR 38, the Gulf Council's SSC recommended OFLs and ABCs for Gulf migratory group king mackerel for the 2015–2016 through 2019–2020 fishing years that decrease over time. The Gulf migratory group king mackerel ABCs in Amendment 26 are lower than the current ABC and total ACL, because the geographical area for which the new ABCs apply is smaller than the current area for which they apply, as a result of the proposed zone revisions in the Gulf and Atlantic.

Because Gulf migratory group king mackerel is not overfished or undergoing overfishing, the Gulf Council recommended that ACL remain equal to OY and to ABC. Therefore, in Amendment 26, the total ACLs for the Gulf migratory group of king mackerel are the same values as the ABCs recommended by the Gulf SSC: 9.21 million lb (4.18 million kg) for the 2016–2017 fishing year, 8.88 million lb (4.03 million kg) for the 2017–2018 fishing year, 8.71 million lb (3.95 million kg) for the 2018–2019 fishing year, and 8.55 million lb (3.88 million kg) for the 2019–2020 fishing year.

Amendment 26 would not revise the current Gulf migratory group king mackerel allocations (68 percent of the total ACL to the recreational sector and 32 percent to the commercial sector). Based on the existing allocations, the commercial ACLs proposed for Gulf migratory group king mackerel are: 2.95 million lb (1.34 million kg) for the 2016–2017 fishing year, 2.84 million lb (1.29 million kg) for the 2017–2018 fishing year, 2.79 million lb (1.27 million kg) for the 2018–2019 fishing year, and 2.74 million lb (1.24 million kg) for the 2019–2020 fishing year and subsequent fishing years.

The Gulf migratory group commercial ACLs would be further divided each fishing year into gear-specific commercial ACLs for hook-and-line gear and for vessels fishing with run-around gillnet gear. The hook-and-line component commercial ACLs (which applies to the entire Gulf) would be: 2,330,500 lb (1,057,097 kg) for the 2016–2017 fishing year, 2,243,600 lb (1,017,680 kg) for the 2017–2018 fishing year, 2,204,100 lb (999,763 kg) for the 2018–2019 fishing year, and 2,164,600 lb (981,846 kg) for the 2019–2020 fishing year and subsequent years. The run-around gillnet component

commercial ACL (which applies to the Gulf southern zone) would be: 619,500 lb (281,000 kg) for the 2016–2017 fishing year, 596,400 lb (270,522 kg) for the 2017–2018 fishing year, 585,900 lb (265,760 kg) for the 2018–2019 fishing year, and 575,400 lb (260,997 kg) for the 2019–2020 fishing year and subsequent fishing years. The commercial quota by zones would also be modified (see below).

The proposed recreational ACLs for Gulf migratory group king mackerel would be: 6.26 million lb (2.84 million kg) for the 2016–2017 fishing year, 6.04 million lb (2.74 million kg) for the 2017–2018 fishing year, 5.92 million lb (2.69 million kg) for the 2018–2019 fishing year, and 5.81 million lb (2.64 million kg) for the 2019–2020 fishing year and subsequent fishing years.

Commercial Zone Quotas for Gulf Migratory Group King Mackerel

Amendment 26 would revise the Gulf migratory group commercial zone quotas, because of the proposed changes to the Councils' jurisdictional boundaries and resultant zone revisions. The current allocation of the commercial ACL for Gulf migratory group king mackerel by zones is: 31 percent in the western zone, 5.17 percent in the northern zone, 15.96 percent for the southern zone using hook-and-line gear, 15.96 percent for the southern zone using gillnet gear, and 31.91 percent for the Florida east coast subzone. However, under Amendment 26, the Florida east coast subzone would no longer exist and the quota associated with that zone would be re-allocated to the remaining zones. The revised allocation of commercial zone quotas for Gulf migratory group king mackerel would be: 40 percent in the western zone, 18 percent in the northern zone, 21 percent for the southern zone using hook-and-line gear, and 21 percent for the southern zone using gillnet gear.

The proposed commercial quotas for the Gulf western zone would be: 1,180,000 lb (535,239 kg) for the 2016–2017 fishing year, 1,136,000 lb (515,281 kg) for the 2017–2018 fishing year, 1,116,000 lb (506,209 kg) for the 2018–2019 fishing year, and 1,096,000 lb (497,137 kg) for the 2019–20 fishing year and subsequent fishing years.

The proposed commercial quotas for the Gulf northern zone would be: 531,000 lb (240,858 kg) for the 2016–2017 fishing year, 511,200 lb (231,876 kg) for the 2017–18 fishing year, 502,200 lb (227,794 kg) for the 2018–2019 fishing year, and 493,200 lb (223,712 kg) for the 2019–2010 fishing year and subsequent fishing years.

The proposed commercial hook-and-line and commercial run-around gillnet component quotas in the southern zone would be equal to each other for each fishing year and would be: 619,500 lb (281,000 kg) for the 2016–2017 fishing year, 596,400 lb (270,522 kg) for the 2017–2018 fishing year, 585,900 lb (265,760 kg) for the 2018–2019 fishing year, and 575,400 lb (260,997 kg) for the 2019–2020 fishing year and subsequent fishing years.

Allocation and the Recreational Bag Limit for Gulf Migratory Group of King Mackerel

From the 2002–2003 fishing year through the 2013–2014 fishing year, the recreational sector's landings of the Gulf migratory group of king mackerel were consistently less than 50 percent of the recreational ACL, while the commercial sector's landings were consistently 90 percent or more of the commercial ACL. In Amendment 26, the Councils considered but rejected, the possibility of reallocating from the recreational ACL to the commercial ACL and instead proposed an increase in the recreational bag limit for Gulf migratory group king mackerel from 2 fish per person per trip to 3 fish per person per trip. The Councils determined that this increased recreational bag limit would allow more opportunities for recreational anglers to harvest the recreational sector ACL.

A proposed rule that would implement Amendment 26 has been drafted. In accordance with the Magnuson-Stevens Act, NMFS is evaluating the proposed rule to determine whether it is consistent with the FMP, the Magnuson-Stevens Act, and other applicable law. If that determination is affirmative, NMFS will publish a proposed rule in the **Federal Register** for public review and comment.

Consideration of Public Comments

The Councils have submitted Amendment 26 for Secretarial review, approval, and implementation. Comments on Amendment 26 must be received by February 13, 2017. Comments received during the respective comment periods, whether specifically directed to the amendment or the proposed rule, will be considered by NMFS in its decision to approve, disapprove, or partially approve Amendment 26.

All comments received by NMFS on the amendment or the proposed rule during their respective comment periods will be addressed in the final rule.

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

Dated: December 9, 2016.

Emily H. Menashes,

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

[FR Doc. 2016–30046 Filed 12–13–16; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 81, No. 240

Wednesday, December 14, 2016

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

Food Safety and Inspection Service

[Docket No. FSIS–2016–0043]

Codex Alimentarius Commission: Meeting of the Codex Committee on Spices and Culinary Herbs

AGENCY: Office of the Deputy Under Secretary for Food Safety, USDA.

ACTION: Notice of public meeting and request for comments.

SUMMARY: The Office of the Deputy Under Secretary for Food Safety, U.S. Department of Agriculture (USDA) and the Agricultural Marketing Service (AMS), are sponsoring a public meeting on January 17, 2017. The objective of the meeting is to provide information and receive public comments on agenda items and draft United States (U.S.) positions to be discussed at the 3rd Session of the Codex Committee on Spices and Culinary Herbs (CCSCH) of the Codex Alimentarius Commission (Codex), taking place in Chennai, India, February 6–10,2017. The Deputy Under Secretary for Food Safety and AMS recognize the importance of providing interested parties the opportunity to obtain background information on the 3rd Session of the CCSCH and to address items on the agenda.

DATES: The public meeting is scheduled for Tuesday, January 17, 2017 from 2:00 p.m.–4:00 p.m.

ADDRESSES: The public meeting will take place at the USDA, Jamie L. Whitten Building, Room 107–A, 1400 Independence Avenue SW., Washington, DC 20250.

Documents related to the 3rd Session of the CCSCH will be accessible via the Internet at the following address: *http://www.codexalimentarius.org/meetings-reports/en/.*

Dorian LaFond, U.S. Delegate to the 3rd Session of the CCSCH, invites U.S. interested parties to submit their comments electronically to the following email address: *Dorian.Lafond@ams.usda.gov.*

Call-In-Number

If you wish to participate in the public meeting for the 3rd Session of the CCSCH by conference call, please use the call-in-number below:

Call-in Number: 1–888–844–9904

The participant code will be posted on the following Web page: *http://www.fsis.usda.gov/wps/portal/fsis/topics/international-affairs/us-codex-alimentarius/public-meetings*

Registration

Attendees may register to attend the public meeting by emailing *Marie.Maratos@fsis.usda.gov* by January 12, 2017. Early registration is encouraged as it will expedite entry into the building. The meeting will take place in a Federal building. Attendees should bring photo identification and plan for adequate time to pass through security screening systems. Attendees that are not able to attend the meeting in person, but who wish to participate may do so by phone.

FOR FURTHER INFORMATION ABOUT THE 3RD SESSION OF CCSCH CONTACT: Dorian LaFond, Agricultural Marketing Service, Fruits and Vegetables Division, Mail Stop 0235, Room 2086, USDA, 1400 Independence Avenue SW., Washington, DC 20250. Telephone: (202) 690–4944, Fax: (202) 720–0016, email: *dorian.lafond@usda.gov.*

FOR FURTHER INFORMATION ABOUT THE PUBLIC MEETING CONTACT: Marie Maratos, U.S. Codex Office, 1400 Independence Avenue SW., Room 4861, Washington, DC 20250. Telephone: (202) 205–7760, Fax: (202) 720–3157, email: *Marie.Maratos@fsis.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Codex was established in 1963 by two United Nations organizations, the Food and Agriculture Organization and the World Health Organization. Through adoption of food standards, codes of practice, and other guidelines developed by its committees, and by promoting their adoption and implementation by governments, the Codex seeks to protect the health of consumers and ensure that fair practices are used in trade.

The CCSCH is responsible for elaborating worldwide standards for spices and culinary herbs in their dried and dehydrated state in whole, ground, and cracked or crushed form. The CCSCH consults as necessary with other international organizations in the standards development process to avoid duplication.

The CCSCH is hosted by India.

Issues To Be Discussed at the Public Meeting

The following items on the Agenda for the 3rd Session of the CCSCH will be discussed during the public meeting:

- Matters Referred by the Codex Alimentarius Commission and its Subsidiary bodies;
- Activities of International Organizations relevant to the Work of CCSCH;
- Draft Standard for Cumin;
- Draft Standard for Thyme;
- Proposed draft Standard for Black, White and Green Pepper;
- Proposed draft Standard for Oregano;
- Sampling plans for cumin and thyme;
- Further work on grouping of spices and culinary herbs;
- Discussion paper on glossary of terms for spices and culinary herbs;
- Discussion paper on further processing (in the context of spices and culinary herbs);
- Proposal for new work (replies to CL 2015/27–SCH); and
- Other business.

Each issue listed will be fully described in documents distributed, or to be distributed, by the Secretariat before the Meeting. Members of the public may access or request copies of these documents (see **ADDRESSES**).

Public Meeting

At the January 17, 2017, public meeting, draft U.S. positions on the agenda items will be described and discussed. Attendees will have the opportunity to pose questions and offer comments. Written comments may be offered at the meeting or sent to the U.S. Delegates for the 3rd Session of the CCSCH,(see **ADDRESSES**). Written comments should state that they relate to the activities of the 3rd Session of the CCSCH.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is

important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS Web page located at: *http://www.fsis.usda.gov/federal-register*.

FSIS also will make copies of this publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The Update is available on the FSIS Web page. Through the Web page, FSIS is able to provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *http://www.fsis.usda.gov/subscribe*. Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

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How To File a Complaint of Discrimination

To file a complaint of discrimination, complete the USDA Program Discrimination Complaint Form, which may be accessed online at *http://www.ocio.usda.gov/sites/default/files/docs/2012/Complain_combined_6_8_12.pdf,* or write a letter signed by you or your authorized representative.

Send your completed complaint form or letter to USDA by mail, fax, or email:

Mail: U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW., Washington, DC 20250–9410.

Fax: (202) 690–7442.

Email: program.intake@usda.gov.

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.), should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Done at Washington, DC, on December 8, 2016.

Paulo Almeida,

Acting U.S. Manager for Codex Alimentarius.

[FR Doc. 2016–29945 Filed 12–13–16; 8:45 am]

BILLING CODE 3410–DM–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Virginia Advisory Committee To Discuss Potential Projects of Study Including a Proposal on Hate Crimes

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a planning meeting of the Virginia State Advisory Committee to the Commission (MD State Advisory Committee) will convene by conference call at 12:00 p.m. (EDT) on Thursday, January 5, 2017. The purpose of each planning meeting is to discuss project planning and eventually select topic(s) for the Committee's civil rights review. At its last meeting, the Committee decided to have a proposal on hate crimes presented and considered among other potential topics.

DATES: The meeting will be held on Thursday, January 5, 2017, at 12:00 p.m. EST.

ADDRESSES: Public call information: Dial: 888–601–3861, Conference ID: 417838

FOR FURTHER INFORMATION CONTACT: Ivy L. Davis, at *ero@usccr.gov* or by phone at 202–376–7533

SUPPLEMENTARY INFORMATION: Interested members of the public may listen to the discussion by calling the following toll-free conference call-in number: 1–888–601–3861 and conference ID: 417838. Please be advised that before being placed into the conference call, you will be prompted to provide your name, organizational affiliation (if any), and email address (so that callers may be notified of future meetings). Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free conference call-in number.

Persons with hearing impairments may also follow the discussion by first calling the Federal Relay Service at 1–800–977–8339 and providing the operator with the toll-free conference call-in number: 1–888–601–3861 and conference call ID: 417838.

Members of the public are invited to submit written comments; the comments must be received in the regional office approximately 30 days after each scheduled meeting. Written comments may be mailed to the Eastern Regional Office, U.S. Commission on Civil Rights, 1331 Pennsylvania Avenue, Suite 1150, Washington, DC 20425, faxed to (202) 376–7548, or emailed to Evelyn Bohor at *ero@usccr.gov*. Persons who desire additional information may contact the Eastern Regional Office at (202) 376–7533.

Records and documents discussed during the meeting will be available for public viewing as they become available at *http://facadatabase.gov/committee/meetings.aspx?cid=279;* click the ''Meeting Details'' and ''Documents'' links. Records generated from this meeting may also be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meetings. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, *www.usccr.gov,* or to contact the Eastern Regional Office at the above phone numbers, email or street address.

Agenda:

I. Welcome and Introductions
—Rollcall
II. Planning Meeting
—Discuss Project Planning, including hate crime proposal
III. Other Business
IV. Adjournment

Dated: December 8, 2016.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2016–29913 Filed 12–13–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Census Bureau

Confidentiality Pledge Revision Notice

AGENCY: U.S. Census Bureau, Department of Commerce.

ACTION: Notice of revision of the confidentiality pledge under Title 13 United States Code, Section 9.

SUMMARY: Under 44 U.S.C. 3506(e) and 13 U.S.C. Section 9, the U.S. Census Bureau is announcing revisions to the confidentiality pledge it provides to its respondents under Title 13, United States Code, Section 9. These revisions are required by the passage and

implementation of provisions of the Federal Cybersecurity Enhancement Act of 2015 (H.R. 2029, Division N, Title II, Subtitle B, Sec. 223), which permit and require the Secretary of Homeland Security to provide Federal civilian agencies' information technology systems with cybersecurity protection for their Internet traffic. More details on this announcement are presented in the **SUPPLEMENTARY INFORMATION** section below.

DATES: These revisions become effective upon publication of this notice in the **Federal Register**. In a separate companion **Federal Register** notice, the U.S. Census Bureau is seeking public comment on these confidentiality pledge revisions.

ADDRESSES: Questions about this notice should be addressed to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *jjessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Robin J. Bachman, Policy Coordination Office, Census Bureau, HQ–8H028, Washington, DC 20233; 301–763–6440 (or via email at *pco.policy.office@census.gov*). Due to delays in the receipt of regular mail related to security screening, respondents are encouraged to use electronic communications.

SUPPLEMENTARY INFORMATION: Federal statistics provide key information that the Nation uses to measure its performance and make informed choices about budgets, employment, health, investments, taxes, and a host of other significant topics. The overwhelming majority of Federal surveys are conducted on a voluntary basis. Respondents, ranging from businesses to households to institutions, may choose whether or not to provide the requested information. Many of the most valuable Federal statistics come from surveys that ask for highly sensitive information such as proprietary business data from companies or particularly personal information or practices from individuals. Strong and trusted confidentiality and exclusively statistical use pledges under Title 13, U.S.C. and similar statistical confidentiality pledges are effective and necessary in honoring the trust that businesses, individuals, and institutions, by their responses, place in statistical agencies.

Under the authority of Title 13, U.S.C. and similar statistical confidentiality protection statutes, many Federal statistical agencies make statutory pledges that the information respondents provide will be seen only by statistical agency personnel or their sworn agents, and will be used only for statistical purposes. Title 13, U.S.C. and similar statutes protect the confidentiality of information that agencies collect solely for statistical purposes and under a pledge of confidentiality. These acts protect such statistical information from administrative, law enforcement, taxation, regulatory, or any other non-statistical use and immunize the information submitted to statistical agencies from legal process. Moreover, many of these statutes carry criminal penalties of a Class E felony (fines up to $250,000, or up to five years in prison, or both) for conviction of a knowing and willful unauthorized disclosure of covered information.

As part of the Consolidated Appropriations Act for Fiscal Year 2016 signed on December 17, 2015, the Congress included the Federal Cybersecurity Enhancement Act of 2015 (H.R. 2029, Division N, Title II, Subtitle B, Sec. 223). This Act, among other provisions, permits and requires the Secretary of Homeland Security to provide Federal civilian agencies' information technology systems with cybersecurity protection for their Internet traffic. The technology currently used to provide this protection against cyber malware is known as Einstein 3A; it electronically searches Internet traffic in and out of Federal civilian agencies in real time for malware signatures.

When such a signature is found, the Internet packets that contain the malware signature are shunted aside for further inspection by Department of Homeland Security (DHS) personnel. Since it is possible that such packets entering or leaving a statistical agency's information technology system may contain a small portion of confidential statistical data, statistical agencies can no longer promise their respondents that their responses will be seen only by statistical agency personnel or their sworn agents. However, they can promise, in accordance with provisions of the Federal Cybersecurity Enhancement Act of 2015, that such monitoring can be used only to protect information and information systems from cybersecurity risks, thereby, in effect, providing stronger protection to the integrity of the respondents' submissions.

Consequently, with the passage of the Federal Cybersecurity Enhancement Act of 2015, the Federal statistical community has an opportunity to welcome the further protection of its confidential data offered by DHS' Einstein 3A cybersecurity protection program. The DHS cybersecurity program's objective is to protect Federal civilian information systems from malicious malware attacks. The Federal statistical system's objective is to ensure that the DHS Secretary performs those essential duties in a manner that honors the Government's statutory promises to the public to protect their confidential data. Given that the Department of Homeland Security is not a Federal statistical agency, both DHS and the Federal statistical system have been successfully engaged in finding a way to balance both objectives and achieve these mutually reinforcing objectives.

Accordingly, DHS and Federal statistical agencies, in cooperation with their parent departments, have developed a Memorandum of Agreement for the installation of Einstein 3A cybersecurity protection technology to monitor their Internet traffic and have incorporated an associated Addendum on Highly Sensitive Agency Information that provides additional protection and enhanced security handling of confidential statistical data.

However, many current Title 13, U.S.C. and similar statistical confidentiality pledges promise that respondents' data will be seen only by statistical agency personnel or their sworn agents. Since it is possible that DHS personnel could see some portion of those confidential data in the course of examining the suspicious Internet packets identified by Einstein 3A sensors, statistical agencies need to revise their confidentiality pledges to reflect this process change. Therefore, the U.S. Census Bureau is providing this notice to alert the public to the confidentiality pledge revisions in an efficient and coordinated fashion.

The following is the revised statistical confidentiality pledge for the Census Bureau's data collections:

> The U.S. Census Bureau is required by law to protect your information. The Census Bureau is not permitted to publicly release your responses in a way that could identify you. Per the Federal Cybersecurity Enhancement Act of 2015, your data are protected from cybersecurity risks through screening of the systems that transmit your data.

The following listing includes Census Bureau information collections which are confidential under 13 U.S.C. Section 9, as well as information collections that the Census Bureau conducts on behalf of other agencies which are confidential under 13 U.S.C. Section 9 and for which

the confidentiality pledges will also be revised.

OMB No.	Title of information collection
0607–0008	Manufacturers' Shipments, Inventories, and Orders Survey.
0607–0013	Annual Retail Trade Report.
0607–0049	Current Population Survey (CPS) Basic Demographics.
0607–0104	Advance Monthly Retail Trade Survey (MARTS).
0607–0110	Survey of Housing Starts, Sales, and Completions.
0607–0117	U.S. Census-Age Search.
0607–0151	The Boundary and Annexation Survey (BAS) & Boundary Validation Program (BVP).
0607–0153	Construction Progress Reporting Surveys.
0607–0175	Quarterly Survey of Plant Capacity Utilization.
0607–0179	Housing Vacancy Survey (HVS).
0607–0189	Business and Professional Classification Report.
0607–0190	Monthly Wholesale Trade Survey.
0607–0195	Annual Wholesale Trade Survey (AWTS).
0607–0354	Annual Social and Economic Supplement to the Current Population Survey.
0607–0368	Special Census Program.
0607–0422	Service Annual Survey.
0607–0432	Quarterly Financial Report (QFR).
0607–0444	2014–2016 Company Organization Survey.
0607–0449	Annual Survey of Manufactures.
0607–0464	October School Enrollment Supplement to the Current Population Survey.
0607–0466	Current Population Survey, Voting and Registration Supplement.
0607–0561	Manufacturers' Unfilled Orders Survey.
0607–0610	Current Population Survey June Fertility Supplement.
0607–0717	Monthly Retail Trade Survey.
0607–0725	Generic Clearance for Questionnaire Pretesting Research.
0607–0757	2017 New York City Housing and Vacancy Survey.
0607–0782	Annual Capital Expenditures Survey.
0607–0795	Generic Clearance for Geographic Partnership Programs.
0607–0809	Generic Clearance for MAF and TIGER Update Activities.
0607–0810	The American Community Survey.
0607–0907	Quarterly Services Survey.
0607–0909	Information and Communication Technology Survey.
0607–0912	Business R&D and Innovation Survey.
0607–0921	2017 Economic Census—Commodity Flow Survey (CFS)—Advance Questionnaire.
0607–0932	2017 Economic Census—Commodity Flow Survey.
0607–0936	American Community Survey Methods Panel Tests.
0607–0963	2015 Management and Organizational Practices Survey.
0607–0969	Federal Statistical System Public Opinion Survey.
0607–0971	Generic Clearance for 2020 Census Tests to Research the Use of Automation in Field Data Collection Activities.
0607–0977	2014 Survey of Income and Program Participation (SIPP) Panel.
0607–0978	Generic Clearance for Internet Nonprobability Panel Pretesting.
0607–0983	Comparing Health Insurance Measurement Error (CHIME).
0607–0986	Annual Survey of Entrepreneurs.
0607–0987	The School District Review Program (SDRP).
0607–0988	The Redistricting Data Program.
0607–0989	2016 Census Test.
0607–0990	National Survey of Children's Health.
0607–0991	2017 Economic Census Industry Classification Report.
0607–0992	Address Canvassing Testing.
0607–XXXX	2017 Census Test—*currently submitted for clearance.*
0607–0760	Economic Census Round 3 Focus Group Discussion—*currently submitted for clearance.*
0607–XXXX	Collection of State Administrative Records Data—*currently submitted for clearance.*
0607–XXXX	2020 Census Local Update of Census Addresses Operation (LUCA)—*currently submitted for clearance.*
2528–0017	2015 American Housing Survey.
1220–0175	American Time Use Survey (ATUS).
1220–0050	Consumer Expenditure Quarterly and Diary Surveys (CEQ/CED).
1220–0100	Current Population Survey (CPS)—Basic Labor Force.
1121–0317	Identify Theft Supplement to the NCVS.
1121–0111	National Crime Victimization Survey 2015–2018.
3145–0141	National Survey of College Graduates (NSCG).
1018–0088	National Survey of Fishing, Hunting, and Wildlife-Associated Recreation.
1121–0260	2015 Police Public Contact Supplement.
1121–0184	2017 School Crime Supplement to the NCVS.
1121–0302	Supplemental Victimization Survey.
2528–0013	Survey of Market Absorption (SOMA).
2528–0276	Rental Housing Finance Survey (RHFS).
1905–0169	Manufacturing Energy Consumption Survey (MECSA).
2528–0029	Manufactured Housing Survey (MHS).
0935–0110	Medical Expenditure Panel Survey (MEPS).
1220–0187	ATUS-Eating and Health Supplement.
0536–0043	Food Security Supplement to the Current Population Survey.

OMB No.	Title of information collection
1220–0153	Contingent Worker Supplement to the Current Population Survey—(Currently in **Federal Register** Notice Stage—has not been fully approved).
1220–0102	Veterans Supplement to the Current Population Survey.
0970–0416	Child Support Supplement to the Current Population Survey.
3064–0167	National Survey of Unbanked and Underbanked Households.
1220–0102	Volunteers Supplement.
1220–0104	Displaced Workers Supplement.
3135–0136	Survey of Public Participation in the Arts.
0660–0221	Computer and Internet Use.

Sheleen Dumas,

PRA Departmental Lead, Office of the Chief Information Officer.

[FR Doc. 2016–30014 Filed 12–13–16; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–964]

Seamless Refined Copper Pipe and Tube from the People's Republic of China: Preliminary Results of Administrative Review; 2014–2015

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

SUMMARY: The Department of Commerce (the ''Department'') is conducting the fifth administrative review of the antidumping duty order on seamless refined copper pipe and tube from the People's Republic of China (''PRC''), covering the period November 1, 2014 through October 31, 2015. The Department preliminarily finds that, during the period of review (''POR''), the Hailiang Single Entity sold subject merchandise in the United States at less than normal value. Additionally, the Department preliminarily finds that the GD Single Entity did not sell subject merchandise in the United States at less than normal value. Interested parties are invited to comment on these preliminary results.

DATES: Effective December 14, 2016.

FOR FURTHER INFORMATION CONTACT: Drew Jackson or Stephen Bailey, AD/CVD Operations, Office IV, Enforcement & Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: 482–4406, and 482–0193, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 22, 2010, the Department published in the **Federal Register** an antidumping duty order on copper pipe and tube from the PRC.[1] On November 3, 2015, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order on copper pipe and tube from the PRC for the period November 1, 2014 through October 31, 2015.[2] On November 30, 2015, the Department received a request from Cerro Flow Products, LLC, Wieland Copper Products, LLC, Mueller Copper Tube Products Inc., and Mueller Copper Tube Company, Inc. (collectively, ''Petitioners'') to conduct administrative reviews of the following companies: (1) GD Group; (2) GD Holding; (3) GD Trading; (4) Zhejiang Hailiang Co., Ltd.; (5) Shanghai Hailiang Copper Co., Ltd.; (6) Zhejiang Jiahe Pipes Inc.; (7) Sinochem Ningbo Ltd.; (8) Sinochem Ningbo Import & Export Co., Ltd.; (9) Ningbo Jintian Copper Tube Co., Ltd.; (10) Zhejiang Naile Copper Co., Ltd.; (11) Guilin Lijia Metals Co., Ltd.; (12) Foshan Hua Hong Copper Tube Co., Ltd.; (13) Taicang City Jinxin Copper Tube Co., Ltd.; (14) Hong Kong Hailiang Metal; (15) Hong Kong Hailiang Metal Trading Limited; (16) China Hailiang Metal Trading; and (17) Shanghai Hailiang Metal Trading Limited.[3] Also, on November 30, 2015, the Department received a request from the Hailiang Group Companies[4] to conduct an administrative review of its sales for the POR.[5] On January 7, 2016, the Department published in the **Federal Register** a notice initiating an antidumping duty administrative review of copper pipe and tube from the PRC for the period November 1, 2014, through October 31, 2015, with respect to these 16 companies.[6]

Scope of the Order

The merchandise subject to the order is seamless refined copper pipe and tube. The product is currently classified under Harmonized Tariff Schedule of the United States (''HTSUS'') item numbers 7411.10.1030 and 7411.10.1090. Products subject to this order may also enter under HTSUS item numbers 7407.10.1500, 7419.99.5050, 8415.90.8065, and 8415.90.8085. Although the HTSUS numbers are provided for convenience and customs purposes, the written description of the scope of this order remains dispositive.[7]

Extension of Deadlines for Preliminary Results

On July 12, 2016, the Department extended the time period for issuing the preliminary results of this review until December 5, 2016.[8]

[1] *See Seamless Refined Copper Pipe and Tube from Mexico and the People's Republic of China: Antidumping Duty Orders and Amended Final Determination of Sales at Less Than Fair Value From Mexico,* 75 FR 71070 (November 22, 2010).

[2] See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 80 FR 67706 (November 3, 2015).

[3] *See* Letter to the Department from Petitioners, ''Seamless Refined Copper Pipe and Tube from China: Request for Administrative Review,'' dated November 30, 2015.

[4] Submissions in this proceeding were filed on behalf of Hong Kong Hailiang Metal Trading Limited, Zhejiang Hailiang Co., Ltd. and Shanghai Hailiang Copper Co., Ltd. (collectively, the ''Hailiang Group Companies'').

[5] *See* Letter to the Department from the Hailiang Group Companies, ''Request for Administrative Review of the Antidumping Duty Order on Seamless Refined Copper Pipe and Tube from the People's Republic of China,'' dated November 30, 2015.

[6] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 81 FR 736 (January 7, 2016) (''*Initiation Notice*'').

[7] *See* Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, from Gary Taverman, Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, regarding, ''Decision Memorandum for the Preliminary Results of the 2014–2015 Administrative Review of the Antidumping Duty Order on Seamless Refined Copper Pipe and Tube from the People's Republic of China,'' dated concurrently with and hereby adopted by this notice (''Preliminary Decision Memorandum''), for a complete description of the scope of the order.

[8] *See* Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, through Abdelali Elouaradia, Office Director, Antidumping and Countervailing Duty Operations, Office 4, regarding, ''Seamless Refined Copper Pipe and Tube from the People's Republic of China: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated July 12, 2016.

Preliminary Affiliation and Single Entity Determination

Based on record evidence in this review, as well as the Department's affiliation determination in the 2013–2014 administrative review,[9] the Department preliminarily finds that the following companies are affiliated pursuant to section 771(33)(F) of the Tariff Act of 1930, as amended (''the Act''): (1) Golden Dragon Precise Copper Tube Group, Inc.; (2) Golden Dragon Holding (Hong Kong) International, Ltd.; (3) Hong Kong GD Trading Co., Ltd.; (4) Shanghai Longyang Precise Copper Compound Copper Tube Co., Ltd.; (5) Jiangsu Canghuan Copper Industry Co., Ltd.; (6) Guangdong Longfeng Precise Copper Tube Co., Ltd.; (7) Wuxi Jinlong Chuancun Precise Copper Tube Co., Ltd.; (8) Longkou Longpeng Precise Copper Tube Co., Ltd.; (9) Xinxiang Longxiang Precise Copper Tube Co., Ltd.; (10) Coaxian Ailun Metal Processing Co., Ltd.; and (11) Chonqing Longyu Precise Copper Tube Co., Ltd.[10] Additionally, based on record evidence, the Department preliminarily finds that the following companies are affiliated pursuant to section 771(33)(F) of the Act: Hong Kong Hailiang Metal Trading Limited, Zhejiang Hailiang Co., Ltd., Shanghai Hailiang Copper Co., Ltd., and Anhui Hailiang.[11]

Moreover, based on the information presented in this review, we preliminarily find that Golden Dragon and its group of affiliated companies should be treated as a single entity and Hailiang and its group of affiliated companies should be treated as a single entity for purposes of this review pursuant to 19 CFR 351.401(f). Specifically, pursuant to 19 CFR 351.401(f)(1), the Department preliminarily found that the Golden Dragon companies are affiliated, have production facilities for producing similar or identical products that would not require substantial retooling of their respective facilities in order to restructure manufacturing priorities, and there is a significant potential for manipulation of price or production. The Department reached a similar preliminarily decision with respect to Hailiang and its affiliated companies. Additionally, the Department preliminarily finds that among the Golden Dragon companies and among the Hailiang companies, a significant potential for manipulation exists pursuant to 19 CFR 351.401(f)(2). For additional information, *see* Preliminary Decision Memorandum and Hailiang Single Entity Memorandum.

Separate Rates

In the Initiation Notice, we informed parties of the opportunity to request a separate rate.[12] In proceedings involving non-market economy (''NME'') countries, the Department begins with a rebuttable presumption that all companies within the NME country are subject to government control and, thus, should be assigned a single weighted-average dumping margin. It is the Department's policy to assign all exporters of merchandise subject to an administrative review involving an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate. Companies that wanted to be considered for a separate rate in this review were required to timely file a separate-rate application or a separate-rate certification to demonstrate their eligibility for a separate rate. Separate-rate applications and separate-rate certifications were due to the Department within 30 calendar days of the publication of the Initiation Notice.

In this review, nine companies for which a review was requested and which remain under review did not submit separate-rate information to rebut the presumption that they are subject to government control. These companies are: Zhejiang Jiahe Pipes Inc., Sinochem Ningbo Ltd., Sinochem Ningbo Import & Export Co., Ltd., Ningbo Jintian Copper Tube Co., Ltd., Zhejiang Naile Copper Co., Ltd., Guilin Lijia Metals Co., Ltd., Foshan Hua Hong Copper Tube Co., Ltd., Hong Kong Hailiang Metal, and Taicang City Jinxin Copper Tube Co., Ltd. As further discussed in the Preliminary Decision Memorandum,[13] we preliminarily find that these entities have not demonstrated that they operate free from government control and thus are not eligible for a separate rate.

The Department preliminarily finds that information placed on the record by the GD Single Entity[14] and the Hailiang Single Entity[15] demonstrates that these

[9] *See* GD Group *et al.*'s July 15, 2016, Supplemental questionnaire response (''supplemental response'') at 28–29. In the supplemental questionnaire response at 28–29 the Golden Dragon Group Companies confirm that all material facts from the 2013–2014 administrative review and the current 2014–2015 administrative review did not change with regard to the following: (1) Affiliation; (2) production facilities for similar or identical products; (3) level of common ownership; (4) cross-managers or board members between affiliates, including the roll of Mr. Changjie Li as Chairman of Golden Dragon Precise Copper Tube, Inc. and his duties and responsibilities as legal representative of the affiliates listed above (excluding Jiangsu Canghuan Copper Industry Co., Ltd.); (5) sharing of sales information; (6) production or pricing decisions; (7) intercompany employee transfers during the current POR and three years prior; (8) sharing of facilities during the current POR and three years prior; (9) transactions or sales; (10) sharing of accounting information; and (11) sales or purchase of material inputs through Golden Dragon Holding (Hong Kong) International Co., Ltd. or Hong Kong GD Trading Co., Ltd. during the POR. Because the information with regard to the above facts remain unchanged in this 2014–2015 administrative review, we continue to find it appropriate to treat the Golden Dragon Group Companies as a single entity for Department purposes. *See also* the Department's Memorandum For Abdelali Elouaradia, Director, AC/CVD Operation, Office 4, from Drew Jackson, International Trade Analyst, AD/CVD Operations, Office 4, regarding ''Affiliation and Single Entity Status of Golden Dragon Precise Copper Tube Group, Inc.; Golden Dragon Holding (Hong Kong) International Co., Ltd.; Hong Kong GD Trading Co., Ltd.; Shanghai Longyang Precise Copper Compound Copper Tube Co., Ltd.; Jiangsu Canghuan Copper Industry Co., Ltd.; Guangdong Longfeng Precise Copper Tube Co., Ltd.; Wuxi Jinlong Chuancun Precise Copper Tube Co., Ltd.; Longkou Longpeng Precise Copper Tube Co., Ltd.; Xinxiang Longxiang Precise Copper Tube Co., Ltd.; Coaxian Ailun Metal Processing Co., Ltd.; and Chonqing Longyu Precise Copper Tube Co., Ltd.,'' dated November 30, 2015.

[10] *See* Memorandum to Abdelali Elouaradia, Director, Office IV, AD/CVD Operations, through Robert Bolling, Program Manager, AD/CVD Operations Office IV, regarding ''Affiliation and Single Entity Status of Golden Dragon Precise Copper Tube Group, Inc.; Golden Dragon Holding (Hong Kong) International Co., Ltd.; Hong Kong GD Trading Co., Ltd.; Shanghai Longyang Precise Copper Compound Copper Tube Co., Ltd.; Jiangsu Canghuan Copper Industry Co., Ltd.; Guangdong Longfeng Precise Copper Tube Co., Ltd.; Wuxi Jinlong Chuancun Precise Copper Tube Co., Ltd.; Longkou Longpeng Precise Copper Tube Co., Ltd.; Xinxiang Longxiang Precise Copper Tube Co., Ltd.; Coaxian Ailun Metal Processing Co., Ltd.; and Chonqing Longyu Precise Copper Tube Co., Ltd.,'' dated November 30, 2015.

[11] *See* Memorandum to Abdelali Elouaradia, Director, Office IV, AD/CVD Operations, through Robert Bolling, Program Manager, AD/CVD Operations Office IV, regarding ''Affiliation and Single Entity Status of (1) Hong Kong Hailiang Metal Trading Limited, (2) Zhejiang Hailiang Co., Ltd., (3) Shanghai Hailiang Copper Co., Ltd., and (4) Hailiang (Anhui) Copper Co., Ltd.,'' (''Hailiang Single Entity Memorandum'') dated concurrently with this notice, for a full discussion of the proprietary details of the Department's single-entity analysis.

[12] *See Initiation Notice.*

[13] *See* Preliminary Determination Memorandum.

[14] The GD Single Entity includes the following companies: (1) Golden Dragon Precise Copper Tube Group, Inc.; (2) Golden Dragon Holding (Hong Kong) International, Ltd.; (3) Hong Kong GD Trading Co., Ltd.; (4) Shanghai Longyang Precise Copper Compound Copper Tube Co., Ltd.; (5) Jiangsu Canghuan Copper Industry Co., Ltd.; (6) Guangdong Longfeng Precise Copper Tube Co., Ltd.; (7) Wuxi Jinlong Chuancun Precise Copper Tube Co., Ltd.; (8) Longkou Longpeng Precise Copper Tube Co., Ltd.; (9) Xinxiang Longxiang Precise Copper Tube Co., Ltd.; (10) Coaxian Ailun Metal Processing Co., Ltd.; and (11) Chonqing Longyu Precise Copper Tube Co., Ltd. (the ''GD Single Entity''). *See* section entitled, ''Preliminary Affiliation and Single Entity Determination,'' below.

[15] The Hailiang Single Entity includes the following companies: (1) Hong Kong Hailiang Metal Trading Limited; (2) Zhejiang Hailiang Co. Ltd.; (3) Shanghai Hailiang Copper Co., Ltd.; and (4) Anhui Hailiang (the ''Hailiang Single Entity''). *See* section entitled, ''Preliminary Affiliation and Single Entity Determination,'' below.

companies are entitled to separate rate status.

PRC-Wide Entity

The Department's change in policy regarding conditional review of the PRC-wide entity applies to this administrative review.[16] Under this policy, the PRC-wide entity will not be under review unless a party specifically requests, or the Department self-initiates, a review of the entity. Because no party requested a review of the PRC-wide entity in this review, the entity is not under review and the entity's rate (*i.e.,* 60.85 percent) is not subject to change.[17] Apart from the GD Single Entity and Hailiang Single Entity companies discussed above, the Department considers all other companies for which a review was requested [18] to be part of the PRC-wide entity. For additional information, *see* the Preliminary Decision Memorandum.

Methodology

The Department is conducting this review in accordance with section 751(a)(1)(B) of the Act. The Department calculated export prices and constructed export prices in accordance with section 772 of the Act. Because the PRC is a non-market economy country, within the meaning of section 771(18) of the Act, the Department calculated normal value in accordance with section 773(c) of the Act. For a full description of the methodology underlying the preliminary results of this review, *see* the Preliminary Decision Memorandum, which is hereby adopted by this notice. A list of the topics included in the Preliminary Decision Memorandum is included as an appendix to this notice.

The Preliminary Decision Memorandum is a public document and is made available to the public *via* ACCESS. In addition, a complete version of the Preliminary Decision Memorandum can be found at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of Review

The Department preliminarily finds that the following weighted-average dumping margins exist for the POR:

Exporter	Weighted-average dumping margin (percent)
Golden Dragon Precise Copper Tube Group, Inc./Golden Dragon Holding (Hong Kong) International Co., Ltd./Hong Kong GD Trading Co., Ltd./Shanghai Longyang Precise Copper Compound Copper Tube Co., Ltd./Jiangsu Canghuan Copper Industry Co., Ltd./Guangdong Longfeng Precise Copper Tube Co., Ltd./Wuxi Jinlong Chuancun Precise Copper Tube Co., Ltd./Longkou Longpeng Precise Copper Tube Co., Ltd./Xinxiang Longxiang Precise Copper Tube Co., Ltd./Coaxian Ailun Metal Processing Co., Ltd./Chonqing Longyu Precise Copper Tube Co., Ltd	0.00
Hong Kong Hailiang Metal Trading Limited/Zhejiang Hailiang Co., Ltd./Shanghai Hailiang Copper Co., Ltd./Hailiang (Anhui) Copper Co., Ltd	8.53

Disclosure and Public Comment

The Department intends to disclose to parties the calculations performed for these preliminary results of review within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). Interested parties may submit case briefs no later than 30 days after the date of publication of these preliminary results of review.[19] Rebuttal briefs may be filed no later than five days after case briefs are due and may respond only to arguments raised in the case briefs.[20] A table of contents, list of authorities used, and an executive summary of issues should accompany any briefs submitted to the Department. The summary should be limited to five pages total, including footnotes.

Interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice.[21] Requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. Oral argument presentations will be limited to issues raised in the briefs. If a request for a hearing is made, the Department intends to hold the hearing at the U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230, at a date and time to be determined.[22] Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

All submissions, with limited exceptions, must be filed electronically using ACCESS.[23] An electronically filed document must be received successfully in its entirety by the Department's electronic records system, ACCESS, by 5 p.m. Eastern Time (''ET'') on the due date. Documents excepted from the electronic submission requirements must be filed manually (*i.e.,* in paper form) with the APO/Dockets Unit in Room 18022 and stamped with the date and time of receipt by 5 p.m. ET on the due date.[24]

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

Assessment Rates

Upon issuance of the final results of this review, the Department will determine, and Customs and Border Protection (''CBP'') shall assess, antidumping duties on all appropriate entries covered by this review.[25] The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. For assessment purposes, the Department applied the assessment rate calculation method adopted in Assessment Rate Modification.[26] For

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

[17] *See Seamless Refined Copper Pipe and Tube From the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 75 FR 60725 (October 1, 2010).

[18] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 81 FR 736 (January 7, 2016) (''*Initiation Notice*'').

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

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

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

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

[23] *See generally* 19 CFR 351.303.

[24] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

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

[26] See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification, 77 FR 8101 (February 14, 2012) (''Assessment Rate

each individually examined respondent in this review whose weighted-average dumping margin in the final results of review is not zero or *de minimis* (*i.e.,* less than 0.5 percent), the Department intends to calculate importer-specific assessment rates, in accordance with 19 CFR 351.212(b)(1).[27] Where the respondent reported reliable entered values, the Department intends to calculate importer- (or customer)-specific *ad valorem* rates by aggregating the dumping margins calculated for all U.S. sales to the importer- (or customer) and dividing this amount by the total entered value of the sales to the importer- (or customer).[28] Where the Department calculates an importer- (or customer)-specific weighted-average dumping margin by dividing the total amount of dumping for reviewed sales to the importer- (or customer) by the total sales quantity associated with those transactions, the Department will direct CBP to assess importer- (or customer)-specific assessment rates based on the resulting per-unit rates.[29] Where an importer- (or customer)-specific ad valorem or per-unit rate is greater than *de minimis,* the Department will instruct CBP to collect the appropriate duties at the time of liquidation.[30] Where either the respondent's weighted average dumping margin is zero or *de minimis,* or an importer- (or customer-) specific *ad valorem* or per-unit rate is zero or *de minimis,* the Department will instruct CBP to liquidate appropriate entries without regard to antidumping duties.[31]

In accordance with section 751(a)(2)(C) of the Act, the final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.

Cash Deposit Requirements

The Department will instruct CBP to require a cash deposit equal to the weighted-average amount by which the normal value exceeds U.S. price. The following cash deposit requirements will be effective upon publication of the final results of this administrative review for shipments of the subject merchandise from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date of this notice, as provided by section 751(a)(2)(C) of the Act: (1) For the exporters listed above, the cash deposit rate will be equal to the weighted-average dumping margin established in the final results of this review (except, if the rate is zero or *de minimis,* then the cash deposit rate will be zero for that exporter); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recently completed segment of this proceeding; (3) for all PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the rate for the PRC-wide entity; and (4) for all non-PRC exporters of subject merchandise that have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

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

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

Dated: December 5, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

Summary
Background
Scope of the Order
Affiliation and Single-Entity Treatment
Discussion of the Methodology
- Non-Market Economy Country Status
- Surrogate Country and Surrogate Value Data
- Separate Rates
- Date of Sale
- Comparisons to Normal Value
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- U.S. Price
- Export Price
- Constructed Export Price
- Value-Added Tax
- Normal Value
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- Currency Conversion

Recommendation

[FR Doc. 2016–29975 Filed 12–13–16; 8:45 am]

BILLING CODE 3510–DS–P

Modification'') in the manner described in more detail in the Preliminary Decision Memorandum.

[27] *See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101 (February 14, 2012) (''*Final Modification*'').

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

[29] *Id.*

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

[31] *See Final Modification* at 8103.

DEPARTMENT OF COMMERCE

International Trade Administration

Environmental Technologies Trade Advisory Committee (ETTAC) Public Meeting

AGENCY: International Trade Administration, DOC.

ACTION: Notice of Federal Advisory Committee Meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a meeting of the Environmental Technologies Trade Advisory Committee (ETTAC).

DATES: The meeting is scheduled for Tuesday, January 10, 2017 from 9:00 a.m.–5:00 p.m. and Wednesday, January 11, 2017 from 9:00 a.m.–2:00 p.m. Eastern Standard Time (EST).

ADDRESSES: The meeting will be held in the Auditorium at the U.S. Department of Commerce, Herbert Clark Hoover Building, 1401 Constitution Avenue NW., Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Kreps, Office of Energy & Environmental Industries (OEEI), International Trade Administration, Room 28018, 1401 Constitution Avenue NW., Washington, DC 20230 (Phone: 202–482–3835; Fax: 202–482–5665; email: *amy.kreps@trade.gov.*) This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to OEEI at (202) 482–5225 no less than one week prior to the meeting.

SUPPLEMENTARY INFORMATION: The two-day meeting will take place on January 10 from 9:00 a.m. to 5:00 p.m. and on January 11 from 9:00 a.m. to 2:00 p.m. Eastern Standard Time (EST). The general meeting is open to the public and time will be permitted for public comment on January 11 from 1:30–2:00 p.m. EST. Those interested in attending must provide notification by Thursday, December 29, 2016 at 5:00 p.m. EST, via the contact information provided above. Written comments concerning ETTAC affairs are welcome any time before or after the meeting. Minutes will be available within 30 days of this meeting.

Topic to be considered: The agenda for the January 10 & 11, 2017 meeting includes providing the newly chartered committee with introductions to the U.S. interagency Environmental Technology Working Group (ETWG). The committee also will discuss its priorities and objectives and deliberate on committee and subcommittee leadership as well as subcommittee topics.

Background: The ETTAC is mandated by Section 2313(c) of the Export Enhancement Act of 1988, as amended, 15 U.S.C. 4728(c), to advise the Environmental Trade Working Group of the Trade Promotion Coordinating Committee, through the Secretary of Commerce, on the development and administration of programs to expand U.S. exports of environmental technologies, goods, services, and products. The ETTAC was originally chartered in May of 1994. It was most recently re-chartered until August 2018.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Kreps, Office of Energy & Environmental Industries (OEEI), International Trade Administration, Room 4053, 1401 Constitution Avenue NW., Washington, DC 20230. (Phone: 202–482–3835; Fax: 202–482–5665; email: *amy.kreps@trade.gov*).

Dated: December 8, 2016.

Edward A. O'Malley,

Director, Office of Energy and Environmental Industries.

[FR Doc. 2016–29947 Filed 12–13–16; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

Advisory Committee on Supply Chain Competitiveness: Notice of Public Meetings

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of open meetings.

SUMMARY: This notice sets forth the schedule and proposed topics of discussion for public meetings of the Advisory Committee on Supply Chain Competitiveness (Committee).

DATES: The meetings will be held on January 25, 2017, from 12:00 p.m. to 3:00 p.m., and January 26, 2017, from 9:00 a.m. to 4:00 p.m., Eastern Standard Time (EST).

ADDRESSES: The meetings on January 25 and 26 will be held at the U.S. Department of Commerce, 1401 Constitution Avenue NW., Research Library (Room 1894), Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Richard Boll, Office of Supply Chain, Professional & Business Services (OSCPBS), International Trade Administration. (Phone: (202) 482–1135 or Email: *richard.boll@trade.gov.*

SUPPLEMENTARY INFORMATION:

Background: The Committee was established under the discretionary authority of the Secretary of Commerce and in accordance with the Federal Advisory Committee Act (5 U.S.C. App. 2). It provides advice to the Secretary of Commerce on the necessary elements of a comprehensive policy approach to supply chain competitiveness designed to support U.S. export growth and national economic competitiveness, encourage innovation, facilitate the movement of goods, and improve the competitiveness of U.S. supply chains for goods and services in the domestic and global economy; and provides advice to the Secretary on regulatory policies and programs and investment priorities that affect the competitiveness of U.S. supply chains. For more information about the Committee visit: *http://trade.gov/td/services/oscpb/supplychain/acscc/.*

Matters to Be Considered: Committee members are expected to continue to discuss the major competitiveness-related topics raised at the previous Committee meetings, including trade and competitiveness; freight movement and policy; trade innovation; regulatory issues; finance and infrastructure; and workforce development. The Committee's subcommittees will report on the status of their work regarding these topics. The agendas may change to accommodate

Committee business. The Office of Supply Chain, Professional & Business Services will post the final detailed agendas on its Web site, *http://trade.gov/td/services/oscpb/supplychain/acscc/,* at least one week prior to the meeting.

The meetings will be open to the public and press on a first-come, first-served basis. Space is limited. The public meetings are physically accessible to people with disabilities. Individuals requiring accommodations, such as sign language interpretation or other ancillary aids, are asked to notify Mr. Richard Boll, at (202) 482–1135 or *richard.boll@trade.gov* five (5) business days before the meeting.

Interested parties are invited to submit written comments to the Committee at any time before and after the meeting. Parties wishing to submit written comments for consideration by the Committee in advance of this meeting must send them to the Office of Supply Chain, Professional & Business Services, 1401 Constitution Ave NW., Room 11014, Washington, DC, 20230, or email to *richard.boll@trade.gov.*

For consideration during the meetings, and to ensure transmission to the Committee prior to the meetings, comments must be received no later than 5:00 p.m. EST on January 18, 2017. Comments received after January 18, 2017, will be distributed to the Committee, but may not be considered at the meetings. The minutes of the meetings will be posted on the Committee Web site within 60 days of the meeting.

Dated: December 8, 2016.

Maureen Smith,

Director, Office of Supply Chain.

[FR Doc. 2016–29937 Filed 12–13–16; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No.: 161128999–6999–01]

Request for Information on Identification of New Capabilities Needed by the Hollings Manufacturing Extension Partnership Program

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice; request for information.

SUMMARY: The National Institute of Standards and Technology (NIST) plans to publish a Notice of Funding Opportunity (NOFO) in fiscal year 2017 (FY17), subject to the availability of appropriated funding, to competitively fund grants and/or cooperative agreements (hereinafter referred to as awards) to existing Hollings Manufacturing Extension Partnership (MEP) Centers to add capabilities to the MEP program, including the development and conduct of projects to solve new or emerging manufacturing problems. This notice is not the NOFO; 15 U.S.C. 287k(f), the statute under which NIST expects to conduct the future award program, requires the NIST Director to consult with small and mid-sized manufacturers regarding their needs and, in turn, for NIST to use the information provided to develop one or more themes for future NOFOs, which will be disseminated through *www.grants.gov.* Through this notice, NIST requests information from small- and medium-sized U.S. manufacturers

related to the needs of such manufacturers in four areas: (1) Critical manufacturing technologies; (2) supply chain requirements; (3) potential business services, including information services; and (4) other technologies or services that would enhance global competition. In addition, NIST requests responses related to other critical issues that NIST should consider in its strategic planning for potential future NOFOs to be conducted pursuant to the authority contained in 15 U.S.C. 278k(f).

DATES: NIST will accept responses to this request for information until 11:59 p.m. Eastern Time on January 13, 2017.

ADDRESSES: Responses will be accepted by email only. Responses must be sent to *meprfi@nist.gov* with the subject line ''MEP Competitive Awards Program RFI Responses.''

FOR FURTHER INFORMATION CONTACT: Diane Henderson, 100 Bureau Drive, Mail Stop 4800, Gaithersburg, MD 20899–4800, 301–975–5020, *meprfi@nist.gov;* or David Cranmer, 100 Bureau Drive, Mail Stop 4800, Gaithersburg, MD 20899–4800, 301–975–5020, *meprfi@nist.gov.* Please direct media inquiries to NIST's Office of Public Affairs at 301–975–NIST (6478).

SUPPLEMENTARY INFORMATION: Pursuant to 15 U.S.C. 287k(f), NIST will consider the information obtained in response to this request for information in the development of one or more NOFOs to competitively fund awards to existing MEP Centers to add capabilities to the MEP program, including the development and conduct of projects to solve new or emerging manufacturing problems.

The MEP National Network

MEP is a nationwide network of Centers located in all 50 States and Puerto Rico that serve as trusted business advisors focused on transforming U.S. manufacturers to compete globally, supporting supply chain integration, and providing access to technology for improved productivity. MEP Centers are a diverse network of State, non-profit university-based, and other non-profit organizations, comprising more than 1,200 technical experts offering products, technical expertise and services that address the critical needs of their local manufacturers.

Each MEP Center works directly with area manufacturers to provide expertise and services tailored to their most critical needs, ranging from process improvement and workforce development to business practices and technology transfer. Additionally, MEP Centers connect manufacturers with government and trade associations, universities and research laboratories, and a host of other public and private resources to help manufacturers realize individual business goals.

Small U.S. manufacturers are a critical segment of our economy, comprising over 99% of all manufacturing establishments and approximately 73% of manufacturing employment.[1]

Small U.S. manufacturers have proven to be flexible and adaptable in their approach to improved competitiveness and profitable growth through new markets, new customers, new products and new processes. Yet gaps remain in identifying, acquiring and implementing new manufacturing and other technologies, business models and supply chain practices that small U.S. manufacturers need to compete globally. Of particular interest is the gap between the research being performed by universities, federal labs, research consortia, as well as other entities, and the readiness of many small U.S. manufacturers to adopt both existing and emerging technologies into their products and processes to respond to the quality and performance requirements of original equipment manufacturers. Within this readiness gap, NIST includes workforce development, education and training needs related to those technologies and practices. Reports by the President's Council of Advisors on Science and Technology[2][3] and the Information Technology and Innovation Foundation[4] emphasize that small- and mid-sized manufacturers lack the financial resources and technical capabilities that large manufacturers possess to be able to monitor and gain access to the universe of emerging technologies and processes being constantly innovated around the globe. As a result, technology adoption rates of smaller U.S. manufacturers lag behind those of larger manufacturers.

Through the efforts of its existing network of MEP Centers to provide services to small U.S. manufacturers, NIST MEP has made strides to address many of the needs of small U.S. manufacturers. However, to effectively assist small U.S. manufacturing firms to compete in the global economy, these firms require meaningful expertise specific to a given technology, supply chain and/or sector.

Bridging the gap between available technologies and commercial adoption by small U.S. manufacturers is essentially a two-part problem. First, there is the critical step of translating available technologies into competitive market advantage including but not limited to the identification of viable business opportunities related to those technologies. Second, the adoption of new technologies requires addressing the variety of challenges that serve as barriers to small U.S. manufacturers to incorporating technology solutions into their processes and product portfolio. These challenges include, but are not limited to, the same challenges that were identified when the MEP program was first created[5]—disproportionate impact of regulation; lack of awareness of changing technology, production techniques and business management practices; isolation; lack of knowledge of where to seek advice; and scarcity of capital—albeit in different form than initially conceived. Since its creation in 1988, the MEP program has become a source of trusted advice about new technologies, production techniques and business management practices for a significant number of firms (about 8,000 to 10,000 per year). The MEP program touches another 20,000 to 22,000 firms each year in training and outreach events. However, NIST recognizes that past events do not predict of the future, and the MEP program must continue to add new skills and capabilities to its MEP Centers to continue to support small U.S. manufacturers in the United States. Further information on the MEP program is available at: *https://www.nist.gov/mep.*

Background Information

15 U.S.C. 287k(f), the statute under which NIST expects to conduct the future award program, requires the NIST Director to consult with small and mid-

[1] ''2014 County Business Patterns,'' U.S. Census Bureau Data, release date 04/2016, *http://www.census.gov/data/datasets/2014/econ/cbp/2014-cbp.html.*

[2] ''Report to the President on Accelerating Advanced U.S. Manufacturing,'' President's Council of Advisors on Science and Technology, Executive Office of the President, October 2014, *https://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/amp20_report_final.pdf.*

[3] ''Report to the President on Capturing Domestic Competitive Advantage in Advanced Manufacturing,'' President's Council of Advisors on Science and Technology, Executive Office of the President, July 2012, *http://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast_amp_steering_committee_report_final_july_27_2012.pdf.*

[4] ''International Benchmarking of Countries' Policies and Programs Supporting SME Manufacturers,'' Stephen J. Ezell and Dr. Robert Atkinson, The Information Technology and Innovation Foundation, September 2011, *http://www.itif.org/files/2011-sme-manufacturing-tech-programss-new.pdf.*

[5] ''Learning to Change—Opportunities to Improve the Performance of Smaller Manufacturers,'' National Research Council, 1993, *https://www.nap.edu/read/2239/chapter/1.*

sized manufacturers regarding their needs and, in turn, for NIST to use the information provided to develop one or more themes for NOFOs to address the needs of small U.S. manufacturers and MEP Centers that support them. NIST is providing the statutory language below to better enable small and mid-sized manufacturers and other members of the public to provide relevant information in response to the request for information.

15 U.S.C. 278k(f)(3) states that the themes identified for the future award competition:

(A) Shall be related to projects designed to increase the viability both of traditional manufacturing sectors and other sectors, such as construction, that increasingly rely on manufacturing through the use of manufactured components and manufacturing techniques, including supply chain integration and quality management;

(B) shall be related to projects related to the transfer of technology based on the technological needs of manufacturers and available technologies from institutions of higher education, laboratories, and other technology producing entities; and

(C) may extend beyond these traditional areas to include projects related to construction industry modernization.

15 U.S.C. 278k(f)(5)(A) also provides requirements for the selection of awardees under the future NOFO. Awards made under this program should:

(i) Create jobs or train newly hired employees;

(ii) promote technology transfer and commercialization of environmentally focused materials, products, and processes;

(iii) increase energy efficiency; and

(iv) improve the competitiveness of industries in the region in which the MEP Center or Centers are located.

Additionally, under 15 U.S.C. 278k(f)(5)(B), awards may:

(i) Encourage greater cooperation and foster partnerships in the region with similar Federal, State, and locally funded programs to encourage energy efficiency and building technology; and

(ii) collect data and analyze the increasing connection between manufactured products and manufacturing techniques, the future of construction practices, and the emerging application of products from the green energy industries.

No Confidential Proprietary, Business or Personally Identifiable Information

No confidential proprietary information, business identifiable information or personally identifiable information should be included in the written responses to this request for information. Reponses received by the deadline may be made publicly available without change at: *www.nist.gov/mep*.

Request for Information

The responses to the questions below are intended to assist NIST in developing one or more NOFOs for the funding of competitive awards to existing MEP Centers to add capabilities to the MEP program. In addition, the NIST Director is fulfilling the consultation requirement contained in 15 U.S.C. 278k(f)(3) via publication of this request for information. As required by the same statutory provision, the NIST Director will also consult with the MEP Advisory Board concerning topics for the future NOFO. Further information on the MEP Advisory Board is available at: *https://www.nist.gov/mep/who-we-are/advisory-board*.

NIST is seeking information that responds to one or more of the questions listed below. Responses should clearly indicate which question is being addressed.

(1) What are the key problems and issues facing small U.S. manufacturers and their competitiveness and opportunities for growth in the near-term (1 to 2 years), mid-term (3 to 5 years) and/or long-term (more than 5 years)?

(2) What advanced manufacturing technologies are and/or will be needed by small U.S. manufacturers for the companies to be competitive and grow in the global marketplace in the near-term (1 to 2 years), mid-term (3 to 5 years) and/or long-term (more than 5 years)?

(a) What would be the appropriate Manufacturing Readiness Level [6] or Technology Readiness Level [7] for those technologies in order for small U.S. manufacturers to consider adoption?

(b) What information will be required for small U.S. manufacturers to understand a technology or related group of technologies and the risks and opportunities associated with making or not making an investment in any given technology?

(c) How is the information about advanced manufacturing technologies best delivered to small U.S. manufacturers and/or MEP Centers that support those small U.S. manufacturers?

(3) What technologies and/or business models are important to small U.S. manufacturers as they choose and participate in any particular supply chain?

(4) What complementary business services, including information services, are and/or will be needed by small U.S. manufacturers and/or MEP Centers to take full advantage of advanced manufacturing technologies at the company or supply chain level?

(5) Are there any other critical issues that NIST MEP should consider in its strategic planning for future investments that are not covered by the first four questions?

Response to this request for information (RFI) is voluntary. Respondents need not reply to all questions; however, they should clearly indicate the number of each question to which they are responding. Brevity is appreciated. No confidential proprietary information, business identifiable information or personally identifiable information should be submitted in response to this RFI, as all responses received by the deadline may be made publicly available without change at: *www.nist.gov/mep/*. Please note that the U.S. Government will not pay for response preparation, or for the use of any information contained in the response. Responses should be typed using 12-point font and be single-spaced. Responses containing references, studies, research, and other empirical data that are not widely published may include copies of the referenced materials as attachments to the responses.

Phillip A. Singerman,

Associate Director of Innovation and Industry Services.

[FR Doc. 2016–30009 Filed 12–13–16; 8:45 am]

BILLING CODE 3510–13–P

[6] ''Manufacturing Readiness Level (MRL) Deskbook,'' OSD Manufacturing Technology Program, version 2.0, May 2011; *http://www.dodmrl.com/MRL_Deskbook_V2.pdf*.

[7] Mankins, John C., ''Technology Readiness Levels: A White Paper,'' April 6, 1995, NASA; *https://www.hq.nasa.gov/office/codeq/trl/trl.pdf*.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF072

Gulf of Mexico Coast Conservation Corps (GulfCorps) Program

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

ACTION: Notice of funding availability.

SUMMARY: The principal objective of the National Oceanic and Atmospheric

Administration's Gulf of Mexico Coast Conservation Corps (''GulfCorps'') Program solicitation is to develop a Gulf-wide conservation corps that will contribute to meaningful Gulf of Mexico ecosystem restoration benefiting coastal habitat and water quality in each of the Gulf states (Texas, Louisiana, Mississippi, Alabama, and Florida), while economically benefiting coastal communities through education, training, and employment opportunities. NOAA's GulfCorps Program grant recipients will recruit, train, and employ workers to work on habitat restoration projects and develop skills in support of long-term Gulf coast restoration. See the full GulfCorps Federal Funding Opportunity (FFO), located on *Grants.gov* as described in the **ADDRESSES** section, for a complete description of program goals and how applications will be evaluated.

DATES: Applications must be postmarked, provided to a delivery service, or received by *www.Grants.gov* by 11:59 p.m. Eastern Time on March 2, 2017. Use of a delivery service must be documented with a receipt. No facsimile or electronic mail applications will be accepted. See also Section III.C of the GulfCorps FFO.

ADDRESSES: Complete application packages, including required Federal forms and instructions, can be found on *www.Grants.gov* by searching for Funding Opportunity Number NOAA–NMFS–HCPO–2017–2005141. If a prospective applicant is having difficulty downloading the application forms from *www.Grants.gov*, contact *www.Grants.gov* Customer Support at 1–800–518–4726 or *support@Grants.gov*.

FOR FURTHER INFORMATION CONTACT: For further information, contact Melanie Gange at (301) 427–8664, or by email at *Melanie.Gange@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Statutory Authority: Fish and Wildlife Coordination Act 16 U.S.C. 661, as amended by the Reorganization Plan No. 4 of 1970; Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, 16 U.S.C. 1891a; the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act (RESTORE Act), Public Law 112–141, Subtitle F.

Catalog of Federal Domestic Assistance (CFDA): 11.463.

Program Description

As noted above, the principal objective of NOAA's GulfCorps Program solicitation is to develop a Gulf-wide conservation corps that will contribute to meaningful Gulf of Mexico ecosystem restoration benefiting coastal habitat and water quality in each of the Gulf states (Texas, Louisiana, Mississippi, Alabama, and Florida), while economically benefiting coastal communities through education, training, and employment opportunities. The GulfCorps Program grant recipients will recruit, train, and employ workers to work on habitat restoration projects and develop skills in support of long-term Gulf coast restoration. This program is funded under the RESTORE Act. Information on the RESTORE Act, including more information on the funding provided to establish this conservation corps, and the other initiatives included on the Funded Priorities List (FPL) can be found online at *www.restorethegulf.gov/council-selected-restoration-component/funded-priorities-list.* Applications selected for funding through this solicitation will primarily be funded through cooperative agreements.

Section IV.B. of the FFO describes the suggested information to include in the application narrative. Supplemental Guidance regarding application writing, a checklist to submit a complete application, and FAQs about this solicitation can be found at *www.restoration.noaa.gov/partnerresources* and *www.habitat.noaa.gov/funding/gulfcorps.html,* respectively. Prospective applicants are strongly encouraged to contact NOAA Restoration Center staff before submitting an application to discuss their GulfCorps proposals with respect to technical merit and NOAA's objectives. NOAA will make every effort to respond to prospective applicants on a first come, first served basis. These discussions will not include review of draft proposals or site visits during the application period.

Funding Availability

Total anticipated funding for all awards is up to $7 million, subject to the availability of funds under the RESTORE Act. NOAA anticipates typical awards will range from $1 million to $7 million. NOAA will not accept applications requesting less than $1 million or more than $7 million in Federal funds from NOAA under this solicitation and the exact amount of funds that may be awarded will be determined in pre-award negotiations between the applicant and NOAA. Funding may be provided in annual increments without further competition, and the period of performance for most awards is expected to be 36 months, although 48 months will be considered. Any funds provided to successful applicants will be at the discretion of the NOAA Office of Habitat Conservation and the NOAA Grants Management Division (GMD). In no event will NOAA or the Department of Commerce be responsible for application preparation costs if programs fail to receive funding or are cancelled because of other agency priorities. Publication of this notice does not oblige NOAA to award any specific project or to obligate any available funds and there is no guarantee that sufficient funds will be available to make awards for all top-ranked applications. The number of awards to be made as a result of this solicitation will depend on the number of eligible applications received, the amount of funds requested for GulfCorps proposals, and the merit and ranking of the applications.

Eligibility Criteria

Eligible applicants are institutions of higher education, non-profits, commercial (for profit) organizations, U.S. territories, and state, local and Native American tribal governments. Applications from individuals, Federal agencies, or employees of Federal agencies will not be considered. Individuals and Federal agencies are strongly encouraged to work with states, non-governmental organizations, municipal and county governments, and others that are eligible to apply. Cost sharing is not required, however, match is included in the evaluation criteria as listed in the full FFO announcement in *www.Grants.gov* (Funding Opportunity Number NOAA–NMFS–HCPO–2017–2005141). Applications selected for funding will be bound by the percentage of cost sharing reflected in the award document signed by the NOAA Grants Officer.

Evaluation and Selection Procedures

The general evaluation criteria and selection factors that apply to full applications to this funding opportunity are summarized below. Further information about the evaluation criteria and selection factors can be found in the full FFO announcement in *www.Grants.gov* (Funding Opportunity Number NOAA–NMFS–HCPO–2017–2005141).

Evaluation Criteria

Reviewers will assign scores to applications ranging from 0 to 100 points based on the following five standard NOAA evaluation criteria and respective weights specified below. Applications that best address these criteria will be most competitive.

1. *Importance and Applicability (18 points):* This criterion ascertains whether there is intrinsic value in the proposed work and/or relevance to the priorities presented in the solicitation.

2. *Technical/Scientific Merit (28 points):* This criterion assesses whether the project activity or approach is technically sound, if the methods are appropriate, and whether there are clear goals and objectives.

3. *Overall Qualifications of Applicant (24 points):* This criterion ascertains whether the applicant possesses the necessary education, experience, training, facilities, and administrative resources to support the proposed award.

4. *Project Costs (20 points):* This criterion evaluates the budget to determine if it is realistic and commensurate with the project's needs and time-frame.

5. *Outreach and Education (10 points):* NOAA assesses whether the recipient can deliver a focused and effective training and community outreach strategy for the GulfCorps.

Review and Selection Process

Applications will undergo an initial administrative review to determine if they are eligible and complete, per Section III of the full FFO posted at *www.Grants.gov*. Eligible applications will be evaluated by three or more merit reviewers as part of a panel review process to determine how well they meet the program priorities and evaluation criteria of this solicitation. The Selecting Official anticipates recommending applications for funding in rank order unless an application is justified to be selected out of rank order based upon one or more of the following selection factors: (1) Availability of funding; (2) Balance/distribution of funds: (a) by geographic area, (b) by type of institutions, (c) by type of partners, (d) by research areas; or (e) by project types; (3) Whether the project duplicates other projects funded or considered for funding by NOAA or other federal agencies; (4) Program priorities and policy factors set out in section I.A. and I.B. of the FFO; (5) An applicant's prior award performance; (6) Partnerships and/or participation of targeted groups; and (7) Adequacy of information necessary for NOAA staff to make a NEPA determination and draft necessary documentation before recommendations for funding are made to the NOAA GMD. Hence, awards may not necessarily be made to the highest-scored applications. Unsuccessful applicants will be notified that their application was not among those recommended for funding. Unsuccessful applications submitted in hard copy will be kept on file in accordance with NOAA records requirements and then destroyed.

Intergovernmental Review

Applications submitted under the FFO are subject to the provisions of Executive Order 12372, ''Intergovernmental Review of Programs.'' Any applicant submitting an application for funding is required to complete item 16 on Form SF–424 regarding clearance by the State Single Point of Contact (SPOC). To find out about and comply with a State's process under Executive Order 12372, the names, addresses and phone numbers of participating SPOC's are listed on the Office of Management and Budget's home page at: *http://www.whitehouse.gov/omb/grants_spoc.*

Limitation of Liability

In no event will NOAA or the Department of Commerce be responsible for proposal preparation costs if these programs fail to receive funding or are cancelled because of other agency priorities. Publication of this announcement does not oblige NOAA to award any specific project or to obligate any available funds.

National Environmental Policy Act

NOAA must analyze the potential environmental impacts, as required by the National Environmental Policy Act (NEPA), for applicant projects or proposals which are seeking NOAA federal funds. Further details regarding NOAA's compliance with NEPA can be found in the full Federal Funding Opportunity.

Administrative and National Policy Requirements

The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of December 30, 2014 (79 FR 78390) are applicable to this solicitation. Additional administrative and national policy requirements are described in the full Federal Funding Opportunity.

Paperwork Reduction Act

This document contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The use of Standard Forms 424, 424A, 424B, and SF–LLL has been approved by the Office of Management and Budget (OMB) under the respective control numbers 4040–0004, 4040–0006, 4040–0007, and 4040–0013. Notwithstanding any other provision of law, no person is required to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.

Executive Order 12866

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

Executive Order 13132 (Federalism)

It has been determined that this notice does not contain policies with implications as that term is defined in Executive Order 13132.

Administrative Procedure Act/ Regulatory Flexibility Act

Prior notices and an opportunity for public comment are not required by the Administrative Procedure Act or any other law for rules concerning public property, loans, grants, benefits, and contracts (5 U.S.C. 553(a)(2)). Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements for the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis has not been prepared.

Dated: December 8, 2016.

Carrie Selberg,

Deputy Director, Office of Habitat Conservation, National Marine Fisheries Service.

[FR Doc. 2016–29926 Filed 12–13–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE940

2017 Annual Determination to Implement the Sea Turtle Observer Requirement

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

ACTION: Notice.

SUMMARY: The National Marine Fisheries Service (NMFS) is providing notification that the agency will not identify additional fisheries to observe on the Annual Determination (AD) for 2017, 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 interactions in a given fishery, evaluate measures to prevent or reduce sea turtle takes, and implement the prohibition against sea turtle takes. Fisheries identified on the 2015 AD (see Table 1) remain on the AD for a 5-year period and are required to carry observers upon NMFS' request until December 31, 2019.

ADDRESSES: See **SUPPLEMENTARY INFORMATION** for a listing of all Regional Offices.

FOR FURTHER INFORMATION CONTACT: Sara Wissmann, 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, 562–980–3209; 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 1–800–877–8339 between 8 a.m. and 4 p.m. Eastern time, Monday through Friday, excluding Federal holidays.

SUPPLEMENTARY INFORMATION:

Availability of Published Materials

Information regarding the Sea Turtle Observer Requirement for Fisheries (72 FR 43176; August 3, 2007) may be obtained online at *www.nmfs.noaa.gov/pr/species/turtles/regulations.htm* or from any NMFS Regional Office at the addresses listed below:

- NMFS, Greater Atlantic Region, 55 Great Republic Drive, Gloucester, MA 01930;
- NMFS, Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701;
- NMFS, West Coast Region, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802;
- NMFS, Pacific Islands Region, Protected Resources, 1845 Wasp Blvd., Building 176, Honolulu, HI 96818.

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 species 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), leatherback (*Dermochelys coriacea*), hawksbill (*Eretmochelys imbricata*), and olive ridley (*Lepidochelys olivacea;* breeding colony on the Pacific Coast of Mexico) sea turtles are listed as endangered. Green (*Chelonia mydas;* North Atlantic, Central North Pacific, and East Pacific distinct population segments), loggerhead (*Caretta caretta;* Northwest Atlantic distinct population segment), and olive ridley (*Lepidochelys olivacea;* all except the breeding colony on the Pacific Coast of Mexico) sea turtles are listed as threatened. 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. waters. While some sea turtle populations have shown signs of recovery, many populations continue to decline.

Incidental take, or 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 (including harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, 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). The purpose of the sea turtle observer requirement and the AD is ultimately to implement ESA sections 9 and 4(d), which prohibit the incidental take of endangered and threatened sea turtles, respectively, and to conserve sea turtles. Section 11 of the ESA provides for civil and criminal penalties for anyone who violates a regulation issued pursuant to the ESA, including regulations that implement the take prohibition, as well as for the issuance of regulations to enforce the take prohibitions. NMFS may grant exceptions to the take prohibitions for activities that are covered by an incidental take statement or an incidental take permit issued pursuant to ESA section 7 or 10, respectively. To do so, NMFS must determine 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.

The most effective way for NMFS to learn about sea turtle-fishery interactions, in order to implement management measures 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 (EEZ), or on the high seas, or on vessels that are otherwise subject to the jurisdiction of the United States. Failure to comply with the requirements under this rule may result in civil or criminal penalties under the ESA.

Where observers are required, NMFS will pay the direct costs for vessels to carry 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 eligible to be observed for a period of five years without further action by NMFS. This will enable NMFS to develop an appropriate sampling protocol to investigate whether, how, when, where, and under what conditions incidental takes are occurring; evaluate whether existing measures are minimizing or preventing takes; and develop ESA management measures that implement the prohibitions against take and that conserve sea turtles.

2017 Annual Determination

Pursuant to 50 CFR 222.402, NOAA's Assistant Administrator for Fisheries (AA), 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 2017 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 (50 CFR 222.402(a)(4)). The 14 fisheries identified on the 2015 AD (see Table 1) remain on the AD for a 5-year

period and are therefore required to carry observers upon NMFS' request until December 31, 2019.

TABLE 1—STATE AND FEDERAL COMMERCIAL FISHERIES INCLUDED ON THE 2015 ANNUAL DETERMINATION

Fishery	Years eligible to carry observers
Trawl Fisheries	
Southeastern U.S. Atlantic, Gulf of Mexico shrimp trawl	2015–2019
Gulf of Mexico mixed species fish trawl	2015–2019
Gillnet Fisheries	
California halibut, white seabass and other species set gillnet (>3.5 in mesh)	2015–2019
California yellowtail, barracuda, and white seabass drift gillnet (mesh size >3.5 in. and <14 in.)	2015–2019
Chesapeake Bay inshore gillnet	2015–2019
Long Island inshore gillnet	2015–2019
North Carolina inshore gillnet	2015–2019
Gulf of Mexico gillnet	2015–2019
Trap/Pot Fisheries	
Atlantic blue crab trap/pot	2015–2019
Atlantic mixed species trap/pot	2015–2019
Northeast/Mid-Atlantic American lobster trap/pot	2015–2019
Pound Net/Weir/Seine Fisheries	
Mid-Atlantic haul/beach seine	2015–2019
Mid-Atlantic menhaden purse seine	2015–2019
Rhode Island floating trap	2015–2019

Dated: December 8, 2016.

Donna S. Wieting

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2016–29948 Filed 12–13–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 16–76]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Pam Young, DSCA/SE&E–RAN, (703) 697–9107.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 16–76 with attached Policy Justification and Sensitivity of Technology.

Dated: December 9, 2016.

Aaron Siegel,

Alternate OSD **Federal Register** *Liaison Officer, Department of Defense.*

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

DEC 02 2016

The Honorable Paul D. Ryan
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 16-76, concerning the Department of the Army's proposed Letter(s) of Offer and Acceptance for the Government of Peru for defense articles and services estimated to cost $668 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

J. W. Rixey
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Transmittal No. 16–76

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Government of Peru

(ii) *Total Estimated Value:*

Major Defense Equipment * ..	$434 million
Other	$234 million
TOTAL	$668 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):

One hundred and seventy-eight (178) Reconditioned Stryker Infantry Carrier Vehicles

One hundred and seventy-eight (178) M2 Flex .50 Cal Machine Guns

One hundred and seventy-eight (178) Remote Weapon Stations (RWS)

Non-MDE includes:

Driver's vision enhancers; Global Positioning System (GPS) navigational capability; sets of special tools testing equipment; associated M2 Flex spare parts and tripods; M6 Smoke Grenade launchers and associated spares; VIC–3 systems; Operators New Equipment Training (OPNET) and Field Level Maintenance Training (FLMNET); publications; training manuals; Contractor Field Service Representative support; contractor and concurrent spare parts; project office technical support; U.S. Government technical assistance; packaging, crating, and handling; de-processing services for shipment; and associated transportation.

(iv) *Military Department:* Army

(v) *Prior Related Cases, if any:* None

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Annex Attached

(viii) *Date Report Delivered to Congress:* December 2, 2016.

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Government of Peru—Reconditioned Stryker Infantry Carrier Vehicles

The Government of Peru has requested a possible sale of one hundred and seventy-eight (178) Reconditioned Stryker Infantry Carrier Vehicles; one hundred and seventy-eight (178) M2 Flex .50 Cal Machine Guns; and one hundred and seventy-eight (178) Remote Weapon Stations (RWS). Also included are driver's vision enhancers; Global Positioning System (GPS) navigation capability; sets of special tools testing equipment; associated M2 Flex spare parts and tripods; M6 Smoke Grenade launchers and associated spares; VIC–3 systems; Operators New Equipment Training (OPNET) and Field Level Maintenance Training (FLMNET); publications; training manuals; Contractor Field Service Representative support; contractor and concurrent spare parts; project office technical support; U.S. Government technical assistance; packaging, crating, and handling; de-processing services for shipment; and associated transportation. Total estimated program cost is $668 million.

This proposed sale will contribute to the foreign policy objectives of the United States by helping to improve the security of an important partner which has been and continues to be an important force for political stability, peace, and economic progress in South America. It is in the U.S. national security interest for Peru to field capable forces and multi-role equipment for border security, disaster response, and to confront de-stabilizing internal threats, such as the terrorist group Sendero Luminoso (Shining Path).

Peru intends to use these defense articles and services to modernize its armed forces. This will contribute to the Peruvian military's goal of updating its capabilities while further enhancing interoperability between Peru, the United States, and other allies and partners. This acquisition would support the first major step in Peru's acquisition strategy to build a multi-dimensional brigade by 2030. Peru will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The prime contractor for this program is General Dynamics Land Systems. There are no known offset agreements in connect with this potential sale.

Implementation of this proposed sale will require the temporary assignment of U.S. Government or contractor representatives to Peru for up to three years.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 16–76

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The following Major Defense Equipment items do not contain any sensitive technologies or classified material: 178 M1126 Stryker Infantry Carrier Vehicles with M2 Flex .50 Cal machine guns and Remote Weapon Systems. The M1126 Stryker is an infantry carrier vehicle transporting nine soldiers, their mission equipment and a crew of two consisting of a driver and vehicle commander. It is equipped with armor protection, M2 machine guns and M6 smoke grenade launchers for self-protection. The Stryker is an eight-wheeled vehicle powered by a 350hp diesel engine. It incorporates a central tire inflation system, run-flat tires, and a vehicle height management system. The Stryker is capable of supporting a communications suite, a Global Positioning System (GPS), and a high frequency and near-term digital radio systems. The Stryker is deployable by C–130 aircraft and combat capable upon arrival. The Stryker is capable of self-deployment by highway and self-recovery. It has a low noise level that reduces crew fatigue and enhances survivability. It moves about the battlefield quickly and is optimized for close, complex, or urban terrain. The Stryker program leverages non-developmental items with common subsystems and components to quickly acquire and filed these systems.

2. The AN/VAS–5 Driver's Vision Enhancer (DVE) is a compact thermal camera providing armored vehicle drivers with day or night time visual awareness in clear or reduced vision (fog, smoke, dust) situations. The system provides the driver a 180 degree viewing angle using a high resolution infrared sensor and image stabilization to reduce the effect of shock and vibration. The viewer and monitor are ruggedized for operation in tactical environments. The system is UNCLASSIFIED but considered sensitive technology. If a technically advanced adversary were to obtain knowledge of the AN/VAS–5, the information could be used to identify ways to countering the system or improve the adversary's ability to avoid detection by the system in low-visibility environments. This is a low-level concern because the thermal imaging technology used in the AN/VAS–5 is considered mature and available in other industrial nation's comparable performance thresholds.

3. A determination has been made that the recipient country can provide the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

4. All defense articles and services listed in this transmittal have been authorized for release and export to Peru.

[FR Doc. 2016–29970 Filed 12–13–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 16–72]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Pam Young, DSCA/SA&E–RAN, (703) 697–9107.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 16–72 with attached Policy Justification and Sensitivity of Technology.

Dated: December 9, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

NOV 28 2016

The Honorable Paul D. Ryan
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 16-72, concerning the Department of the Air Force's proposed Letter of Offer(s) and Acceptance to Poland for defense articles and services estimated to cost $200 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

J.W. Rixey
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Transmittal No. 16–72

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Poland

(ii) *Total Estimated Value:*

Major Defense Equipment *	$ 110 million
Other	$ 90 million
TOTAL	$ 200 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):

Seventy (70) AGM–158B Joint Air-to-Surface Standoff Missiles Extended Range (JASSM–ER)

Two (2) AGM–158B Flight Test Vehicles—Live Fire with TIK & FTS

Two (2) AGM–158B Mass Simulant Vehicles

One (1) AGM–158B Flight Test Vehicle—Captive Carry

Three (3) AGM–158B Separation Test Vehicles

Non-MDE includes:

Two (2) AGM–158B Weapon System Simulators, F–16 operational flight plan upgrade for the Polish F- 16C/D, JASSM–ER integration, missile containers, spare and repair parts, support and test equipment, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor engineering, technical and logistics support services, and other related elements of logistical and program support.

(iv) *Military Department:* Air Force (X7–D–YAD)

(v) *Prior Related Cases, if any:* PL–D–SAC, PL–D–YAB and amendments

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Annex Attached

(viii) *Date Report Delivered to Congress:* November 28, 2016

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Poland—JASSM–ER with Support

The Government of Poland has requested a possible sale of seventy (70) AGM–158B Joint Air-to-Surface Standoff Missiles Extended Range (JASSM–ER), two (2) AGM–158B Flight Test Vehicles, two (2) AGM–158B Mass Simulant Vehicles, one (1) AGM–158B Flight Test Vehicle—Captive Carry, three (3) AGM–158B Separation Test Vehicles. Also included are two (2) AGM–158B Weapon System Simulators, F–16 operational flight plan upgrade for the Polish F- 16C/D, JASSM–ER integration, missile containers, spare and repair parts, support and test equipment, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor engineering, technical and logistics support services, and other related elements of logistical and program support. The total estimated program value is $200 million.

The proposed sale will contribute to the foreign policy and the national security objectives of the United States by helping to improve the security of a NATO ally. Poland continues to be an important force for political stability and economic progress in Central Europe.

The proposed sale will improve Poland's capability to meet current and future threats of enemy air and ground weapons systems. Poland will use the enhanced capability as a deterrent to regional threats and to strengthen its homeland defense. These weapon and capabilities upgrades will allow Poland to strengthen its air-to-ground strike capabilities and increase its contribution to future NATO operations. Poland will have no difficulty absorbing these missiles into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The prime contractor will be the Lockheed Martin of Ft. Worth, Texas. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to Poland.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 16–72

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(l) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The AGM–158B JASSM ER is an extended range low-observable, highly survivable subsonic cruise missile designed to penetrate next generation air defense systems en-route to target. It is designed to kill hard, medium-hardened, soft and area type targets. The extended range over the baseline was obtained by going from a turbo jet to a turbo-fan engine and by reconfiguring the fuel tanks for added capacity. Classification of the technical data and information on the AGM–158's performance, capabilities, systems, sub-systems, operations, and maintenance will range from UNCLASSIFIED to SECRET.

2. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

3. A determination has been made that Poland can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This proposed sale is necessary to further the US foreign policy and national security objectives outlined in the Policy Justification.

4. All defense articles and services listed in this transmittal are authorized for release and export to Poland.

[FR Doc. 2016–29954 Filed 12–13–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 16–65]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Pam Young, DSCA/SE&E–RAN, (703) 697–9107.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 16–65 with attached Policy Justification and Sensitivity of Technology.

Dated: December 9, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

DEC 02 2016

The Honorable Paul D. Ryan
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 16-65, concerning the Department of the Navy's proposed Letter(s) of Offer and Acceptance for the Government of Finland for defense articles and services estimated to cost $156 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

James Wagner
Deo Dir (A)

for J. W. Rixey
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Transmittal No. 16–65

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Government of Finland

(ii) *Total Estimated Value:*

Major Defense Equipment * ..	$57 million
Other	$99 million
TOTAL	$156 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE): Ninety (90) Multifunctional Information Distribution System Joint Tactical Radio System (MIDS–JTRS) Variant(s)

Non-MDE includes:

Follow-on equipment and support for Finland's F/A–18 Mid-Life Upgrade (MLU) program includes software test and integration center upgrades, flight testing, spare and repair parts, support and test equipment, transportation, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor technical and logistics support services, and other related elements of logistics support.

(iv) *Military Department:* Navy

(v) *Prior Related Cases, if any:*

FMS case FI–P–SAA $2.4 billion—9 Jun 1992

FMS case FI–P–SAB $675 million—7 Feb 1994

FMS case FI–P–GAD $25 million—13 Jul 2001

FMS case FI–P–LBB $63 million—4 Aug 2001

FMS case FI–P–LBC $127 million—1 Jan 2004

FMS case FI–P–LBD $252 million—25 Jul 2007

FMS case FI–P–LBH $307 million—3 Apr 2009

FMS case FI–P–GAU $170 million—27 Jun 2013

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Annex Attached

(viii) *Date Report Delivered to Congress:* December 2, 2016

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Government of Finland—F–18 Mid-Life Upgrade Program

The Government of Finland has requested a possible sale of follow-on equipment and support for Finland's F/A–18 Mid-Life Upgrade (MLU) program, consisting of: Ninety (90) Multifunctional Information Distribution System Joint Tactical Radio System (MIDS–JTRS) variant(s). The proposed program support also includes software test and integration center upgrades, flight testing, spare and repair parts, support and test equipment, transportation, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor technical and logistics support services, and other related elements of logistics support. Total estimated program cost is $156 million.

This proposed sale will contribute to the foreign policy and national security objectives of the United State by helping to improve the security of a friendly country which has been and continues to be an important force for political stability and economic progress in Europe.

The Finnish Air Force (FAF) intend to purchase this MLU program equipment and services to extend the useful life of its F/A–18 fighter aircraft and enhance their survivability and communications connectivity. The FDF needs this upgrade to keep pace with technology advances in sensors, weaponry, and communications. Finland has extensive experience operating the F/A–18 aircraft and will have no difficulty incorporating the upgraded capabilities into its forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractors will be Raytheon in Waltham, Massachusetts; Lockheed Martin in Bethesda, Maryland; The Boeing Company in St. Louis, Missouri; BAE North America in Arlington, Virginia; General Electric in Fairfield, Connecticut; General Dynamics in West Falls Church, Virginia; Northrop Grumman in Falls Church, Virginia; Rockwell Collins in Cedar rapids, Iowa; ViaSat in Carlsbad, California; and Data Link Solutions in Cedar Rapids, Iowa. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require multiple trips to Finland involving U.S. Government and contractor representatives for technical reviews, support, and training.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 16–65

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The Multifunctional Information Distribution System Joint Tactical Radio System (MIDS–JTRS) is not classified but is considered a COMSEC Controlled Item (CCI). There are no training devices, associated documentation, or services to be provided with the sale of these MIDS–JTRS units. No sensitive information is provided or associated with this sale.

2. All defense articles and services listed in this transmittal have been authorized for release and export to the Government of Finland.

[FR Doc. 2016–29973 Filed 12–13–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2014–OS–0077]

Proposed Collection; Comment Request

AGENCY: Defense Security Service, DoD.

ACTION: Notice.

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

DATES: Consideration will be given to all comments received by February 13, 2017.

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

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

• Mail: Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350–1700.

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

Any associated form(s) for this collection may be located within this same electronic docket and downloaded for review/testing. Follow the instructions at *http://www.regulations.gov* for submitting comments. Please submit comments on any given form identified by docket number, form number, and title.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Security Service, ATTN: Mr. Corey Beckett, Chief Finanical Officer, 27130 Telegraph Road, Quantico, VA 22134.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: National Industrial Security Program Cost Collection Survey; DSS Form 232; OMB Control Number 0704–0458.

Needs and Uses: The information collection requirement is necessary as a result of Executive Order 12829, ''National Industrial Security Program,'' which requires the Department of Defense to account each year for the costs associated with implementation of the National Industrial Security Program and report those costs to the Director of the Information Security Oversight Office (ISOO).

Affected Public: Business or other for profit; Not-for-profit institutions.

Annual Burden Hours: 507.

Number of Respondents: 1,014.

Responses per Respondent: 1.

Annual Responses: 1,014.

Average Burden per Response: 30 minutes.

Frequency: Annually.

Collection of this data is required to comply with the reporting requirements of Executive Order 12829, ''National Industrial Security Program.'' This collection of information requests the assistance of the Facility Security Officer to provide estimates of annual security labor cost in burdened, current year dollars and the estimated percentage of security labor dollars to the total security costs for the facility. Security labor is defined as personnel whose positions exist to support operations and staff in the implementation of government security requirements for the protect ion of classified information. Guards who are required as supplemental controls are included in security labor. This data will be incorporated into a report produced to ISOO for the estimated cost of securing classified information within industry. The survey will be distributed electronically via a Web-based commercial survey tool.

Dated: December 9, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–30023 Filed 12–13–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 16–54]

36(b)(1) Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Pam Young, DSCA/SE&E–RAN, (703) 697–9107.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 16–54 with attached Policy Justification and Sensitivity of Technology.

Dated: December 9, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

DEC 02 2016

The Honorable Paul D. Ryan
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 16-54, concerning the Department of the Navy's proposed Letter(s) of Offer and Acceptance to the Government of Australia for defense articles and services estimated to cost $115 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

J. W. Rixey
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Transmittal No. 16–54

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Government of Australia

(ii) *Total Estimated Value:*

Major Defense Equipment (MDE) *.	$0.00 million
Basic Case (GUW)	$79.07 million
Amendment Funding	$35.93 million
TOTAL	$115.00 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Non-MDE: FMS case AT–P–GUW, originally offered below congressional notification threshold at $79.07 million, was for acquisition of two Range Systems to conduct Electronic Warfare (EW), Electronic Surveillance, and Airborne Electronic Attack for Royal Australian Air Force aircrew training on its twelve (12) Australian EA–18G aircraft. An amendment to AT–P–GUW is required to add $35.93 million in funding, to provide for unfunded requirements to meet the scope of the basic case and provide for the sale of additional classified technical data and software, system integration and testing, tools and test equipment, support equipment, spare and repair parts, publications, operations manuals, and

technical documents, personnel training, U.S. Government and contractor technical assistance, and other related elements of engineering, logistics, and program management. This amendment will push the original case value above notification threshold and thus requires notification of the entire case.

(iv) Military Department: Navy (AT–P–GUW–A1)

(v) *Prior Related Cases, if any:*

FMS case AT–P–LEN: $992M September 13, 2012 (Airborne Electronic Attack Kits)

FMS case AT–P–SCI $1.3B July 4, 2013 (twelve EA–18G aircrafts)

FMS case AT–P–GUW $79M February 12, 2015 (Electronic Warfare Range System)

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex

(viii) *Date Report Delivered to Congress:* December 2, 2016

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Government of Australia—AEA–18G Electronic Warfare Range System

The Government of Australia has requested additional funding to a previously implemented case for two Electronic Warfare Range Systems to conduct Electronic Warfare and Electronic Surveillance training within the borders of Australia. The original FMS case, valued at $79.07 million, includes non-MDE costs for all support elements required to provide for system integration testing, tools and test equipment, support equipment, spare and repair parts, publications, operations manuals, technical documents, personnel training, U.S. Government and contractor technical assistance, and other related elements of logistics and program support. The addition of $35.93 million in non-MDE funding to the basic case will provide for unfunded requirements to meet the scope of the basic case and provide for the sale of additional classified technical data and software, system integration and testing, tools and test equipment, support equipment, spare and repair parts, publications, operations manuals, and technical documents, personnel training, U.S. Government and contractor technical assistance, and other related elements of engineering, logistics, and program management. This amendment will push the original case value above notification threshold and thus requires notification of the entire case. The total overall estimated value is $115 million.

This sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a major contributor to political stability, security, and economic development in the Western Pacific. Australia is an important Major non-NATO Ally and partner that contributes significantly to peacekeeping and humanitarian operations around the world. It is vital to the U.S. national interest to assist our ally in developing and maintaining a strong and ready self-defense capability. By enabling Australian Defense Force (ADF) ranges, the U.S. Government will ensure consistency in training across platforms and theaters, whether the exercises are conducted in the United State or in Australia, where U.S. aircrews will be able to participate in training exercises alongside their Australian counterparts.

The proposed sale will allow continued efforts to improve Australia's capability in current and future coalition operations. Australia will use the range to enhance Electronic Warfare capabilities as a deterrent to regional threats and to strengthen its homeland defense. Australia will have no difficulty absorbing these items into its armed forces.

The proposed sale will not alter the basic military balance in the region.

The prime contractors will be Leidos (hardware) and General Dynamics Mission Systems (software). The U.S. Government is not aware of any known offsets associated with this sale.

Implementation of this sale will require ten (10) temporary U.S. Government or contractor representatives to Australia for assistance in integration and range operational and maintenance training.

There will be no adverse impact on U.S. defense readiness as a result of this proposed amendment.

Transmittal No. 16–54

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology*

1. Provides two (2) in-country Electronic Warfare (EW) ranges for EA–18G aircrew training to detect, identify, locate, and suppress hostile emitters. Range technology transfers programmable equipment able to emulate generic Integrated Air Defense Systems, threat and other emitters, along with authentic threat emitters purchased from vendors in Former Soviet Block states. The range hardware is Unclassified either stand-alone or integrated. The range software is unclassified with the exception of one (1) Secret Digital Integrated Air Defense System (DIADS) software suite. The amendment facilitates transfer of classified information such as software, classified threat and fly-out models, user event captured data, range operations manuals, and security classification guidance. The classified information enhances the usefulness of the range technology being transferred and provides guidance on safeguarding sensitive information.

2. When EW range hardware and software work together against a particular aircraft platform, the visual and recorded information becomes classified Secret. The range capability is unclassified until the networks touch a Secret network (*e.g.,* Link 16) or perform against real world training missions. The customer may capture intelligence regarding the authentic threat emitters that is classified Confidential or Secret, as well as other training artifacts and debrief products capturing weapons capability and tactics.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce EA–18G weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

4. All defense articles and services listed in this transmittal are authorized for release and export to the Government of Australia.

[FR Doc. 2016–29962 Filed 12–13–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (Judicial Proceedings Panel); Notice of Federal Advisory Committee Meeting

AGENCY: Department of Defense.

ACTION: Notice of meeting.

SUMMARY: The Department of Defense is publishing this notice to announce the following Federal Advisory Committee meeting of the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (''the Judicial Proceedings Panel'' or ''the Panel''). The meeting is open to the public.

DATES: A meeting of the Judicial Proceedings Panel will be held on Friday, January 6, 2017. The public session will begin at 9:00 a.m. and end at 4:45 p.m.

ADDRESSES: Holiday Inn Arlington at Ballston, Grand Ballroom, 4610 N. Fairfax Drive, Arlington, Virginia 22203.

FOR FURTHER INFORMATION CONTACT: Ms. Julie Carson, Judicial Proceedings Panel, One Liberty Center, Suite 150, 875 N. Randolph Street, Arlington, Virginia 22203. Email: *whs.pentagon.em.mbx.judicial-panel@mail.mil.* Phone: (703) 693–3849. Web site: *http://jpp.whs.mil.*

SUPPLEMENTARY INFORMATION: This public meeting is being held under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150.

Purpose of the Meeting: In section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112–239), as amended, Congress tasked the Judicial Proceedings Panel to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice (UCMJ) involving adult sexual assault and related offenses since the amendments made to the UCMJ by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112–81; 125 Stat. 1404), for the purpose of developing recommendations for improvements to such proceedings. At this meeting, the Panel will receive testimony on current military justice practices related to Military Rules of Evidence 412 and 513 from former military trial judges and current military justice practitioners. The Panel will also receive a presentation from JPP Subcommittee members on the policy of withholding initial disposition authority in sexual assault cases to the O–6 level and on judge advocate military justice training.

Agenda:

8:30 a.m.–9:00 a.m. Administrative Work (41 CFR 102–3.160, not subject to notice & open meeting requirements)

9:00 a.m.–9:15 a.m. Welcome and Introduction

—Designated Federal Official Opens Meeting

—Remarks of the Chair

9:15 a.m.–10:45 a.m. Perspectives of Former Military Trial Judges on M.R.E. 412 and M.R.E. 513 Evidence at Article 32 Hearings and Courts-Martial

—Former Military Trial Judges

10:45 a.m.–12:15 p.m. Perspectives of Defense Counsel on M.R.E. 412 and M.R.E. 513 Evidence at Article 32 Hearings and Courts-Martial

—Service Defense Counsel

12:15 p.m.–1:15 p.m. Lunch

1:15 p.m.–2:45 p.m. Perspectives of Trial Counsel on M.R.E. 412 and M.R.E. 513 Evidence at Article 32 Hearings and Courts-Martial

—Service Trial Counsel

2:45 p.m.–4:00 p.m. Perspectives of Special Victims' Counsel/Victims' Legal Counsel on M.R.E. 412 and M.R.E. 513 Evidence at Article 32 Hearings and Courts-Martial

—Service Special Victims' Counsel and Victims' Legal Counsel

4:00 p.m.–4:30 p.m. Presentation by JPP Subcommittee Members on Withholding Initial Disposition Authority in Sexual Assault Cases and Service Attorney Training

—JPP Subcommittee Members

4:30 p.m.–4:45 p.m. Public Comment

4:45 p.m. Meeting Adjourned

Availability of Materials for the Meeting: A copy of the January 6, 2017 public meeting agenda and any updates or changes to the agenda, including the location and individual speakers not identified at the time of this notice, as well as other materials provided to Panel members for use at the public meeting, may be obtained at the meeting or from the Panel's Web site at *http://jpp.whs.mil.*

Public's Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. Seating is limited and is on a first-come basis. In the event the Office of Personnel Management closes the government due to inclement weather or any other reason, please consult the Web site for any changes to public meeting dates or time.

Special Accommodations: Individuals requiring special accommodations to access the public meeting should contact the Judicial Proceedings Panel at *whs.pentagon.em.mbx.judicial-panel@mail.mil* at least five (5) business days prior to the meeting so that appropriate arrangements can be made.

Procedures for Providing Public Comments: Pursuant to 41 CFR 102–3.140 and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written comments to the Panel about its mission and topics pertaining to this public session. Written comments must be received by the JPP at least five (5) business days prior to the meeting date so that they may be made available to the Judicial Proceedings Panel for their consideration prior to the meeting. Written comments should be submitted via email to the Judicial Proceedings Panel at *whs.pentagon.em.mbx.judicial-panel@mail.mil* in the following formats: Adobe Acrobat or Microsoft Word. Please note that since the Judicial Proceedings Panel operates under the provisions of the Federal Advisory Committee Act, as amended, all written comments will be treated as public documents and will be made available for public inspection. If members of the public are interested in making an oral statement pertaining to the agenda for the public meeting, a written statement must be submitted as above along with a request to provide an oral statement. After reviewing the written comments and the oral statement, the Chairperson and the Designated Federal Official will determine who will be permitted to make an oral presentation of their issue during the public comment portion of this meeting. This determination is at the sole discretion of the Chairperson and Designated Federal Official, will depend on the time available and relevance to the Panel's activities for that meeting, and will be on a first-come basis. When approved in advance, oral presentations by members of the public will be permitted from 4:30 p.m. to 4:45 p.m. on January 6, 2017 in front of the Panel members.

Committee's Designated Federal Official: The Panel's Designated Federal Official is Ms. Maria Fried, Department of Defense, Office of the General Counsel, 1600 Defense Pentagon, Room 3B747, Washington, DC 20301–1600.

Dated: December 9, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–29979 Filed 12–13–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2016–ICCD–0111]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; NPEFS 2016–2018: Common Core of Data (CCD) National Public Education Financial Survey

AGENCY: National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is

proposing a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before January 13, 2017.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2016–ICCD–0111. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E–347, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact NCES Information Collections at *NCES.Information.Collections@ed.gov.*

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

Title of Collection: NPEFS 2016–2018: Common Core of Data (CCD) National Public Education Financial Survey.

OMB Control Number: 1850–0067.

Type of Review: A revision of an existing information collection.

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

Total Estimated Number of Annual Responses: 56.

Total Estimated Number of Annual Burden Hours: 5,334.

Abstract: The National Public Education Financial Survey (NPEFS) is an annual collection of state-level finance data that has been included in the NCES Common Core of Data (CCD) since FY 1982 (school year 1981–82). NPEFS provides function expenditures by salaries, benefits, purchased services, and supplies, and includes federal, state, and local revenues by source. The NPEFS collection includes data on all state-run schools from the 50 states, the District of Columbia, American Samoa, the Northern Mariana Islands, Guam, Puerto Rico, and the Virgin Islands. NPEFS data are used for a wide variety of purposes, including to calculate federal program allocations such as states' ''average per-pupil expenditure'' (SPPE) for elementary and secondary education, certain formula grant programs (*e.g.,* Title I, Part A of the Elementary and Secondary Education Act of 1965 (ESEA) as amended, Impact Aid, and Indian Education programs). Furthermore, other federal programs, such as the Educational Technology State Grants program (Title II Part D of the ESEA), the Education for Homeless Children and Youth Program under Title VII of the McKinney-Vento Homeless Assistance Act, and the Teacher Quality State Grants program (Title II Part A of the ESEA) make use of SPPE data indirectly because their formulas are based, in whole or in part, on State Title I Part A allocations. On December 10, 2015, an amendment to ESEA, the Every Student Succeeds Act (ESSA), was signed into law. This request is to add two new items to the NPEFS data collection (to report current expenditures disaggregated by source of funds and to align with the State and LEA report cards required by ESSA) and to conduct the annual NPEFS collection of state-level finance data for FY 2016–2018.

Dated: December 8, 2016.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2016–29924 Filed 12–13–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Opening Doors, Expanding Opportunities

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

Overview Information:
Opening Doors, Expanding Opportunities
Notice inviting applications for new awards using fiscal year (FY) 2016 funds.
Catalog of Federal Domestic Assistance (CFDA) Number: 84.377C.

DATES:
Applications Available: December 14, 2016.
Date of Pre-Application Webinar: January 5, 2017.
Deadline for Notice of Intent to Apply (optional): January 13, 2017.
Deadline for Transmittal of Applications: February 13, 2017.
Deadline for Intergovernmental Review: April 13, 2017.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program

In an effort to support the implementation of effective school improvement strategies, the U.S. Department of Education (Department) is using a portion of its FY 2016 School Improvement Grants (SIG) national activities funds to initiate the FY 2017 grant competition for the Opening Doors, Expanding Opportunities program. This program supports Local Educational Agencies (LEAs) [1] and their communities in preparing to implement innovative, effective, ambitious, comprehensive, and locally driven strategies to increase socioeconomic diversity in schools and LEAs as a means to improve the achievement of students in the lowest-performing schools.[2] Through the Opening Doors,

[1] Defined terms are used throughout the notice and are indicated by capitalization.

[2] Note that applicants may address various types of diversity. If racial or ethnic diversity is considered it should be one of many factors in accordance with the ''Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial

Continued

Expanding Opportunities program, the Department will support LEAs in two different stages of increasing socioeconomic diversity in their schools. First, this program supports an LEA, or a consortium of LEAs, to: (1) Analyze existing challenges and devise potential solutions for increasing socioeconomic diversity in their schools; and (2) create a blueprint for improving academic outcomes for students in their lowest-performing schools by substantially increasing socioeconomic diversity, as referenced above, in their lowest-performing schools by the end of the 2025–2026 school year and a strategy for implementing that blueprint. Second, this program supports an LEA, or a consortium of LEAs, that have existing or established efforts to improve student outcomes by increasing socioeconomic diversity, to: (1) Analyze existing challenges and devise potential solutions for further increasing socioeconomic diversity in their schools; (2) publish a blueprint for building on these existing efforts to improve academic outcomes for students in their lowest-performing schools by substantially increasing and maintaining socioeconomic diversity in their lowest-performing schools by the end of the 2025–2026 school year; and (3) execute one or more Pre-Implementation Activities that will contribute to the possible full implementation of the blueprint after the grant period.

The resulting blueprints will: (1) Provide a publicly available implementation plan for the grantee LEAs and their communities to support efforts to increase the socioeconomic diversity in their schools; (2) serve as a resource for local and State policy decisions that could reduce barriers to, and build support for, increasing socioeconomic diversity in schools; and (3) serve as a resource for other communities considering similar approaches.

The Department also intends to provide technical assistance to grantees during the grant period, which will include a community of practice with opportunities for collaborative planning and problem solving with other grantees and experts in the field.

Background

The SIG program, authorized under section 1003(g) of Title I of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001 (NCLB), provides resources in order to substantially raise the achievement of students in the lowest-performing schools. Since FY 2012, Congress has authorized the Department to reserve up to five percent of the SIG appropriations to carry out activities to build State and LEA capacity to implement the SIG program effectively. These funds are used to build upon the school improvement work that States and LEAs have been doing with SIG funds in order to raise the achievement of students in SIG Schools. The Department has used its national activities reservation to support SEAs, LEAs, and schools in increasing the effectiveness of their school improvement activities, including through activities that support the preparation and development of school leaders who lead turnaround efforts; the development of early warning indicator systems to help identify students at risk of dropout early on to provide appropriate interventions as soon as possible; efforts to strengthen community partnerships in low-performing schools with AmeriCorps service members; and the incorporation of arts into school turnaround efforts. The Department will take the lessons it has learned from the investments it has made to date, and with this notice apply it to the school improvement efforts it will undertake as it seeks to support State and local implementation of the Every Student Succeeds Act (ESSA), which calls for all States to target attention and resources to their lowest performing schools, those with chronic underperformance among student subgroups, and high schools with low graduation rates.

Increasing student diversity is one of many potentially beneficial strategies for improving low-performing schools. As outlined in this section, studies of recent initiatives to increase student diversity indicate that such efforts may improve student achievement and may particularly benefit students from low-income households. Furthermore, increasing student diversity has the potential to further support whole-school reform models implemented in SIG Schools. Diverse learning environments can serve as engines of social mobility. Unfortunately, our Nation's schools are becoming less diverse and more segregated each year. More than sixty years after *Brown* v. *Board of Education,* public schools continue to be separate and unequal, with recent research showing that America's schools are more segregated, not only by students' race, but also socioeconomic status, than they were in the late 1960s.[3] For example, nearly one-quarter (24 percent) of our Nation's public school students attend high-poverty schools (75–100 percent poverty level).[4] In many cases, high-poverty schools are in high-poverty LEAs (75–100 percent poverty level).[5] Specifically as it relates to the SIG program, when compared to all public elementary and secondary schools, SIG-Eligible Schools were more likely to be high-poverty (72 percent of students in SIG-Eligible Schools were eligible for free or reduced-price lunch compared to 47 percent of students nationwide).[6]

These data reflect inequities that can have detrimental impacts on children and communities. Studies have shown that students from low-income households enter kindergarten far behind their middle- and upper-income peers. For example, cognitive and socio-emotional skill gaps between low-income and middle-class children are evident by kindergarten entry, and these gaps persist through the beginning of high school.[7] Disadvantaged children still enter kindergarten with fewer academic and behavioral skills than their more advantaged peers, though the

Isolation in Elementary and Secondary Schools,'' released by the U.S. Department of Education's Office for Civil Rights (OCR) and the U.S. Department of Justice on December 2, 2011. *http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html.*

[3] Orfield, G., Frankenberg, E., Jongyeon, E., & Kuscera, J. (2014). *Brown at 62: Great Progress, a Long Retreat and an Uncertain Future.* Civil Rights Project/Proyecto Derechos Civiles, May 2014 (revised version May 15, 2014).

[4] U.S. Department of Education, National Center for Education Statistics, Common Core of Data (CCD), ''Public Elementary/Secondary School Universe Survey,'' 2010–11. See Digest of Education Statistics 2012. *https://nces.ed.gov/ccd/pubschuniv.asp.*

[5] Owens, A, Reardon, S.F., & Jencks, C. (2016). *Income Segregation between Schools and Districts, 1990 to 2010.* Stanford Center for Education Policy Analysis. Retrieved from: *http://cepa.stanford.edu/sites/default/files/wp16-04-v201602.pdf.*

[6] U.S. Department of Education, National Center for Education Statistics, ''School Improvement Grants: Analyses of State Applications and Eligible and Awarded Schools,'' 2012. *http://ies.ed.gov/ncee/pubs/20124060/.*

[7] Noble, K.G., Norman, M.F., & Farah, M.J. (2005). ''Neurocognitive correlates of socioeconomic status in kindergarten children.'' *Developmental Science, 8*(1), 74–78;

Hackman, D.A., & Farah, M.J. (2009). ''Socioeconomic status and the developing brain.'' *Trends in Cognitive Sciences,* 13(2), 65–73. doi:10.1016/j.tics.2008.11.003;

Hughes, C., Ensor, R., Wilson, A., & Graham, A. (2010). ''Tracking executive function across the transition to school: A latent variable approach.'' *Developmental Neuropsychology,* 35(1), 20–36. doi:10.1080/87565640903325691;

Council of Economic Advisers. (2016). *2016 Economic Report of the President.* Accessed from *https://www.whitehouse.gov/sites/default/files/docs/ERP_2016;* Isaaacs, J.B. (2012). *Starting School at a Disadvantage: The School Readiness of Poor Children.* Washington, DC: Brookings Institution. Accessed from *www.brookings.edu/wp-content/uploads/2016/06/0319_school_disadvantage_isaacs.pdf.*

academic skills gap narrowed between 1998 and 2010.[8] The academic skills gaps between low- and high-socioeconomic status children are larger than the skills gaps between non-white and white students.[9]

Multiple studies indicate that increasing student diversity, through socioeconomic diversity and other means, is one strategy that holds promise for supporting efforts to improve low-performing schools. One study showed that low-income children gain more language and mathematics skills from preschool if they attend preschools with children from economically diverse backgrounds.[10] In addition, students from low-income households attending more affluent schools have been found to have higher mathematics and science scores than similar students from low-income households attending high-poverty schools. For example, average scale scores on the 2009 National Assessment of Educational Progress Fourth Grade Mathematics assessment [11] were about 240 for low-income students in schools with 1–25 percent low-income students in the school, compared to about 220 for low-income students in schools with 76–99 percent low-income students in the school.[12] Moreover, students who attend low-poverty schools are nearly 70 percent more likely to enroll in a four-year college than students who attend high-poverty schools; mediating factors include peer effects and school effects (such as a schoolwide emphasis on academics).[13]

Although the Department anticipates that applicants will propose to develop approaches best suited to their local context, it is worth illuminating a few examples of efforts to increase student diversity. Data on one effort that increased socioeconomic diversity in Montgomery County, Maryland, schools [14] shows that after five to seven years, students in public housing who were randomly assigned to low-poverty elementary schools significantly outperformed their peers in public housing who attended moderate-poverty elementary schools in both mathematics and reading.[15] Additionally, some districts with longstanding socioeconomic integration programs, such as the Cambridge Public School District, have seen steadily rising scores on State assessments and high school graduation rates.[16] Inter-district policies also hold promise to reduce the number of high-poverty schools.[17]

Therefore, as Secretary King recently noted, ''A number of promising examples demonstrate what research has shown: increasing diversity has the power to pay off for everyone. From corporate boards to the scientific world, there are increasing indications that diversity isn't just a feel-good nicety—it's a clear path to better outcomes in school and in life.'' [18] As the above instances show, although student diversity in our Nation's public schools remains alarmingly low, there are several examples of policies that have increased diversity in schools. In addition to the examples mentioned above, some LEAs currently use socioeconomic status as a consideration in student school assignment, including strategies such as attendance zone boundaries, district-wide choice policies, magnet school opportunities, and transfer policies. Some charter school operators across the country also consider socioeconomic status in their admissions policies.[19]

Through the Opening Doors, Expanding Opportunities program, the Department invites interested LEAs and consortia of LEAs to apply for funding to develop ambitious blueprints focused on improving academic outcomes for students in SIG Schools or SIG-Eligible Schools by systematically increasing socioeconomic diversity, and offers the option to apply for funding for one or more Pre-Implementation Activities aligned to their blueprint. The Department seeks to support applicants who will explore and develop voluntary, community-led strategies that will positively impact the socioeconomic diversity in a significant percentage or number of SIG Schools or SIG-Eligible Schools where a substantial number of students are acutely impacted by a lack of student diversity, while also closing historic achievement gaps. Applicants may, but are not required to, consider developing voluntary strategies to increase socioeconomic diversity in early learning settings (which may include schools implementing the SIG early learning model, as described in the SIG final requirements, published in the **Federal Register** on February 9, 2015 (80 FR 7223)), charter schools, and secondary schools. Applicants may, but are not required to, consider how they might develop new, or leverage existing, partnerships through this program; communities that have been designated ''Promise Zones'' [20] and communities that have recently completed the U.S. Department of Housing and Urban Development's Assessment of Fair Housing [21] are encouraged to apply.

Although the Department expects applicants to propose plans for developing blueprints for socioeconomic diversity, applicants may also choose to voluntarily promote student diversity by considering additional factors beyond socioeconomic diversity, including race and ethnicity, in their efforts to diversify schools. We encourage all applicants choosing to consider factors in addition to socioeconomic diversity to consult the ''Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools,''

[8] Reardon, S.F. & Portilla, X.A. (2016). ''Recent trends in income, racial, and ethnic school readiness gaps at kindergarten entry.'' *AERA Open, 2*(3), 1–18.

[9] Reardon & Portilla (2016).

[10] Reid, J.L. (2012). ''Socioeconomic Diversity and Early Learning: The Missing Link in Policy for High-Quality Preschools.'' In R. Kahlenberg (Ed.), *The Future of School Integration:* 67–125.

[11] For more information about how to interpret NAEP scores, you may wish to visit the following Web site: *https://nces.ed.gov/nationsreportcard/mathematics/interpret_results.aspx.*

[12] Mantil, A., Perkins, A.G., & Aberger, S. (2012). ''The Challenge of High-Poverty Schools: How Feasible Is Socioeconomic School Integration?'' In R. Kahlenberg (Ed.), *The Future of School Integration:* 155–222.

[13] Palardy, G.J. (2013). ''High School Socioeconomic Segregation and Student Attainment.'' *American Educational Research Journal:* 714–754.

[14] This policy allows the public housing authority to purchase one-third of the inclusionary zoning homes in each subdivision to operate as federally subsidized public housing, which enables students from low-income households who occupy those public housing units to attend schools in that neighborhood-based attendance zone.

[15] Schwartz, H. (2012). ''Housing Policy is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland.'' In R. Kahlenberg (Ed.), *The Future of School Integration:* 27–66.

[16] Potter, H., Quick, K, & Davies, E. (2016). ''A New Wave of School Integration: Districts and Charters Pursuing Socioeconomic Diversity.'' The Century Foundation. Retrieved from: *https://tcf.org/content/report/a-new-wave-of-school-integration/.*

[17] Mantil, A., Perkins, A.G., & Aberger, S. (2012). ''The Challenge of High-Poverty Schools: How Feasible Is Socioeconomic School Integration?'' *The Future of School Integration:* 155–222.

[18] King, J. (2016). ''Stronger Together: Why Our Budget Supports Voluntary, Community-led Efforts to Increase Diversity.''*Medium. https://medium.com/@JohnKingAtED/stronger-together-why-our-budget-supports-voluntary-community-led-efforts-to-increase-diversity-53b45a5f49df#.n9h807fre.*

[19] Potter, H., Quick, K, & Davies, E. (2016). ''A New Wave of School Integration: Districts and Charters Pursuing Socioeconomic Diversity.'' The Century Foundation, 2016. Retrieved from: *https://tcf.org/content/report/a-new-wave-of-school-integration/.*

[20] A list of designated Promise Zones and lead organizations, as well as a more detailed description about the program, can be found at the following Web site: *http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2016/HUDNo_16–085.*

[21] For more information see the following Web site: *https://www.hudexchange.info/programs/affh/overview/.*

released by the U.S. Department of Education's Office for Civil Rights (OCR) and the U.S. Department of Justice on December 2, 2011.[22] The guidance outlines, ''school districts should first determine if they can meet their compelling interests by using race-neutral approaches. When race-neutral approaches would be unworkable to achieve their compelling interests, school districts may employ generalized race-based approaches. Generalized race-based approaches employ expressly racial criteria, such as the overall racial composition of neighborhoods, but do not involve decision-making on the basis of any individual student's race.'' The guidance also provides examples of approaches that may be considered, including school and program siting; grade realignment and feeder patterns; school zoning; open choice and enrollment; admission to competitive schools and programs; and inter- and intra-district transfers. We encourage applicants to consult legal counsel when considering which approaches might be best suited to a particular situation and in alignment with their project's objectives.

Priorities: This competition includes three absolute priorities and two competitive preference priorities. We are establishing these priorities for this FY 2017 grant competition (which uses FY 2016 SIG national activities funds) and any subsequent year in which we make awards from the list of unfunded applications from this competition, in accordance with section 437(d)(1) of the General Education Provisions Act (GEPA), 20 U.S.C. 1232(d)(1).

Absolute Priorities: These priorities are absolute priorities. Under 34 CFR 75.105(c)(3), we consider only applications that meet Absolute Priority 1 and either Absolute Priority 2 or Absolute Priority 3. All applicants must address Absolute Priority 1. Absolute Priority 1 is from the notice of final supplemental priority for discretionary grant programs, published in the **Federal Register** on September 14, 2016 (81 FR 63099).

An applicant must indicate in its application whether it is applying under Absolute Priority 2 or Absolute Priority 3. If an applicant applies under Absolute Priority 3 and is deemed ineligible, it will be considered for funding under Absolute Priority 2, if it meets the requirements for Absolute Priority 2. If an applicant mistakenly applies under Absolute Priority 2 but clearly proposes Pre-Implementation Activities and meets the requirements for Absolute Priority 3, it will be peer reviewed for consideration under Absolute Priority 3. The Secretary prepares a rank order of applications for Absolute Priority 2 and Absolute Priority 3 based solely on the evaluation of their quality according to the selection criteria. Absolute Priorities 2 and 3 each constitutes its own funding category. Assuming that applications in each funding category are of sufficient quality, the Secretary intends to award grants under both Absolute Priorities 2 and 3 (Absolute Priority 1 applies to all grants).

These priorities are:

Absolute Priority 1: Increasing Socioeconomic Diversity in Schools.

Projects that are designed to increase socioeconomic diversity in educational settings by addressing one or more of the following:

(a) Using established survey or data-collection methods to identify socioeconomic stratification and related barriers to socioeconomic diversity at the classroom, school, district, community, or regional level.

(b) Designing or implementing, with community input, education funding strategies, such as the use of weighted per-pupil allocations of local, State, and eligible Federal funds, to provide incentives for schools and districts to increase socioeconomic diversity.

(c) Developing or implementing policies or strategies to increase socioeconomic diversity in schools that are evidence-based; demonstrate ongoing, robust family and community involvement, including a process for intensive public engagement and consultation; and meet one or more of the following factors—

(i) Are carried out on one or more of an intra-district, inter-district, community, or regional basis;

(ii) Reflect coordination with other relevant government entities, including housing or transportation authorities, to the extent practicable;

(iii) Include one or both of the following strategies—

(A) Establishing school assignment or admissions policies that are designed to give preference to low-income students, students from low-performing schools, or students residing in neighborhoods experiencing concentrated poverty to attend higher-performing schools; or

(B) Establishing or expanding schools that are designed to attract substantial numbers of students from different socioeconomic backgrounds, such as magnet or theme schools, charter schools, or other schools of choice.

Absolute Priority 2: Improving Schools by Increasing Student Diversity—Blueprint.

To meet this priority, the applicant must propose to develop a blueprint for improving student academic outcomes in SIG Schools or SIG-Eligible Schools by increasing the diversity of students enrolled in those schools and, at the applicant's discretion, other schools in the LEA(s) to be served. Applicants under this priority may only use funds for Planning Activities.

Absolute Priority 3: Improving Schools by Increasing Student Diversity—Blueprint and Pre-implementation.

To meet this priority, the applicant must propose to: (1) Develop a blueprint for improving student academic outcomes in SIG Schools or SIG-Eligible Schools by increasing the diversity of students enrolled in those schools and, at the applicant's discretion, other schools in the LEA(s) to be served, including by expanding existing plans of the LEA(s) to increase student diversity in schools; and (2) execute one or more Pre-Implementation Activities that are outlined in existing plans. The applicant must also provide evidence of its existing diversity plans.

Competitive Preference Priorities: These priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award up to an additional six points to an application for Competitive Preference Priority 1, depending on how well the application addresses this priority, and we award an additional three points to an application that meets Competitive Preference Priority 2.

These priorities are:

Competitive Preference Priority 1: Blueprint for Inter-District Efforts to Increase Student Diversity. (zero to six points)

This priority is for applicants that propose to develop a blueprint that includes establishing or expanding an inter-district partnership that provides students with increased educational options by allowing them to attend schools in another LEA. Under this priority, an inter-district partnership may be between contiguous or non-contiguous LEAs. Under this priority, the applicant must submit, for each LEA that will participate in the inter-district partnership, a memorandum of understanding (MOU) or letter of commitment signed by the superintendent or chief executive officer (CEO) of each LEA that describes each LEA's proposed commitment, including its contribution of financial or in-kind resources (if any). An applicant will receive competitive preference priority points under this priority based on the strength of the commitment of each LEA to the partnership. Note that applicants

[22] *http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html.*

do not need to apply as a consortium to be considered for Competitive Preference Priority 1 points.

Competitive Preference Priority 2: Efforts to Increase Student Diversity in Rural Schools. (zero or three points)

This priority is for applicants that propose to serve at least one SIG School or SIG-Eligible School designated as a Rural School. If applying as a consortium, at least one LEA in the consortium must have at least one SIG School or SIG-Eligible School designated as a Rural School. Applicants applying under this priority must provide the school name and National Center for Education Statistics (NCES) number for each school designated as a Rural School. An applicant will receive three competitive preference priority points under this priority if at least one SIG School or SIG-Eligible School the applicant proposes to serve is designated as a Rural School.

Application Requirements:

Assurances. The applicant must assure in its grant application that it will:

(1) Fully participate in the Opening Doors, Expanding Opportunities Community of Practice to explore strategies and design solutions to relevant problems, and also attend, in-person, at least one project director's meeting;

(2) Participate in any program evaluation or related activity (which may include public presentations) conducted by or for the Department, including by providing access to relevant program and project data and other information, as appropriate; and

(3) Submit to the Department within the project period of the grant award, a blueprint that meets the Program Requirements as outlined in this notice.

Plan to Develop a Blueprint. In its application, the applicant must describe how it will develop a blueprint for public dissemination by the end of the project period of the grant award by addressing the following: need for the project, significance of the project, project design, project personnel, management plan, and resources.

Pre-Implementation Activities Plan. If applying under Absolute Priority 3, in its application, the applicant must also describe:

(1) Each Pre-Implementation Activity;

(2) How each Pre-Implementation Activity will promote student diversity in the schools to be served;

(3) How each proposed Pre-Implementation Activity will contribute to full implementation of the blueprint;

(4) A theory of action and the evidence base (with consideration for the Department's recent guidance on using evidence [23]) that support the appropriateness and effectiveness of each Pre-Implementation Activity;

(5) A description of the anticipated challenges and potential solutions to executing each Pre-Implementation Activity, including stakeholder support for work to date and plans to engage stakeholders going forward;

(6) The timeline for executing each Pre-Implementation Activity;

(7) The costs associated with each Pre-Implementation Activity, including the process by which such costs were estimated;

(8) The significance of the anticipated impact on the participating LEA(s) and schools, including, but not limited to: The percentage and number of schools and students (disaggregated by socioeconomic status, race, or ethnicity, as appropriate for the blueprint) that will be affected by each Pre-Implementation Activity;

(9) In the appendix, current or recent student diversity plans (which do not need to meet the blueprint requirements at the time of application) or other relevant documentation to demonstrate that the applicant has existing or established efforts related to student diversity; and

(10) If applicable, a description of how the applicant will leverage new or existing partnerships to execute each Pre-Implementation Activity, such as, but not limited to, partnerships with the following: (i) An LEA; (ii) a charter management organization or charter school operator; (iii) an SEA; (iv) an institution of higher education; (v) a non-profit or for-profit organization; (vi) a local governmental agency (such as mayor's office or transportation or housing authority); (vii) a community-based organization; (viii) a Federal agency; and (ix) another organization, as determined by the applicant.

MOUs or other Binding Agreements. If applying as a consortium, consistent with 34 CFR 75.128, the applicant must submit as part of its application package, for each LEA in the consortium, copies of all MOUs or other binding agreements related to the consortium. If applying under the competitive preference priority, the applicant must submit, as part of its application package, copies of all MOUs or other binding agreements related to the partnership and described in the response to the competitive preference priority.

Signature. Applications must be signed by the LEA superintendent or CEO. In the case of a consortium, applications must be signed by each LEA superintendent or CEO.

Program Requirements: Within the project period of the grant award, an eligible applicant awarded an Opening Doors Expanding Opportunities Grant must—

(1) Submit to the Department, within the grant period, a blueprint that includes the following:

(a) A detailed needs analysis of the LEA(s) to determine the factors that have led to low student achievement in its SIG Schools or SIG-Eligible Schools, including:

(i) A comparison of student demographic and academic outcome information for the SIG Schools or SIG-Eligible Schools with that of other schools in the LEA(s);

(ii) A comparison of student demographic information for the SIG Schools or SIG-Eligible Schools with that of the residential population of the LEA(s), if such information is available and relevant; and

(iii) Other information, if such information is available and relevant, including, for the LEA(s) to be served:

(A) Other analyses of concentrated poverty or racial or ethnic segregation;

(B) Analyses of the location and capacity of school facilities or the adequacy of local or regional transportation infrastructure; and

(C) Analyses of school-level resources, including per pupil expenditures (if available), student access to instructional tools, full day Pre-Kindergarten, advanced coursework, and effective educators;

(b) An explanation of how the LEA(s) determined which schools would be served under the blueprint, including:

(i) The extent to which the LEA(s) gave priority to serving students in SIG Schools or SIG-Eligible Schools; and

(ii) The extent to which the determination of the participating schools reflected robust parental involvement and community engagement;

(c) Measurable goals, beginning with the 2019–2020 school year and for every two years thereafter through the 2025–2026 school year, including a description of how such goals were determined, for increasing student diversity and for improving student academic outcomes:

(i) In each school to be served;

(ii) At the applicant's discretion, in other schools in the LEA(s) to be served; and

(iii) At the applicant's discretion and if appropriate, in the LEA(s) to be served;

(d) A detailed description of the strategies the applicant will pursue to

[23] Available at *http://www2.ed.gov/policy/elsec/leg/essa/guidanceuseseinvestment.pdf.*

improve student academic outcomes in the schools to be served by increasing student diversity, including:

(i) A theory of action and the evidence base (with consideration for the Department's recent guidance on using evidence [24]) that support the appropriateness and effectiveness of the selected strategies based on findings from the needs analyses described in blueprint requirement (a) and the likelihood of achieving the goals described in blueprint requirement (c).

(ii) For each selected strategy:

(A) A description of the anticipated challenges and potential solutions;

(B) Timeline for implementation;

(C) Costs associated with implementation, including the process by which such costs were estimated; and

(D) A description of the extent to which it reflects parental involvement and community engagement; and

Note: Selected strategies must not be limited to virtual educational experiences and may include, but are not limited to, redesigning school boundaries, assignment policies, feeder patterns, and admissions policies (*e.g.,* establishing open enrollment using controlled choice); creating or expanding schools capable of attracting students from diverse backgrounds, including by converting existing schools into charter schools, theme schools, or magnet schools; using new funding strategies to incentivize schools to enroll a diverse group of students (*e.g.,* weighted per-pupil allocations of State and local funds); and establishing or expanding inter-district school choice programs;

(e) A description of the significance of the anticipated impact on the participating LEA(s) and schools, including, but not limited to:

(i) The percentage and number of schools and students (disaggregated by socioeconomic status, race, or ethnicity, as appropriate for the blueprint) that will be affected by the implementation of the blueprint;

(ii) If applicable, how the implementation of the blueprint may positively or adversely affect diversity or educational opportunities available to poor or minority students in other schools within the LEA(s) and how these adverse effects could be mitigated; and

(iii) Potential cost savings as a result of specific strategies outlined in the blueprint.

(f) Plans for continued community engagement, parental involvement, and LEA and school staff capacity building to support the ongoing implementation of the blueprint (including a summary of how the community, parents, and family participated in the planning process as well as a description of how they will be engaged during implementation);

(g) If applicable, a description of how the applicant will leverage new or existing partnerships with entities such as, but not limited to, the following: (i) An LEA; (ii) a charter management organization or charter school operator; (iii) an SEA; (iv) an institution of higher education; (v) a non-profit or for-profit organization; (vi) a local governmental agency (such as mayor's office or transportation or housing authority); (vii) a community-based organization; (viii) a Federal agency; and (ix) another organization, as determined by the applicant;

(h) An implementation plan including a proposed personnel and management plan; and

(i) A description of potential opportunities to implement the blueprint (*e.g.,* leveraging available Federal, State, local, and private funding sources, integrating the blueprint into related programs or initiatives).

(2) For grantees who applied under Absolute Priority 3, blueprints must be submitted to the Department prior to executing Pre-Implementation Activities.

Definitions: The following definitions apply to this competition. For the purposes of this competition, we establish the definitions for Community of Practice, Planning Activities, Pre-Implementation Activities, Rural School, SIG-Eligible School, and SIG School, in this notice, in accordance with section 437(d)(1) of GEPA, 20 U.S.C. 1232(d)(1). The definition for Local Educational Agency is from section 8101(30) of the ESEA, as amended by the ESSA.

Community of Practice means a group of grantees that meets and collaborates regularly to solve persistent problems and improve practice in areas important to the success of their projects.

Local Educational Agency (LEA) means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools. The term includes any other public institution or agency having administrative control and direction of a public elementary school or secondary school. The term includes an elementary school or secondary school funded by the Bureau of Indian Education but only to the extent that including the school makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the Local Educational Agency receiving assistance under this Act with the smallest student population, except that the school shall not be subject to the jurisdiction of any State educational agency other than the Bureau of Indian Education. The term includes educational service agencies and consortia of those agencies. The term includes the State educational agency in a State in which the State educational agency is the sole educational agency for all public schools.

Planning Activities mean activities that support the development of a student diversity blueprint. Some examples of activities are:

(1) Collecting and analyzing available demographic data;

(2) Using surveys and other research strategies to gain a better understanding of local student diversity issues and concerns, barriers to integration, etc.;

(3) Identifying Federal, State, and local resources needed to implement each activity;

(4) Convening groups of stakeholders to better understand challenges (such as local zoning or State legislative barriers to overcome) and brainstorm solutions (such as viable opportunities to transport students to different schools);

(5) Designing student admission systems aligned to strategies included in the blueprint; and

(6) Visiting districts that are implementing diversity strategies to inform blueprint development.

Pre-Implementation Activities mean activities that support the development of an infrastructure to create more diverse schools as outlined in the blueprint. Some examples of activities are:

(1) Making upgrades to a data system to improve the capacity to track and use information relevant to the blueprint; and

(2) Piloting activities included in the blueprint (*e.g.,* running a pilot student admissions lottery for select schools, redesigning school assignment boundaries, simulating various factors

[24] Available at *http://www2.ed.gov/policy/elsec/leg/essa/guidanceuseseinvestment.pdf.*

to consider for revised attendance zones).

Rural School is a school that is assigned a locale code of 41 (located in a census-defined rural territory less than 5 miles from an urban cluster), a locale code of 42 (located in a census-defined rural territory more than 5 miles but less than or equal to 25 miles from an urban cluster), or a locale code of 43 (located in a census-defined rural territory that is more than 25 miles from an urban cluster) by NCES. To identify the locale code of any school to be served by the proposed project, access the NCES public school database here: *http://nces.ed.gov/ccd/schoolsearch/.*

SIG-Eligible School means either:

(a) A school that is identified in the State's most recently approved State SIG application as a Tier I or Tier II school; or

(b) For a State that previously received approval of its ESEA flexibility request, any school identified as a priority or focus school by the State under ESEA flexibility for the 2016–2017 school year.

SIG School means either:

(a) A Tier I or Tier II school as defined in the SIG final requirements published in the **Federal Register** on February 9, 2015 (80 FR 7223) that is, as of the date of the application, implementing one of the SIG intervention models or a planning year in preparation to implement a model, including any school identified as a Tier I or Tier II school in the State's most recently approved State SIG application; or

(b) For a State that previously received approval of its ESEA flexibility request, any school identified as a priority or focus school by the State under ESEA flexibility for the 2016–2017 school year that is, as of the date of the application, implementing one of the SIG intervention models or a planning year in preparation to implement a model.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed priorities, definitions, and other requirements. Section 437(d)(1) of GEPA, however, allows the Secretary to exempt from rulemaking requirements, regulations governing the first grant competition under a new or substantially revised program authority. This is the first grant competition for this program under Division H, Title III, of the Consolidated and Further Continuing Appropriations Act, 2016 (Pub. L. 114–113) and therefore qualifies for this exemption. In order to ensure timely grant awards, the Secretary has decided to forgo public comment on the priorities, definitions, and requirements under section 437(d)(1) of GEPA. These priorities, definitions, and requirements will apply to the FY 2017 grant competition and any subsequent year in which we make awards from the list of unfunded applicants from this competition.

Program Authority: Section 1003(g) of the ESEA, as amended by NCLB (20 U.S.C. 6303(g)); the Consolidated Appropriations Act, 2016 (Pub. L. 114–113).

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 81, 82, 84, 97, 98, and 99. (b) The Office of Management and Budget (OMB) Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The Notice of Final Requirements for SIG, published in the **Federal Register** on February 9, 2015 (80 FR 7223).

II. Award Information

Type of Award: Discretionary grant.

Estimated Available Funds: $12,000,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2018 from the list of unfunded applications from this competition.

Estimated Range of Awards: $350,000–$750,000 under Absolute Priority 2; $500,000–$1,500,000 under Absolute Priority 3.

Estimated Average Size of Awards: $500,000 under Absolute Priority 2; $1,000,000 under Absolute Priority 3.

Maximum Award: We will not fully fund any application that proposes a budget exceeding $750,000 for a single budget period of 26 months under Absolute Priority 2 or $1,500,000 under Absolute Priority 3 for a single budget period of 26 months.

Estimated Number of Awards: 8–20.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 26 months.

III. Eligibility Information

1. *Eligible Applicants:* (a) An LEA with at least one SIG School or SIG-Eligible School; and (b) a consortium of LEAs, each with at least one SIG School or SIG-Eligible School in each member LEA.

Note: Eligible applicants seeking to apply as a consortium must comply with the regulations in 34 CFR 75.127–75.129 (see Appendix for MOU or Other Binding Agreement Requirements for Consortia Applicants).

2. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

IV. Application and Submission Information

1. *Address to Request Application Package:* Ashley Briggs, U.S. Department of Education, 400 Maryland Avenue SW., Room 3W242, Washington, DC 20202. Telephone: (202) 453–6987 or by email: *OpeningDoors@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) by contacting the program contact person listed in this section.

2.a. *Content and Form of Application Submission:* Requirements concerning the content and form of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative to no more than 40 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1'' margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the page

limit does apply to all of the application narrative.

Our reviewers will not read any pages of your application that exceed the page limit.

2.b. *Submission of Proprietary Information:* Given the types of projects that may be proposed, your application may include business information that you consider proprietary. In 34 CFR 5.11 we define ''business information'' and describe the process we use in determining whether any of that information is proprietary and, thus, protected from disclosure under Exemption 4 of the Freedom of Information Act (5 U.S.C. 552, as amended).

Because we plan to make successful applications available to the public, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application, under ''Other Attachments Form,'' please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Submission Dates and Times:*

Applications Available: December 14, 2016.

Date of Pre-Application Webinar: January 5, 2017.

Deadline for Notice of Intent to Apply (optional): January 13, 2017.

Deadline for Transmittal of Applications: February 13, 2017.

Applications for grants under this competition must be submitted electronically using the *Grants.gov* Apply site (*Grants.gov*). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to *Other Submission Requirements* in section IV of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under *For Further Information Contact* in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: April 13, 2017.

4. *Intergovernmental Review:* This project is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and System for Award Management:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the System for Award Management (SAM), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet at the following Web site: *http://fedgov.dnb.com/webform.* A DUNS number can be created within one to two business days.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow two to five weeks for your TIN to become active.

The SAM registration process can take approximately seven business days, but may take upwards of several weeks, depending on the completeness and accuracy of the data you enter into the SAM database. Thus, if you think you might want to apply for Federal financial assistance under a program administered by the Department, please allow sufficient time to obtain and register your DUNS number and TIN. We strongly recommend that you register early.

Note: Once your SAM registration is active, it may be 24 to 48 hours before you can access the information in, and submit an application through, *Grants.gov*.

If you are currently registered with SAM, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more business days.

Information about SAM is available at *www.SAM.gov.* To further assist you with obtaining and registering your DUNS number and TIN in SAM or updating your existing SAM account, we have prepared a *SAM.gov* Tip Sheet, which you can find at: *http://www2.ed.gov/fund/grant/apply/sam-faqs.html.*

In addition, if you are submitting your application via *Grants.gov*, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with *Grants.gov* as an AOR. Details on these steps are outlined at the following *Grants.gov* Web page: *www.grants.gov/web/grants/register.html.*

7. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Opening Doors, Expanding Opportunities program must be submitted electronically using the Governmentwide *Grants.gov* Apply site at *www.Grants.gov*. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to the Department.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for Opening Doors, Expanding Opportunities at *www.Grants.gov*. You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.377, not 84.377C).

Please note the following:

• When you enter the *Grants.gov* site, you will find information about submitting an application electronically through the site, as well as the hours of operation.

• Applications received by *Grants.gov* are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the *Grants.gov* system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the *Grants.gov* system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from *Grants.gov*, we will notify you if we are rejecting your application because it was date and time stamped by the *Grants.gov* system after 4:30:00 p.m., Washington, DC time, on the application deadline date.

• The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through *Grants.gov*.

• You should review and follow the Education Submission Procedures for submitting an application through *Grants.gov* that are included in the application package for this competition to ensure that you submit your application in a timely manner to the *Grants.gov* system. You can also find the Education Submission Procedures pertaining to *Grants.gov* under News and Events on the Department's G5 system home page at *www.G5.gov.* In addition, for specific guidance and procedures for submitting an application through *Grants.gov*, please refer to the *Grants.gov* Web site at: *www.grants.gov/web/grants/applicants/apply-for-grants.html.*

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

• You must submit all documents electronically, including all information you typically provide on the following forms: The Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.

• You must upload any narrative sections and all other attachments to your application as files in a read-only Portable Document Format (PDF). Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only PDF (*e.g.,* Word, Excel, WordPerfect, etc.) or submit a password-protected file, we will not review that material. Please note that this could result in your application not being considered for funding because the material in question—for example, the application narrative—is critical to a meaningful review of your proposal. For that reason it is important to allow yourself adequate time to upload all material as PDF files. The Department will not convert material from other formats to PDF.

• Your electronic application must comply with any page-limit requirements described in this notice.

• After you electronically submit your application, you will receive from *Grants.gov* an automatic notification of receipt that contains a *Grants.gov* tracking number. This notification indicates receipt by *Grants.gov* only, not receipt by the Department. *Grants.gov* will also notify you automatically by email if your application met all the *Grants.gov* validation requirements or if there were any errors (such as submission of your application by someone other than a registered Authorized Organization Representative, or inclusion of an attachment with a file name that contains special characters).

Once your application is successfully validated by *Grants.gov*, the Department will retrieve your application from *Grants.gov* and send you an email with a unique PR/Award number for your application.

These emails do not mean that your application is without any disqualifying errors. While your application may have been successfully validated by *Grants.gov*, it must also meet the Department's application requirements as specified in this notice and in the application instructions. Disqualifying errors could include, for instance, failure to upload attachments in a read-only PDF; failure to submit a required part of the application; or failure to meet applicant eligibility requirements. It is your responsibility to ensure that your submitted application has met all of the Department's requirements.

• We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through *Grants.gov*, please contact the *Grants.gov* Support Desk, toll free, at 1–800–518–4726. You must obtain a *Grants.gov* Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the *Grants.gov* system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under *For Further Information Contact* in section VII of this notice and provide an explanation of the technical problem you experienced with *Grants.gov*, along with the *Grants.gov* Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the *Grants.gov* system and that the problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. We will contact you after we determine whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the *Grants.gov* system. We will not grant you an extension if you failed to fully register to submit your application to *Grants.gov* before the application deadline date and time or if the technical problem you experienced is unrelated to the *Grants.gov* system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the *Grants.gov* system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the *Grants.gov* system; and

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written

statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Ashley Briggs, U.S. Department of Education, 400 Maryland Avenue SW., Room 3W242, Washington, DC 20202. Fax: (202) 401–1557.

Your paper application must be submitted in accordance with the mail or hand-delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: CFDA Number 84.377C, LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

We will not consider applications postmarked after the application deadline date.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: CFDA Number 84.377C, 550 12th Street SW., Room 7039, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from 34 CFR 75.210. We will award up to 100 points to an application under the selection criteria; the total possible points for addressing each selection criterion are noted in parentheses.

a. Need for Project (25 Points)

The Secretary considers the need for the proposed project. In determining the need for the proposed project, the Secretary considers the following factors:

1. The magnitude or severity of the problem to be addressed by the proposed project.

2. The extent to which the proposed project will focus on serving or otherwise addressing the needs of disadvantaged individuals.

3. The extent to which specific gaps or weaknesses in services, infrastructure, or opportunities have been identified and will be addressed by the proposed project, including the nature and magnitude of those gaps or weaknesses.

b. Significance (15 Points)

The Secretary considers the significance of the proposed project. In determining the significance of the proposed project, the Secretary considers the following factors:

1. The potential contribution of the proposed project to increased knowledge or understanding of educational problems, issues, or effective strategies.

2. The extent to which the proposed project is likely to build local capacity to provide, improve, or expand services that address the needs of the target population.

c. Quality of the Project Design (30 Points)

The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers the following factors:

1. The potential and planning for the incorporation of project purposes, activities, or benefits into the ongoing work of the applicant beyond the end of the grant.

2. The extent to which the proposed project will integrate with or build on similar or related efforts to improve relevant outcomes (as defined in 34 CFR 77.1(c)), using existing funding streams from other programs or policies supported by community, State, and Federal resources.

3. The extent to which the proposed project will establish linkages with other appropriate agencies and organizations providing services to the target population.

4. The extent to which the proposed project encourages parental involvement.

d. Quality of Project Personnel (10 Points)

The Secretary considers the quality of the personnel who will carry out the proposed project. In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. In addition, the Secretary considers the following factors:

1. The qualifications, including relevant training and experience, of the project director or principal investigator.

2. The qualifications, including relevant training and experience, of key project personnel.

3. The qualifications, including relevant training and experience, of project consultants or subcontractors.

e. Quality of the Management Plan (15 Points)

The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

1. The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

2. How the applicant will ensure that a diversity of perspectives are brought to bear in the operation of the proposed project, including those of parents, teachers, the business community, a variety of disciplinary and professional fields, recipients or beneficiaries of services, or others, as appropriate.

f. Adequacy of Resources (5 Points)

The Secretary considers the adequacy of resources for the proposed project. In determining the adequacy of resources for the proposed project, the Secretary considers the following factors:

1. The extent to which the budget is adequate to support the proposed project.

2. The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project.

3. The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant organization or the lead applicant organization.

2. *Review and Selection Process:* To ensure that grantees under this project serve both LEAs that are just beginning efforts to diversify schools and those that have established or existing efforts to diversify their schools, the Department may separately consider for funding applications meeting Absolute Priority 2 and those meeting Absolute Priority 3. We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Risk Assessment and Special Conditions:* Consistent with 2 CFR 200.205, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose special conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $150,000), under 2 CFR 200.205(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through SAM. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the Applicable Regulations section of this notice.

We reference the regulations outlining the terms and conditions of an award in the Applicable Regulations section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report that must include a description of progress to date on its goals, timelines, activities, deliverables, and budgets. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection analysis and reporting. In this case, the Secretary establishes a data collection period.

4. *Performance Measures:* The Secretary has established measures for assessing the effectiveness of the Opening Doors, Expanding Opportunities program. The performance measures are:

Performance Measure 1 (for all grantees): The percentage of grantees that produce blueprints that are of high quality and feasible to implement. In evaluating performance with respect to this measure, the Department may convene, at the end of the grant period, a panel of experts to assess blueprints using specific criteria regarding quality and feasibility of implementation.

Performance Measure 2 (for grantees awarded under Absolute Priority 3): The percentage of grantees that complete their Pre-Implementation Activities successfully and in a manner consistent with the objectives and timelines proposed in their application.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Ashley Briggs, U.S. Department of Education, 400 Maryland Avenue SW.,

room 3W242, Washington, DC 20202. Telephone: (202) 453–6987 or by email: *OpeningDoors@ed.gov.*

If you use a TDD or a TTY, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* 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 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.

Dated: December 8, 2016.

Ann Whalen,

Senior Advisor to the Secretary, Delegated the Duties of Assistant Secretary, for Elementary and Secondary Education.

Appendix: Memorandum of Understanding or Other Binding Agreement Requirements for Consortia Applicants

An applicant that is applying as part of a consortium must enter into a memorandum of understanding (MOU) or other binding agreement with each member of the consortium. At a minimum, each MOU or other binding agreement must include the following key elements, each of which is described in detail below: (1) Terms and conditions; and (2) signatures.

1. *Terms and conditions:* In accordance with the Opening Doors, Expanding Opportunities application requirements and the requirements for group applicants under 34 CFR 75.127–129, the MOU must:

a. Designate one member of the group to apply for the grant or establish a separate legal entity to apply for the grant;

b. Detail the activities that each party plans to perform;

c. Bind each party to every statement and assurance made by the applicant in the application;

d. State that the applicant for the consortium (the lead LEA) is legally responsible for:

i. The use of all grant funds;

ii. Ensuring that the project is carried out by the partners or consortium in accordance with Federal requirements;

iii. Ensuring that the indirect costs are determined as required under 34 CFR 75.564(e);

iv. Carrying out the activities it has agreed to perform; and

v. Using the funds that it receives under the MOU or other binding agreement in accordance with the Federal requirements that apply to the Opening Doors, Expanding Opportunities grant.

e. State that each member of the consortium is legally responsible for:

i. Carrying out the activities it has agreed to perform; and

ii. Using the funds that it receives under the MOU or other binding agreement in accordance with the Federal requirements that apply to the Opening Doors, Expanding Opportunities grant.

2. *Signatures:* Each MOU must be signed by each party's superintendent or CEO.

[FR Doc. 2016–29936 Filed 12–13–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2016–ICCD–0139]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; International Computer and Information Literacy Study (ICILS 2018) Field Test Questionnaires Change Request

AGENCY: Department of Education (ED), National Center for Education Statistics (NCES)

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a reinstatement of a previously approved information collection.

DATES: Interested persons are invited to submit comments on or before January 13, 2017.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2016–ICCD–0139. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E–347, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact NCES Information Collections at *NCES.Information.Collections@ed.gov.*

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

Title of Collection: International Computer and Information Literacy Study (ICILS 2018) Field Test Questionnaires Change Request.

OMB Control Number: 1850–0929.

Type of Review: A reinstatement of a previously approved information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 1,983.

Total Estimated Number of Annual Burden Hours: 2,046.

Abstract: The International Computer and Information Literacy Study (ICILS) is a computer-based international assessment of eighth-grade students'

computer and information literacy (CIL) skills that will provide a comparison of U.S. student performance and technology access and use with those of the international peers. ICILS collects data on eighth-grade students' abilities to collect, manage, evaluate, and share digital information; their understanding of issues related to the safe and responsible use of electronic information; on student access to, use of, and engagement with ICT at school and at home; school environments for teaching and learning CIL; and teacher practices and experiences with ICT. The data collected through ICILS will also provide information about the nature and extent of the possible ''digital divide'' and has the potential to inform understanding of the relationship between technology skills and experience and student performance in other core subject areas. ICILS is conducted by the International Association for the Evaluation of Educational Achievement (IEA), an international collective of research organizations and government agencies that create the assessment framework, assessment, and background questionnaires. In the U.S., the National Center for Education Statistics (NCES) conducts this study. In preparation for the ICILS 2018 main study, NCES will conduct a field test from March through May 2017 to evaluate new assessment items and background questions, to ensure practices that promote low exclusion rates, and to ensure that classroom and student sampling procedures proposed for the main study are successful. The U.S. ICILS main study will be conducted in the spring of 2018. Field recruitment will begin in October 2016 and main study recruitment in May of 2017. The request for the 2017 field test and the 2018 main study recruitment activities and the 2017 field test data collection was approved in August 2016 (OMB# 1850–0929 v.1). This request (a) amends the approved record with the versions of the ICILS 2018 field test questionnaires that contain the finalized international versions of the questionnaires along with the U.S. adaptations that have been submitted for approval to the IEA, (b) updates respondent burden estimates, and (c) updates the international assessment framework for distribution and naming of dimensions. Because a few new questionnaire items have been added and burden time slightly increased, NCES is announcing in the **Federal Register** another 30-day public comment period to accompany this change request.

Dated: December 8, 2016.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2016–29925 Filed 12–13–16; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2016–0731; FRL–9956–64–OAR]

Proposed Information Collection Request; Comment Request; Reporting and Recordkeeping Requirements Under EPA's Natural Gas STAR Methane Challenge Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency is planning to submit an information collection request (ICR), ''Reporting and Recordkeeping Requirements Under EPA's Natural Gas STAR Methane Challenge Program'' (EPA ICR No. 2547.01, OMB Control No. 2060–NEW) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a request for approval of a new collection. 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.

DATES: Comments must be submitted on or before February 13, 2017.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2016–0731, online using *www.regulations.gov* (our preferred method), by email to *a-and-r-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Justin Pryor, Office of Atmospheric Programs, Climate Change Division, (6207A), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: 202–343–9258; fax number: 202–343–2342; email address: *Pryor.Justin@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: The Natural Gas STAR Methane Challenge Program is a voluntary program sponsored by the U.S. Environmental Protection Agency (EPA) that provides an innovative voluntary mechanism through which oil and natural gas companies can make specific, ambitious commitments to reduce methane emissions. This Program is an integral part of the EPA's—and the Administration's—ongoing commitment to address methane emissions and global climate change. Methane is the primary component of natural gas and a potent

greenhouse gas. The Program works to encourage oil and natural gas companies to go above and beyond existing regulatory action and make meaningful and transparent commitments to yield significant methane emissions reductions in a quick, flexible, cost-effective way. Transparency in comprehensively tracking company commitments through the non-confidential data reported by Methane Challenge partners is a key feature of the Program, and enables partners to highlight emissions reductions achieved through voluntary action taken. Implementation of the Methane Challenge Program's two commitment options, the Best Management Practice Commitment Option and the ONE Future Emissions Intensity Commitment Option, improves operational efficiency, saves partner companies money, and enhances the protection of the environment.

Form Numbers: Methane Challenge Program partners are required to sign and submit to EPA a Partnership Agreement (PA) that describes the terms of participation in the Program. The PA forms covered under this ICR include:

- *Natural Gas STAR Methane Challenge Program—Partnership Agreement for Best Management Practice Commitment:* EPA Form No. *XXXX–XXX;* and,
- *Natural Gas STAR Methane Challenge Program—Partnership Agreement for ONE Future Commitment:* EPA Form No. *XXXX–XXX.*

Partners must complete and submit a Methane Challenge Implementation Plan within six months of signing the MOU. The Implementation Plan forms covered under this ICR include:

- *Methane Challenge Program Implementation Plan Guidelines:* EPA Form No. *XXXX–XXX;* and
- *Methane Challenge Program Implementation Plan Template—BMP Commitment:* EPA Form No. *XXXX–XXX.*

After one full calendar year of participation in the Program, EPA requires partners to submit a specific set of data documenting the previous year's methane emissions, activity data, and reduction activities. The annual reporting forms covered under this ICR include:

BMP Commitment

- *Distribution Reporting Forms:* EPA Form No. *XXXX–XXX;*
- *Transmission and Storage Reporting Forms:* EPA Form No. *XXXX–XXX;* and
- *Gathering and Boosting Reporting Forms:* EPA Form No. *XXXX–XXX.*

ONE Future Commitment

The annual reporting forms for the ONE Future Commitment Option are to be developed but will follow the requirements set forth in the following document:

- *Supplemental Technical Information for ONE Future Commitment Option:* EPA Form No. *XXXX–XXX.*

Upon becoming a partner in the Methane Challenge Program, companies are given an opportunity to draft and submit a Historical Actions Fact Sheet, which provides information on historical methane reduction actions taken prior to joining Methane Challenge. A two-page fact sheet template is made available to partner companies and allows entry of up to five key methane mitigation activities, including text, photos, and graphics. Submitting this document is *not* a requirement of the Methane Challenge Program partnership. The fact sheet covered under this ICR is:

- *Historical Actions Fact Sheet Template—EPA Form No.: XXXX–XXX*

Respondents/affected entities: The Natural Gas STAR Methane Challenge Program is open to companies in the oil production, and production, gathering and boosting, processing, transmission and storage, and distribution segments of the natural gas industry.

Respondent's obligation to respond: Voluntary.

Estimated number of respondents: 58 (total projected partners over the three-year ICR period).

Frequency of response: Annual.

Total estimated burden: 2,978 hours (per year, averaged over the three-year ICR period). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $268,952 (per year, averaged over the three-year ICR period), includes $0 annualized capital or operation & maintenance costs.

Changes in Estimates: This is a new program. Therefore, this is an initial burden estimate.

Dated: November 14, 2016.

Paul Gunning,

Director, Climate Change Division.

[FR Doc. 2016–30062 Filed 12–13–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2014–0558; FRL–9936–80]

Removal of Certain Inert Ingredients From the Approved Chemical Substance List for Pesticide Products

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is removing certain chemical substances from the current listing of inert ingredients approved for use in pesticide products because these chemical substances are no longer used as an inert ingredient in any registered pesticide product.

FOR FURTHER INFORMATION CONTACT: *For general information contact:* Cameo G. Smoot, Field and External Affairs Division, Office of Pesticide Programs, Environmental Protection Agency; 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 305–5454; email address: *smoot.cameo@epa.gov.*

For listing inquiries contact: Kerry B. Leifer, Registration Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 308–8811; email address*: leifer.kerry@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you engage in activities related to the registration of pesticide products, including but not limited to, the use of approved inert ingredients used in registered pesticide products. Potentially affected entities may include, but are not limited to, engaging in the formulation and preparation of agricultural and household pest control chemical substances or pesticides and other agricultural and household pest control chemical substances or inert ingredient manufacturers and those who make proprietary inert ingredient formulations or pesticides and other agricultural chemical substance manufacturing generally identified by the North American Industrial Classification System (NAICS) code 325320.

This listing is not intended to be exhaustive, but rather provides a guide for readers to help determine whether this document applies to them and which entities are likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The NAICS code has been

provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult either person listed under **FOR FURTHER INFORMATION CONTACT**.

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

EPA is taking this action under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*

C. What action is the Agency taking?

EPA is removing 72 chemical substances from the current listing of inert ingredients approved for use in pesticide products because these chemical substances are no longer used as an inert ingredient in any registered pesticide product. The list of chemical substances that are no longer on the approved inert ingredient list is available in the docket for this action, under docket identifier EPA–HQ–OPP–2014–0558–0002 at *http://www.regulations.gov.* A copy of the list will also be posted on the Agency's Web site.

Removal of a chemical substance from the approved inert ingredient listing does not, by itself, restrict the use of the chemical substance in a pesticide product; it changes the way an application is processed. Once removed, the chemical substance would be considered a ''new'' inert ingredient. Any inert ingredient that is not on the approved list must be approved by EPA before the Agency will approve a registration for a formulation containing that chemical substance as an inert ingredient. EPA approval can be obtained by submitting a request, along with relevant data as instructed in applicable EPA guidance. The type of data needed to evaluate a new inert ingredient may include, among other things, studies to evaluate potential carcinogenicity, adverse reproductive effects, developmental toxicity, genotoxicity, as well as environmental effects associated with any chemical substance that is persistent or bioaccumulative. In addition, adding the chemical substance to the list of approved inert ingredients would also require payment of a fee in accordance with FIFRA section 33, 7 U.S.C. 136w–8.

Information regarding the inert ingredient request and approval process is available on the Agency's Web site at *http://www2.epa.gov/pesticide-registration/guidance-documents-inert-ingredients.*

D. How can I access the docket for this action?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2014–0558, is available online at *http://www.regulations.gov* or in person 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 is: (202) 566–1744, and the telephone number for the OPP Docket is: (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

II. Background

A. What did EPA propose?

On October 22, 2014 (79 FR 63120; FRL–9916–22), EPA published for comment a proposal to remove from the Agency's list of inert ingredients approved for use in pesticide products 72 chemical substances that are no longer being used as inert ingredients in pesticide products. In response to EPA's request for comments, no specific information regarding those 72 chemical substances or any products that may include them was provided to the Agency indicating that these chemical substances are being used in currently approved pesticide product formulations.

B. What comments did EPA receive and what is EPA response?

EPA received approximately 50 public comments on the proposal. A summary of the significant areas of comment and EPA's responses is presented in this unit.

1. Removal of inert ingredients no longer used in pesticide products. Some commenters believe that EPA is banning certain chemical substances from pesticide products, stating that the chemical substances should remain on the approved list of inert ingredients because they are harmless.

EPA is not banning the chemical substances. This action does not change the fact that the chemical substances may be part of a formulation for which an application for a pesticide registration is submitted. All that changes is the process, which will now include an application for approval of the inert ingredient. As before, each application for registration is evaluated pursuant to the unreasonable adverse effects on the environment standard in FIFRA section 3, which evaluation includes the inert ingredients in the formulation.

Another commenter requested that seven chemical substances: methyl ethyl ketone (CAS Reg. No. 78–93–3), tetrahydrofuran (CAS Reg. No. 109–99–9), 1-butanol, 3-methyl-, acetate (CAS Reg. No. 123–92–2), nitrous oxide (CAS Reg. No. 10024–97–2), ethane (CAS Reg. No. 74–84–0), turpentine oil (CAS Reg. No. 8006–64–2), and formaldehyde (CAS Reg. No. 50–00–0) not be removed from the list, stating that the chemical substances are currently being used in pesticide products formulations.

The commenter did not submit any evidence (*e.g.* a confidential statement of formula form or other record) indicating that the chemical substances were in fact being used as inert ingredients in currently approved pesticide product formulas.

2. Inert ingredient strategy. Some commenters believe that the action does not improve public access to inert ingredient information and suggested that EPA proceed with the rest of the inert ingredient strategy as expressed in the EPA May 22, 2014, letter to Kamala Harris, Attorney General of the State of California (see document in Docket EPA–HQ–OPP–2014–0558–0003).

This action is not intended to address public access to inert ingredient information but to facilitate EPA review of inert ingredients not currently used in pesticide formulations. Removing ingredients no longer used in pesticide products from the list of approved inert ingredients is one of the actions discussed in the May 22, letter. The Agency continues to develop and implement the other concepts outlined in that letter.

3. Administrative decision to remove chemical substances. Some commenters stated that FIFRA requires that the Agency decision to remove chemical substances from the approved inert ingredient list must be based on risk.

FIFRA does not state a standard for approval of an inert ingredient, specifying only the fee category and review time. While the statute incorporates the risk of unreasonable adverse effects on the environment as one of the factors in granting a registration for an individual pesticide product under FIFRA section 3, no such criteria apply to approval of an inert ingredient. Addition of an inert ingredient to the approved inert list is a prerequisite to approval of applications for registration of specific pesticide formulations that contain the inert ingredient.

4. Regulation of pesticide adjuvants. Some commenters asked the Agency to clarify the impact of this removal action on the use of tank-mix adjuvants, including with respect to tolerances and exemptions under the Federal Food, Drug and Cosmetic Act.

An adjuvant is a chemical substance separately added to a pesticide product (typically as part of a spray tank mixture). Since pesticide adjuvant products do not make pesticidal claims, they are not pesticides, and the components of adjuvants are therefore not pesticide inert ingredients. Adjuvants are not included in the inert ingredient approval process and are therefore unaffected by this policy. While adjuvants may need tolerances or tolerance exemptions in some cases, tolerances and exemptions are separate from the inert ingredient approval process.

5. No impact to the fragrance ingredient listing. One commenter noted that a few inert ingredients proposed for removal from the chemical substance list appear on the EPA Fragrance Ingredient List (FIL).

The EPA FIL comprises more than 1,500 fragrance component ingredients that have undergone Agency evaluation to determine their suitability for safe use as components of fragrances in nonfood-use pesticide product formulations in accordance with the Fragrance Notification Program. Removal of an inert ingredient from the approved inert ingredient listing does not preclude use as a fragrance ingredient as part of the Fragrance Notification Program provided that inert ingredient is listed on the FIL and use in a pesticide formulation is consistent with the Fragrance Notification Process. The inert ingredients no longer used in registered pesticide products will be removed from the approved inert ingredient listing but these same ingredients will not be removed from the FIL.

6. Impurities. Some commenters want EPA to clarify that removing the chemical substances from the list does not prohibit the use of these chemical substances being classified as residual impurities in approved inert ingredients.

The definition of inert ingredient as given in 40 CFR 152.3 applies to chemical substances used as inert ingredients that are ''intentionally included in a pesticide product'' and as such the removal of a chemical substance from the approved inert ingredient list does not apply to circumstances where the chemical substance may be present as an impurity. Impurities in pesticide products are considered on a case-by-case basis as part of the Agency's pesticide product registration process. As part of that evaluation, the Agency looks at the identity and amount of an impurity in the product manufacturing information, and the steps taken to limit or remove impurities.

7. Confirming the ingredient use in current pesticide products. Some commenters suggested that EPA provide them more time to investigate whether any of the 72 chemical substances are used in currently registered products.

EPA records include no Confidential Statements of Formula for any currently registered pesticide product that list any of these chemical substances. However, if a registrant or a producer of proprietary mixtures identifies an active registration that contains one of the chemical substances that has now been removed from the approved inert ingredient listing, that registrant or producer should contact the Agency directly, using the contact for listing inquiries that is provided under **FOR FURTHER INFORMATION CONTACT**. If EPA confirms that the chemical substance is contained in a currently registered product, the Agency will restore the chemical substance to the list of approved inert ingredients.

Authority: 7 U.S.C. 136 *et seq.*

Dated: December 7, 2016.

James J. Jones,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2016–30043 Filed 12–13–16; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within twelve days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*www.fmc.gov*) or by contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 012338–001.

Title: Sealand/APL Caribbean Slot Charter Agreement.

Parties: Maersk Line A/S DBA Sealand; and APL Co. Pte Ltd. and American President Lines, Ltd.

Filing Party: Wayne Rohde; Cozen O'Connor; 1200 Nineteenth Street NW.; Washington, DC 20036.

Synopsis: The amendment deletes Costa Rica from the geographic scope of the Agreement, reduces the amount of space chartered, and adjusts the minimum the duration of Agreement.

Agreement No.: 012446.

Title: Sealand/APL Central America Slot Charter Agreement.

Parties: Maersk Line A/S DBA Sealand; and APL Co. Pte Ltd. and American President Lines, Ltd.

Filing Party: Wayne Rohde; Cozen O'Connor; 1200 Nineteenth Street NW.; Washington, DC 20036.

Synopsis: The Agreement authorizes Sealand to charter space to APL in the trade between the U.S. East Coast and ports in Panama, Costa Rica, and Colombia.

Agreement No.: 012447.

Title: THE Alliance/Zim MED–USEC Slot Exchange Agreement.

Parties: Hapag-Lloyd AG; Nippon Yusen Kaisha; Mitsui O.S.K. Lines, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Yang Ming Marine Transport Corp.; Zim Integrated Shipping Services Limited.

Filing Party: Joshua Stein; Cozen O'Connor; 1200 Nineteenth Street NW.; Washington, DC 20036.

Synopsis: The Agreement authorizes the Parties to exchange slots on their respective services in the Agreement trade and to enter into cooperative working arrangements in connection therewith.

By Order of the Federal Maritime Commission.

Dated: December 9, 2016.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2016–30022 Filed 12–13–16; 8:45 am]

BILLING CODE 6731–AA–P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Extension

AGENCY: Federal Trade Commission (''FTC'' or ''Commission'').

ACTION: Notice.

SUMMARY: The information collection requirements described below will be submitted to the Office of Management and Budget (''OMB'') for review, as required by the Paperwork Reduction Act (''PRA''). The FTC is seeking public comments on its proposal to extend for an additional three years the current PRA clearance for disclosure requirements in its Affiliate Marketing Rule (or ''Rule''), which applies to certain motor vehicle dealers, and its shared enforcement with the Consumer Financial Protection Bureau (''CFPB'') of

the provisions (subpart C) of the CFPB's Regulation V regarding other entities (''CFPB Rule''). The current clearance expires on January 31, 2017.

DATES: Comments must be filed by January 13, 2017.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Affiliate Marketing Disclosure Rule, PRA Comment: FTC File No. P105411'' on your comment, and file your comment online at *https://ftcpublic.commentworks.com/ftc/affiliatemarketingpra2*, by following the instructions on the Web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex J), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be addressed to Ruth Yodaiken, Attorney, Division of Privacy and Identity Protection, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW., Room CC–8232, Washington, DC 20580, (202) 326–2127.

SUPPLEMENTARY INFORMATION: Under the PRA, 44 U.S.C. 3501–3521, federal agencies must get OMB approval for each collection of information they conduct or sponsor. ''Collection of information'' includes agency requests or requirements to submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3); 5 CFR 1320.3(c). The FTC seeks clearance for its assumed share of the estimated PRA burden regarding the disclosure requirements under the FTC and CFPB Rules.

On August 15, 2016, the FTC sought public comment on the consumer notification (''disclosure'') requirements associated with the FTC Rule (August 15, 2016 Notice [1]), the FTC's shared enforcement with the CFPB of the disclosure provisions of the CFPB Rule, and the FTC's associated PRA burden analysis. No relevant comments were received. The FTC provisionally retains its previously published PRA burden estimates subject to further public comment. For details about the FTC and CFPB Rules' disclosure requirements, the background behind them, and the basis for the burden-related estimates stated below, see the August 15, 2016 Notice.[2]

Pursuant to the OMB regulations, 5 CFR part 1320, that implement the PRA, 44 U.S.C. 3501 *et seq.,* the FTC is providing this second opportunity for public comment while seeking OMB renewed clearance regarding the FTC's enforcement of and PRA burden estimates for the disclosure requirements at issue.

Burden Statement

A. Non-GLBA Entities

1. 894,969 annualized burden hours
2. $35,626,785 annualized labor cost

These estimates include the start-up burden and attendant costs, such as determining compliance obligations.

B. GLBA Entities

1. 15,633 annualized burden hours
2. $818,059 annualized labor cost

C. FTC Share of Estimated PRA Burden

1. 460,205 annualized burden hours
2. $18,472,938 annualized labor cost

The FTC's share of total estimated burden for affected entities includes the increment apportioned to the FTC reflective of its sole jurisdiction over certain motor vehicle dealers. Capital and other non-labor costs should be minimal, at most, since the Rule has been in effect several years, with covered entities now equipped to provide the required notice.

Request for Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before January 13, 2017. Write ''Affiliate Marketing Disclosure Rule, PRA Comment: FTC File No. P105411'' on your comment. Your comment, including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment doesn't include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment doesn't include any sensitive health information, like medical records or other individually identifiable health information. In addition, don't include any ''[t]rade secret or any commercial or financial information which is . . . privileged or confidential,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, don't include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[3] Your comment will be kept confidential only if the FTC General Counsel grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/affiliatemarketingpra2* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write ''Affiliate Marketing Disclosure Rule, PRA Comment: FTC File No. P105411'' on your comment, and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex J), Washington, DC 20024. If possible, submit your paper comment to the

[1] 81 FR 54088.

[2] 81 FR at 54089.

[3] In particular, the written request for confidential treatment that accompanies the comment must include the actual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

Commission by courier or overnight service.

Comments on the disclosure requirements subject to review under the PRA should additionally be submitted to OMB. If sent by U.S. mail, they should be addressed to Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission, New Executive Office Building, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503. Comments sent to OMB by U.S. postal mail, however, are subject to delays due to heightened security precautions. Thus, comments instead should be sent by facsimile to (202) 395–5806.

The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before January 13, 2017. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *http://www.ftc.gov/ftc/privacy.htm.*

David C. Shonka,

Acting General Counsel.

[FR Doc. 2016–29946 Filed 12–13–16; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier CMS–10266 and CMS–R–71]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by February 13, 2017.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number ____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995.*

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: Reports Clearance Office at (410) 786–1326.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10266 Conditions of Participation: Requirements for Approval and Reapproval of Transplant Centers to Perform Organ Transplants

CMS–R–71 Quality Improvement Organization (QIO) Assumption of Responsibilities and Supporting Regulations

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Extension of a previously approved collection; *Title of Information Collection:* Conditions of Participation: Requirements for Approval and Reapproval of Transplant Centers to Perform Organ Transplants; *Use:* The Conditions of Participation and accompanying requirements specified in the regulations are used by our surveyors as a basis for determining whether a transplant center qualifies for approval or re-approval under Medicare. We, along with the healthcare industry, believe that the availability to the facility of the type of records and general content of records is standard medical practice and is necessary in order to ensure the well-being and safety of patients and professional treatment accountability. *Form Number:* CMS–10266 (OMB Control Number: 0938–1069); *Frequency:* Yearly; *Affected Public:* Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 226; *Total Annual Responses:* 528; *Total Annual Hours:* 2,523. (For policy questions regarding this collection contact Diane Corning at 410–786–8486.)

2. *Type of Information Collection Request:* Extension of a previously approved collection; *Title of Information Collection:* Quality Improvement Organization (QIO) Assumption of Responsibilities and Supporting Regulations; *Use:* The Peer

Review Improvement Act of 1982 amended Title XI of the Social Security Act to create the Utilization and Quality Control Peer Review Organization (PRO) program which replaces the Professional Standards Review Organization (PSRO) program and streamlines peer review activities. The term PRO has been renamed Quality Improvement Organization (QIO). This information collection describes the review functions to be performed by the QIO. It outlines relationships among QIOs, providers, practitioners, beneficiaries, intermediaries, and carriers. *Form Number:* CMS–R–71 (OMB Control Number: 0938–0445); *Frequency:* Yearly; *Affected Public:* Private sector—Business or other for-profit and Not-for-profit institutions; *Number of Respondents:* 6,939; *Total Annual Responses:* 44,015; *Total Annual Hours:* 100,065. (For policy questions regarding this collection contact Tennille Coombs at 410–786–3472.)

Dated: December 9, 2016.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2016–30024 Filed 12–13–16; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–N–2016–4198]

Public Meeting on Patient-Focused Drug Development for Sarcopenia; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting; request for comments.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing a public meeting and an opportunity for public comment on ''Patient-Focused Drug Development for Sarcopenia.'' Patient-Focused Drug Development is part of FDA's performance commitments made as part of the fifth authorization of the Prescription Drug User Fee Act (PDUFA V). The public meeting is intended to allow FDA to obtain patient perspectives on the impact of sarcopenia on daily life as well as patient views on treatment approaches for sarcopenia.

DATES: The public meeting will be held on April 6, 2017, from 1 p.m. to 5 p.m. Registration to attend the meeting must be received by March 27, 2017 (see **SUPPLEMENTARY INFORMATION** for instructions). Public comments will be accepted through June 6, 2017. See the **ADDRESSES** section for information about submitting comments to the public docket.

ADDRESSES: The public meeting will be held at the FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room, (Rm. 1503), Silver Spring, MD 20993–0002. Entrance for the public meeting participants (non-FDA employees) is through Building 1 where routine security check procedures will be performed. For more information on parking and security procedures, please refer to *http://www.fda.gov/AboutFDA/WorkingatFDA/BuildingsandFacilities/WhiteOakCampusInformation/ucm241740.htm.*

You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, 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–2016–N–4198 for ''Public Meeting on Patient-Focused Drug Development for Sarcopenia; Request for Comments.'' 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 Division of Dockets Management 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 Division of Dockets Management. 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: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

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 Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FDA will post the agenda approximately 5 days before the meeting

at: *http://www.fda.gov/ForIndustry/UserFees/PrescriptionDrugUserFee/ucm527587.htm.*

FOR FURTHER INFORMATION CONTACT: Meghana Chalasani, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 1146, Silver Spring, MD 20993–0002, 240–402–6525, FAX: 301–847–8443, *Meghana.Chalasani@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on Patient-Focused Drug Development

FDA has selected sarcopenia as the focus of a public meeting under Patient-Focused Drug Development, an initiative that involves obtaining a better understanding of patient perspectives on the severity of a disease and the available therapies for that condition. Patient-Focused Drug Development is being conducted to fulfill FDA performance commitments that are part of the reauthorization of the PDUFA under Title I of the Food and Drug Administration Safety and Innovation Act (Pub. L. 112–144). The full set of performance commitments is available at *http://www.fda.gov/downloads/forindustry/userfees/prescriptiondruguserfee/ucm270412.pdf.*

FDA committed to obtain the patient perspective on at least 20 disease areas during the course of PDUFA V. For each disease area, the Agency is conducting a public meeting to discuss the disease and its impact on patients' daily lives, the types of treatment benefit that matter most to patients, and patients' perspectives on the adequacy of the available therapies. These meetings will include participation of FDA review divisions, the relevant patient communities, and other interested stakeholders.

On April 11, 2013, FDA published a notice in the **Federal Register** (78 FR 21613) announcing the disease areas for meetings in fiscal years (FYs) 2013–2015, the first 3 years of the 5-year PDUFA V time frame. The Agency used several criteria outlined in that notice to develop the list of disease areas. FDA obtained public comment on the Agency's proposed criteria and potential disease areas through a public docket and a public meeting that was convened on October 25, 2012. In selecting the set of disease areas, FDA carefully considered the public comments received and the perspectives of review divisions at FDA. FDA initiated a second public process for determining the disease areas for FY 2016–2017, and published a notice in the **Federal Register** on July 2, 2015 (80 FR 38216), announcing the selection of eight disease areas. More information, including the list of disease areas and a general schedule of meetings, is posted at *http://www.fda.gov/ForIndustry/UserFees/PrescriptionDrugUserFee/ucm326192.htm.*

II. Public Meeting Information

As part of Patient-Focused Drug Development, FDA will obtain patient and patient stakeholder input on the symptoms of sarcopenia that matter most to patients and on current approaches to treating sarcopenia. Sarcopenia is a condition characterized by loss of muscle mass and loss of muscle function or strength that occurs with age. While there is currently no cure, treatments for sarcopenia are primarily non-drug therapies including exercise and nutrition. FDA is interested in the perspectives of patients with sarcopenia on (1) symptoms and the daily impacts of their condition, (2) current approaches to treatment, and (3) decision factors taken into account when selecting a treatment.

The questions that will be asked of patients and patient stakeholders at the meeting are listed in this section, organized by topic. For each topic, a brief initial patient panel discussion will begin the dialogue. This will be followed by a facilitated discussion inviting comments from other patient and patient stakeholder participants. In addition to input generated through this public meeting, FDA is interested in receiving patient input addressing these questions through written comments, which can be submitted to the public docket (see **ADDRESSES**).

Topic 1: Disease Symptoms and Daily Impacts That Matter Most to Patients

(1) Of all the symptoms that you experience because of your condition, which one to three symptoms have the most significant impact on your life? (Examples may include difficulty walking, feeling unsteady and falling frequently, having a decreased level of activity, etc.)

(2) Are there specific activities that are important to you but that you cannot do at all or as fully as you would like because of your condition? (Examples of activities may include participation in social activities, household chores, daily hygiene, etc.)

(3) How do your symptoms and their negative impacts affect your daily life on the best days? On the worst days?

(4) How have your condition and its symptoms changed over time?

(a) Would you define your condition today as being well managed?

(5) What worries you most about your condition?

Topic 2: Patients' Perspectives on Current Approaches to Treatment

(1) What are you currently doing to help treat your condition or its symptoms? (Examples may include prescription medicines, over-the-counter products, and other therapies including non-drug therapies such as diet modification.)

(a) What specific symptoms do your treatments address?

(b) How has your treatment regimen changed over time, and why?

(2) How well does your current treatment regimen control your condition?

(a) How well do your treatments address specific activities that are important to you in your daily life?

(b) How well have these treatments worked for you as your condition has changed over time?

(3) What are the most significant downsides to your current treatments, and how do they affect your daily life? (Examples of downsides may include going to the hospital or clinic for treatment, time devoted to treatment, etc.)

(4) What specific things would you look for in an ideal treatment for your condition?

(a) What would you consider to be a meaningful improvement (for example, symptom improvements or functional improvements) in your condition that a treatment could provide?

III. Meeting Attendance and Participation

If you wish to attend this meeting, visit *https://sarcopeniapfdd.eventbrite.com.* Please register by March 27, 2017. If you are unable to attend the meeting in person, you can register to view a live Webcast of the meeting. You will be asked to indicate in your registration if you plan to attend in person or via the Webcast. Seating will be limited, so early registration is recommended. Registration is free and will be on a first-come, first-served basis. However, FDA may limit the number of participants from each organization based on space limitations. Registrants will receive confirmation once they have been accepted. Onsite registration on the day of the meeting will be based on space availability.

If you need special accommodations because of a disability, please contact Meghana Chalasani (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days before the meeting.

Patients who are interested in presenting comments as part of the initial panel discussions will be asked to indicate in their registration which topic(s) they wish to address. These patients also must send to *PatientFocused@fda.hhs.gov* a brief summary of responses to the topic questions by March 20, 2017. Panelists will be notified of their selection approximately 7 days before the public meeting. We will try to accommodate all patients and patient stakeholders who wish to speak, either through the panel discussion or audience participation; however, the duration of comments may be limited by time constraints.

Transcripts: Please be advised that as soon as a transcript of the public meeting is available, it will be accessible at *https://www.regulations.gov.* It may be viewed at the Division of Dockets Management (see **ADDRESSES**). A link to the transcript will also be available on the Internet at *http://www.fda.gov/ForIndustry/UserFees/PrescriptionDrugUserFee/ucm527587.htm.*

Dated: December 9, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–29998 Filed 12–13–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2013–N–0375; FDA–2013–N–0370; FDA–2013–N–0134; FDA–2009–N–0511; FDA–1997–N–0020; FDA–2011–N–0902; FDA–2013–N–0662; FDA–2013–N–0450; FDA–2012–N–0477; FDA–2013–N–0519]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approvals

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is publishing a list of information collections that have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, Three White Flint North, 10A63, 11601 Landsdown St., North Bethesda, MD 20852, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: The following is a list of FDA information collections recently approved by OMB under section 3507 of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). The OMB control number and expiration date of OMB approval for each information collection are shown in table 1. Copies of the supporting statements for the information collections are available on the Internet at *http://www.reginfo.gov/public/do/PRAMain.* 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.

TABLE 1—LIST OF INFORMATION COLLECTIONS APPROVED BY OMB

Title of collection	OMB control No.	Date approval expires
Agreement for Shipments of Devices for Sterilization	0910–0131	9/30/2019
Export of Medical Devices—Foreign Letters of Approval	0910–0264	9/30/2019
Mammography Facilities, Standards, and Lay Summaries for Patients	0910–0309	9/30/2019
Medicated Fee Mill License Application	0910–0337	9/30/2019
Substances Generally Recognized as Safe: Notification Procedure	0910–0342	9/30/2019
Prescription Drug Product Labeling; Medication Guide Requirements	0910–0393	9/30/2019
Applications for FDA Approval to Market a New Drug: Patent Submission and Listing Requirements and Application of 30-month Stays on Approval of Abbreviated New Drug Applications Certifying That a Patent Claiming a Drug is Invalid or Will Not be Infringed	0910–0513	9/30/2016
Substances Prohibited from Use in Animal Food or Feed; Animal Proteins Prohibited in Ruminant Feed	0910–0339	10/31/2019
Investigational Device Exemptions Reports and Records—21 CFR 812	0910–0078	11/30/2019
Guidance for Industry on How to Submit Information in Electronic Format to the Center for Veterinary Medicine Using the FDA Electronic Submission Gateway	0910–0454	11/30/2019

Dated: December 9, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–30035 Filed 12–13–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–N–4119]

Food Safety Modernization Act Third-Party Certification Program User Fee Rate for Fiscal Year 2017

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the fiscal year (FY) 2017 fee rate for accreditation bodies applying to be recognized in the third-party certification program that is authorized by the Federal Food, Drug, and Cosmetic Act (the FD&C Act), as amended by the FDA Food Safety Modernization Act (FSMA).

FOR FURTHER INFORMATION CONTACT: Sylvia Kim, Office of Foods and Veterinary Medicine, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 3212, Silver Spring, MD 20993, 301–796–7599.

DATES: This fee is effective January 13, 2017, and will remain in effect through September 30, 2017.

SUPPLEMENTARY INFORMATION:

I. Background

Section 307 of FSMA, Accreditation of Third-Party Auditors, amends the FD&C Act to create a new provision, section 808, under the same name. Section 808 of the FD&C Act (21 U.S.C. 384d) directs us to establish a new program for accreditation of third-party certification bodies [1] conducting food safety audits and issuing food and facility certifications to eligible foreign entities (including registered foreign

[1] For the reasons explained in the third-party certification final rule (80 FR74570 at 74578–74579, November 27, 2015), and for consistency with the implementing regulations for the third-party certification program in 21 CFR parts 1, 11, and 16, this notice uses the term ''third-party certification body'' rather than the term ''third-party auditor'' used in section 808(a)(3) of the FD&C Act.

food facilities) that meet our applicable requirements. Under this provision, we will recognize accreditation bodies to accredit certification bodies, except for limited circumstances in which we may directly accredit certification bodies to participate in the third-party certification program.

Section 808(c)(8) of the FD&C Act directs FDA to establish a reimbursement (user fee) program by which we assess fees and require reimbursement for the work FDA performs to establish and administer the third-party certification program under section 808 of the FD&C Act. The FSMA FY 2017 third-party certification program user fee rate announced in this notice is effective on January 13, 2017, and will remain in effect through September 30, 2017. We plan to publish the FSMA third-party certification program user fee rates for FY 2018 prior to the beginning of the next fiscal year.

Section 808(c)(8) of the FD&C Act requires FDA to establish the user fee program for the third-party certification program by regulation. Elsewhere in this issue of the **Federal Register** we are issuing a final rule entitled ''Amendments to Accreditation of Third-Party Certification Bodies to Conduct Food Safety Audits and To Issue Certifications to Provide for the User Fee Program.''

II. Estimating the Average Cost of a Supported Direct FDA Work Hour for FY 2017

In each year, the costs of salary (or personnel compensation) and benefits for FDA employees account for between 50 and 60 percent of the funds available to, and used by, FDA. Almost all of the remaining funds (operating funds) available to FDA are used to support FDA employees for paying rent, travel, utility, information technology, and other operating costs.

A. Estimating the Full Cost per Direct Work Hour in FY 2015

In general, the starting point for estimating the full cost per direct work hour is to estimate the cost of a full-time equivalent (FTE) or paid staff year for the relevant activity. This is done by dividing the total funds allocated to the elements of FDA primarily responsible for carrying out the activities for which fees are being collected by the total FTEs allocated to those activities. For the purposes of the third-party certification program user fees authorized by section 808(c)(8) of the FD&C Act (the fees that are the subject of this notice), primary responsibility for the activities for which fees will be collected rests with FDA's Office of Regulatory Affairs (ORA). ORA carries out field-based activities on behalf of FDA's product centers, including the Center for Food Safety and Applied Nutrition (CFSAN) and the Center for Veterinary Medicine (CVM). Thus, as the starting point for estimating the full cost per direct work hour, FDA will use the total funds allocated to ORA for CFSAN and CVM related field activities. The most recent fiscal year with available data was FY 2015. In that year, FDA obligated a total of $666,722,326 for ORA in carrying out the CFSAN and CVM related field activities work, excluding the cost of inspection travel. In that same year, the number of ORA staff primarily conducting the CFSAN and CVM related field activities was 3,022 FTEs or paid staff years. Dividing $666,722,326 by 3,022 FTEs results in an average cost of $220,623 per paid staff year, excluding travel costs.

Not all of the FTEs required to support the activities for which fees will be collected are conducting direct work such as conducting onsite assessments. Data collected over a number of years and used consistently in other FDA user fee programs (*e.g.,* under the Prescription Drug User Fee Act (PDUFA) and the Medical Device User Fee and Modernization Act (MDUFA)) show that every seven FTEs who perform direct FDA work require three indirect and supporting FTEs. These indirect and supporting FTEs function in budget, facility, human resource, information technology, planning, security, administrative support, legislative liaison, legal counsel, program management, and other essential program areas. On average, two of these indirect and supporting FTEs are located in ORA or the FDA center where the direct work is being conducted, and one of them is located in the Office of the Commissioner. To get the fully supported cost of an FTE, FDA needs to multiply the average cost of an FTE by 1.43, to take into account the indirect and supporting functions. The 1.43 factor is derived by dividing the 10 fully supported FTEs by 7 direct FTEs. In FY 2015, the average cost of an FTE was $220,623. Multiplying this amount by 1.43 results in an average fully supported cost of $315,491 per FTE, excluding the cost of travel.

To calculate an hourly rate, FDA must divide the average fully supported cost of $315,491 per FTE by the average number of supported direct FDA work hours. See table 1.

TABLE 1—SUPPORTED DIRECT FDA WORK HOURS IN A PAID STAFF YEAR

Total number of hours in a paid staff year	2,080
Less:	
10 paid holidays	80
20 days of annual leave	160
10 days of sick leave	80
10 days of training	80
2 hours of meetings per week	80
Net Supported Direct FDA Work Hours Available for Assignments	1,600

Dividing the average fully supported cost of an FTE in FY 2015 ($315,491) by the total number of supported direct work hours available for assignment (1,600) results in an average fully supported cost of $197 (rounded to the nearest dollar), excluding travel costs, per supported direct work hour in FY 2015—the last fiscal year for which complete data are available.

B. Adjusting FY 2015 Costs for Inflation To Estimate FY 2017 Costs

To adjust the hourly rate for FY 2017, FDA must estimate the cost of inflation in each year for FY 2016 and FY 2017. FDA uses the method prescribed for estimating inflationary costs under the PDUFA provisions of the FD&C Act (section 736(c)(1) (21 U.S.C. 379h(c)(1)), the statutory method for inflation adjustment in the FD&C Act that FDA has used consistently. FDA previously determined the FY 2016 inflation rate to be 2.0266; this rate was published in the FY 2016 PDUFA user fee rates notice in the **Federal Register** of August 3, 2015 (80 FR 46028). Utilizing the method set forth in section 736(c)(1) of the FD&C Act, FDA has calculated an inflation rate of 1.5468 percent for FY 2017 and FDA intends to use this inflation rate to make inflation adjustments for FY 2017 for several of its user fee programs; the derivation of this rate is published in the **Federal Register** in the FY 2017 notice for the PDUFA user fee rates (81 FR 49674). The compounded inflation rate for FYs 2016 and 2017, therefore, is 3.6047 percent (1 plus 2.0266 percent times 1 plus 1.5468 percent).

Increasing the FY 2015 average fully supported cost per supported direct FDA work hour of $197 (excluding travel costs) by 3.6047 percent yields an inflationary adjusted estimated cost of $204 per a supported direct work hour in FY 2017, excluding travel costs. FDA will use this base unit fee in determining the hourly fee rate for third-party certification program fee for FY 2017 prior to including travel costs as applicable for the activity. For the purpose of estimating the fee, we are

using the travel cost rate for foreign travel, because we anticipate that the vast majority of onsite assessments made by FDA under this program will require foreign travel. In FY 2015, ORA spent a total of $2,521,216 on 269 foreign inspection trips related to FDA's CFSAN and CVM field activities programs, which averaged a total of $9,373 per foreign inspection trip. These trips averaged 3 weeks (or 120 paid hours) per trip. Dividing $9,373 per trip by 120 hours per trip results in a total and an additional cost of $78 per paid hour spent for foreign inspection travel costs in FY 2015. To adjust $78 for inflationary increases in FY 2016 and FY 2017, FDA must multiply it by the same inflation factor mentioned previously in this document (1.036047), which results in an estimated cost of $81 dollars per paid hour in addition to $204 for a total of $285 per paid hour ($204 plus $81) for each direct hour of work requiring foreign inspection travel. FDA will use these rates in charging fees in FY 2017 when travel is required for the third-party certification program.

TABLE 2—FSMA FEE SCHEDULE FOR FY 2017

Fee category	Fee rates for FY 2017
Hourly rate without travel	$204
Hourly rate if travel is required	285

III. Application Fee for Accreditation Bodies Applying for Recognition in the Third-Party Certification Program Under Section 808(c)(8) of the FD&C Act

In FY 2017 (the first fiscal year in which the program will operate), the only fee that will be collected by FDA under section 808(c)(8) of the FD&C Act is the initial application fee for accreditation bodies seeking recognition. Section 1.705(a)(1) establishes an application fee for accreditation bodies applying for initial recognition that represents the estimated average cost of the work FDA performs in reviewing and evaluating initial applications for recognition of accreditation bodies.

The fee is based on the fully supported FTE hourly rates and estimates of the number of hours it would take FDA to perform relevant activities. These estimates represent FDA's current thinking, and as the program evolves, FDA will reconsider the estimated hours. We estimate that it would take, on average, 60 person-hours to review an accreditation body's submitted application, 48 person-hours for an onsite performance evaluation of the applicant (including travel and other steps necessary for a fully supported FTE to complete an onsite assessment), and 45 person-hours to prepare a written report documenting the onsite assessment.

FDA employees are likely to review applications and prepare reports from their worksites, so we use the fully supported FTE hourly rate excluding travel, $204/hour, to calculate the portion of the user fee attributable to those activities: $204/hour × (60 hours + 45 hours) = $21,420. FDA employees will likely travel to foreign countries for the onsite performance evaluations because most accreditation bodies are located in foreign countries. For this portion of the fee we use the fully supported FTE hourly rate for work requiring travel, $285/hour, to calculate the portion of the user fee attributable to those activities: $285 × 48 hours (*i.e.,* 2 fully supported FTEs × (2 travel days + 1 day onsite)) = $13,680. The estimated average cost of the work FDA performs in total for reviewing an initial application for recognition for an accreditation body based on these figures would be $21,420 + $13,680 = $35,100. Therefore the application fee for accreditation bodies applying for recognition in FY 2017 will be $35,100.

IV. Estimated Fees for Accreditation Bodies and Certification Bodies in Fee Categories Not Applicable in FY 2017

The third-party certification program will also assess other application fees and annual fees in future years of this program. Section 1.705(a) also establishes application fees for recognized accreditation bodies submitting renewal applications, certification bodies applying for direct accreditation, and certification bodies applying for renewal of direct accreditation. Section 1.705(b) establishes annual fees for recognized accreditation bodies, certification bodies directly accredited by FDA, and certification bodies accredited by recognized accreditation bodies.

Although we will not be collecting these other fees in FY 2017, for transparency and planning purposes, we have provided an estimate of what these fees could have been for FY 2017 based on the fully supported FTE hourly rates for FY 2017 and estimates of the number of hours it would take FDA to perform relevant activities as outlined in the Final Regulatory Impact Analysis for the Third-Party Certification Regulation. Table 3 provides an overview of the estimated fees for other fee categories.

Fee category	Estimated fee rates for FY 2017
Renewal application fee for recognized accreditation body	$18,855
Initial application fee for certification body seeking direct-accreditation from FDA	35,100
Renewal application fee for directly-accredited certification body	26,460
Annual fee for recognized accreditation body	1,579
Annual fee for certification body directly-accredited by FDA	20,208
Annual fee for accredited certification body	1,974

V. How Must the Fee Be Paid?

Accreditation bodies seeking initial recognition must submit the application fee with the application.

VI. What Are the Consequences of Not Paying This Fee?

The consequence of not paying this fee is outlined in § 1.725. If FDA does not receive an application fee with an application for recognition, the application will be considered incomplete and FDA would not review the application.

Dated: *December 9, 2016.*

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–30034 Filed 12–13–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2015–D–4803]

Public Notification of Emerging Postmarket Medical Device Signals (''Emerging Signals''); Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of the guidance entitled ''Public Notification of Emerging Postmarket Medical Device Signals ('Emerging Signals').'' FDA is issuing this guidance to describe the Center for Devices and Radiological Health's (CDRH) policy for notifying the public about medical device ''emerging signals.'' This guidance describes the

factors CDRH intends to consider in deciding whether to notify the public about an emerging signal and the processes and timelines it intends to follow in issuing and updating the notification. Timely notification about those emerging signals based on the factors described in this guidance document is intended to provide health care providers, patients, and consumers with access to the most current information concerning the performance and potential benefits and risks of marketed medical devices so that they can make informed patient management decisions about their treatment and diagnostic options.

DATES: Submit either electronic or written comments on this guidance at any time. General comments on Agency guidance documents are welcome at any time.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://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 *http://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):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, 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–2015–D–4803 for ''Public Notification of Emerging Postmarket Medical Device Signals ('Emerging Signals').'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management 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 *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. 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: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://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 Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

An electronic copy of the guidance document is available for download from the Internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the guidance document entitled ''Public Notification of Emerging Postmarket Medical Device Signals ('Emerging Signals')'' to the Office of the Center Director, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Rebecca Nipper, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1540, Silver Spring, MD 20993–0002, 301–796–6527.

SUPPLEMENTARY INFORMATION:

I. Background

All medical devices have benefits and risks. FDA weighs probable benefit to health from the use of the device against any probable risk of injury or illness from such use in determining the safety and effectiveness of a device.[1] Once FDA has made its determination, health care providers, patients, and consumers must weigh these benefits and risks when making patient management decisions. However, not all information regarding benefits and risks for a given device may be known before the device reaches the market. New information about a device's safety and/or effectiveness, including unanticipated adverse events, may become available once the device is more widely distributed and used under real-world conditions and in broader patient populations than may have been studied in support of a marketing application. Also, subsequent changes made to the device, its manufacturing process, or supply chain might lead to new safety problems.

FDA is issuing this guidance to describe CDRH policy for notifying the public about medical device ''emerging signals.'' For the purposes of this guidance, an emerging signal is new information about a marketed medical device: (1) That supports a new causal association or a new aspect of a known association between a device and an adverse event or set of adverse events and (2) for which the Agency has conducted an initial evaluation and determined that the information has the potential to impact patient management decisions and/or the known benefit-risk profile of the device. Information that is

[1] See 21 U.S.C. 360c(a)(2) and 21 CFR 860.7.

unconfirmed, unreliable, or lacks sufficient strength of evidence is not an emerging signal.

This guidance describes the factors CDRH intends to consider in deciding whether to notify the public about emerging signals and the processes and timelines it intends to follow in issuing and updating the notification. Timely notification about those emerging signals based on the factors described in this guidance document is intended to provide health care providers, patients, and consumers with access to the most current information concerning the performance and potential benefits and risks of marketed medical devices so that they can make informed patient management decisions about their treatment and diagnostic options.

In the **Federal Register** of December 31, 2015 (80 FR 81829), FDA announced the availability of the draft of this guidance. Interested persons were invited to comment by February 29, 2016. In the **Federal Register** of January 27, 2016 (81 FR 4632), FDA extended the comment period to March 29, 2016. FDA received and considered 21 sets of public comments and revised the guidance as appropriate. CDRH also intends to provide periodic public updates on the implementation of this guidance.

II. Significance of Guidance

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 ''Public Notification of Emerging Postmarket Medical Device Signals ('Emerging Signals').'' 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.

III. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by downloading an electronic copy from the Internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* Guidance documents are also available at *http://www.regulations.gov.* Persons unable to download an electronic copy of ''Public Notification of Emerging Postmarket Medical Device Signals ('Emerging Signals')'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number 1500027 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR parts 801, regarding labeling, have been approved under OMB control number 0910–0485 and the collections of information in 21 CFR part 803, regarding medical device reporting, have been approved under OMB control numbers 0910–0291, 0910–0437, and 0910–0471.

Dated: December 9, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–29989 Filed 12–13–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Announcement of Requirements and Registration for ''Privacy Policy Snapshot Challenge''

AGENCY: Office of the National Coordinator for Health Information Technology, HHS.

ACTION: Notice.

SUMMARY: The Model Privacy Notice (MPN) is a voluntary, openly available resource designed to help health technology developers who collect digital health data clearly convey information about their privacy and security policies to their users. Similar to a nutrition facts label, the MPN provides a snapshot of a product's existing privacy practices, encouraging transparency and helping consumers make informed choices when selecting products. The MPN does not mandate specific policies or substitute for more comprehensive or detailed privacy policies. The Privacy Policy Snapshot Challenge is a call for designers, developers, and health data privacy experts to create an online MPN generator. The statutory authority for this Challenge is Section 105 of the America COMPETES Reauthorization Act of 2010 (Pub. L. 111–358).

DATES:

- Submission period begins: December 13, 2016
- Submission period ends: April 10, 2017
- Winners announced: May-June, 2017

FOR FURTHER INFORMATION CONTACT: Adam Wong, *adam.wong@hhs.gov* (preferred), 202–720–2866.

SUPPLEMENTARY INFORMATION:

Award Approving Official

B. Vindell Washington, National Coordinator for Health Information Technology

Subject of Challenge

In 2011, the Office of the National Coordinator for Health Information Technology (ONC) collaborated with the Federal Trade Commission (FTC) and released a Model Privacy Notice (MPN) focused on personal health records (PHRs), which were the emerging technology at the time (view 2011 PHR MPN). The project's goals were to increase consumers' awareness of companies' PHR data practices and empower consumers by providing them with an easy way to compare the data practices of two or more PHR companies. In the last five years, the health information technology market has changed significantly and there is now a larger variety of products such as mobile applications and wearable devices that collect digital health data.

ONC recognized a need to update the MPN to make it applicable to a broad range of consumer health technologies beyond PHRs. More and more individuals are obtaining access to their electronic health information and using consumer health technology to manage this information. As retail products that collect digital health data directly from consumers are used, such as exercise trackers, it is increasingly important for consumers to be aware of companies' privacy and security policies and information sharing practices. Health technology developers can use the MPN to easily enter their information practices and produce a notice to allow consumers to quickly learn and understand privacy policies, compare company policies, and make informed decisions. Many consumer health technologies are offered by organizations that are not subject to the Health Insurance Portability and Accountability Act (HIPAA) privacy and security standards. This is detailed in the HHS report, Examining Oversight of the Privacy & Security of Health Data Collected by Entities Not Regulated by HIPAA, released in July 2016 by ONC's Office of the Chief Privacy Officer with the cooperation of the HHS Office for Civil Rights (OCR) and the FTC.

The Privacy Policy Snapshot Challenge leverages updated content developed recently by ONC, with feedback from OCR, FTC, and other private and public stakeholders. The

content also underwent informal consumer testing. The Privacy Policy Snapshot Challenge provides an award to the creators of the best MPN generator that produces a customizable MPN for health technology developers. The Challenge is a call for designers, developers, and health data privacy experts to create an online MPN generator that is easy for health technology developers to use in customizing a privacy notice that is compelling and understandable to consumers. Submissions will provide the code for an open source, web-based tool that allows health technology developers who collect digital health data to generate a customized privacy notice. The MPN generator must be able to produce privacy notices that adhere to the MPN content yet provide for customization by a health technology developer. Visit *https://www.healthit.gov/sites/default/files/2016_model_privacy_notice.pdf* to download the MPN.

The code for the web-based generator must be posted to GitHub and be available through an open source license such that any app developer can implement and use it. The solution should be developed as an HTML Web page styled using CSS (or SASS) that is powered by a framework, library, or plugin developed in JavaScript that is packaged and made available as one of the following:

- JQuery Plugin
- Node.JS Module
- Standalone Script

The final output of a successful submission is an MPN generator that can create customized privacy notices that would be accessible from an app or other consumer health technology; the privacy notices must, following the MPN, inform and educate the app or technology user so that they understand how the app or technology uses their personal health data. What the privacy notices created by the MPN generator look like and how they educate the user is up to the submitter—for example, the notices can be interactive or use graphics and images; however, it cannot be a simple static document such as a pdf. The MPN generator should create privacy notices that factor in accessibility, clean web design, and the differences between reading and understanding content on paper versus online, for which resources like Health Literacy Online (*https://health.gov/healthliteracyonline/*), the Draft U.S. Web Design Standards (*https://standards.usa.gov/getting-started/*), and *Usability.gov* can be helpful.

Submitters are also required to undertake consumer testing of the final customizable MPN produced by the MPN generator, which is intended to help bring in direct user feedback. Testing can be formal (such as standardized assessments or focus groups) or informal (such as among family members or individuals in a waiting room). Submitters must provide evidence of testing with at least five people. A larger amount of time spent with each tester, greater formal rigor, and the number and diversity of people used for testing will result in a more positive assessment under the selection criteria. Evidence demonstrating consumer testing could include sample feedback, quotes, or pictures, and should include how it affected development of the language, design, and/or structure of the customizable MPN. Resources like *https://methods.18f.gov/discover/stakeholder-and-user-interviews/* can help.

Submission Requirements

Submitters must submit the following through the challenge Web page:

- Framework, library, or plugin file(s) for the MPN generator.
- ReadMe file that documents usage and installation instructions and system requirements (including supported browsers).
- Link to a demo Web page of the MPN generator.
- Slide deck of no more than ten slides that describes how the submission functions, addresses the application requirements, and includes evidence of consumer testing of the customizable MPN with a minimum of five people.
- Video demo (five minute maximum) showing implementation and use of the MPN generator and creation of the customizable MPN, and may also address consumer testing.
- Link to a GitHub Repository that includes the submission elements above. Submitters can make the Repository private so that their code is not out in the open during the submission and review phase, but are required to make it public if designated as challenge winners.

How to Enter

To enter this Challenge, submitters can access *http://www.challenge.gov* and search for ''Privacy Policy Snapshot Challenge.'' On the challenge Web page, click ''Submit Solution'' and follow the instructions.

Eligibility Rules for Participating in the Challenge

To be eligible to win a prize under this Challenge, an individual or entity:

1. Shall have registered to participate in the Challenge under the rules promulgated by ONC.
2. Shall have complied with all the stated requirements of the Privacy Policy Snapshot Challenge (parentheses above).
3. In the case of a private entity, shall be incorporated in and maintained a primary place of business in the United States, and in the case of an individual, whether participating singly or in a group, shall be a citizen or permanent resident of the United States.
4. Shall not be an HHS employee.
5. May not be a federal entity or federal employee acting within the scope of their employment. We recommend that all non-HHS federal employees consult with their agency Ethics Official to determine whether the federal ethics rules will limit or prohibit the acceptance of a COMPETES Act prize.
6. Federal grantees may not use federal funds to develop COMPETES Act challenge applications unless consistent with the purpose of their grant award.
7. Federal contractors may not use federal funds from a contract to develop COMPETES Act challenge applications or to fund efforts in support of a COMPETES Act challenge submission.
8. All individual members of a team must meet the eligibility requirements.

An individual or entity shall not be deemed ineligible because the individual or entity used federal facilities or consulted with federal employees during a Challenge if the facilities and employees are made available to all individuals and entities participating in the Challenge on an equitable basis.

Participants must agree to assume any and all risks and waive claims against the Federal Government and its related entities, except in the case of willful misconduct, for any injury, death, damage, or loss of property, revenue, or profits, whether direct, indirect, or consequential, arising from my participation in this prize contest, whether the injury, death, damage, or loss arises through negligence or otherwise. Participants are required to obtain liability insurance or demonstrate financial responsibility in the amount of $500,000, for claims by a third party for death, bodily injury, or property damage, or loss resulting from an activity carried out in connection with participation in a Challenge.

Participants must also agree to indemnify the Federal Government against third party claims for damages arising from or related to Challenge activities.

General Submission Requirements

In order for a submission to be eligible to win this Challenge, it must meet the following requirements:

1. No HHS or ONC logo—The product must not use HHS' or ONC's logos or official seals and must not claim endorsement.

2. Functionality/Accuracy—A product may be disqualified if it fails to function as expressed in the description provided by the Submitter, or if it provides inaccurate or incomplete information.

3. Security—Submissions must be free of malware. Submitter agrees that ONC may conduct testing on the product to determine whether malware or other security threats may be present. ONC may disqualify the submission if, in ONC's judgment, it may damage government or others' equipment or operating environment.

Prize

- Total: $35,000 in prizes
- First Place: $20,000
- Second Place: $10,000
- Third Place: $5,000

Payment of the Prize

Prize will be paid by a contractor.

Basis Upon Which Winner Will Be Selected

The review panel will make selections based upon the following criteria:

- Accurate use of MPN content, including appropriate modification of flexible language and no deviation from standardized language.
- Use and demonstration of best practices in developing and presenting web content for consumption, including consumer testing, web design, and accessibility, as exemplified in the resources provided above.
- Visual appeal of the generated MPN.
- Ease of use for a developer to implement and use the MPN generator, including ability to customize the MPN.

Additional Information

General Conditions: ONC reserves the right to cancel, suspend, and/or modify the Challenge, or any part of it, for any reason, at ONC's sole discretion.

Access: Submitters must keep the submission and its component elements public, open, and available for anyone (*i.e.,* not on a private or limited access setting) on GitHub.

Open Source License: Winning submissions must use the open source MIT License.

Representation, Warranties and Indemnification

By entering the Challenge, each applicant represents, warrants and covenants as follows:

(a) Participant is the sole author, creator, and owner of the Submission;

(b) The Submission is not the subject of any actual or threatened litigation or claim;

(c) The Submission does not and will not violate or infringe upon the intellectual property rights, privacy rights, publicity rights, or other legal rights of any third party;

(d) The Submission does not and will not contain any harmful computer code (sometimes referred to as ''malware,'' ''viruses,'' or ''worms''); and

(e) The Submission, and participants' use of the Submission, does not and will not violate any applicable laws or regulations, including, without limitation, HIPAA, applicable export control laws and regulations of the U.S. and other jurisdictions.

If the submission includes any third party works (such as third party content or open source code), participant must be able to provide, upon request, documentation of all appropriate licenses and releases for such third party works. If participant cannot provide documentation of all required licenses and releases, ONC reserves the right, at their sole discretion, to disqualify the applicable submission.

Participants must indemnify, defend, and hold harmless the Federal Government from and against all third party claims, actions, or proceedings of any kind and from any and all damages, liabilities, costs, and expenses relating to or arising from participant's submission or any breach or alleged breach of any of the representations, warranties, and covenants of participant hereunder.

ONC reserves the right to disqualify any submission that, in their discretion, deems to violate these Official Rules, Terms & Conditions.

Authority: 15 U.S.C. 3719

Dated: December 7, 2016.

Jon White,

Deputy National Coordinator for Health Information Technology.

[FR Doc. 2016–29718 Filed 12–13–16; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the National Advisory Committee on Children and Disasters and the National Preparedness and Response Science Board

AGENCY: Department of Health and Human Services, Office of the Secretary.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) is hereby giving notice that the National Advisory Committee on Children and Disasters (NACCD) and the National Preparedness and Response Science Board (NPRSB) will be holding a joint public teleconference.

DATES: The NACCD and NPRSB will hold a joint public meeting on January 9, 2017, from 2:00 p.m. to 3:00 p.m. EST. The agenda is subject to change as priorities dictate.

ADDRESSES: Individuals who wish to participate should send an email to *naccd@hhs.gov* and *nprsb@hhs.gov* with ''NACCD Registration'' or ''NPRSB Registration'' in the subject line. The meeting will occur by teleconference. To attend via teleconference and for further instructions, please visit the NACCD and NPRSB Web sites at *www.phe.gov/naccd* or *www.phe.gov/nprsb.*

FOR FURTHER INFORMATION CONTACT: Please submit an inquiry via the NPRSB Contact Form or the NACCD Contact Form located at *www.phe.gov/NACCDComments* or *www.phe.gov/NBSBComments.*

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), and section 2811A of the Public Health Service (PHS) Act (42 U.S.C. 300hh–10a), as added by section 103 of the Pandemic and All Hazards Preparedness Reauthorization Act of 2013 (Pub. L. 113–5), the HHS Secretary, in consultation with the Secretary of the U.S. Department of Homeland Security, established the NACCD. The purpose of the NACCD is to provide advice and consultation to the HHS Secretary with respect to the medical and public health needs of children in relation to disasters. Pursuant to section 319M of the PHS Act (42 U.S.C. 247d–7f) and section 222 of the PHS Act (42 U.S.C. 217a), HHS established the NPRSB. The NPRSB shall provide expert advice and guidance to the Secretary on scientific, technical, and other matters of special interest to HHS regarding current and

future chemical, biological, nuclear, and radiological agents, whether naturally occurring, accidental, or deliberate. The NPRSB may also provide advice and guidance to the Secretary and/or the Assistant Secretary for Preparedness and Response on other matters related to public health emergency preparedness and response.

Background: This joint public meeting via teleconference will be dedicated to the NACCD and NPRSB's deliberation and vote on the NPRSB–NACCD Joint Youth Leadership Draft Report. Subsequent agenda topics will be added as priorities dictate. Any additional agenda topics will be available on the January 9, 2017, meeting Web pages of the NACCD and NPRSB, available at *www.phe.gov/naccd* and *www.phe.gov/nprsb.*

Availability of Materials: The joint meeting agenda and materials will be posted prior to the meeting on the January 9, meeting Web pages at *www.phe.gov/naccd* and *www.phe.gov/nprsb.*

Procedures for Providing Public Input: Members of the public are invited to attend by teleconference via a toll-free call-in phone number which is available on the NPRSB or NACCD Web sites at *www.phe.gov/naccd* and *www.phe.gov/nprsb.* All members of the public are encouraged to provide written comment to the NPRSB and NACCD. All written comments must be received prior to January 9, 2017, and should be sent by email to *NACCD@HHS.GOV* or *NPRSB@HHS.GOV* with ''NACCD Public Comment'' or ''NPRSB Public Comment'' as the subject line. Public comments received by close of business one week prior to the teleconference will be distributed to the NACCD or NPRSB in advance.

Dated: December 9, 2016.

Nicole Lurie,

Assistant Secretary for Preparedness and Response.

[FR Doc. 2016–30049 Filed 12–13–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Notice of Meeting Center for Mental Health Services

Pursuant to Public Law 92–463, notice is hereby given that the Substance Abuse and Mental Health Services Administration (SAMHSA) Center for Mental Health Services (CMHS) National Advisory Council (NAC) on February 1, 2017, from 9:00 a.m. to 5:15 p.m. E.D.T.

The meeting will include discussion of the Center's policy issues, and current administrative, legislative, and program developments and a conversation with the SAMHSA Principal Deputy Administrator, and the SAMHSA Chief Medical Officer.

The meeting will be held at the SAMHSA building, 5600 Fishers Lane, 5th Floor, Conference Room 5W07, Rockville, MD 20857. Attendance by the public will be limited to space available. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions should be forwarded to the contact person (below) on or before January 18, 2017. Oral presentations from the public will be scheduled at the conclusion of the meeting. Individuals interested in making oral presentations are encouraged to notify the contact on or before January 18, 2017. Five minutes will be allotted for each presentation.

The meeting can be accessed via telephone. To attend on site, obtain the call-in number and access code, submit written or brief oral comments, or request special accommodations for persons with disabilities, please register at the SAMHSA's Advisory Committees Web site at *http://nac.samhsa.gov/Registration/meetingsRegistration.aspx* or contact Pamela Foote (see contact information below).

Substantive meeting information and a roster of Committee members may be obtained either by accessing the SAMHSA Committees' Web site *http://www.samhsa.gov/about-us/advisory-councils/cmhs-national-advisory-council* or by contacting Ms. Foote.

Committee Name: Substance Abuse and Mental Health Services Administration, Center for Mental Health Services National Advisory Council.

Dates/Time/Type: Wednesday, February 1, 2017, 9:00 a.m. to 5:15 p.m. EDT: OPEN.

Place: SAMHSA, 5600 Fishers Lane, 5th Floor, Conference Room 5W07, Rockville, Maryland 20857.

Contact: Pamela Foote, Acting Designated Federal Official, SAMHSA CMHS National Advisory Council, 5600 Fishers Lane, Room 14E53C, Rockville, Maryland 20857, *Telephone:* (240) 276–1279, *Fax:* (301) 480–8491, *Email: pamela.foote@samhsa.hhs.gov.*

Carlos Castillo,

Committee Management Officer, Substance Abuse and Mental Health Services Administration.

[FR Doc. 2016–29949 Filed 12–13–16; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Quarterly IRS Interest Rates Used in Calculating Interest on Overdue Accounts and Refunds on Customs Duties

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This notice advises the public that the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties will remain the same from the previous quarter. For the calendar quarter beginning October 1, 2016, the interest rates for overpayments will be 3 percent for corporations and 4 percent for non-corporations, and the interest rate for underpayments will be 4 percent for both corporations and non-corporations. This notice is published for the convenience of the importing public and U.S. Customs and Border Protection personnel.

DATES: *Effective Date:* October 1, 2016.

FOR FURTHER INFORMATION CONTACT: Kara N. Welty, Revenue Division, Collection and Refunds Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 614–4614.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 provides different interest rates applicable to overpayments: One for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on

behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2016–23, the IRS determined the rates of interest for the calendar quarter beginning October 1, 2016, and ending on December 31, 2016. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (1%) plus three percentage points (3%) for a total of four percent (4%) for both corporations and non-corporations. For corporate overpayments, the rate is the Federal short-term rate (1%) plus two percentage points (2%) for a total of three percent (3%). For overpayments made by non-corporations, the rate is the Federal short-term rate (1%) plus three percentage points (3%) for a total of four percent (4%). These interest rates are subject to change for the calendar quarter beginning January 1, 2017, and ending March 31, 2017.

For the convenience of the importing public and U.S. Customs and Border Protection personnel the following list of IRS interest rates used, covering the period from before July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning date	Ending date	Underpayments (%)	Overpayments (%)	Corporate overpayments (Eff. 1–1–99) (%)
070174	063075	6	6	
070175	013176	9	9	
020176	013178	7	7	
020178	013180	6	6	
020180	013182	12	12	
020182	123182	20	20	
010183	063083	16	16	
070183	123184	11	11	
010185	063085	13	13	
070185	123185	11	11	
010186	063086	10	10	
070186	123186	9	9	
010187	093087	9	8	
100187	123187	10	9	
010188	033188	11	10	
040188	093088	10	9	
100188	033189	11	10	
040189	093089	12	11	
100189	033191	11	10	
040191	123191	10	9	
010192	033192	9	8	
040192	093092	8	7	
100192	063094	7	6	
070194	093094	8	7	
100194	033195	9	8	
040195	063095	10	9	
070195	033196	9	8	
040196	063096	8	7	
070196	033198	9	8	
040198	123198	8	7	
010199	033199	7	7	6
040199	033100	8	8	7
040100	033101	9	9	8
040101	063001	8	8	7
070101	123101	7	7	6
010102	123102	6	6	5
010103	093003	5	5	4
100103	033104	4	4	3
040104	063004	5	5	4
070104	093004	4	4	3
100104	033105	5	5	4
040105	093005	6	6	5
100105	063006	7	7	6
070106	123107	8	8	7
010108	033108	7	7	6
040108	063008	6	6	5
070108	093008	5	5	4
100108	123108	6	6	5
010109	033109	5	5	4
040109	123110	4	4	3
010111	033111	3	3	2
040111	093011	4	4	3
100111	033116	3	3	2
040116	123116	4	4	3

DATED: December 9, 2016.

R. Gil Kerlikowske,

Commissioner.

[FR Doc. 2016–30057 Filed 12–13–16; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Agency Information Collection Activities: DHS Civil Rights Compliance Form

AGENCY: Office for Civil Rights and Civil Liberties, DHS.

ACTION: 30-Day notice and request for comments; new collection, 1601–NEW.

SUMMARY: The Department of Homeland Security (DHS), Office for Civil Rights and Civil Liberties, will submit the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. DHS previously published this information collection request (ICR) in the **Federal Register** on Thursday, September 22, 2016 at 81 FR 65390 for a 60-day public comment period. Five comments were received by DHS. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until January 13, 2017. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to OMB Desk Officer, Department of Homeland Security and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

SUPPLEMENTARY INFORMATION: Recipients of Federal financial assistance from DHS are required to meet certain legal requirements relating to nondiscrimination and nondiscriminatory use of Federal funds. Those requirements include ensuring that entities receiving Federal financial assistance from DHS do not deny benefits or services, or otherwise discriminate on the basis of race, color, national origin, disability, age, or sex, in accordance with the following authorities: Title VI of the Civil Rights Act of 1964 (Title VI) Public Law 88–352, 42 U.S.C. 2000d–1 *et seq.,* and the Department's implementing regulation, 6 CFR part 21 and 44 CFR part 7; Section 504 of the Rehabilitation Act of 1973 (Sec. 504), Public Law 93–112, as amended by Public Law 93–516, 29 U.S.C. 794; Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1681 *et seq.,* and the Department's implementing regulations, 6 CFR part 17, and 44 CFR part 19; Age Discrimination Act of 1975, Public Law 94–135, 42 U.S.C. 6101 *et seq.,* and the Department implementing regulation at 44 CFR part 7. The aforementioned civil rights authorities also prohibit retaliatory acts against individuals for participating or opposing discrimination in a complaint, investigation, or other proceeding related to prohibited discrimination.

DHS has an obligation to enforce nondiscrimination requirements to ensure that its Federally-assisted programs and activities are administered in a nondiscriminatory manner. In order to carry out its enforcement responsibilities, DHS must obtain a signed assurance of compliance and collect and review information from recipients to ascertain their compliance with applicable requirements. DHS implementing regulations and the Department of Justice (DOJ) regulation Coordination of Non-discrimination in Federally Assisted Program, 28 CFR part 42, provide for the collection of data and information from recipients (see 28 CFR 42.406).

DHS has developed the DHS Civil Rights Compliance Form as the primary tool to implement this information collection. The purpose of the information collection is to advise recipients of their civil rights obligation; obtain an assurance of compliance from each recipient, and collect pertinent civil rights information to ascertain if the recipient has in place adequate policies and procedures to achieve compliance, and to determine what, if any, further action may be needed (technical assistance, training, compliance review, etc.) to ensure the recipient is in compliance and will carry out its programs and activities in a nondiscriminatory manner. DHS will make available sample policies and procedures to assist recipients in completing Section 4 of the Form, and providing technical assistance directly to recipients as needed.

DHS will use the DHS Civil Rights Compliance Form to collect civil rights related information from all primary recipients of Federal financial assistance from the Department. Primary recipients are non-federal entities that receive Federal financial assistance in the form of a grant, cooperative agreement, or other type of financial assistance directly from the Department and not through another recipient or ''pass-through'' entity. This information collection does not apply to sub-recipients, Federal contractors (unless the contract includes the provision of financial assistance), nor the ultimate beneficiaries of services, financial aid, or other benefits from the Department. Recipients will be required to provide the information once every two years, not every time a grant is awarded. Entities whose award does not run a full two years are required to provide the information again if they receive a subsequent award more than two (2) years after the prior award. In responding to Section 4: Required Information, which contains the bulk of the information collection, if the recipient's responses have not changed in the two year period since their initial submission, the recipient does not need to resubmit the information. Instead, the recipient will indicate ''no change'' for each applicable item. DHS will require recipients to submit their completed forms and supporting information electronically, via email, to the Department, in an effort to minimize administrative burden on the recipient and the Department. DHS anticipates that records or files that will be used to respond to the information collection are already maintained in electronic format by the recipient, so providing the information electronically will further minimize administrative burden. DHS will allow recipients to scan and submit documents that are not already maintained electronically. If the recipient is unable to submit their information electronically, alternative arrangements will be made to submit responses in hard copy.

There are no confidentiality assurances associated with this collection. The system of record notices associated with this information collection are: DHS/ALL–029—Civil Rights and Civil Liberties Records, (July 8, 2010, 75 FR 39266) and DHS/ALL–016—Department of Homeland Security Correspondence Records, (November 10, 2008, 73 FR 66657).

This is a new information collection. The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Analysis

Agency: Office for Civil Rights and Civil Liberties, DHS.

Title: Agency Information Collection Activities: DHS Civil Rights Compliance Form.

OMB Number: 1601–NEW.

Frequency: Bi-annually.

Affected Public: Private and Public Sector.

Number of Respondents: 2220.

Estimated Time Per Respondent: 4 hours.

Total Burden Hours: 8,880 hours.

Dated: December 8, 2016.

Carlene C. Ileto,

Executive Director, Enterprise Business Management Office.

[FR Doc. 2016–30002 Filed 12–13–16; 8:45 am]

BILLING CODE 9110–9B–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5658–N–02]

Federal Housing Administration (FHA): Direct Endorsement Program Timeframe for Conducting Pre-Endorsement Review

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: Through this document FHA advises that it is shifting the timeframe for FHA's review of loans prior to endorsement from pre-closing to post-closing. A lender applying for unconditional Direct Endorsement authority will therefore submit required loan files, required in accordance with HUD regulations, only after closing. After determining that the mortgage is acceptable and meets all FHA requirements, FHA will notify the lender that the loan has been endorsed.

DATES: *Effective Date:* January 13, 2017.

FOR FURTHER INFORMATION CONTACT: Joy Hadley, Director, Office of Lender Activities and Program Compliance, Office of Housing, U.S. Department of Housing and Urban Development, 490 L'Enfant Plaza East SW., Room P3214, Washington, DC 20024–8000; telephone number 202–708–1515 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

FHA grants lenders unconditional Direct Endorsement authority to close loans without prior FHA approval in accordance with the terms and conditions of HUD's regulations in 24 CFR 203.3. Under the Direct Endorsement program, the lender underwrites and closes the mortgage loan without prior FHA review or approval. Before being granted unconditional Direct Endorsement authority, the lender must submit a specified number of loan files for review and approval by FHA as described in 24 CFR 203.3(b)(4). The regulations provide for the review of each loan file to be conducted by FHA, and the lender to be notified of the acceptability of the mortgage, prior to FHA endorsement of the mortgage for insurance. The Direct Endorsement program has been designed to give the lender sufficient certainty of FHA endorsement requirements to justify the assumption of the responsibilities involved in originating and closing mortgage loans without prior FHA review.

Currently, FHA generally conducts this review of the loan files required under 24 CFR 203.3(b)(4) prior to closing and, if acceptable, issues a commitment to the lender at that time. After closing, the mortgage is then submitted to FHA for endorsement for insurance. While this is the general procedure utilized by lenders seeking unconditional Direct Endorsement approval, FHA currently allows lenders to close the loans before submission for review. A lender is eligible for unconditional Direct Endorsement authority once FHA has reviewed and found acceptable the requisite number of loan files, at either pre-closing or pre-endorsement review, provided that the lender has met the other requirements for Direct Endorsement approval under 24 CFR 203.3.

II. Solicitation of Comment on Timeframe Pre-Endorsement Review

A. March 2013 Notice Soliciting Comment

On March 21, 2013, at 78 FR 17303, HUD published in the **Federal Register** a notice that solicited comment from FHA-approved lenders and other interested parties on FHA's announcement that it was considering shifting the timeframe for FHA's review of loans prior to endorsement from pre-closing to post-closing. The notice specifically sought feedback on whether the proposed change in review time would benefit the lender by reducing the amount of time between loan origination and closing, and would result in operational savings of time and costs associated with approval timeframes, which FHA recognizes can be lengthy at times. The notice also sought feedback on whether the proposed change in review time would benefit the borrower; that is, would the borrower be able to take advantage of shorter interest rate lock-in periods, which could help to ensure that the borrower receives the best interest rate available at the lowest possible cost to the borrower.

As provided in the March 21, 2013, notice, HUD submitted that the proposed change in review time should not alter the current quality of review of the loan file or the quality of the Direct Endorsement lender approval process. The notice advised that FHA guidance issued in accordance with 24 CFR 203.3(b)(2), already requires the lender to certify that their underwriter(s) have the qualifications, expertise, and experience to underwrite mortgage loans in accordance with FHA requirements. The notice provided that given the certification required of lenders, the shift in the timeframe for review may in fact result in enhanced lender accountability; that is, the lender will place more emphasis on ensuring that their underwriting staff is sufficiently trained prior to requesting Direct Endorsement authority. The notice further provided that properly trained underwriters will help to increase the number of loans that are found to be acceptable, resulting in an even higher percentage of loan files that meet FHA policies and guidelines.

The March 21, 2013, notice also advised that HUD had analyzed data for mortgage loans that were submitted for review during the period beginning October 1, 2009 through June 30, 2012, and the data demonstrated that 86.7 percent of all loans reviewed during this time period, and 90.5 percent of all loans reviewed year to date in FY 2012, were found to meet FHA policies and guidelines and were subsequently endorsed. The notice further advised that the lenders entering the Direct Endorsement review process during the October 1, 2009 through June 30, 2012 timeframe, 48.6 percent did not receive an unacceptable rating on any loan submitted for review, while 28 percent

of lenders had only one loan rated unacceptable and 10.9 percent of lenders had two loans rated unacceptable, and that overall, 87.4 percent of lenders had two or fewer loans rated unacceptable. The March 21, 2013, notice provided that when material violations of FHA policies and procedures are uncovered during the loan file review, FHA notifies the lender that a preliminary assessment, based on file documentation, indicates that the loan contains material findings such that FHA is exposed to an unacceptable level of risk. FHA will provide the lender with an opportunity to present missing information or documentation to address the review findings and permit subsequent submission for endorsement, and as is the current practice, if the lender is unable to adequately respond (or fails to respond) to the material findings, FHA will notify the lender that the loan is not eligible for endorsement.

B. Public Comment and HUD's Response to the Comment

In response to HUD's solicitation of comment, HUD received only one comment, and the following provides the issues raised by the commenter and HUD's responses.

Comment: The commenter stated that feedback received from FHA during the pre-endorsement review is helpful and enables lenders to adjust their processes prior to closing loans that may be ineligible for insurance. The commenter stated that if the proposal is adopted lenders applying for Direct Endorsement authority will be expected to close loan transactions with no guarantee that their loans will be insured by FHA when they are submitted for post-closing, pre-endorsement review.

HUD Response: FHA guidance issued in accordance with 24 CFR 203.3(b)(2) requires lenders to certify that it has on its permanent staff an underwriter(s) that has the qualifications, expertise and experience to underwrite mortgage loans in accordance with FHA requirements. (See Handbook 4000.1 Section I.B.3). Further, lenders must submit loans for review and approval by FHA as described in 24 CFR 203.3(b)(4), which are processed in accordance with § 203.5 which, in turn, requires underwriter due diligence be exercised to the same level of care which the lender would exercise in obtaining and verifying information for a loan in which the lender would be entirely dependent on the property as security to protect its investment.

On September 14, 2015, FHA's Single Family Housing Policy Handbook went into effect and FHA implemented a core component of its goal to expand access to mortgage credit. This implementation consolidated and superseded hundreds of Mortgagee Letters and Housing Notices, along with numerous policy handbooks. Mortgagees and other stakeholders now benefit from a single consolidated source and comprehensive set of policies that support homeownership for millions of qualified individuals and families each year. It also provides mortgagees' with a clear and consistent understanding of FHA's requirements during the origination, underwriting, closing and endorsement process.

FHA provides live and online training events throughout the year covering multiple topics regarding FHA Single Family Housing policies, processes, and technology to assist lenders in complying with HUD/FHA's requirements. In addition, FHA has created a series of eight pre-recorded training webinars covering the policies that mortgagees use for origination through FHA insurance endorsement for Title II forward mortgages. The modules provide an overview of the policies and requirements contained in the Origination through Post-Closing/Endorsement for Title II Forward Mortgages section of the Single Family Housing Policy Handbook 4000.1.

Comment: Under the proposed rule, lenders would bear considerable new financial responsibility. The commenter wrote that bringing lenders attention to uninsurable loans only after they closed at considerable expense to the lender would discourage some FHA lenders from seeking DE authority and/or force them to make loans only to the most credit worthy borrowers. The commenter cited the 13 percent of all loans reviewed from October 1, 2009 to June 30, 2012 which were not in compliance with FHA policies and guidelines and were not eligible for endorsement.

HUD Response: As a part of the post-closing, pre-endorsement program, FHA will continue to notify the lender that a preliminary assessment, based on file documentation, indicates that the loan contains material findings such that FHA is exposed to an unacceptable level of risk. FHA will provide the lender with an opportunity to present missing information or documentation to address the review findings and permit subsequent submission for endorsement. As is the current practice, if the lender is unable to adequately respond (or fails to respond) to the material findings, FHA will notify the lender that the loan is not eligible for endorsement.

FHA requires lenders to certify that it has on its permanent staff an underwriter(s) that has the qualifications, expertise and experience to underwrite mortgage loans in accordance with FHA requirements. As stated in March 21, 2013, notice, FHA continues to believe that given the certification required of lenders, the shift in the timeframe for review may in fact result in enhanced lender accountability; that is, the lender will place appropriate emphasis on ensuring that their underwriting staff is sufficiently trained prior to requesting Direct Endorsement authority. Properly trained underwriters will help to increase the number of loans that are found to be acceptable, resulting in an even higher percentage of loan files that meet FHA policies and guidelines.

C. Analysis of More Recent Data

Since HUD issued the March 2013 notice, FHA analyzed a new set of data for the period October 1, 2014 through June 30, 2016 and found that overall the acceptability of mortgage loans submitted for pre-closing review continued to improve during this period when compared to the October 1, 2009 through June 30, 2012 data analyzed in the March 21, 2013, notice. Specifically, for mortgage loans that were submitted for review during the period beginning October 1, 2014 through June 30, 2016, the data demonstrated that 94.3 percent of the total cases reviewed were found to meet HUD/FHA guidelines and were eligible for endorsement; 87.2 percent of the eligible cases were endorsed as of July 25, 2016. In addition, of the lenders entering the Direct Endorsement review process during the October 1, 2014 through June 30, 2016 timeframe, 55.5 percent did not receive an unacceptable rating on any loan submitted for review, while 33.7 percent of lenders had only one loan rated unacceptable and 6.4 percent of lenders had two loans rated unacceptable. Overall, 95.6 percent of lenders had two or fewer loans rated unacceptable.

III. New Timeframe for FHA's Review of Loans Prior to Endorsement

After consideration of public comment and further consideration of this issue, FHA has determined to move the timeframe for FHA's review of loans prior to endorsement from pre-closing to post-closing. FHA's Mortgagee Letter which more fully addresses this issue can be found at *http://portal.hud.gov/hudportal/documents/huddoc?id=16-21ml.pdf.*

Dated: December 1, 2016.

Genger Charles,

General Deputy Assistant Secretary for Housing.

[FR Doc. 2016–29757 Filed 12–13–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–ES–2016–N202; FF09E15000–FXES111609B0000–178]

John H. Chafee Coastal Barrier Resources System; Availability of Final Revised Maps for Louisiana, Puerto Rico, and the U.S. Virgin Islands

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: The Coastal Barrier Resources Act (CBRA) requires the Secretary of the Interior (Secretary) to review the maps of the John H. Chafee Coastal Barrier Resources System (CBRS) at least once every 5 years and make any minor and technical modifications to the boundaries of the CBRS as are necessary to reflect changes that have occurred in the size or location of any CBRS unit as a result of natural forces. The U.S. Fish and Wildlife Service (Service) has conducted this review and has prepared final revised maps for 14 CBRS units in Louisiana, all units in Puerto Rico, and all units in the U.S. Virgin Islands. The maps were produced by the Service in partnership with the Federal Emergency Management Agency (FEMA) and in consultation with the appropriate Federal, State, and local officials. This notice announces the findings of the Service's review and the availability of final revised maps for 121 CBRS units. The final revised maps for these CBRS units, dated November 15, 2016, are the official controlling CBRS maps for these areas.

DATES: Changes to the CBRS depicted on the final revised maps, dated November 15, 2016, become effective on December 14, 2016.

ADDRESSES: For information about how to get copies of the maps or where to go to view them, see the Availability of Final Maps and Related Information section below.

FOR FURTHER INFORMATION CONTACT: Katie Niemi, Coastal Barriers Coordinator, U.S. Fish and Wildlife Service, Ecological Services Program, 5275 Leesburg Pike, MS: ES, Falls Church, VA 22041; (703) 358–2071 (telephone); or *CBRA@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

Background

Background information on the CBRA (16 U.S.C. 3501 *et seq.*) and the CBRS, as well as information on the digital conversion effort and the methodology used to produce the revised maps, can be found in a notice the Service published in the **Federal Register** on August 29, 2013 (78 FR 53467). However, there is one deviation from the methodology described in the 2013 notice. The Service was unable to obtain aerial imagery to serve as the CBRS base map for several areas in Puerto Rico that both meets the standards described in the 2013 notice (*i.e.,* generally less than 5 years old, 1 meter per pixel resolution or better, orthorectified, and available free of charge) and is also free from cloud cover. In these cases (affecting eight CBRS maps in Puerto Rico), the Service substituted 2013 U.S. Geological Survey 7.5-minute topographic quadrangles for aerial imagery.

For information on how to access the final revised maps, see the Availability of Final Maps and Related Information section below.

Announced Map Modifications

This notice announces modifications to the maps for several CBRS units in Louisiana, all units in Puerto Rico, and all units in the U.S. Virgin Islands. Most of the modifications were made to reflect changes to the CBRS units as a result of natural forces (*e.g.,* erosion and accretion). The CBRA requires the Secretary to review the CBRS maps at least once every 5 years and make, in consultation with the appropriate Federal, State, and local officials, any minor and technical modifications to the boundaries of the CBRS as are necessary to reflect changes that have occurred in the size or location of any CBRS unit as a result of natural forces (16 U.S.C. 3503(c)).

The Service's review resulted in a set of 65 final revised maps, dated November 15, 2016, depicting a total of 121 CBRS units. The set of maps includes 31 maps for 14 CBRS units located in Louisiana; 28 maps for 70 CBRS units located in Puerto Rico; and 6 maps for 37 CBRS units located in the U.S. Virgin Islands. The Service found that a total of 41 of the 121 units reviewed had experienced changes in their size or location as a result of natural forces since they were last mapped.

The Service is specifically notifying the following stakeholders concerning the availability of the final revised maps: The Chair and Ranking Member of the House of Representatives Committee on Natural Resources; the Chair and Ranking Member of the Senate Committee on Environment and Public Works; the members of the Senate and House of Representatives for the affected areas; the Governors of the affected areas; the local elected officials of the affected areas; and other appropriate Federal, State, and local agency officials.

Consultation With Federal, State, and Local Officials

The CBRA requires consultation with the appropriate Federal, State, and local officials (stakeholders) on the proposed CBRS boundary modifications to reflect changes that have occurred in the size or location of any CBRS unit as a result of natural forces (16 U.S.C. 3503(c)). The Service fulfilled this requirement by holding a 30-day comment period on the draft maps (dated July 8, 2016) for Federal, State, and local stakeholders, from October 11, 2016, through November 10, 2016. This comment period was announced in a notice published in the **Federal Register** (81 FR 70130) on October 11, 2016.

Formal notification of the comment period was provided via letters to approximately 110 stakeholders, including the Chair and Ranking Member of the House of Representatives Committee on Natural Resources; the Chair and Ranking Member of the Senate Committee on Environment and Public Works; the members of the Senate and House of Representatives for the affected areas; the Governors of the affected areas; the local elected officials of the affected areas; and other appropriate Federal, State, and local agency officials. No comments were received during the comment period.

No Changes to Draft Maps

The Service made no changes to the CBRS boundaries depicted on the draft maps dated July 8, 2016, as a result of the fall 2016 comment period (October 11, 2016; 81 FR 70130). The CBRS boundaries depicted on the final revised maps, dated November 15, 2016, are identical to the CBRS boundaries depicted on the draft revised maps dated July 8, 2016.

Summary of Modifications to the CBRS Boundaries

Below is a summary of the changes depicted on the final revised maps dated November 15, 2016.

Louisiana

The Service's review found 6 of the 14 CBRS units in Louisiana that are included in this review (Units LA–03P, LA–04P, LA–05P, LA–07, LA–08P, LA–09, LA–10, S01, S01A, S02, S08, S09,

S10, and S11) have changed due to natural forces. The remaining seven Louisiana CBRS units not included in this review (Units LA–01, LA–02, S03, S04, S05, S06, and S07) were remapped and referenced in notices the Service published in the **Federal Register** on November 17, 2015 (80 FR 71826) and March 14, 2016 (81 FR 13407).

The six CBRS units that have changed are:

LA–03P: CHANDELEUR ISLANDS UNIT. A portion of the western boundary of the unit has been moved westward to account for the migration of the Chandeleur Islands and to include associated shoals within the unit. In some places, the boundary has been generalized due to a lack of remaining features in the area.

LA–05P: MARSH ISLAND/RAINEY UNIT. The northern boundary of the unit has been modified to account for wetland erosion along Vermilion Bay and West Cote Blanche Bay. The eastern boundary of the unit has been modified to account for wetland erosion along East Cote Blanche Bay. Due to the significant rate of erosion in this area, some of the boundaries have been generalized.

LA–10: CALCASIEU PASS UNIT. A portion of the northern boundary of the unit has been modified to account for wetland erosion along West Cove. Due to the significant rate of erosion in this area, some of the boundaries have been generalized.

S01: BASTIAN BAY COMPLEX. Portions of the eastern and northern boundary of the unit have been modified and generalized due to wetland loss along Bay Jacques, Fleur Pond, Pipeline Canal, Scofield Bay, and Shell Island Bay. The western boundary coincident with Unit S01A has been moved eastward to account for accretion at the eastern end of an unnamed island between Bay Joe Wise and the Gulf of Mexico.

S01A: BAY JOE WISE COMPLEX. The eastern boundary coincident with Unit S01 has been moved eastward to account for accretion at the eastern end of an unnamed island between Bay Joe Wise and the Gulf of Mexico. The western boundary of the unit has been modified to account for the northward migration of an unnamed island between Bay Cheniere Ronquille and the Gulf of Mexico.

S10: MERMENTAU RIVER UNIT. A portion of the eastern boundary of the unit has been modified to account for shoreline erosion along the Gulf of Mexico near Beach Prong. The southern boundary of the excluded area at the western end of the unit has been modified to account for shoreline erosion along the Gulf of Mexico.

Puerto Rico

The Service's review found 22 of the 70 CBRS units in Puerto Rico have changed due to natural forces. Maps for the following CBRS units in Puerto Rico are depicted on U.S. Geological Survey topographic quadrangles instead of aerial imagery: PR–07, PR–09P, PR–10, PR–45P, PR–49P, PR–61, PR–63P, PR–64P, and PR–65P.

PR–07: LAGUNA AGUAS PRIETAS UNIT. A portion of the excluded area boundary of the unit has been modified to account for natural changes that have occurred in the configuration of the shoreline along Laguna Aguas Prietas and the Atlantic Ocean.

PR–09P: RIO FAJARDO UNIT. Portions of the landward boundary of the unit have been modified to account for natural changes that have occurred in the configuration of the mangroves.

PR–10: PUNTA BARRANCAS UNIT. The northern boundary of the unit has been modified to account for natural changes that have occurred in the configuration of the mangroves.

PR–16P: PUERTO DEL MANGLAR UNIT. A portion of the eastern boundary of the unit has been modified to account for natural changes that have occurred in the configuration of the wetland/fastland interface.

PR–17P: ENSENADA SOMBE UNIT. A portion of the western boundary of the unit has been modified to account for natural changes that have occurred along the shoreline of Ensenada Sombe. Portions of the northeastern boundary were modified to account for natural changes that have occurred in the configuration of the shoreline of an unnamed ponding area.

PR–18P: CAYO ALGODONES UNIT. A portion of the northern boundary of the unit has been modified to account for natural changes that have occurred along an unnamed channel. A portion of the northeastern boundary has been modified to account for natural changes that have occurred in the configuration of the mangroves of Bosque Estatal De Ceiba.

PR–40: PUNTA TUNA UNIT. A portion of the northwestern boundary of the unit has been modified to account for natural changes that have occurred in the configuration of the mangroves.

PR–41: RIO MAUNABO UNIT. The western lateral boundary of the unit has been extended to clarify the extent of the unit. No modifications were made to the boundaries of this unit as a result of changes due to natural forces.

PR–45P: BAHIA DE JOBOS UNIT. A portion of the northwestern landward boundary of the unit has been modified to account for natural changes that have occurred in the configuration of the mangroves of Mar Negro.

PR–49P: PUNTA AGUILA UNIT. A portion of the northwestern boundary of the unit has been modified to account for natural changes that have occurred in the configuration of the shoreline along an unnamed bay.

PR–55: ISLA DEL FRIO UNIT. A portion of the landward boundary of the unit has been modified to account for natural changes that have occurred in the configuration of the shoreline along the Caribbean Sea.

PR–56: PUNTA CABULLONES UNIT. A portion of the landward boundary of the unit has been modified to account for natural changes that have occurred in the configuration of the mangroves.

PR–61: ENSENADA LAS PARDAS UNIT. The landward boundary of the unit has been modified to account for natural changes that have occurred in the configuration of the mangroves.

PR–63P: CAYO DON LUIS UNIT. The northeastern portion of the landward boundary of the unit has been modified to account for natural changes that have occurred along the shoreline of an unnamed ponding area.

PR–64P: BAHIA MONTALVA UNIT. A portion of the northeastern landward boundary of the unit has been modified to account for natural changes that have occurred along the shoreline of Bahia Montalva. Portions of the northwest and northeast landward boundary have been modified to account for natural changes that have occurred in the configuration of the mangroves. Portions of the excluded area boundary have been modified to account for natural changes that have occurred in the configuration of the wetland/fastland interface along Isla Matei.

PR–65P: ISLA CUEVA/GUAYACAN UNIT. Portions of the northeastern and northwestern landward boundary of the unit have been modified to account for natural changes that have occurred in the configuration of the mangroves.

PR–66: CABO ROJO UNIT. A portion of the northeastern boundary of the unit has been modified to account for natural changes that have occurred in the configuration of the shoreline of an unnamed lake.

PR–67P: BAHIA DE BOQUERON UNIT. A portion of the northwestern landward boundary of the unit has been modified to account for natural changes that have occurred in the configuration of the shoreline along Laguna Guaniquilla. A portion of the southeastern boundary has been modified to account for natural changes that have occurred along the shoreline of an island located in the channel of Caño Boquerón.

PR–69: PUNTA CARENERO UNIT. Portions of the landward boundary of the unit have been modified to account for natural changes that have occurred in the configuration of the wetland/fastland interface.

PR–83: TORTUGUERO UNIT. Portions of the landward boundary of the unit have been modified to account for natural changes that have occurred in the configuration of the wetland/fastland interface. Portions of the boundary have been modified to account for natural changes that have occurred along the shoreline of Laguna Tortuguero.

PR–84: PUNTA GARZA UNIT. A portion of the western boundary of the unit has been modified to account for natural changes that have occurred in the configuration of the mangroves.

PR–86P: PUNTA SALINAS UNIT. A portion of the northern boundary of the unit has been modified to account for natural changes that have occurred in the shoreline along Bahía Toa.

PR–87: PUNTA VACIA TALEGA UNIT. A portion of the southwestern boundary of the unit has been modified to account for natural changes that have occurred in the configuration of Canal Blasina. A portion of the southern boundary has been modified to account for natural changes that have occurred in the configuration of the wetland/fastland interface.

U.S. Virgin Islands

The Service's review found 13 of the 37 CBRS units in the U.S. Virgin Islands have changed due to natural forces.

VI–01: RUST UP TWIST UNIT. Portions of the landward boundary of the unit have been modified to reflect natural changes that have occurred in the configuration of the wetland/fastland interface. The western lateral boundary has been extended offshore to clarify the extent of the unit.

VI–02: SALT RIVER BAY UNIT. Portions of the landward boundary of the unit have been modified to reflect natural changes that have occurred in the wetland/fastland interface.

VI–03: ALTONA LAGOON UNIT. Portions of the landward boundary of the unit have been modified to reflect natural changes that have occurred in the wetland/fastland interface.

VI–06: ROBIN BAY UNIT. A portion of the landward boundary of the unit has been modified to account for natural changes that have occurred in the configuration of the shoreline along an unnamed salt pond.

VI–09: KRAUSE LAGOON UNIT. A portion of the landward boundary of the unit has been modified to reflect natural changes that have occurred in the wetland/fastland interface. The eastern boundary of the unit has been modified to account for natural changes that have occurred along Krause Lagoon Channel.

VI–10: LONG POINT UNIT. A portion of the landward boundary of the unit has been modified to account for shoreline erosion along Long Point Bay.

VI–11: WESTEND SALTPOND UNIT. A portion of the northeastern boundary of the unit has been modified to account for shoreline erosion along Westend Saltpond.

VI–11P: WESTEND SALTPOND UNIT. Offshore boundaries have been added at the western end of the unit to clarify the extent of the unit. The eastern lateral boundary has been extended offshore to clarify the extent of the unit. No modifications were made to the boundaries of this unit as a result of changes due to natural forces.

VI–12P: CINNAMON BAY UNIT. A portion of the landward boundary of the unit has been modified to account for shoreline erosion along Cinnamon Bay.

VI–13P: MAHO BAY UNIT. A portion of the landward boundary of the unit has been modified to reflect natural changes that have occurred in the configuration of the wetland/fastland interface.

VI–15P: LEINSTER BAY UNIT. Portions of the landward boundary of the unit have been modified to account for shoreline erosion along Leinster Bay and natural changes that have occurred in the wetland/fastland interface.

VI–19P: RAM HEAD UNIT. Lateral offshore boundaries have been added to the eastern and western ends of the unit to clarify the extent of the unit. No modifications were made to the boundaries of this unit as a result of changes due to natural forces.

VI–27: LIMESTONE BAY UNIT. Portions of the landward boundary of the unit were modified to reflect natural changes that have occurred in the configuration of the marsh adjacent to Limestone Bay.

VI–29: MAGENS BAY UNIT. Portions of the landward boundary of the unit have been modified to account for natural changes that have occurred in the configuration of the shoreline along Magens Bay.

VI–32: VESSUP BAY UNIT. An offshore boundary has been added to the unit in Vessup Bay to clarify the extent of the unit. No modifications were made to the boundaries of this unit as a result of changes due to natural forces.

VI–34: JERSEY BAY UNIT. Portions of the landward boundary of the unit have been modified to account for natural changes that have occurred in the configuration of the shoreline and wetland/fastland interface. The eastern lateral boundary has been extended offshore to clarify the extent of the unit.

Availability of Final Maps and Related Information

The final revised maps dated November 15, 2016, and digital boundary data can be accessed and downloaded from the Service's Web site at *http://www.fws.gov/ecological-services/habitat-conservation/Coastal.html.* The digital boundary data are available for reference purposes only. The digital boundaries are best viewed using the base imagery to which the boundaries were drawn; this information is printed in the title block of the maps. The Service is not responsible for any misuse or misinterpretation of the digital boundary data.

Interested parties may also contact the Service individual identified in **FOR FURTHER INFORMATION CONTACT** to make arrangements to view the final maps at the Service's Headquarters office. Interested parties who are unable to access the maps via the Service's Web site or at the Service's Headquarters office may contact the Service individual identified in **FOR FURTHER INFORMATION CONTACT**, and reasonable accommodations will be made to ensure the individual's ability to view the maps.

Gina Shultz,

Acting Assistant Director for Ecological Services.

[FR Doc. 2016–30050 Filed 12–13–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R6–ES–2016–N173; FXES11130600000–178–FF06E00000]

Endangered Species Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comment.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications for a permit to conduct activities intended to enhance the survival of endangered species. With some exceptions, the Endangered Species Act of 1973, as amended (Act), prohibits certain activities that may impact endangered and threatened species unless a Federal permit allows such activity. The Act also requires that we invite public comment before issuing these permits.

DATES: To ensure consideration, please send your written comments by January 13, 2017.

ADDRESSES: Documents and other information submitted with the applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the following office within 30 days of the date of publication of this notice. You may use one of the following methods to request hard copies or a CD–ROM of the documents. Please specify the permit you are interested in by number (*e.g.,* Permit No. TE–XXXXXX).

- *Email: permitsR6ES@fws.gov.* Please refer to the respective permit number (*e.g.,* Permit No. TE–XXXXXX) in the subject line of the message.
- *U.S. Mail:* Ecological Services, U.S. Fish and Wildlife Service, P.O. Box 25486–DFC, Denver, CO 80225.
- *In-Person Drop-off, Viewing, or Pickup:* Call (719) 628–2670 to make an appointment during regular business hours at 134 Union Blvd., Suite 645, Lakewood, CO 80228.

FOR FURTHER INFORMATION CONTACT: Kathy Konishi, Recovery Permits Coordinator, Ecological Services, (719) 628–2670 (phone); *permitsR6ES@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

Background

The Act (16 U.S.C. 1531 *et seq.*) prohibits certain activities with endangered and threatened species unless authorized by a Federal permit. The Act and our implementing regulations in part 17 of title 50 of the Code of Federal Regulations (CFR) provide for the issuance of such permits and require that we invite public comment before issuing permits for activities involving endangered species.

A permit granted by us under section 10(a)(1)(A) of the Act authorizes the permittee to conduct activities with U.S.

endangered or threatened species for scientific purposes, enhancement of propagation or survival, or interstate commerce (the latter only in the event that it facilitates scientific purposes or enhancement of propagation or survival). Our regulations implementing section 10(a)(1)(A) for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Applications Available for Review and Comment

We invite local, State, Tribal, and Federal agencies and the public to comment on the following applications. Please refer to the permit number for the application when submitting comments.

Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552).

Permit Application Number TE069300

Applicant: Nebraska Game and Parks Commission, Lincoln, NE

The applicant requests the renewal of their permit to continue surveying and monitoring activities for pallid sturgeon (*Scaphirhynchus albus*) in Nebraska, South Dakota, Kansas, Missouri, and Iowa for the purpose of enhancing the species' survival.

Permit Application Number TE09897C

Applicant: Deidre Duffy, Durango, CO

The applicant requests a new recovery permit to conduct presence/absence surveys of southwestern willow flycatcher (*Empidonax traillii extimus*) in Colorado, Utah, and New Mexico for the purpose of enhancing the species' survival.

Permit Application Number TE04585C

Applicant: Fort Belknap Fish and Wildlife Department, Harlem, MT

The applicant requests an amendment to their current permit to conduct presence/absence surveys for black-footed ferrets (*Mustela nigripes*) in Montana for the purpose of enhancing the species' survival.

Permit Application Number TE27491B

Applicant: PG Environmental, LLC, Golden, CO

The applicant requests the renewal of their permit to continue surveying and monitoring activities for bonytail chub (*Gila elegans*), Colorado pikeminnow (*Ptychocheilus lucius*), humpback chub (*Gila cypha*), and razorback sucker (*Xyrauchen texanus*) in Colorado for the purpose of enhancing the species' survival.

Permit Application Number TE049109

Applicant: Red Butte Garden and Arboretum, Salt Lake City, UT

The applicant requests an amendment to their current permit to collect vouchers and seeds in Arizona and propagate Gierisch mallow (*Sphaeralcea gierischii*) for genetic research purposes to enhance the species' survival.

Permit Application Number TE85664B

Applicant: Wingate Biological Solutions, Durango, CO

The applicant requests an amendment to their current permit to conduct presence/absence surveys for southwestern willow flycatcher (*Empidonax traillii extimus*) in Arizona and New Mexico for the purpose of enhancing the species' survival.

Permit Application Number TE039100

Applicant: Nebraska Public Power District, Lincoln, NE

The applicant requests the renewal of their permit to continue surveying and monitoring activities for the interior least tern (*Sternula antillarum athalassos*) and the American burying beetle (*Nicrophorus americanus*) in Nebraska for the purpose of enhancing the species' survival.

Permit Application Number TE038221

Applicant: Central Nebraska Public Power District, Gothenburg, NE

The applicant requests the renewal of their permit to continue surveying and monitoring activities for the interior least tern (*Sternula antillarum athalassos*) and the American burying beetle (*Nicrophorus americanus*) in Nebraska for the purpose of enhancing the species' survival.

Permit Application Number TE067729

Applicant: Kansas State University, Manhattan, KS

The applicant requests an amendment to their current permit to conduct telemetry studies of Colorado pikeminnow (*Ptychocheilus lucius*), and razorback sucker (*Xyrauchen texanus*) in Colorado and Utah. Upon review and approval, the applicant's permit will extend for another five years. The extension encompasses previously approved survey and monitoring projects for loach minnow (*Tiaroga cobitis*) and spikedace (*Meda fulgida*) in New Mexico and Topeka shiner (*Notropis topeka*) in Kansas. All projects are for the purpose of enhancing the species' survival.

Permit Application Number TE047290

Applicant: Colorado Parks and Wildlife John W. Mumma Native Aquatic Species Restoration Facility, Alamosa, CO

The applicant requests the renewal of their permit for research, propagation, transport, and release of bonytail chub (*Gila elegans*), Colorado pikeminnow (*Ptychocheilus lucius*), humpback chub (*Gila cypha*), and razorback sucker (*Xyrauchen texanus*) into the wild for the purpose of enhancing the species' survival.

Permit Application Number TE040748

Applicant: Cheyenne Mountain Zoo, Colorado Springs, CO

The applicant requests the renewal of their permit to exhibit Mexican wolf (*Canis lupus spp. baileyi*) and to exhibit, propagate, and transport black-footed ferrets (*Mustela nigripes*) and Wyoming toad (*Anaxyrus baxteri*), for the purpose of enhancing the species' survival.

National Environmental Policy Act

The proposed activities in the requested permits qualify as categorical exclusions under the National Environmental Policy Act, as provided by Department of the Interior implementing regulations in part 46 of title 43 of the Code of Federal Regulations (43 CFR 46.205, 46.210, and 46.215).

Public Availability of Comments

All comments and materials we receive in response to these requests will be available for public inspection, by appointment, during normal business hours at the address listed above in **ADDRESSES.**

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*).

Michael G. Thabault,

Assistant Regional Director, Mountain-Prairie Region.

[FR Doc. 2016–29971 Filed 12–13–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[178A2100DD/AAKC001030/ A0A501010.999900 253G]

Final Environmental Impact Statement and a Revised Draft Conformity Determination for the Proposed Wilton Rancheria Fee-to-Trust and Casino Project, Sacramento County, California

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice advises the public that the Bureau of Indian Affairs (BIA) as lead agency, with the Wilton Rancheria (Tribe), City of Galt, City of Elk Grove, Sacramento County (County), and the United States Environmental Protection Agency (EPA) serving as cooperating agencies, has prepared a Final Environmental Impact Statement (FEIS) for the Wilton Rancheria Fee-to-Trust and Casino Project, Sacramento County, California, pursuant to the National Environmental Policy Act (NEPA) of 1969, as amended. This notice announces that the FEIS is now available for public review. In accordance with Section 176 of the Clean Air Act and EPA's general conformity regulations, a Revised Draft Conformity Determination (DCD) also has been prepared for the proposed project.

DATES: The BIA will issue a Record of Decision (ROD) on the proposed action no sooner than 30 days after the date EPA publishes its Notice of Availability in the **Federal Register**. The BIA must receive any comments on the FEIS on or before that date.

ADDRESSES: The FEIS is available for public review at the Galt Branch of the Sacramento Public Library, located at 1000 Caroline Ave., Galt, California 95632, and the Elk Grove Branch of the Sacramento Public Library, located at 8900 Elk Grove Blvd., Elk Grove, California 95624, and online at *http://www.wiltoneis.com.* You may mail or hand-deliver written comments to Ms. Amy Dutschke, Pacific Regional Director, Bureau of Indian Affairs, 2800 Cottage Way, Sacramento, California 95825. You may also submit comments through email to Mr. John Rydzik, Chief, Division of Environmental, Cultural Resource Management and Safety, Bureau of Indian Affairs, at *john.rydzik@bia.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. John Rydzik, Bureau of Indian Affairs, Pacific Regional Office, 2800 Cottage Way, Sacramento, California 95825, (916) 978–6051.

SUPPLEMENTARY INFORMATION: The Tribe has requested that BIA take into trust approximately 36 acres of land (known as the Elk Grove Mall site) currently in fee, on which the Tribe proposes to construct a casino, hotel, parking area, and other ancillary facilities (Proposed Project). The proposed fee-to-trust property is located within the incorporated boundaries of the City of Elk Grove in Sacramento County, California.

The Draft Environmental Impact Statement (DEIS) identified Alternative A, located on the 282-acre Twin Cities site, as the Proposed Action that would allow for the development of the Tribe's proposed casino/hotel project; however, after evaluating all alternatives in the Draft EIS, BIA has now selected Alternative F, located on the Elk Grove Mall Site, as its Preferred Alternative to allow for the Tribe's Proposed Project. Since the DEIS was published, the Elk Grove Mall site increased by approximately eight acres, from approximately 28 to 36 acres. The additional eight acres consists of developed and disturbed land similar to the original 28 acres and was added due to parcel configuration and redesigned interior circulation. In addition, Alternative F project components have been revised in the FEIS from their discussion in the DEIS. The total square footage of the proposed facility has decreased approximately 2,299 square feet, from 611,055 square feet to 608,756 square feet. Some components have also changed, such as restaurant types, and a three-story parking garage has been added. However, gaming floor square footage has remained the same. These changes do not impact the conclusions of the EIS. The Final EIS was updated accordingly.

The Proposed Action consists of transferring the approximately 36 acres of property and the subsequent development of the Proposed Project. The Proposed Project would contain approximately 110,260 square-feet (sf) of gaming floor area, a 12-story hotel with approximately 302 guest rooms, a 360-seat buffet, 60-seat pool grill, other food and beverage providers, retail area, a fitness center, spa, and an approximately 48,000 sf convention center. Access to the Mall site would be provided via an existing driveway and a new driveway located along Promenade Parkway.

The following alternatives are considered in the FEIS: Alternative A—Proposed Twin Cities Casino Resort; Alternative B—Reduced Twin Cities Casino; Alternative C—Retail on the Twin Cities Site; Alternative D—Casino Resort at Historic Rancheria Site; Alternative E—Reduced Intensity Casino at Historic Rancheria Site; Alternative F—Casino Resort at Mall Site; and Alternative G—No Action.

Alternative F has been identified as the Preferred Alternative, as discussed in the FEIS. The information and analysis contained in the FEIS, as well as its evaluation and assessment of the Preferred Alternative, are intended to assist the Department of the Interior (Department) in its review of the issues presented in the fee-to-trust application. The Preferred Alternative does not reflect the Department's final decision because the Department must further evaluate all of the criteria listed in 25 CFR part 151 and 25 CFR part 292. The Department's consideration and analysis of the applicable regulations may lead to a final decision that selects an alternative other than the Preferred Alternative, including no action, or a variant of the Preferred or another of the alternatives analyzed in the FEIS.

Environmental issues addressed in the FEIS include geology and soils, water resources, air quality, biological resources, cultural and paleontological resources, socioeconomic conditions (including environmental justice), transportation and circulation, land use, public services, noise, hazardous materials, aesthetics, cumulative effects, and indirect and growth inducing effects.

Section 176 of the Clean Air Act, 42 U.S.C. 7506, requires Federal agencies to ensure that their actions conform to applicable implementation plans for achieving and maintaining the National Ambient Air Quality Standards for criteria air pollutants. The BIA has prepared a Revised DCD for the proposed action/project described above. The Revised DCD is included as Revised Appendix T of the FEIS.

A public scoping meeting for the DEIS was held by BIA on December 19, 2013 at the Chabolla Community Center in Galt, California. A Notice of Availability for the Draft EIS was published in the **Federal Register** on January 15, 2016 (81 FR 2214), and announced a review period that ended on February 29, 2016. The BIA held a public hearing on the Draft EIS on January 29, 2016 in Galt, California.

Directions for Submitting Comments: Please include your name, return address, and the caption: ''FEIS Comments, Wilton Rancheria Fee-to-Trust and Casino Project,'' on the first page of your written comments. If emailing comments, please use ''FEIS Comments, Wilton Rancheria Fee-to-

Trust and Casino Project'' as the subject of your email.

Locations Where the FEIS Is Available for Review: The FEIS is available for review during regular business hours at the BIA Pacific Regional Office and the Galt and Elk Grove Branches of the Sacramento Public Library at the addresses noted above in the **ADDRESSES** section of this notice. The FEIS is also available online at *http://www.wiltoneis.com.*

To obtain a compact disc copy of the FEIS, please provide your name and address in writing or by voicemail to Mr. John Rydzik, Bureau of Indian Affairs, at the address or phone number above in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Individual paper copies of the DEIS will be provided upon payment of applicable printing expenses by the requestor for the number of copies requested.

Public Comment Availability: Comments, including names and addresses of respondents, will be available for public review during regular business hours at the BIA mailing address shown in the **ADDRESSES** section of this notice. Before including your address, telephone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: This notice is published pursuant to Sections 1503.1 and 1506.6(b) of the Council of Environmental Quality Regulations (40 CFR parts 1500 through 1508) implementing the procedural requirements of the NEPA (42 U.S.C. 4321, *et seq.*), the Department of the Interior NEPA Regulations (43 CFR part 46), and is in the exercise of authority delegated to the Assistant Secretary—Indian Affairs by 209 DM 8. This notice is also published in accordance with Federal general conformity regulations (40 CFR part 93, subpart B).

Dated: December 8, 2016.

Lawrence S. Roberts,

Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 2016–29991 Filed 12–13–16; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MO #4500069731, 14X.LLMTC02000. L51100000.GA0000.LVEME14CE500]

Notice of Intent To Prepare an Environmental Impact Statement and Notice of Public Meetings for a Federal Coal Lease by Application (MTM 105485), Application To Modify Federal Coal Lease (MTM 94378), and Applications To Amend Land Use Permit (MTM 96659), and Land Use Lease (MTM 74913), Big Horn County, MT

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: In accordance with Bureau of Land Management (BLM) regulations, the United States Department of the Interior, BLM Miles City Field Office is publishing this notice of intent to prepare an environmental impact statement (EIS) to evaluate the potential impacts of four proposed actions related to coal mining at the Spring Creek Mine in Big Horn County, Montana. The proposed actions involve the potential sale of two tracts of Federal coal through a Lease-By-Application (LBA) and a lease modification application (LMA). Both applications cover proposed additions to an existing Federal coal lease at the Spring Creak Mine. Related to these leasing requests, the EIS will also evaluate proposed amendments to an existing land use permit to maintain access to mine monitoring and gauging stations and an existing land use lease to provide room for the placement of overburden and infrastructure. The EIS will be called the Spring Creek Coal EIS. This notice initiates the public scoping process for the Spring Creek Coal EIS.

DATES: Public scoping meetings to provide the public with an opportunity to review the proposals and gain understanding of the coal leasing process will be held by the BLM. The dates and locations of any scoping meetings will be announced at least 15 days in advance through local media outlets and through the Miles City BLM Web site at: *www.blm.gov/mt/st/en/fo/miles_city_field_office.html.* At the meetings, the public is invited to submit comments and resource information, plus identify issues or concerns to be considered in the environmental analysis. The BLM can best use public input if comments and resource information are submitted in writing by February 13, 2017. We will provide additional opportunities for public participation upon publication of the Draft EIS.

ADDRESSES: Please submit written comments or concerns to the BLM Miles City Field Office, Attn: Irma Nansel, 111 Garryowen Road, Miles City, MT 59301. Written comments or resource information may also be hand delivered to the BLM Miles City Field Office. Comments may be sent electronically to *BLM_MT_MCFO_SCCEIS@blm.gov.* For electronic submission, please include ''Spring Creek Coal EIS/Irma Nansel'' in the subject line. Members of the public may examine documents pertinent to this proposal by visiting the Miles City Field Office during its business hours (7:45 a.m. to 4:30 p.m.), Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Irma Nansel, Planning and Environmental Coordinator; telephone 406–233–3653. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FRS is available 24 hours a day, seven days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: Spring Creek Coal LLC (SCC) submitted four applications to the BLM, Montana State Office in 2012 and 2013. The four applications are as follows:

A. On February 15, 2013, SCC submitted LBA MTM 105485 for the Spring Creek Northwest and Spring Creek Southeast tracts. The LBA encompasses approximately 1,602.57 acres (containing approximately 198.2 million mineable tons of coal) adjacent to the Spring Creek Mine. Since decertification of the Powder River Federal Coal Region as a Federal coal production region by the Powder River Regional Coal Team (PRRCT) in 1990, leasing is permitted to take place under the existing regulations on an application basis, in accordance with 43 CFR 3425.1–5. The PRRCT reviewed the proposed Spring Creek Northwest and Spring Creek Southeast tracts in the application and recommended that the Montana State Office begin processing the application. This LBA consists of the following acreage:

		Acres
Principal Meridian, Montana		
Township 8 South, Range 39 East:		
Sec. 8	S½NE¼SE¼	20
	S½NW¼SE¼	20
	SW¼SE¼	40
	SE¼SE¼	40
Sec. 9	S½NW¼SW¼	20
	SW¼ SW¼	40
	SE¼SW¼	40
Sec. 17	NE¼NE¼	40
	NW¼NE¼	40
	N½SW¼NE¼	20
	N½SE¼NE¼	20
Sec. 35	NE¼	160
	SE¼	160
Township 9 South, Range 39 East:		
Sec. 1	Lot 1	40.20
	Lot 2	40.58
	Lot 3	40.39
	Lot 4	39.92
	NW¼NE¼	40
	SW¼NE¼	40
	NW¼	160
	E½NW¼SE¼	20
	E½SW¼SE¼	20
Sec. 2	NE¼	160
Township 9 South, Range 40 East:		
Sec. 6	Lot 5	37.12
	Lot 6	37.16
	Lot 7	37.20
	S½SE¼NW¼	20
	NE¼SW¼	40
	SE¼SW¼	40
	S½NE¼SE¼	20
	NW¼NW¼SE¼	10
	S½NW¼SE¼	20
	SW¼SE¼	40
	SE¼SE¼	40

B. On December 20, 2012, SCC applied for a lease modification to Federal coal lease MTM 94378, for the Spring Creek Northeast tract, consisting of about 170 acres (containing approximately 7.9 million mineable tons of coal) adjacent to the Spring Creek Mine. On May 9, 2016, the application was modified to reduce the tract acreage to 150 acres. The tract reserve value did not change as a result of the acreage reduction. If approved, the acreage covered by the LMA would be added to the existing lease and is listed below. Consistent with applicable statutory authority, the proposed LMA acreage does not exceed the original lease acreage of (1,117.70 acres):

		Acres
Principal Meridian, Montana		
Township 8 South, Range 39 East:		
Sec. 13	NW¼SW¼NE¼	10
	SW¼SW¼NE¼	10
	SE¼SW¼NE¼	10
	SW¼NE¼NW¼	10
	SE¼NE¼NW¼	10
	NE¼NW¼NW¼	10
	NW¼NW¼NW¼	10
	SE¼NW¼NW¼	10
	NE¼SE¼NW¼	10
	NW¼SE¼NW¼	10
	SE¼SE¼NW¼	10
	NW¼NE¼SE¼	10
	SW¼NE¼SE¼	10
	NE¼NW¼SE¼	10
Sec. 14	NE¼NE¼NE¼	10

C. On December 23, 2013, SCC submitted an application to amend land use permit (LUP) MTM 96659, adding 175 acres to the permit and removing 320 acres currently included within the permit that overlap the Spring Creek Southeast LBA tract. The LUP amendment would maintain access to mine monitoring areas and gauging stations by utilizing existing two-track roads and trails. The LUP use will not exceed 3 years, in accordance with 43 CFR 2920.1–1(b), and will not cause appreciable damage or disturbance to the public lands, their resources or improvements in accordance with 43 CFR 2920.2–2(a). The acreage to be added to LUP MTM 96659 are:

		Acres
Principal Meridian, Montana		
Township 8 South, Range 39 East:		
Sec. 20	S½NE¼	80
Sec. 22	SW¼SW¼NE¼	10
	S½SE¼SW¼NE¼	5
Sec. 27	NE¼SW¼	40
Township 9 South, Range 40 East:		
Sec. 7	S½SW¼SW¼NE¼	5
	S½SE¼SW¼NE¼	5
	S½SW¼SE¼NE¼	5
	S½SE¼SE¼NE¼	5
Sec. 8	S½SW¼NW¼	20

Acres to be removed from LUP MTM 96659 are:

		Acres
Township 8 South, Range 39 East:		
Sec. 35	E½	320

D. On December 23, 2013, SCC submitted an application in accordance with 43 CFR 2920.2–3 to amend noncompetitive land use lease (LUL) MTM 74913, adding 255 acres to the existing lease and removing approximately 195 acres that overlap the Spring Creek Southeast LBA tract. A Notice of Realty Action was published in the **Federal Register** in parallel with this notice. The lands added to LUL MTM 74913 are as follows:

		Acres
Principal Meridian, Montana		
Township 8 South, Range 39 East:		
Sec. 22	N½SW¼NE¼	20
	N½SE¼SW¼NE¼	5
	SE¼SE¼NE¼	10
	W½SE¼NE¼	20
Township 9 South, Range 39 East:		
Sec. 1	SE¼SW¼	40
Township 9 South, Range 40 East:		
Sec. 7	½NE¼	80
	N½SW¼NE¼	20
	N½SW¼NE¼	20
	N½SW¼SE¼NE¼	5
	N½SE¼SE¼NE¼	5
	N½SE¼SW¼NE¼	5
	N½SW¼SW¼NE¼	5
Sec. 8	N½SW¼NW¼	20

Acres to be removed from LUL MTM 74913 are:

		Acres
Township 8 South, Range 39 East:		
Sec. 35	NE¼NE¼	40
	SE¼NE¼	40
	E½NW¼NE¼	20
	E½NW¼NW¼NE¼	5
	NW¼NW¼NW¼NE¼	2.5
	E½SW¼NW¼NE¼	5

		Acres
	NE¼SW¼NE¼	10
	NE¼SE¼SW¼NE¼	2.5
	E½NE¼SE¼	20
	E½NW¼NE¼SE¼	5
	NE¼SE¼SE¼	10
Township 9 South, Range 40 East:		
Sec. 6	Lot 5	34.78

The Spring Creek Mine operates under an existing approved surface mining permit from the State of Montana. The Montana Department of Environmental Quality, the Montana Department of Natural Resources and Conservation, and the OSMRE will be cooperating agencies in the preparation of the Spring Creek Coal EIS. Other cooperating agencies may be identified during the scoping process.

The actions announced by this Notice are consistent with Secretarial Order (S.O.) 3338, which allows preparatory work, including National Environmental Policy Act and other related analyses, on already-pending applications to continue while the BLM's programmatic review of the Federal coal program is pending. With respect to the sale of the coal covered by the leasing requests, unless it is shown that one of the exceptions or exclusions to S.O. 3338 applies, the BLM will not make a final leasing decision on the proposed LBA until the programmatic review has concluded. The BLM has confirmed that the LMA is not subject to S.O. 3338's leasing pause because the lease tract is less than 160 acres. As result, issuane of the LMA can occur prior to the finalization of the programmatic review.

If the proposed tracts were to be leased to the applicant, the new lease and the modifications to the existing coal lease, LUP, and LUL, must be incorporated into the existing approved mining and reclamation plans for the mine. Before this can occur, the Secretary of the Interior must approve the revised Mineral Leasing Act (MLA) mining plan for the mine in which the tracts will be included. The OSMRE is the Federal agency that is responsible for recommending approval, approval with conditions, or disapproval of the revised MLA mining plan to the Secretary of the Interior, which is why it is a cooperator in this EIS.

In order to help facilitate its analysis, the BLM is providing interested parties the opportunity to submit comments and relevant information to help the BLM identify issues to be considered in preparing the Spring Creek Coal EIS. Issues that have been identified in analyzing the impacts of previous Federal coal-leasing actions in the Montana Powder River Basin (PRB) include: (1) The need for resolution of potential conflicts between existing and proposed oil and gas development and coal mining on the tracts proposed for coal leasing; (2) Potential impacts to big game herds and hunting, Greater Sage-Grouse, listed threatened and endangered species, and air quality, including greenhouse gas emissions; (3) The need to consider the cumulative impacts of coal leasing decisions combined with other existing and proposed development in the Montana PRB; and (4) Potential site-specific and cumulative impacts on air and water quality.

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 public at any time. While you may request to us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1506.6, 43 CFR 3425.3, and 3425.4.

Diane M. Friez,

District Manager.

[FR Doc. 2016–29969 Filed 12–13–16; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMTC02200–L14300000–EQ0000; MTM–74913]

Notice of Realty Action: Proposed Amendment to Noncompetitive Land Use Lease MTM 74913, Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management (BLM) has received a proposal to amend Spring Creek Coal, LLC's existing Land Use Lease (LUL) MTM–74913, pursuant to Section 302 of the Federal Land Policy and Management Act (FLPMA) of 1976, as amended, for not less than the appraised fair market value.

DATES: Interested parties may submit comments on or before January 30, 2017.

ADDRESSES: Send written comments to the Field Manager, Miles City Field Office, Bureau of Land Management, 111 Garryowen Road, Miles City, MT 59301.

FOR FURTHER INFORMATION CONTACT: Beth Klempel, BLM Miles City Field Office, 111 Garryowen Road, Miles City, MT 59301, telephone 406–233–2800, or email *bklempel@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact Ms. Klempel during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question for Ms. Klempel. You will receive a reply during normal business hours. Normal business hours are 7:45 a.m. to 4:30 p.m., Monday through Friday, except for Federal holidays.

SUPPLEMENTARY INFORMATION: The following described lands include the proposed LUL amendment and have been determined as suitable for leasing under Section 302 of FLPMA (43 U.S.C. 1732):

Principal Meridian, Montana

T. 8 S., R. 39 E.,
Sec. 22, N½SW¼NE¼, N½SE¼SW¼NE¼, W½SE¼NE¼, and SE¼SE¼NE¼.
T. 9 S., R. 39 E.,
Sec. 1, SE¼SW¼.
T. 9 S., R. 40 E.,
Sec. 7, N½NE¼, N½SW¼NE¼, N½SE¼NE¼, N½SW¼ SW¼NE ¼, N½SE¼SW¼NE¼, N½SW¼SE¼NE¼, and N½SE¼SE¼NE¼.
Sec. 8, N½SW¼NW¼.
The areas described aggregate 255 acres.

The BLM is considering amending the existing LUL, which is 222.12 acres. The amendment would modify its size to authorize the surface use of 255 additional acres of public lands for coal mine layback, establishing a highwall crest, topsoil and overburden stockpiles, and transportation and utility corridors on Spring Creek Coal, LLC's existing

LUL MTM–74913. Although based on available information, the BLM estimates that only 155 acres of disturbance will occur within the 255 acre area described above.

The amendment has been requested to facilitate recovery of coal reserves from Spring Creek Coal, LLC's adjoining Federal coal leases MTM–94378 and MTM–69782, Montana State coal lease C–1088–05, and for Spring Creek, LLC's to ultimately access the coal contained within its pending coal lease modification MTM–94378 and coal lease by application MTM–105485, if they were to be approved. Layback on the area covered by the LUL is a critical component in coal surface mine recovery, which consists of a series of benches cut into the mine highwall to stabilize the wall as mining progresses into an area.

If the LUL amendment were to be approved, the coal lessee will: (1) Remove the topsoil from the coal leases and stockpile it on the above-described lands and use it for reclamation after mining; (2) Remove the overburden from the pit and stockpile it on the subject lands to be used in post-mining topography construction; (3) Locate an electric line and distribution station within the use area at a safe distance from the pit and grading activity; (4) Construct access/haul roads to use in the mining process and to access the stockpiles; and (5) Cut benches into the mine highwall to stabilize the wall as mining progresses into an area.

The BLM is considering offering the land use lease amendment noncompetitively to Spring Creek Coal, LLC to amend its existing LUL MTM–74913 because the authorized officer has determined that: (1) These parcels are surrounded by land owned or controlled by Spring Creek Coal, LLC; and (2) It is unlikely there would be interest in competitive bidding in these lands. The BLM does not authorize mineral use under this LUL amendment; however, Spring Creek Coal, LLC applied for a modification of coal lease MTM–94378 and submitted a coal lease by application request (MTM–105485). The BLM will process the LUL amendment and coal lease modification concurrently in accordance with 43 CFR 2920 and 43 CFR 3432, and will process the lease by application separately in accordance with 43 CFR 3425.

Any application filed for this LUL amendment must reference this Notice and provide a complete description of the proposed project. If the BLM accepts the application to amend the LUL, the reimbursement of costs and the annual rental is the responsibility of the applicant in accordance with the provisions of 43 CFR 2920.6 and 43 CFR 2920.8, respectively. This LUL amendment is consistent with the applicable Resource Management Plan.

The BLM will complete an environmental analysis addressing the proposed LUL amendment, proposed amendment to an existing land use permit, coal lease modification, and coal lease by application in accordance with the National Environmental Policy Act of 1969, prior to making a decision to approve the proposed applications. The BLM will solicit public comment in support of scoping for the environmental analysis. You may review the proposed LUL amendment at the BLM Miles City Field Office. Interested parties may submit in writing any comments concerning the LUL amendment to the BLM Field Manager listed under **ADDRESSES** above.

Comments on the proposed LUL amendment should be specific, confined to issues pertinent to the proposed action, and should explain the reason for any recommended revisions. Where possible, comments should reference the specific section or paragraph of the proposal. The BLM is not obligated to consider or include in the Administrative Record comments received after the close of the comment period or comments delivered to an address other than the one listed above.

Comments, including names and street addresses of respondents, will be available for public review at the BLM Miles City Field Office address listed in **ADDRESSES** above. Before including your address, phone number, email address, or other personal identifying information in your comments, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Any adverse comments regarding the proposed LUL amendment will be reviewed by the BLM Montana State Director or other authorized official of the Department of the Interior, who may sustain, vacate, or modify this realty action in whole or in part. In the absence of timely filed objections, this realty action will become the final determination of the Department of the Interior.

Authority: 43 CFR 2920.4, 43 CFR 3430.3–2

Diane M. Friez,

Eastern Montana/Dakotas District Manager.

[FR Doc. 2016–29964 Filed 12–13–16; 8:45 am]

BILLING CODE 4310–DN–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Liquid Crystal Ewriters and Components Thereof, DN 3187* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing under § 210.8(b) of the Commission's Rules of Practice and Procedure (19 CFR 210.8(b)).

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Kent Displays, Inc. on December 8, 2016. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C.

1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain liquid crystal ewriters and components thereof. The complaint names as respondents Shenzhen Howshow Technology Co., Ltd. d/b/a Shenzhen Howshare Technology Co., Ltd. d/b/a Howshare of China; and Shenzhen SUNstone Technology Co., Ltd. d/b/a iQbe of China. The complainant requests that the Commission issue a limited exclusion order, cease and desist orders and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to § 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 3187'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures).[1] Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: December 9, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–29972 Filed 12–13–16; 8:45 am]

BILLING CODE 7020–02–P

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0032]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Records of Acquisition and Disposition, Collectors of Firearms

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 60-day notice.

SUMMARY: The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit 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 February 13, 2017.

FOR FURTHER INFORMATION CONTACT: If you have additional comments, particularly with respect to the estimated public burden or associated response time, have suggestions, need a copy of the proposed information collection instrument with instructions, or desire any additional information, please contact Rinell Lawrence, Firearms Industry Program Branch, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), either by mail at 99 New York Ave. NE., Washington, DC 20226, by email at *fipb-informationcollection@atf.gov,* or by telephone at 202–648–7190.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Evaluate whether and if so how the quality, utility, and clarity of the information 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.

Overview of This Information Collection

1. *Type of Information Collection (check justification or form 83–I):* Revision of a currently approved collection.

2. *The Title of the Form/Collection:* Records of Acquisition and Disposition, Collectors of Firearms.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number (if applicable): None.

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Individuals or households.

Other (if applicable): None.

Abstract: The recordkeeping requirement for this collection is primarily to facilitate ATF's authority to inquire into the disposition of any firearm during the course of a criminal investigation.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 56,928 respondents will report once annually for this collection, and it will take each respondent approximately 3 hours to complete a report.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 173,630 hours, which is a reduction in the public burden.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 3E–405B, Washington, DC 20530.

Dated: December 9, 2016.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2016–29955 Filed 12–13–16; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

[OMB Number 1121–0336]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Revision of a Currently Approved Collection: Office for Victims of Crime Training and Technical Assistance Center—Trafficking Information Management System (TIMS)

AGENCY: Office for Victims of Crime, Department of Justice.

ACTION: 60-day notice.

SUMMARY: The Department of Justice (DOJ), Office of Justice Programs, Office for Victims of Crime, 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 February 13, 2017.

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 Shelby Jones Crawford, Program Manager, Office for Victims of Crime, Office of Justice Programs, Department of Justice, 810 7th Street NW., Washington, DC 20530.

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.

Overview of This Information Collection

1. *Type of Information Collection:* Revision of Existing Collection.

2. *The Title of the Form/Collection:* Office for Victims of Crime Training and Technical Assistance Center—Trafficking Information Management System (TIMS).

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* NA. The applicable component within the Department of Justice is the Office for Victims of Crime, in the Office of Justice Programs.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: OVC Grantees.

Abstract: The current package for OMB approval is designed to simplify performance reporting for OVC grantees through the OVC Trafficking Information Management System (TIMS) Online system, a Web-based database and reporting system for the Victims of Human Trafficking Grant and the Enhanced Collaborative Model Grant initiatives. OVC will require OVC Grantees to use this electronic tool to submit grant performance data, including demographics about human trafficking victims. Since 2012, OVC has published annual analyses of these data to provide the crime victims' field with stronger evidence for practices and programs.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There are approximately 60 OVC Services to Victims of Human Trafficking Grantees per six-month reporting period. On average, it should take each grantee one hour to seven hours, depending on client case load per reporting period, to enter information into TIMS Online. There are two reporting periods per year.

6. *An estimate of the total public burden (in hours) associated with the collection:* 480 hours (average 60 OVC grantees * average 4 hours * 2 times per year).

If additional information is required contact: Jerri Murray, Department

Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 3E.405B, Washington, DC 20530.

Dated: December 9, 2016.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2016–29956 Filed 12–13–16; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (OJJDP) Docket No. 1731]

Webinar Meeting of the Federal Advisory Committee on Juvenile Justice

AGENCY: Office of Juvenile Justice and Delinquency Prevention, Justice.

ACTION: Notice of webinar meeting.

SUMMARY: The Office of Juvenile Justice and Delinquency Prevention (OJJDP) has scheduled a webinar meeting of the Federal Advisory Committee on Juvenile Justice (FACJJ).

DATES AND LOCATION: The webinar meeting will take place online on Thursday, January 12, 2017 at 2:00p.m.–5:00p.m. ET.

FOR FURTHER INFORMATION CONTACT: Jeff Slowikowski, Designated Federal Official, OJJDP, *Jeff.Slowikowski@usdoj.gov* or (202) 616–3646. [This is not a toll-free number.]

SUPPLEMENTARY INFORMATION: The Federal Advisory Committee on Juvenile Justice (FACJJ), established pursuant to Section 3(2)A of the Federal Advisory Committee Act (5 U.S.C. App. 2), will meet to carry out its advisory functions under Section 223(f)(2)(C–E) of the Juvenile Justice and Delinquency Prevention Act of 2002. The FACJJ is composed of representatives from the states and territories. FACJJ member duties include: Reviewing Federal policies regarding juvenile justice and delinquency prevention; advising the OJJDP Administrator with respect to particular functions and aspects of OJJDP; and advising the President and Congress with regard to State perspectives on the operation of OJJDP and Federal legislation pertaining to juvenile justice and delinquency prevention. More information on the FACJJ may be found at *www.facjj.org.*

Meeting Agenda: The proposed agenda includes: (a) Opening Introductions, and Webinar Logistics; (b) Remarks of Robert L. Listenbee, Administrator, OJJDP; (c) FACJJ Subcommittee Reports (Legislation/Policy; Confidentiality of Records; Research/Publications; LGBT; Transitioning Youth); (d) FACJJ Administrative Business; and (e) Summary, Next Steps, and Meeting Adjournment.

To participate in or view the webinar meeting, FACJJ members and the public must pre-register online. Members and interested persons must link to the webinar registration portal through *www.facjj.org,* no later than Thursday, January 5, 2017. Upon registration, information will be sent to you at the email address you provide to enable you to connect to the webinar. Should problems arise with webinar registration, please call Callie Long Murray at 571–308–6617. [This is not a toll-free telephone number.] Note: Members of the public will be able to listen to and view the webinar as observers, but will not be able to participate actively in the webinar.

An on-site room is available for members of the public interested in viewing the webinar in person. If members of the public wish to view the webinar in person, they must notify Melissa Kanaya by email message at *Melissa.Kanaya@usdoj.gov* no later than Thursday, January 5, 2017.

FACJJ members will not be physically present in Washington, DC for the webinar. They will participate in the webinar from their respective home jurisdictions.

Written Comments: Interested parties may submit written comments by email message in advance of the webinar to Jeff Slowikowski, Designated Federal Official, at *Jeff.Slowikowski@usdoj.gov,* no later than Thursday, January 5, 2017. In the alternative, interested parties may fax comments to 202–307–2819 and contact Melissa Kanaya at 202–532–0121 to ensure that they are received. [These are not toll-free numbers.]

Robert L. Listenbee,

Administrator, Office of Juvenile Justice and Delinquency Prevention.

[FR Doc. 2016–29953 Filed 12–13–16; 8:45 am]

BILLING CODE 4410–18–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2017–012]

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when agencies no longer need them for current Government business. The records schedules authorize agencies to preserve records of continuing value in the National Archives of the United States and to destroy, after a specified period, records lacking administrative, legal, research, or other value. NARA publishes notice in the **Federal Register** for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: NARA must receive requests for copies in writing by January 13, 2017. Once NARA finishes appraising the records, we will send you a copy of the schedule you requested. We usually prepare appraisal memoranda that contain additional information concerning the records covered by a proposed schedule. You may also request these. If you do, we will also provide them once we have completed the appraisal. You have 30 days after we send to you these requested documents in which to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting Records Appraisal and Agency Assistance (ACRA) using one of the following means:

Mail: NARA (ACRA); 8601 Adelphi Road; College Park, MD 20740–6001.

Email: *request.schedule@nara.gov.*

FAX: 301–837–3698.

You must cite the control number, which appears in parentheses after the name of the agency that submitted the schedule, and a mailing address. If you would like an appraisal report, please include that in your request.

FOR FURTHER INFORMATION CONTACT: Margaret Hawkins, Director, by mail at Records Appraisal and Agency Assistance (ACRA); National Archives and Records Administration; 8601 Adelphi Road; College Park, MD 20740–6001, by phone at 301–837–1799, or by email at *request.schedule@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year, Federal agencies create billions of

records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing records retention periods and submit these schedules for NARA's approval. These schedules provide for timely transfer into the National Archives of historically valuable records and authorize the agency to dispose of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media neutral unless otherwise specified. An item in a schedule is media neutral when an agency may apply the disposition instructions to records regardless of the medium in which it creates or maintains the records. Items included in schedules submitted to NARA on or after December 17, 2007, are media neutral unless the item is expressly limited to a specific medium. (See 36 CFR 1225.12(e).)

Agencies may not destroy Federal records without Archivist of the United States' approval. The Archivist approves destruction only after thoroughly considering the records' administrative use by the agency of origin, the rights of the Government and of private people directly affected by the Government's activities, and whether or not the records have historical or other value.

In addition to identifying the Federal agencies and any subdivisions requesting disposition authority, this notice lists the organizational unit(s) accumulating the records (or notes that the schedule has agency-wide applicability when schedules cover records that may be accumulated throughout an agency); provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction); and includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it also includes information about the records. You may request additional information about the disposition process at the addresses above.

Schedules Pending

1. Department of Agriculture, Office of the Secretary (DAA–0016–2016–0003, 3 items, 2 temporary items). Case files related to scientific integrity and research misconduct, including written allegations, correspondence, copies of research records, case summaries, determinations, notifications, and decisional letters. Proposed for permanent retention are case files of historical value.

2. Department of the Army, Agency-wide (DAA–AU–2011–0001, 1 item, 1 temporary item). Master files of an electronic information system used to track the movement of supplies and equipment.

3. Department of the Army, Agency-wide (DAA–AU–2016–0008, 1 item, 1 temporary item). Master files of an electronic information system used to correct supply discrepancies.

4. Department of the Army, Agency-wide (DAA–AU–2016–0050, 1 item, 1 temporary item). Master files of an electronic information system that contains resource planning and financial management data.

5. Department of the Army, Agency-wide (DAA–AU–2016–0056, 1 item, 1 temporary item). Master files of an electronic information system used to process access requests for individual military personnel records.

6. Department of Defense, National Guard Bureau (DAA–0168–2016–0001, 2 items, 1 temporary item). Records relating to biographical information on agency leadership and spouses. Proposed for permanent retention are biographies of general officers.

7. Department of Defense, Office of the Secretary of Defense (DAA–0330–2016–0014, 1 item, 1 temporary item). Master files of an electronic information system used to manage human resource activities of the Military Health System for contractors and volunteers.

8. Department of Energy, Naval Nuclear Propulsion Program (DAA–0434–2015–0009, 74 items, 66 temporary items). Records relating to environmental health and safety including routine correspondence, safety checks, protective equipment, leak tests, alarm systems, equipment inspection, and related matters. Proposed for permanent retention are records relating to archaeology, environmental monitoring, radiological protection, waste shipments, radiological training, site closures, and incidents.

9. Department of Energy, Office of Science and Energy (DAA–0434–2016–0009, 1 item, 1 temporary item). Records relating to oil shale research created by the former Laramie Project Office including engineering drawings, maps, special events and activities at the site, employee activities, ancillary mining operations, routine correspondence, and related records.

10. Department of the Navy, Agency-wide (DAA–NU–2015–0009, 30 items, 21 temporary items). Records relating to ship designs and materials management records including routine correspondence, construction records, examinations, ship surveillance, equipment modifications, and related matters. Proposed for permanent retention are records relating to policy, planning, master technical reports and manuals, ship system planning, ship drawings, weight and moment changes, inclining studies, and ship photographs.

11. National Archives and Records Administration, Government-wide (DAA–GRS–2016–0016, 3 items, 3 temporary items). General Records Schedule for general administrative records including the day-to-day administrative records maintained, non-recordkeeping copies of electronic records, and records related to non-mission related internal agency committees.

12. National Mediation Board, Agency-wide (DAA–0013–2015–0002, 9 items, 4 temporary items). Routine program and administrative records including litigation case files, arbitration files, and housekeeping and general administrative files. Proposed for permanent retention are Presidential Emergency Board reports and case files, official published board actions, mediation case files, representation case files, and significant litigation case files.

13. Peace Corps, Office of Volunteer Recruitment and Selection (DAA–0490–2016–0004, 2 items, 2 temporary items). Records include fingerprint cards and recruiting records.

Laurence Brewer,

Chief Records Officer for the U.S. Government.

[FR Doc. 2016–29867 Filed 12–13–16; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–341–LR]; [ASLBP No. 16–951–01–LR–BD01]

DTE Electric Company; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission, *see* 37 FR 28,710 (Dec. 29, 1972), and the Commission's regulations, *see, e.g.,* 10 CFR 2.104, 2.105, 2.309, 2.313, 2.318, and 2.321,

notice is hereby given that an Atomic Safety and Licensing Board (Board) is being established to preside over the following proceeding:

DTE Electric Company (Fermi Nuclear Power Plant, Unit 2)

This proceeding—which was previously terminated by a Board on September 11, 2015, *see* LBP–15–25, 82 NRC 161 (2015)—involves an application by DTE Electric Company to renew for twenty years its operating license for Fermi Nuclear Power Plant, Unit 2, located near Frenchtown Township, Michigan. On November 21, 2016, Citizen's Resistance at Fermi 2 filed a motion to reopen the record and admit a new contention.

The Board is comprised of the following Administrative Judges:

Ronald M. Spritzer, Chairman, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

Dr. Gary S. Arnold, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

Dr. Sue H. Abreu, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

All correspondence, documents, and other material shall be filed in accordance with the NRC E-Filing rule. *See* 10 CFR 2.302.

Rockville, Maryland.

Dated: December 7, 2016.

E. Roy Hawkens,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 2016–29881 Filed 12–13–16; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79509; File No. SR–NYSEMKT–2016–112]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Pilot Period for the Exchange's Retail Liquidity Program

December 8, 2016.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on November 28, 2016, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the pilot period for the Exchange's Retail Liquidity Program (the ''Retail Liquidity Program'' or the ''Program''), which is currently scheduled to expire on December 31, 2016, until June 30, 2017. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to extend the pilot period of the Retail Liquidity Program, currently scheduled to expire on December 31, 2016,[4] until June 30, 2017.

Background

In July 2012, the Commission approved the Retail Liquidity Program on a pilot basis.[5] The Program is designed to attract retail order flow to the Exchange, and allows such order flow to receive potential price improvement. The Program is currently limited to trades occurring at prices equal to or greater than $1.00 per share. Under the Program, Retail Liquidity Providers (''RLPs'') are able to provide potential price improvement in the form of a non-displayed order that is priced better than the Exchange's best protected bid or offer (''PBBO''), called a Retail Price Improvement Order (''RPI''). When there is an RPI in a particular security, the Exchange disseminates an indicator, known as the Retail Liquidity Identifier, indicating that such interest exists. Retail Member Organizations (''RMOs'') can submit a Retail Order to the Exchange, which would interact, to the extent possible, with available contra-side RPIs.

The Retail Liquidity Program was approved by the Commission on a pilot basis. Pursuant to NYSE MKT Rule 107C(m)—Equities, the pilot period for the Program is scheduled to end on December 31, 2016.

Proposal to Extend the Operation of the Program

The Exchange established the Retail Liquidity Program in an attempt to attract retail order flow to the Exchange by potentially providing price improvement to such order flow. The Exchange believes that the Program promotes competition for retail order flow by allowing Exchange members to submit RPIs to interact with Retail Orders. Such competition has the ability to promote efficiency by facilitating the price discovery process and generating additional investor interest in trading securities, thereby promoting capital formation. The Exchange believes that extending the pilot is appropriate because it will allow the Exchange and the Commission additional time to analyze data regarding the Program that the Exchange has committed to provide.[6] As such, the Exchange believes that it is appropriate to extend the current operation of the Program.[7] Through this filing, the Exchange seeks to amend NYSE MKT Rule 107C(m)—Equities and extend the current pilot period of the Program until June 30, 2017.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[8]

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 78602 (August 17, 2016), 81 FR 57639 (August 23, 2016) (SR–NYSEMKT–2016–76).

[5] *See* Securities Exchange Act Release No. 67347 (July 3, 2012), 77 FR 40673 (July 10, 2012) (''RLP Approval Order'') (SR–NYSEAmex–2011–84).

[6] *See id.* at 40681.

[7] Concurrently with this filing, the Exchange has submitted a request for an extension of the exemption under Regulation NMS Rule 612 previously granted by the Commission that permits it to accept and rank the undisplayed RPIs. *See* Letter from Martha Redding, Asst. Corporate Secretary, NYSE Group, Inc. to Brent J. Fields, Secretary, Securities and Exchange Commission, dated November 28, 2016.

[8] 15 U.S.C. 78f(b).

in general, and furthers the objectives of Section 6(b)(5),[9] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that extending the pilot period for the Retail Liquidity Program is consistent with these principles because the Program is reasonably designed to attract retail order flow to the exchange environment, while helping to ensure that retail investors benefit from the better price that liquidity providers are willing to give their orders. Additionally, as previously stated, the competition promoted by the Program may facilitate the price discovery process and potentially generate additional investor interest in trading securities. The extension of the pilot period will allow the Commission and the Exchange to continue to monitor the Program for its potential effects on public price discovery, and on the broader market structure.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change simply extends an established pilot program for an additional six months, thus allowing the Retail Liquidity Program to enhance competition for retail order flow and contribute to the public price discovery process.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[12] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2016–112 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2016–112. 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 Web site (*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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2016–112 and should be submitted on or before January 4, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–29939 Filed 12–13–16; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A)(iii).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] 15 U.S.C. 78s(b)(2)(B).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 32384; File No. 812–14543]

ALAIA Market Linked Trust and Beech Hill Securities, Inc.; Notice of Application

December 8, 2016.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under section 12(d)(1)(J) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 12(d)(1)(A), (B), and (C) of the Act and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (2) of the Act. The requested order would permit certain registered unit investment trusts (''UITs'') to acquire shares of certain registered open-end investment companies, registered closed-end investment companies and registered UITs (collectively, the ''Underlying Funds'') that are within and outside the same group of investment companies as the acquiring

UITs, in excess of the limits in section 12(d)(1) of the Act.

APPLICANTS: ALAIA Market Linked Trust (the ''Trust''), a UIT that is registered under the Act, and Beech Hill Securities, Inc. (''BHSI''), a New York corporation registered as a broker-dealer under the Securities Exchange Act of 1934 (the ''Exchange Act'').

DATES: *Filing Dates:* The application was filed on September 3, 2015 and amended on January 15, 2016, October 17, 2016 and November 22, 2016.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 3, 2017 and should be accompanied by proof of service on the applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to Rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants: ALAIA Market Linked Trust, 10 Corbin Drive, Darien, CT 06820, Beech Hill Securities, Inc., 880 3rd Avenue, 16th Floor, New York, NY 10022–4730.

FOR FURTHER INFORMATION CONTACT: Deepak T. Pai, Senior Counsel, at (202) 551–6876 or Mary Kay Frech, Branch Chief, at (202) 551–6814 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm,* or by calling (202) 551–8090.

Summary of the Application

1. Applicants request an order to permit (a) a Series [1] to acquire shares of Underlying Funds [2] in excess of the limits in sections 12(d)(1)(A) and (C) of the Act and (b) the Underlying Funds that are registered open-end investment companies, their principal underwriters and any broker or dealer registered under the Exchange Act to sell shares of the Underlying Funds to the Series in excess of the limits in section 12(d)(1)(B) of the Act.[3] Applicants also request an order of exemption under sections 6(c) and 17(b) of the Act from the prohibition on certain affiliated transactions in section 17(a) of the Act to the extent necessary to permit the Underlying Funds to sell their shares to, and redeem their shares from, the Series.[4] Applicants state that such transactions will be consistent with the policies of each Series and each Underlying Fund and with the general purposes of the Act and will be based on the net asset values of the Underlying Funds.

2. Applicants agree that any order granting the requested relief will be subject to the terms and conditions stated in the application. Such terms and conditions are designed to, among other things, help prevent any potential (i) undue influence over an Underlying Fund that is not in the same ''group of investment companies'' as the UIT through control or voting power, or in connection with certain services, transactions, and underwritings, (ii) excessive layering of fees, and (iii) overly complex fund structures, which are the concerns underlying the limits in sections 12(d)(1)(A), (B), and (C) of the Act.

3. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that (a) the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policies of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act. Section 6(c) of the Act permits the Commission to exempt any persons or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–29932 Filed 12–13–16; 8:45 am]

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[1] Applicants request that the order apply to each existing and future series of the Trust and to any future registered UIT and series thereof sponsored by BHSI or an entity controlling, controlled by or under common control with BHSI (the ''Series'').

[2] Certain of the Underlying Funds may be registered as an open-end investment company or a UIT, but have received exemptive relief from the Commission to permit their shares to be listed and traded on a national securities exchange at negotiated prices and to operate as exchange-traded funds (''ETFs'').

[3] Applicants do not request relief for the Series to invest in reliance on the order in closed-end investment companies that are not listed and traded on a national securities exchange.

[4] A Series generally would purchase and sell shares of an Underlying Fund that operates as an ETF through secondary market transactions rather than through principal transactions with the Underlying Fund. Applicants nevertheless request relief from section 17(a) to permit a Series to purchase or redeem shares from the ETF. A Series will purchase and sell shares of an Underlying Fund that is a closed-end fund through secondary market transactions at market prices rather than through principal transactions with the closed-end fund. Accordingly, applicants are not requesting section 17(a) relief with respect to transactions in shares of closed-end funds.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79506; File No. SR–NYSEArca–2016–158]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the Exchange's Schedule of Fees and Charges Relating to the Listing and Annual Fees Applicable to Certain Structured Products

December 8, 2016

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 29, 2016, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Schedule of Fees and Charges (''Fee Schedule'') relating to the Listing and Annual Fees applicable to certain Structured Products. This amendment to the Fee Schedule is effective November 29, 2016. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Exchange's Schedule of Fees and Charges (''Fee Schedule'') relating to the Listing Fee and the Annual Fee applicable to certain ''Structured Products'', as described below.[4] This amendment to the Fee Schedule is effective November 29, 2016.

Currently, the Exchange's Fee Schedule provides for a ''Listing Fee'' for issues of ''Structured Products'' which ranges from $5,000 to $45,000 based on the number of shares outstanding.

The Exchange proposes to amend the Fee Schedule to eliminate the Listing Fee in connection with Exchange listing of certain Structured Products effective November 29, 2016, as described below. Exchange rules applicable to listing of Structured Products under NYSE Arca Equities Rules 5.2(j)(2), 5.2(j)(4) and 5.2(j)(6) provide for listing such products pursuant to Rule 19b–4(e) under the Act if they satisfy all criteria—referred to as ''generic'' listing criteria—in such rule. If an issue of such Structured Products does not satisfy all applicable generic criteria, the Commission must approve or issue a notice of effectiveness with respect to a proposed rule change filed by the Exchange pursuant to Section 19(b) of the Act prior to Exchange listing of such issue.

The Exchange proposes to eliminate the Listing Fee for the following Structured Products listed on the Exchange pursuant to Rule 19b–4(e) under the Act, and for which a proposed rule change pursuant to Section 19(b) of the Act is not required to be filed with the Commission: (i) Equity Linked Notes (listed under Rule 5.2(j)(2)); (ii) Index-Linked Exchangeable Notes (listed under Rule 5.2(j)(4)); and (iii) Index-Linked Securities (listed under Rule 5.2(j)(6)) (collectively, ''Generically-Listed Structured Products''). The Exchange believes that eliminating the Listing Fee for Generically-Listed Structured Products would help correlate the Listing Fee applicable to an issue of Generically-Listed Structured Products to the resources required to list such securities on the Exchange. The Exchange believes it is appropriate to eliminate the Listing Fee for Generically-Listed Structured Products because such products do not require a commitment of time and resources by Exchange staff to prepare and review Rule 19b–4 filings for Structured Products other than Generically-Listed Structured Products, and to communicate with issuers and the Commission staff regarding such filings. Application of a Listing Fee for Structured Products other than Generically-Listed Structured Products is appropriate because the Exchange generally incurs increased costs in connection with the listing administration process, issuer services, and consultative legal services when a proposed rule change pursuant to Section 19(b) of the Act is required to be filed with the Commission.[5]

The Exchange also proposes to amend the Exchange's Fee Schedule relating to the Annual Fee payable in connection with Exchange listing of Index-Linked Securities.[6] The issuer of a series of Index-Linked Securities, which are referred to as exchange-traded notes (or ''ETNs''), may issue a subsequent series of ETNs based on the identical reference asset (for example, stock index) as the initially-listed securities. The Exchange proposes to amend the Fee Schedule to provide that multiple series of securities listed under Rule 5.2(j)(6) that are issued by the same issuer and are based on an identical reference asset and leverage factor (*i.e.,* 1X, –1X, 2X, –2X, 3X or –3X) will receive a 30% discount off the aggregate calculated Annual Fee for such multiple series. Thus, for such series, the Exchange would aggregate the Annual Fee that would apply to the initial and subsequently issued series, and apply a 30% discount to the aggregated Annual Fee amount.

Example: An issuer issues ETN Series A based on the S&P 500 Index with a leverage factor of 2X and subsequently issues Series B based on the S&P 500 Index with a leverage factor of 2X. Series A has 20 million shares outstanding and Series B has 7 million shares outstanding. The Annual Fee, calculated separately, for Series A is $25,000 and, for Series B, $12,000. The aggregate Annual Fee for both series is $37,000. The aggregate Annual Fee would be reduced by 30%, and the Annual Fee for both series combined would be $25,900.

The Exchange believes it is appropriate to provide a reduction in the Annual Fee for related ETNs, as described above, because such reduction will facilitate the issuance of additional ETNs series, which may provide enhanced competition among ETN issuers, while providing a reduction in fees to certain issuers listing additional ETN series. The proposed reduction would apply equally to all issuers issuing additional ETN series based on the same reference asset and leverage factor. The Exchange believes that a discount, as described above, is appropriate in such cases because the Exchange would incur cost savings relating to listing review, ongoing regulatory compliance, issuer services and legal services in connection with listing of such additional related ETNs that are commensurate with the proposed reduction in Annual Fees.

[4] ''Structured Products'' are defined in Note 4 to the Fee Schedule as securities listed under Rule 5.2(j)(1) (Other Securities), 5.2(j)(2) (Equity Linked Notes); Rule 5.2(j)(4) (Index-Linked Exchangeable Notes); Rule 5.2(j)(6) (Equity Index-Linked Securities, Commodity-Linked Securities, Currency-Linked Securities, Fixed Income Index-Linked Securities, Futures-Linked Securities and Multifactor Indexed-Linked Securities (collectively, ''Index-Linked Securities'')); Rule 5.2(j)(7) (Trust Certificates); Rule 8.3 (Currency and Index Warrants); and Rule 8.400 (Paired Trust Shares).

[5] The Exchange has eliminated the Exchange Listing Fee applicable to certain Exchange Traded Products for which a proposed rule change pursuant to Section 19(b) of the Act is not required to be filed with the Commission. *See* Securities Exchange Act Release No. 78633 (August 22, 2016), 81 FR 59025 (August 26, 2016) (SR–NYSEArca–2016–114) (notice of filing and immediate effectiveness of proposed rule change amending the Exchange's Schedule of Fees and Charges to eliminate the Listing Fee in connection with Exchange listing of certain Exchange Traded Products).

[6] The Fee Schedule provides that Annual Fees for Structured Products range from $10,000 to $55,000, based on the total number of securities outstanding per listed issue.

Notwithstanding the proposed amendments to the Listing Fee and Annual Fee, as described above, the Exchange will continue to be able to fund its regulatory obligations.

2. Statutory Basis

NYSE Arca believes that the proposal is consistent with Section 6(b)[7] of the Act, in general, and Section 6(b)(4)[8] of the Act in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its issuers and other persons using its facilities. In addition, the Exchange believes the proposal is consistent with the requirement under Section 6(b)(5)[9] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed elimination of the Listing Fee for certain Generically-Listed Structured Products, as described above, is equitable and does not unfairly discriminate between issuers because it would apply uniformly to issues of Structured Products that are listed generically under Exchange rules. The Exchange believes eliminating the Listing Fee for such Structured Products, as described above, listed on the Exchange pursuant to Rule 19b–4(e) under the Act, and for which a proposed rule change pursuant to Section 19(b) of the Act is not required to be filed with the Commission, would help correlate the Listing Fee applicable to an issue of Structured Products to the resources required to list such securities on the Exchange. The Exchange believes it is appropriate to continue to charge a Listing Fee for Structured Products other than Generically-Listed Structured Products for which a proposed rule change pursuant to Section 19(b) of the Act is required to be filed because of the significant additional extensive time and legal and business resources required by Exchange staff to prepare and review such filings and to communicate with issuers and the Commission regarding such filings.

The Exchange believes it is appropriate to provide a reduction in the Annual Fee for ETNs, as described above, because such reduction will facilitate the issuance of additional ETN series, which may provide enhanced competition among ETN issuers, while providing a reduction in fees to certain issuers listing additional ETN series. The proposed reduction would apply equally to all issuers issuing additional ETNs series based on the same reference asset and leverage factor. The Exchange believes that a discount, as described above, is appropriate in such cases because the Exchange would incur cost savings relating to listing review, ongoing regulatory compliance, issuer services and legal services in connection with listing of such additional related ETNs that are commensurate with the proposed reduction in Annual Fees.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange believes the proposed rule change would promote competition because it will eliminate the Listing Fee for certain Structured Products and reduce the Annual Fee for certain ETNs and will therefore encourage issuers to develop and list additional Structured Products on the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[10] of the Act and subparagraph (f)(2) of Rule 19b–4[11] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[12] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2016–158 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NYSEArca–2016–158. 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 Web site (*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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(2).

[12] 15 U.S.C. 78s(b)(2)(B).

NYSEArca–2016–158 and should be submitted on or before January 4, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–29938 Filed 12–13–16; 8:45 am]

BILLING CODE 8011–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–32386; File No. 812–14447]

Hartford Life Insurance Company, et al; Notice of Application

December 8, 2016.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of application for an order approving the substitution of certain securities pursuant to section 26(c) of the Investment Company Act of 1940, as amended (''Act'') and an order of exemption pursuant to section 17(b) of the Act from section 17(a) of the Act.

APPLICANTS: Hartford Life Insurance Company (''Hartford Life''), Hartford Life and Annuity Insurance Company (''Hartford Life and Annuity,'' and together with Hartford Life, the ''Hartford Life Insurance Companies''); their respective separate accounts, Hartford Life Insurance Company Separate Account Three (''HL Separate Account 3''), Hartford Life and Annuity Insurance Company Separate Account Three (''HLA Separate Account 3''), Hartford Life Insurance Company Separate Account Seven (''HL Separate Account 7''), Hartford Life and Annuity Insurance Company Separate Account Seven (''HLA Separate Account 7'') (collectively, the ''Separate Accounts,'' and together with the Hartford Insurance Companies, the ''Section 26 Applicants''); HIMCO Variable Insurance Trust (the ''Trust''), Hartford Investment Management Company (''HIMCO,'' and collectively with the Section 26 Applicants and the Trust, the ''Section 17 Applicants'').

SUMMARY OF APPLICATION: The Applicants seek an order pursuant to section 26(c) of the Act, approving the substitution of shares of twenty-seven (27) investment portfolios of registered investment companies (the ''Existing Portfolios'') with shares of six (6) investment portfolios of the Trust (the ''Replacement Portfolios''), under certain variable annuity contracts (the ''Contracts''), each funded through the Separate Accounts (the ''Substitutions''). In addition, the Section 17 Applicants also seek an order pursuant to section 17(b) of the Act exempting them from section 17(a) of the Act to the extent necessary to permit them to engage in certain in-kind transactions (the ''In-Kind Transactions'') in connection with the Substitutions.

DATES: *Filing Date:* The application was filed on April 21, 2015, and amended on May 25, 2016 and August 31, 2016.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 3, 2017, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants: Hartford Life Insurance Company, Attn: Lisa Proch, Vice President, Assistant General Counsel, P.O. Box 2999, Hartford, CT 06104–2999.

FOR FURTHER INFORMATION CONTACT: Jessica Shin, Attorney-Adviser at (202) 551–5921 or David J. Marcinkus, Branch Chief, at (202) 551–6821 (Chief Counsel's Office, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm,* or by calling (202) 551–8090.

Applicants' Representations

1. Hartford Life is a stock life insurance company incorporated under the laws of the state of Connecticut. Hartford Life was engaged in the business of writing individual and group life insurance and annuity contracts until April 30, 2013, and remains authorized to do business in every state and the District of Columbia. Hartford Life is an indirect, wholly-owned subsidiary of The Hartford Financial Services Group, Inc. (''The Hartford''), a Delaware corporation whose stock is traded on the New York Stock Exchange.

2. Hartford Life and Annuity is a stock life insurance company incorporated under the laws of the state of Connecticut. Hartford Life and Annuity was engaged in the business of writing individual and group life insurance and annuity contracts until April 30, 2013, and remains authorized to do business in every state (except New York), the District of Columbia and Puerto Rico. Hartford Life and Annuity is an indirect wholly-owned subsidiary of The Hartford.

3. Hartford Life established HL Separate Account 3 and HL Separate Account 7 as segregated asset accounts under Connecticut law on June 22, 1994 and December 8, 1986, respectively. Hartford Life and Annuity established HLA Separate Account 3 and HLA Separate Account 7 as segregated asset accounts under Connecticut law on June 22, 1994 and April 1, 1999, respectively. Each of the Separate Accounts meets the definition of ''separate account,'' as defined in Section 2(a)(37) of the Act. The Separate Accounts are registered with the Commission under the Act as unit investment trusts. The assets of the Separate Accounts support the Contracts and interests in the Separate Accounts offered through such Contracts. The Separate Accounts are segmented into subaccounts, and certain of these subaccounts invest in the Existing Portfolios. The Contracts are individual and group deferred variable annuity contracts, with group participants acquiring certain ownership rights as described in the group contract or plan documents. Contract owners and participants in group contracts (each, a ''Contract owner,'' and collectively, ''Contract owners'') may allocate some or all of their Contract value to one or more subaccounts available as investment options under their respective Contracts and any rider(s).

4. By the terms of each Contract (and as set forth in the prospectuses for the Contracts), the Hartford Insurance Companies reserve the right to substitute shares of another registered investment company for the shares of any registered investment company already purchased or to be purchased in the future by the Separate Accounts.

5. The Trust is a Delaware statutory trust that was established on January 13, 2012. The Trust is registered with the

Commission as an open-end management investment company under the Act and its shares are registered under the Securities Act of 1933. The Trust is a series investment company and currently has twenty-four (24) separate portfolios (each a ''HIMCO VIT Fund,'' and collectively, the ''HIMCO VIT Funds''). Six (6) HIMCO VIT Funds comprise the Replacement Portfolios.

6. HIMCO, a Delaware corporation and a registered investment adviser, serves as investment adviser to each of the HIMCO VIT Funds pursuant to an investment advisory agreement between the Trust, on behalf of each HIMCO VIT Fund, and HIMCO. In addition, the Trust has obtained an exemptive order from the Commission (File No. 812–11684) (the ''Manager of Managers Order''). The Replacement Portfolios may rely on the the Manager of Managers Order, and the Trust's registration statement discloses and explains the existence, substance and effect of the Manager of Managers Order.[1]

7. The Section 26 Applicants propose to substitute shares of the Existing Portfolios with shares of the corresponding Replacement Portfolios, as shown in the table below. As discussed in greater detail in the application, the Section 26 Applicants believe that each Existing Portfolio has substantially similar investment objectives, principal investment strategies, and principal investment risks, and has substantially similar risk and return characteristics, as its corresponding Replacement Portfolio.

Substitution	Existing portfolio (Share class(es))	Replacement portfolio (Share class)
1	American Funds Growth-Income Fund (Class 2)	HIMCO VIT Large Cap Core Fund (Class IB).
2	Franklin Rising Dividends VIP Fund (Class 2) (Class 4).	
3	Invesco V.I. Core Equity Fund (Series I) (Series II).	
4	Lord Abbett Calibrated Dividend Growth Portfolio (Class VC).	
5	Lord Abbett Fundamental Equity Portfolio (Class VC).	
6	Lord Abbett Growth & Income Portfolio (Class VC).	
7	MFS Investors Trust Series (Initial Class) (Service Class).	
8	Oppenheimer Main Street Fund/VA (Service Shares).	
9	Pioneer Fund VCT Portfolio (Class II).	
10	AB VPS Value Portfolio (Class B)	HIMCO VIT Large Cap Value Fund (Class IB).
11	American Century VP Value Fund (Class II).	
12	American Funds Blue Chip Income and Growth Fund (Class 2).	
13	Fidelity VIP Equity-Income Portfolio (Service Class 2).	
14	Franklin Mutual Shares VIP Fund (Class 2) (Class 4).	
15	Invesco V.I. Comstock Fund (Series II).	
16	Invesco V.I. Diversified Dividend Fund (Series II).	
17	Invesco V.I. Growth and Income Fund (Series II).	
18	Invesco V.I. Value Opportunities Fund (Series I).	
19	MFS Value Series (Initial Class) (Service Class).	
20	American Funds International Fund (Class 2)	HIMCO VIT International Core Equity Fund (Class IB).
21	MFS Research International Portfolio (Initial Class).	
22	AB VPS International Value Portfolio (Class B)	HIMCO VIT International Value Equity Fund (Class IB).
23	Templeton Foreign VIP Fund (Class 2) (Class 4).	
24	American Funds Bond Fund (Class 2)	HIMCO VIT Total Return Bond Fund (Class IB).
25	MFS Total Return Bond Series (Initial Class) (Service Class).	
26	Fidelity VIP Strategic Income Portfolio (Service Class 2)	HIMCO VIT Strategic Income Bond Fund (Class IB).
27	Franklin Strategic Income VIP Fund (Class 1) (Class 2) (Class 4).	

8. The Hartford Insurance Companies state that the proposed Substitutions are intended to improve the administrative efficiency and cost-effectiveness of the Contracts, as well as to make the Contracts more attractive to existing Contract owners. Applicants state that by eliminating overlapping investment options that duplicate one another by having substantially similar investment objectives, strategies and risks, the Hartford Insurance Companies can present a more streamlined menu of investment options under the Contracts. Applicants further state that since the proposed Substitutions were designed to reduce investment-option redundancy, the diversity of available investment styles under the Contracts will not be adversely impacted. Additional information for each Existing Portfolio and the corresponding Replacement Portfolio, including investment objectives, principal investment strategies, principal risks, and fees can be found in the application.

9. Applicants state that through the proposed Substitutions, the Hartford Insurance Companies seek to replace certain investment options in the Contracts' current fund lineups with investment options that will provide Contract owners with lower expenses, while maintaining a high-quality menu of investment options. In this regard, the Section 26 Applicants believe that Contract owners with Contract value allocated to the subaccounts of the Existing Portfolios will have lower total and net annual operating expenses immediately after the proposed Substitutions than before the proposed Substitutions. Applicants also state that, for each Substitution, the combined management fee and Rule 12b–1 fee of each Replacement Portfolio is lower than that of the corresponding Existing Portfolio. The application sets forth the fees and expenses of each Existing Portfolio and its corresponding Replacement Portfolio in greater detail.

10. The Section 26 Applicants also agree that, during a period of two (2)

[1] HIMCO has agreed, as a condition of the application, that it will not change a sub-adviser, add a new sub-adviser, or otherwise rely on the Manager of Managers Order or any replacement order from the Commission with respect to any Replacement Portfolio without first obtaining shareholder approval of the change in sub-adviser, the new sub-adviser, or the Replacement Portfolio's ability to add or to replace a sub-adviser in reliance on the Manager of Managers Order or any replacement order from the Commission at a shareholder meeting, the record date for which shall be after the proposed Substitution has been effected.

years following the implementation of the proposed Substitution (the ''Substitution Date''), and for those Contracts with assets allocated to an Existing Portfolio on the Substitution Date, the Hartford Insurance Companies will reimburse, on the last business day of each fiscal quarter, the owners of those Contracts invested in the applicable Replacement Portfolio to the extent that the Replacement Portfolio's total net annual operating expenses (taking into account fee waivers and expense reimbursements) for such period exceeds, on an annualized basis, the total net annual operating expenses of the Existing Portfolio for fiscal year 2015. In addition, the Hartford Insurance Companies will not increase the Contract fees and charges that would otherwise be assessed under the terms of those Contracts for a period of at least two (2) years following the Substitution Date.

11. Applicants state that the Hartford Insurance Companies or their affiliates will pay all expenses and transaction costs of the proposed Substitutions, including legal and accounting expenses, any applicable brokerage expenses and other fees and expenses. Applicants state that no fees or charges will be assessed to the affected Contract owners to effect the proposed Substitutions. Applicants state that the proposed Substitutions will not cause the Contract fees and charges currently being paid by existing Contract owners to be greater after the Substitutions than before the Substitutions.

12. Applicants state that the Contract value of each Contract owner affected by the proposed Substitutions will not change as a result of the proposed Substitutions. Applicants state that, because the Substitutions will occur at relative net asset value, and the fees and charges under the Contracts will not change as a result of the Substitutions, the benefits offered by the guarantees under the Contracts will be the same immediately before and after the Substitutions. Applicants further state that what effect the Substitutions may have on the value of the benefits offered by the Contract guarantees would depend, among other things, on the relative future performance of each Existing Portfolio and Replacement Portfolio, which the Section 26 Applicants cannot predict. Nevertheless, the Section 26 Applicants note that at the time of the Substitutions, the Contracts will offer a comparable variety of investment options with as broad a range of risk/return characteristics.

13. At least 30 days prior to the Substitution Date, Contract owners will be notified via prospectus supplements, which will be filed with the Commission pursuant to Rule 497 under the Securities Act of 1933, that the Section 26 Applicants received or expect to receive Commission approval of the applicable proposed Substitutions and of the anticipated Substitution Date (the ''Pre-Substitution Notice''). The Pre-Substitution Notice will advise Contract owners that Contract values attributable to investments in the Existing Portfolios will be transferred to the Replacement Portfolios, without any charge that would otherwise apply and without being subject to any limitations on transfers, on the Substitution Date. The Pre-Substitution Notice also will state that, from the date of the Pre-Substitution Notice through the date thirty (30) days after the Substitutions, Contract owners may transfer Contract value from the subaccounts investing in the Existing Portfolios (before the Substitutions) or the Replacement Portfolios (after the Substitutions) to any other available investment option without charge and without imposing any transfer limitations.

14. The Section 26 Applicants will also deliver to affected Contract owners, at least thirty (30) days before the Substitution Date, a prospectus for each applicable Replacement Portfolio. In addition, within five (5) business days after the Substitution Date, Contract owners whose assets are allocated to a Replacement Portfolio as part of the proposed Substitutions will be sent a written notice (each, a ''Confirmation'') informing them that the Substitutions were carried out as previously notified. The Confirmation will also restate the information set forth in the Pre-Substitution Notice. The Confirmation will also reflect the Contract owners Contract values before and after the Substitution(s).

15. Each Substitution will be effected at the relative net asset values of the respective shares of the Replacement Portfolios in conformity with Section 22(c) of the 1940 Act and Rule 22c–1 thereunder without the imposition of any transfer or similar charges by the Section 26 Applicants. The Substitutions will be effected without change in the amount or value of any Contracts held by affected Contract owners. As such, the Section 26 Applicants believe that the procedures to be implemented are sufficient to assure that each Contract owner's cash values immediately after the Substitution will be equal to the cash value immediately before the Substitution. As of the Substitution Date, the Separate Accounts will redeem shares of the Existing Portfolios for cash or in- kind. The proceeds of such redemptions will then be used to purchase shares of the corresponding Replacement Portfolio, as each subaccount of the Separate Accounts will invest the proceeds of its redemption from the Existing Portfolios in the applicable Replacement Portfolios.

Legal Analysis

1. The Section 26 Applicants request that the Commission issue an order pursuant to section 26(c) of the Act approving the proposed Substitutions. Section 26(c) of the Act prohibits any depositor or trustee of a unit investment trust holding the security of a single issuer from substituting another security of another issuer without the approval of the Commission. Section 26(c) provides that such approval shall be granted by order of the Commission ''if the evidence establishes that [the substitution] is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of [the Act].''

2. The Section 26 Applicants submit that each of the Substitutions meet the standards set forth in section 26(c) and that, if implemented, the Substitutions would not raise any of the concerns underlying this provision. The Section 26 Applicants believe that each Replacement Portfolio and its corresponding Existing Portfolio(s) have substantially similar investment objectives, principal investment strategies and principal risks. Applicants state that, accordingly, no Contract owner will involuntarily lose his or her rider(s) as a result of any proposed Substitution. Contract owners will not incur any fees or charges as a result of the proposed Substitutions.

3. The Section 17 Applicants request that the Commission issue an order pursuant to section 17(b) of the Act exempting them from section 17(a) of the Act to the extent necessary to permit them to carry out, as part of the Substitutions, the In-Kind Transactions. Section 17(a)(1) of the Act prohibits any affiliated person of a registered investment company, or any affiliated person of such person, acting as principal, from selling any security or other property to such registered investment company. Section 17(a)(2) of the Act prohibits any of the persons described above, acting as principals, from purchasing any security or other property from such registered investment company.

4. Because the proposed Substitutions may be effected, in whole or in part, by means of in-kind redemptions and purchases, the proposed Substitutions

may be deemed to involve one or more purchases or sales of securities or property between affiliated persons. The proposed transactions may involve a transfer of portfolio securities by the Existing Portfolios to the Separate Accounts. Immediately thereafter, the Separate Accounts would purchase shares of the Replacement Portfolios with the portfolio securities received from the Existing Portfolios. Accordingly, to the extent the Separate Accounts and the Existing Portfolios, and the Separate Accounts and the Replacement Portfolios, are deemed to be affiliated persons of one another under Section 2(a)(3) of the Act, it is conceivable that this aspect of the proposed Substitutions could be viewed as being prohibited by Section 17(a). As such, the Section 17 Applicants have determined that it is prudent to seek relief from Section 17(a) in the context of this application.

5. The Section 17 Applicants maintain that the terms of the proposed In-Kind Transactions, including the consideration to be paid by each Existing Portfolio and received by each Replacement Portfolio involved, are reasonable, fair and do not involve overreaching, principally because the transactions will conform with all but one of the conditions enumerated in Rule 17a–7. The In-Kind Transactions will take place at relative net asset value in conformity with the requirements of Section 22(c) of the Act and Rule 22c–1 thereunder without the imposition of any transfer or similar charges by the Section 26 Applicants. The Substitutions will be effected without change in the amount or value of any Contract held by the affected Contract owners. The Substitutions will in no way alter the tax treatment of affected Contract owners in connection with their Contracts, and no tax liability will arise for Contract owners as a result of the Substitutions. The fees and charges under the Contracts will not increase because of the Substitutions. Even though the Separate Accounts, the Hartford Insurance Companies and the Trust may not rely on Rule 17a–7, the Section 17 Applicants believe that the Rule's conditions outline the type of safeguards that result in transactions that are fair and reasonable to registered investment company participants and preclude overreaching in connection with an investment company by its affiliated persons.

6. The Section 17 Applicants submit that the proposed in-kind purchases by the Separate Accounts are consistent with the policies of the Trust and the Replacement Portfolios, as recited in the Trust's current registration statement and reports filed under the Act. Finally, the Section 17 Applicants submit that the proposed Substitutions are consistent with the general purposes of the Act.

Applicants' Conditions

The Section 26 Applicants, and HIMCO as applicable, agree that any order granting the requested relief will be subject to the following conditions.

1. The Substitutions will not be effected unless the Section 26 Applicants determine that: (i) The Contracts allow the substitution of shares of registered open-end investment companies in the manner contemplated by this application; (ii) the Substitutions can be consummated as described in this application under applicable insurance laws; and (iii) any regulatory requirements in each jurisdiction where the Contracts are qualified for sale have been complied with to the extent necessary to complete the Substitutions.

2. The Hartford Insurance Companies will seek approval of the proposed Substitutions from any state insurance regulators whose approval may be necessary or appropriate.

3. HIMCO will not change a sub-adviser, add a new sub-adviser, or otherwise rely on the Manager of Managers Order or any replacement order from the Commission with respect to any Replacement Portfolio without first obtaining shareholder approval of the change in sub-adviser, the new sub-adviser, or the Replacement Portfolio's ability to add or to replace a sub-adviser at a shareholder meeting, the record date for which shall be after the proposed Substitution has been effected.

4. The Hartford Insurance Companies or their affiliates will pay all expenses and transaction costs of the Substitutions, including legal and accounting expenses, any applicable brokerage expenses and other fees and expenses. No fees or charges will be assessed to the affected Contract owners to effect the Substitutions. The proposed Substitutions will not cause the Contract fees and charges currently being paid by Contract owners to be greater after the proposed Substitution than before the proposed Substitution.

5. The Substitutions will be effected at the relative net asset values of the respective shares of the Replacement Portfolios in conformity with Section 22(c) of the 1940 Act and Rule 22c–1 thereunder without the imposition of any transfer or similar charges by the Section 26 Applicants. The Substitutions will be effected without change in the amount or value of any Contracts held by affected Contract owners.

6. The Substitutions will in no way alter the tax treatment of affected Contract owners in connection with their Contracts, and no tax liability will arise for Contract owners as a result of the Substitutions.

7. The obligations of the Section 26 Applicants, and the rights of the affected Contract owners, under the Contracts of affected Contract owners will not be altered in any way.

8. Affected Contract owners will be permitted to transfer Contract value from the subaccount investing in the Existing Portfolio (before Substitution Date) or the Replacement Portfolio (after the Substitution Date) to any other available investment option under the Contract without charge for a period beginning at least 30 days before the Substitution Date through at least 30 days following the Substitution Date. Contract owners with guaranteed living and/or death benefit riders, as applicable, may transfer Contract value from the subaccounts investing in the Existing Portfolios (before the Substitutions) or the Replacement Portfolios (after the Substitutions) to any other available investment option available under their respective riders without charge and without imposing any transfer limitations. Except as described in any market timing/short-term trading provisions of the relevant prospectus, the Section 26 Applicants will not exercise any rights reserved under the Contracts to impose restrictions on transfers between the subaccounts under the Contracts, including limitations on the future number of transfers, for a period beginning at least 30 days before the Substitution Date through at least 30 days following the Substitution Date.

9. All affected Contract owners will be notified, at least 30 days before the Substitution Date about: (a) The intended Substitution of Existing Portfolios with the Replacement Portfolios; (b) the intended Substitution Date; and (c) information with respect to transfers as set forth in Condition 8 above. In addition, the Section 26 Applicants will also deliver to affected Contract owners, at least thirty (30) days before the Substitution Date, a prospectus for each applicable Replacement Portfolio.

10. The Section 26 Applicants will deliver to each affected Contract owner within five (5) business days of the Substitution Date a written confirmation which will include: (a) A confirmation that the Substitutions were carried out as previously notified; (b) a restatement of the information set forth in the Pre-

Substitution Notice; and (c) values of the Contract owner's positions in the Existing Portfolio before the Substitution and the Replacement Portfolio after the Substitution.

11. For a period of two years following the Substitution Date, for those Contracts with assets allocated to the Existing Portfolio on the Substitution Date, the Hartford Insurance Companies will reimburse, on the last business day of each fiscal quarter, the Contract owners whose subaccounts invest in the applicable Replacement Portfolio to the extent that the Replacement Portfolio's net annual operating expenses (taking into account fee waivers and expense reimbursements) for such period exceeds, on an annualized basis, the net annual operating expenses of the Existing Portfolio for fiscal year 2015. In addition, the Section 26 Applicants will not increase the Contract fees and charges that would otherwise be assessed under the terms of the Contracts for a period of at least two years following the Substitution Date.

For the Commission, by the Division of Investment Management, under delegated authority.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–29934 Filed 12–13–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–32385; File No. 812–14446]

Hartford Life Insurance Company, et al; Notice of Application

December 8, 2016.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of application for an order approving the substitution of certain securities pursuant to section 26(c) of the Investment Company Act of 1940, as amended (''Act'') and an order of exemption pursuant to section 17(b) of the Act from section 17(a) of the Act.

APPLICANTS: Hartford Life Insurance Company (''Hartford Life''), Hartford Life and Annuity Insurance Company (''Hartford Life and Annuity,'' and together with Hartford Life, the ''Hartford Life Insurance Companies''); their respective separate accounts, Hartford Life Insurance Company Separate Account Three (''HL Separate Account 3''), Hartford Life and Annuity Insurance Company Separate Account Three (''HLA Separate Account 3''), Hartford Life Insurance Company Separate Account Seven (''HL Separate Account 7''), Hartford Life and Annuity Insurance Company Separate Account Seven (''HLA Separate Account 7) (collectively, the ''Separate Accounts,'' and together with the Hartford Insurance Companies, the ''Section 26 Applicants''); HIMCO Variable Insurance Trust (the ''Trust''), Hartford Investment Management Company (''HIMCO,'' and collectively with the Section 26 Applicants and the Trust, the ''Section 17 Applicants'').

SUMMARY OF APPLICATION: The Applicants seek an order pursuant to section 26(c) of the Act, approving the substitution of shares of thirty-five (35) investment portfolios of registered investment companies (the ''Existing Portfolios'') with shares of five (5) investment portfolios of the Trust (the ''Replacement Portfolios''), under certain variable annuity contracts (the ''Contracts''), each funded through the Separate Accounts (the ''Substitutions''). In addition, the Section 17 Applicants also seek an order pursuant to section 17(b) of the Act exempting them from section 17(a) of the Act to the extent necessary to permit them to engage in certain in-kind transactions (the ''In-Kind Transactions'') in connection with the Substitutions.

DATES: Filing Date:

The application was filed on April 21, 2015, and amended on May 25, 2016 and August 31, 2016.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 3, 2017, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants: Hartford Life Insurance Company, Attn: Lisa Proch, Vice President, Assistant General Counsel, P.O. Box 2999, Hartford, CT 06104–2999.

FOR FURTHER INFORMATION CONTACT: Jessica Shin, Attorney-Adviser at (202) 551–5921 or David J. Marcinkus, Branch Chief, at (202) 551–6821 (Chief Counsel's Office, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm,* or by calling (202) 551–8090.

Applicants' Representations

1. Hartford Life is a stock life insurance company incorporated under the laws of the state of Connecticut. Hartford Life was engaged in the business of writing individual and group life insurance and annuity contracts until April 30, 2013, and remains authorized to do business in every state and the District of Columbia. Hartford Life is an indirect, wholly-owned subsidiary of The Hartford Financial Services Group, Inc. (''The Hartford''), a Delaware corporation whose stock is traded on the New York Stock Exchange.

2. Hartford Life and Annuity is a stock life insurance company incorporated under the laws of the state of Connecticut. Hartford Life and Annuity was engaged in the business of writing individual and group life insurance and annuity contracts until April 30, 2013, and remains authorized to do business in every state (except New York), the District of Columbia and Puerto Rico. Hartford Life and Annuity is an indirect wholly-owned subsidiary of The Hartford.

3. Hartford Life established HL Separate Account 3 and HL Separate Account 7 as segregated asset accounts under Connecticut law on June 22, 1994 and December 8, 1986, respectively. Hartford Life and Annuity established HLA Separate Account 3 and HLA Separate Account 7 as segregated asset accounts under Connecticut law on June 22, 1994 and April 1, 1999, respectively. Each of the Separate Accounts meets the definition of ''separate account,'' as defined in Section 2(a)(37) of the Act. The Separate Accounts are registered with the Commission under the Act as unit investment trusts. The assets of the Separate Accounts support the Contracts and interests in the Separate Accounts offered through such Contracts. The Separate Accounts are segmented into subaccounts, and certain of these subaccounts invest in the Existing Portfolios. The Contracts are individual and group deferred variable

annuity contracts, with group participants acquiring certain ownership rights as described in the group contract or plan documents. Contract owners and participants in group contracts (each, a ''Contract owner,'' and collectively, ''Contract owners'') may allocate some or all of their Contract value to one or more subaccounts available as investment options under their respective Contracts and any rider(s).

4. By the terms of each Contract (and as set forth in the prospectuses for the Contracts), the Hartford Insurance Companies reserve the right to substitute shares of another registered investment company for the shares of any registered investment company already purchased or to be purchased in the future by the Separate Accounts.

5. The Trust is a Delaware statutory trust that was established on January 13, 2012. The Trust is registered with the Commission as an open-end management investment company under the Act and its shares are registered under the Securities Act of 1933. The Trust is a series investment company and currently has twenty-four (24) separate portfolios (each a ''HIMCO VIT Fund,'' and collectively, the ''HIMCO VIT Funds''). Five (5) HIMCO VIT Funds comprise the Replacement Portfolios.

6. HIMCO, a Delaware corporation and a registered investment adviser, serves as investment adviser to each of the HIMCO VIT Funds pursuant to an investment advisory agreement between the Trust, on behalf of each HIMCO VIT Fund, and HIMCO. In addition, the Trust has obtained an exemptive order from the Commission (File No. 812–11684) (the ''Manager of Managers Order''). The Replacement Portfolios may rely on the the Manager of Managers Order, and the Trust's registration statement discloses and explains the existence, substance and effect of the Manager of Managers Order.[1]

7. The Section 26 Applicants propose to substitute shares of the Existing Portfolios with shares of the corresponding Replacement Portfolios, as shown in the table below. As discussed in greater detail in the application, the Section 26 Applicants believe that each Existing Portfolio has substantially similar investment objectives, principal investment strategies, and principal investment risks, and has substantially similar risk and return characteristics, as its corresponding Replacement Portfolio.

Substitution	Existing portfolio (share class(es))	Replacement portfolio (share class)
1	American Funds Global Growth and Income Fund (Class 2)	HIMCO VIT Global Core Equity Fund (Class IB).
2	American Funds Global Growth Fund (Class 2).	
3	American Funds Global Small Capitalization Fund (Class 2).	
4	Franklin Mutual Global Discovery VIP Fund.	
	(Class 2).	
	(Class 4).	
5	MFS Global Equity Series (Initial Class).	
6	Oppenheimer Global Fund/VA (Service Shares).	
7	Templeton Growth VIP Fund.	
	(Class 2).	
	(Class 4).	
8	American Funds Growth Fund (Class 2)	HIMCO VIT Large Cap Growth Fund (Class IB).
9	Fidelity VIP Contrafund Portfolio (Service Class 2).	
10	Fidelity VIP Growth Portfolio (Service Class 2).	
11	Franklin Flex Cap Growth VIP Fund.	
	(Class 2).	
	(Class 4).	
12	Franklin Large Cap Growth VIP Fund (Class 2).	
13	Invesco V.I. American Franchise Fund.	
	(Series I).	
	(Series II).	
14	MFS Core Equity Portfolio (Initial Class).	
15	MFS Growth Series.	
	(Initial Class).	
	(Service Class).	
16	MFS Massachusetts Investors Growth Stock Portfolio.	
	(Initial Class).	
17	MFS Research Series (Initial Class).	
18	Oppenheimer Capital Appreciation Fund/VA (Service Shares).	
19	AB VPS Small/Mid Cap Value Portfolio (Class B)	HIMCO VIT Small & Mid Cap Core Fund (Class IB).
20	Fidelity VIP Mid Cap Portfolio (Service Class 2).	
21	Fidelity VIP Value Strategies Portfolio (Service Class 2).	
22	Franklin Small Cap Value VIP Fund (Class 2) (Class 4).	
23	Franklin Small-Mid Cap Growth VIP Fund (Class 2) (Class 4).	
24	Invesco V.I. American Value Fund (Series II).	
25	Invesco V.I. Mid Cap Core Equity Fund (Series I) (Series II).	
26	Invesco V.I. Small Cap Equity Fund (Series I) (Series II).	
27	MFS Mid Cap Growth Series (Initial Class).	
28	MFS New Discovery Series (Initial Class) (Service Class).	
29	Oppenheimer Main Street Small Cap Fund/VA (Service Shares).	
30	UIF Mid Cap Growth Portfolio (Class II).	
31	Franklin Income VIP Fund	HIMCO VIT Conservative Allocation Fund (Class IB).

[1] HIMCO has agreed, as a condition of the application, that it will not change a sub-adviser, add a new sub-adviser, or otherwise rely on the Manager of Managers Order or any replacement order from the Commission with respect to any Replacement Portfolio without first obtaining shareholder approval of the change in sub-adviser, the new sub-adviser, or the Replacement Portfolio's ability to add or to replace a sub-adviser in reliance on the Manager of Managers Order or any replacement order from the Commission at a shareholder meeting, the record date for which shall be after the proposed Substitution has been effected.

Substitution	Existing portfolio (share class(es))	Replacement portfolio (share class)
	(Class 2).	
	(Class 4).	
32	AB VPS Balanced Wealth Strategy Portfolio (Class B)	HIMCO VIT Moderate Allocation Fund (Class B).
33	American Funds Asset Allocation Fund (Class 2).	
34	Invesco V.I. Equity and Income Fund (Series II).	
35	MFS Total Return Series.	
	(Initial Class).	
	(Service Class).	

8. The Hartford Insurance Companies state that the proposed Substitutions are intended to improve the administrative efficiency and cost-effectiveness of the Contracts, as well as to make the Contracts more attractive to existing Contract owners. Applicants state that by eliminating overlapping investment options that duplicate one another by having substantially similar investment objectives, strategies and risks, the Hartford Insurance Companies can present a more streamlined menu of investment options under the Contracts. Applicants further state that since the proposed Substitutions were designed to reduce investment-option redundancy, the diversity of available investment styles under the Contracts will not be adversely impacted. Additional information for each Existing Portfolio and the corresponding Replacement Portfolio, including investment objectives, principal investment strategies, principal risks, and fees can be found in the application.

9. Applicants state that through the proposed Substitutions, the Hartford Insurance Companies seek to replace certain investment options in the Contracts' current fund lineups with investment options that will provide Contract owners with lower expenses, while maintaining a high-quality menu of investment options. In this regard, the Section 26 Applicants believe that Contract owners with Contract value allocated to the subaccounts of the Existing Portfolios will have lower total and net annual operating expenses immediately after the proposed Substitutions than before the proposed Substitutions. Applicants also state that, for each Substitution, the combined management fee and Rule 12b–1 fee of each Replacement Portfolio is lower than that of the corresponding Existing Portfolio. The application sets forth the fees and expenses of each Existing Portfolio and its corresponding Replacement Portfolio in greater detail.

10. The Section 26 Applicants also agree that, during a period of two (2) years following the implementation of the proposed Substitution (the ''Substitution Date''), and for those Contracts with assets allocated to an Existing Portfolio on the Substitution Date, the Hartford Insurance Companies will reimburse, on the last business day of each fiscal quarter, the owners of those Contracts invested in the applicable Replacement Portfolio to the extent that the Replacement Portfolio's total net annual operating expenses (taking into account fee waivers and expense reimbursements) for such period exceeds, on an annualized basis, the total net annual operating expenses of the Existing Portfolio for fiscal year 2015. In addition, the Hartford Insurance Companies will not increase the Contract fees and charges that would otherwise be assessed under the terms of those Contracts for a period of at least two (2) years following the Substitution Date.

11. Applicants state that the Hartford Insurance Companies or their affiliates will pay all expenses and transaction costs of the proposed Substitutions, including legal and accounting expenses, any applicable brokerage expenses and other fees and expenses. Applicants state that no fees or charges will be assessed to the affected Contract owners to effect the proposed Substitutions. Applicants state that the proposed Substitutions will not cause the Contract fees and charges currently being paid by existing Contract owners to be greater after the Substitutions than before the Substitutions.

12. Applicants state that the Contract value of each Contract owner affected by the proposed Substitutions will not change as a result of the proposed Substitutions. Applicants state that, because the Substitutions will occur at relative net asset value, and the fees and charges under the Contracts will not change as a result of the Substitutions, the benefits offered by the guarantees under the Contracts will be the same immediately before and after the Substitutions. Applicants further state that what effect the Substitutions may have on the value of the benefits offered by the Contract guarantees would depend, among other things, on the relative future performance of each Existing Portfolio and Replacement Portfolio, which the Section 26 Applicants cannot predict. Nevertheless, the Section 26 Applicants note that at the time of the Substitutions, the Contracts will offer a comparable variety of investment options with as broad a range of risk/return characteristics.

13. At least 30 days prior to the Substitution Date, Contract owners will be notified via prospectus supplements, which will be filed with the Commission pursuant to Rule 497 under the Securities Act of 1933, that the Section 26 Applicants received or expect to receive Commission approval of the applicable proposed Substitutions and of the anticipated Substitution Date (the ''Pre-Substitution Notice''). The Pre-Substitution Notice will advise Contract owners that Contract values attributable to investments in the Existing Portfolios will be transferred to the Replacement Portfolios, without any charge that would otherwise apply and without being subject to any limitations on transfers, on the Substitution Date. The Pre-Substitution Notice also will state that, from the date of the Pre-Substitution Notice through the date thirty (30) days after the Substitutions, Contract owners may transfer Contract value from the subaccounts investing in the Existing Portfolios (before the Substitutions) or the Replacement Portfolios (after the Substitutions) to any other available investment option without charge and without imposing any transfer limitations.

14. The Section 26 Applicants will also deliver to affected Contract owners, at least thirty (30) days before the Substitution Date, a prospectus for each applicable Replacement Portfolio. In addition, within five (5) business days after the Substitution Date, Contract owners whose assets are allocated to a Replacement Portfolio as part of the proposed Substitutions will be sent a written notice (each, a ''Confirmation'') informing them that the Substitutions were carried out as previously notified. The Confirmation will also restate the information set forth in the Pre-Substitution Notice. The Confirmation will also reflect the Contract owners Contract values before and after the Substitution(s).

15. Each Substitution will be effected at the relative net asset values of the respective shares of the Replacement Portfolios in conformity with Section 22(c) of the 1940 Act and Rule 22c–1 thereunder without the imposition of any transfer or similar charges by the Section 26 Applicants. The Substitutions will be effected without change in the amount or value of any Contracts held by affected Contract owners. As such, the Section 26 Applicants believe that the procedures to be implemented are sufficient to assure that each Contract owner's cash values immediately after the Substitution will be equal to the cash value immediately before the Substitution. As of the Substitution Date, the Separate Accounts will redeem shares of the Existing Portfolios for cash or in-kind. The proceeds of such redemptions will then be used to purchase shares of the corresponding Replacement Portfolio, as each subaccount of the Separate Accounts will invest the proceeds of its redemption from the Existing Portfolios in the applicable Replacement Portfolios.

Legal Analysis

1. The Section 26 Applicants request that the Commission issue an order pursuant to section 26(c) of the Act approving the proposed Substitutions. Section 26(c) of the Act prohibits any depositor or trustee of a unit investment trust holding the security of a single issuer from substituting another security of another issuer without the approval of the Commission. Section 26(c) provides that such approval shall be granted by order of the Commission ''if the evidence establishes that [the substitution] is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of [the Act].''

2. The Section 26 Applicants submit that each of the Substitutions meet the standards set forth in section 26(c) and that, if implemented, the Substitutions would not raise any of the concerns underlying this provision. The Section 26 Applicants believe that each Replacement Portfolio and its corresponding Existing Portfolio(s) have substantially similar investment objectives, principal investment strategies and principal risks. Applicants state that, accordingly, no Contract owner will involuntarily lose his or her rider(s) as a result of any proposed Substitution. Contract owners will not incur any fees or charges as a result of the proposed Substitutions.

3. The Section 17 Applicants request that the Commission issue an order pursuant to section 17(b) of the Act exempting them from section 17(a) of the Act to the extent necessary to permit them to carry out, as part of the Substitutions, the In-Kind Transactions. Section 17(a)(1) of the Act prohibits any affiliated person of a registered investment company, or any affiliated person of such person, acting as principal, from selling any security or other property to such registered investment company. Section 17(a)(2) of the Act prohibits any of the persons described above, acting as principals, from purchasing any security or other property from such registered investment company.

4. Because the proposed Substitutions may be effected, in whole or in part, by means of in-kind redemptions and purchases, the proposed Substitutions may be deemed to involve one or more purchases or sales of securities or property between affiliated persons. The proposed transactions may involve a transfer of portfolio securities by the Existing Portfolios to the Separate Accounts. Immediately thereafter, the Separate Accounts would purchase shares of the Replacement Portfolios with the portfolio securities received from the Existing Portfolios. Accordingly, to the extent the Separate Accounts and the Existing Portfolios, and the Separate Accounts and the Replacement Portfolios, are deemed to be affiliated persons of one another under Section 2(a)(3) of the Act, it is conceivable that this aspect of the proposed Substitutions could be viewed as being prohibited by Section 17(a). As such, the Section 17 Applicants have determined that it is prudent to seek relief from Section 17(a) in the context of this application.

5. The Section 17 Applicants maintain that the terms of the proposed In-Kind Transactions, including the consideration to be paid by each Existing Portfolio and received by each Replacement Portfolio involved, are reasonable, fair and do not involve overreaching, principally because the transactions will conform with all but one of the conditions enumerated in Rule 17a–7. The In-Kind Transactions will take place at relative net asset value in conformity with the requirements of Section 22(c) of the Act and Rule 22c–1 thereunder without the imposition of any transfer or similar charges by the Section 26 Applicants. The Substitutions will be effected without change in the amount or value of any Contract held by the affected Contract owners. The Substitutions will in no way alter the tax treatment of affected Contract owners in connection with their Contracts, and no tax liability will arise for Contract owners as a result of the Substitutions. The fees and charges under the Contracts will not increase because of the Substitutions. Even though the Separate Accounts, the Hartford Insurance Companies and the Trust may not rely on Rule 17a–7, the Section 17 Applicants believe that the Rule's conditions outline the type of safeguards that result in transactions that are fair and reasonable to registered investment company participants and preclude overreaching in connection with an investment company by its affiliated persons.

6. The Section 17 Applicants submit that the proposed in-kind purchases by the Separate Accounts are consistent with the policies of the Trust and the Replacement Portfolios, as recited in the Trust's current registration statement and reports filed under the Act. Finally, the Section 17 Applicants submit that the proposed Substitutions are consistent with the general purposes of the Act.

Applicants' Conditions

The Section 26 Applicants, and HIMCO as applicable, agree that any order granting the requested relief will be subject to the following conditions.

1. The Substitutions will not be effected unless the Section 26 Applicants determine that: (i) The Contracts allow the substitution of shares of registered open-end investment companies in the manner contemplated by this application; (ii) the Substitutions can be consummated as described in this application under applicable insurance laws; and (iii) any regulatory requirements in each jurisdiction where the Contracts are qualified for sale have been complied with to the extent necessary to complete the Substitutions.

2. The Hartford Insurance Companies will seek approval of the proposed Substitutions from any state insurance regulators whose approval may be necessary or appropriate.

3. HIMCO will not change a sub-adviser, add a new sub-adviser, or otherwise rely on the Manager of Managers Order or any replacement order from the Commission with respect to any Replacement Portfolio without first obtaining shareholder approval of the change in sub-adviser, the new sub-adviser, or the Replacement Portfolio's ability to add or to replace a sub-adviser at a shareholder meeting, the record date for which shall be after the proposed Substitution has been effected.

4. The Hartford Insurance Companies or their affiliates will pay all expenses and transaction costs of the Substitutions, including legal and

accounting expenses, any applicable brokerage expenses and other fees and expenses. No fees or charges will be assessed to the affected Contract owners to effect the Substitutions. The proposed Substitutions will not cause the Contract fees and charges currently being paid by Contract owners to be greater after the proposed Substitution than before the proposed Substitution.

5. The Substitutions will be effected at the relative net asset values of the respective shares of the Replacement Portfolios in conformity with Section 22(c) of the 1940 Act and Rule 22c–1 thereunder without the imposition of any transfer or similar charges by the Section 26 Applicants. The Substitutions will be effected without change in the amount or value of any Contracts held by affected Contract owners.

6. The Substitutions will in no way alter the tax treatment of affected Contract owners in connection with their Contracts, and no tax liability will arise for Contract owners as a result of the Substitutions.

7. The obligations of the Section 26 Applicants, and the rights of the affected Contract owners, under the Contracts of affected Contract owners will not be altered in any way.

8. Affected Contract owners will be permitted to transfer Contract value from the subaccount investing in the Existing Portfolio (before Substitution Date) or the Replacement Portfolio (after the Substitution Date) to any other available investment option under the Contract without charge for a period beginning at least 30 days before the Substitution Date through at least 30 days following the Substitution Date. Contract owners with guaranteed living and/or death benefit riders, as applicable, may transfer Contract value from the subaccounts investing in the Existing Portfolios (before the Substitutions) or the Replacement Portfolios (after the Substitutions) to any other available investment option available under their respective riders without charge and without imposing any transfer limitations. Except as described in any market timing/short-term trading provisions of the relevant prospectus, the Section 26 Applicants will not exercise any rights reserved under the Contracts to impose restrictions on transfers between the subaccounts under the Contracts, including limitations on the future number of transfers, for a period beginning at least 30 days before the Substitution Date through at least 30 days following the Substitution Date.

9. All affected Contract owners will be notified, at least 30 days before the Substitution Date about: (a) The intended Substitution of Existing Portfolios with the Replacement Portfolios; (b) the intended Substitution Date; and (c) information with respect to transfers as set forth in Condition 8 above. In addition, the Section 26 Applicants will also deliver to affected Contract owners, at least thirty (30) days before the Substitution Date, a prospectus for each applicable Replacement Portfolio.

10. The Section 26 Applicants will deliver to each affected Contract owner within five (5) business days of the Substitution Date a written confirmation which will include: (a) A confirmation that the Substitutions were carried out as previously notified; (b) a restatement of the information set forth in the Pre-Substitution Notice; and (c) values of the Contract owner's positions in the Existing Portfolio before the Substitution and the Replacement Portfolio after the Substitution.

11. For a period of two years following the Substitution Date, for those Contracts with assets allocated to the Existing Portfolio on the Substitution Date, the Hartford Insurance Companies will reimburse, on the last business day of each fiscal quarter, the Contract owners whose subaccounts invest in the applicable Replacement Portfolio to the extent that the Replacement Portfolio's net annual operating expenses (taking into account fee waivers and expense reimbursements) for such period exceeds, on an annualized basis, the net annual operating expenses of the Existing Portfolio for fiscal year 2015. In addition, the Section 26 Applicants will not increase the Contract fees and charges that would otherwise be assessed under the terms of the Contracts for a period of at least two years following the Substitution Date.

For the Commission, by the Division of Investment Management, under delegated authority.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–29933 Filed 12–13–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79510; File No. SR–NYSEMKT–2016–58]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Designation of a Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendments No. 1 and 2 Thereto, Relating to Amendments to NYSE MKT Rules 1600 et seq. and the Listing Rules Applicable to the Shares of the Nuveen Diversified Commodity Fund and the Nuveen Long/Short Commodity Total Return Fund

December 8, 2016.

On May 24, 2016, NYSE MKT LLC (''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to among other things, amend NYSE MKT Rules 1600 *et seq.* and to amend the listing rules applicable to the shares of the Nuveen Diversified Commodity Fund and the Nuveen Long/Short Commodity Total Return Fund, which the Exchange currently lists and trades. The proposed rule change was published for comment in the **Federal Register** on June 13, 2016.[3]

On July 28, 2016, 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] On September 2, 2016, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed.[6] On September 9, 2016, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act,[7] to determine whether to approve or disapprove the proposed rule change, as modified by

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 78000 (June 7, 2016), 81 FR 38232.

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 78432, 81 FR 51248 (August 3, 2016). The Commission designated September 9, 2016, as the date by which the Commission would either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[6] Amendment No. 1 is available at *https://www.sec.gov/comments/sr-nysemkt-201658/nysemkt201658-2.pdf.*

[7] 15 U.S.C. 78s(b)(2)(B).

Amendment No. 1.[8] On November 10, 2016, the Exchange filed Amendment No. 2 to the proposed rule change, which replaced and superseded the proposed rule change as modified by Amendment No. 1 thereto its entirety.[9] The Commission has received two comments on the proposal.[10]

Section 19(b)(2) of the Act[11] provides that, after initiating disapproval proceedings, the Commission shall issue an order approving or disapproving the proposed rule change not later than 180 days after the date of publication of notice of filing of the proposed rule change. The Commission may extend the period for issuing an order approving or disapproving the proposed rule change, however, by not more than 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination. December 10, 2016, and February 8, 2017, are 180 days and 240 days, respectively, from June 13, 2016, the date that the proposed rule change was published for notice and comment in the **Federal Register.**

The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the proposed rule change so that it has sufficient time to consider this proposed rule change, as modified by Amendments No. 1 and 2, thereto, and the comments received.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[12] designates February 8, 2017, as the date by which the Commission shall either approve or disapprove the proposed rule change, as modified by Amendments No. 1 and 2, thereto (File Number SR–NYSEMKT–2016–58).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–29940 Filed 12–13–16; 8:45 am]

BILLING CODE 8011–01–P

[8] *See* Securities Exchange Act Release No. 78804 (September 9, 2016), 81 FR 63543 (September 15, 2016) (''Order Instituting Proceedings'').

[9] Amendment No. 2 is available at *https://www.sec.gov/comments/sr-nysemkt-2016-58/nysemkt201658-4.pdf.*

[10] *See* letter dated July 4, 2016, to Division of Trading and Markets, Commission (''Anonymous Letter''); and letter from Michael Szkodzinski, Associate General Counsel, Weiss Asset Management LP, to Brent J. Fields, Secretary, Commission, dated October 6, 2016. The comments regarding the proposed rule change are available at: *https://www.sec.gov/comments/sr-nysemkt-2016-58/nysemkt201658.shtml.*

[11] 15 U.S.C. 78s(b)(2).

[12] *Id.*

[13] 17 CFR 200.30–3(a)(57).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #14999 and #15000]

Pennsylvania Disaster #PA–00077

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the Commonwealth of PENNSYLVANIA (FEMA–4292–DR), dated 12/02/2016.

Incident: Severe Storms and Flooding.

Incident Period: 10/20/2016 through 10/21/2016.

Effective Date: 12/02/2016.

Physical Loan Application Deadline Date: 01/31/2017.

Economic Injury (EIDL) Loan Application Deadline Date: 09/05/2017.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 12/02/2016, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Bradford, Centre, Lycoming, Sullivan.

The Interest Rates are:

	Percent
For Physical Damage:	
Non–Profit Organizations with Credit Available Elsewhere ...	2.625
Non–Profit Organizations without Credit Available Elsewhere	2.625
For Economic Injury:	
Non–Profit Organizations without Credit Available Elsewhere	2.625

The number assigned to this disaster for physical damage is 14999B and for economic injury is 15000B (Catalog of Federal Domestic Assistance Number 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2016–29928 Filed 12–13–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60-day notice and request for comments.

SUMMARY: The Small Business Administration (SBA) intends to request approval, from the Office of Management and Budget (OMB) for the collection of information described in the **SUPPLEMENTARY INFORMATION** section.

DATES: Submit comments on or before February 13, 2017.

ADDRESSES: Send all comments to Brenda Fernandez, Program Analyst, Office of Government Contracting, Small Business Administration, 409 3rd Street, 7th Floor, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Brenda Fernandez, Analyst, (202) 205–7337, *Brenda.Fernandez@sba.gov,* or Curtis B. Rich, Management Analyst, (202)-205–7030, *curtis.rich@sba.gov.*

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act (PRA) of 1995, 44 U.S.C Chapter 35 requires federal agencies to publish a notice in the **Federal Register** concerning each proposed collection of information before submission to OMB, and to allow 60 days for public comment in response to the notice. This notice complies with that requirement.

This form is used by SBA Government Contracting Area Office for size protest and size determinations, and program offices to assist in determining eligibility for small business programs.

Title: Information for Small Business Size Determination

Description of Respondents: Size Standards Determination requirements for Small Business Eligible Companies.

SBA Form No: 355.

Total Estimated Annual Responses: 575.

Total Estimated Annual Hour Burden: 2,300.

Curtis Rich,

Management Analyst.

[FR Doc. 2016–29923 Filed 12–13–16; 8:45 am]

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DEPARTMENT OF STATE

[Public Notice: 9816]

Notice of Public Meeting

The Department of State will conduct an open meeting at 9:00am on Thursday, January 19, 2017, in room 7M15–01 of the Douglas A. Munro Coast Guard Headquarters Building at St. Elizabeth's, 2703 Martin Luther King Jr. Avenue SE., Washington, DC 20593. The primary purpose of the meeting is to prepare for the Fourth session of the International Maritime Organization's (IMO) Sub-Committee on Ship Design and Construction to be held at the IMO headquarters, London, United Kingdom, February 13–17, 2017.

The agenda items to be considered include:

—Adoption of the agenda
—Decisions of other bodies
—Amendments to SOLAS regulations II–1/6 and II–1/8–1 (5.2.1.13)
—Computerized stability support for the master in case of flooding for existing passenger ships (5.2.1.7)
—Finalization of second generation intact stability criteria (5.2.1.12)
—Amendments to SOLAS and FSS Code to make evacuation analysis mandatory for new passenger ships and review of the Recommendation on evacuation analysis for new and existing passenger ships (5.1.1.3)
—Revision of section 3 of the Guidelines for damage control plans and information to the master (MSC.1/Circ.1245) for passenger ships (5.2.1.6)
—Mandatory instrument and/or provisions addressing safety standards for the carriage of more than 12 industrial personnel on board vessels engaged on international voyages (5.2.1.4)
—Amendments to the 2011 ESP Code (2.0.1.1)
—Unified interpretation to provisions of IMO safety, security, and environment-related Conventions (1.1.2.3)
—Revised SOLAS regulation II–1/3–8 and associated guidelines (MSC.1/Circ.1175) and new guidelines for safe mooring operations for all ships (5.2.1.1)
—Guidelines for use of Fibre Reinforced Plastic (FRP) within ship structures (5.2.1.21)
—Biennial status report and provisional agenda for SDC 5
—Election of Chairman and Vice-Chairman for 2018
—Any other business
—Report to the Maritime Safety Committee

Members of the public may attend this meeting up to the seating capacity of the room. Upon request to the meeting coordinator, members of the public may also participate via teleconference. To facilitate the building security process, and to request reasonable accommodation, those who plan to attend should contact the meeting coordinator, LT Joshua Kapusta, by email at *Joshua.A.Kapusta@uscg.mil,* or by phone at (202) 372–1428, or in writing at 2703 Martin Luther King Jr. Ave. SE., Stop 7509, Washington DC 20593–7509 not later than January 12, 2017. Requests made after January 12, 2017 might not be able to be accommodated. Please note that due to security considerations, two valid, government issued photo identifications must be presented to gain entrance to the Coast Guard Headquarters building. The building is accessible by taxi, public transportation, and privately owned conveyance (upon request).

In the case of inclement weather where the Federal Government is closed or delayed, a public meeting may be conducted virtually by calling (202) 475–4000 or 1–855–475–2447, Participant code: 887 809 72. The meeting coordinator will confirm whether the virtual public meeting will be utilized by posting an announcement at: *www.uscg.mil/imo.* Members of the public can find out whether the Federal Government is delayed or closed by visiting *www.opm.gov/status/.* Additional information regarding this and other IMO public meetings may be found at: *www.uscg.mil/imo.*

Dated: December 7, 2016.

Jonathan W. Burby,

Coast Guard Liaison Officer, Office of Ocean and Polar Affairs, Department of State.

[FR Doc. 2016–29943 Filed 12–13–16; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Public Notice: 9817]

Notice of Public Meeting

The Department of State will conduct an open meeting at 9:00am on Wednesday, January 11, 2017, in room 7K15–01 of the Douglas A. Munro Coast Guard Headquarters Building at St. Elizabeth's, 2703 Martin Luther King Jr. Avenue SE., Washington, DC 20593. The primary purpose of the meeting is to prepare for the fourth session of the International Maritime Organization's (IMO) Sub-Committee on Pollution Prevention and Response (PPR 4) to be held at the IMO Headquarters, United Kingdom, on January 16–20, 2017. The agenda items to be considered include:

—Decisions of other IMO bodies
—Safety and pollution hazards of chemicals and preparation of consequential amendments to the IBC Code
—Review of MARPOL Annex II requirements that have an impact on cargo residues and tank washings of high viscosity and persistent floating products
—Code for the transport and handling of limited amounts of hazardous and noxious liquid substances in bulk on offshore support vessels
—Revised guidance on ballast water sampling and analysis
—Review of the guidelines for approval of ballast water management systems
—Production of a manual entitled ''Ballast Water Management—How to do it''
—Consideration of the impact on the Arctic of emissions of Black Carbon from international shipping
—Standards for shipboard gasification of waste systems and associated amendments to regulation 16 of MARPOL Annex VI
—Guidelines for the discharge of exhaust gas recirculation bleed-off water
—Improved and new technologies approved for ballast water management systems and reduction of atmospheric pollution
—Updated IMO Dispersant Guidelines
—Updated OPRC Model training courses
—Unified interpretation to provisions of IMO environment-related Conventions
—Use of electronic record books
—Revision of the 2011 SCR Guidelines

Members of the public may attend this meeting up to the seating capacity of the room. Upon request to the meeting coordinator, members of the public may also participate via teleconference. To facilitate the building security process, and to request reasonable accommodation, those who plan to attend should contact the meeting coordinator, Mr. Patrick Keffler, by email at *Patrcik.A.Keffler@uscg.mil,* by phone at (202) 372–1424, or in writing at 2703 Martin Luther King Jr. Ave. SE., Stop 7509, Washington DC 20593–7509, not later than January 4, 2017. Requests made after January 4, 2017 might not be able to be accommodated. Please note that due to security considerations, two valid, government issued photo identifications must be presented to gain entrance to the Coast Guard Headquarters building. The building is accessible by taxi,

public transportation, and privately owned conveyance (upon request). In the case of inclement weather where the Federal Government is closed or delayed, a public meeting may be conducted virtually by calling (202) 475–4000 or 1–855–475–2447, Participant code: 887 809 72. The meeting coordinator will confirm whether the virtual public meeting will be utilized by posting an announcement at: *www.uscg.mil/imo.* Members of the public can find out whether the Federal Government is delayed or closed by visiting *www.opm.gov/status/.* Additional information regarding this and other IMO public meetings may be found at: *www.uscg.mil/imo.*

Dated: December 7, 2016.

Jonathan W. Burby,

Coast Guard Liaison Officer, Office of Ocean and Polar Affairs, Department of State.

[FR Doc. 2016–29942 Filed 12–13–16; 8:45 am]

BILLING CODE 4710–09–P

SURFACE TRANSPORTATION BOARD

[Docket No. EP 526 (Sub–No. 8)]

Notice of Railroad-Shipper Transportation Advisory Council Vacancies

AGENCY: Surface Transportation Board (Board).

ACTION: Notice of vacancies on the Railroad-Shipper Transportation Advisory Council (RSTAC) and solicitation of nominations.

SUMMARY: The Board hereby gives notice of vacancies on RSTAC for (1) a representative of a small shipper; and (2) a representative for a Class I railroad. The Board is soliciting suggestions for candidates to fill these vacancies.

DATES: Nominations are due on January 9, 2017.

ADDRESSES: Suggestions may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E–FILING link on the Board's Web site, at *http://www.stb.gov.* Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: Docket No. EP 526 (Sub-No. 8), 395 E Street SW., Washington, DC 20423–0001 (if sending via express company or private courier, please use zip code 20024). Please note that submissions will be available to the public at the Board's offices and posted on the Board's Web site under Docket No. EP 526 (Sub-No. 8).

FOR FURTHER INFORMATION, CONTACT: Katherine Bourdon at 202–245–0285. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The Board, created in 1996 to take over many of the functions previously performed by the Interstate Commerce Commission, exercises broad authority over transportation by rail carriers, including regulation of railroad rates and service (49 U.S.C. 10701–47, 11101–24), as well as the construction, acquisition, operation, and abandonment of rail lines (49 U.S.C. 10901–07) and railroad line sales, consolidations, mergers, and common control arrangements (49 U.S.C. 10902, 11323–27).

RSTAC was established upon the enactment of the ICC Termination Act of 1995 (ICCTA), on December 29, 1995, to advise the Board's Chairman; the Secretary of Transportation; the Committee on Commerce, Science, and Transportation of the Senate; and the Committee on Transportation and Infrastructure of the House of Representatives with respect to rail transportation policy issues RSTAC considers significant. RSTAC focuses on issues of importance to small shippers and small railroads, including car supply, rates, competition, and procedures for addressing claims. ICCTA directs RSTAC to develop private-sector mechanisms to prevent, or identify and address, obstacles to the most effective and efficient transportation system practicable. The Secretary of Transportation and the members of the Board cooperate with RSTAC in providing research, technical, and other reasonable support. RSTAC also prepares an annual report concerning its activities and recommendations on whatever regulatory or legislative relief it considers appropriate. RSTAC is not subject to the Federal Advisory Committee Act.

RSTAC currently consists of 19 members. Of this number, 15 members are appointed by the Chairman of the Board, and the remaining four members are comprised of the Secretary of Transportation and the Members of the Board, who serve as *ex officio,* nonvoting members.[1] Of the 15 members, nine members are voting members and are appointed from senior executive officers of organizations engaged in the railroad and rail shipping industries. At least four of the voting members must be representatives of small shippers as determined by the Chairman, and at least four of the voting members must be representatives of Class II or III railroads. The remaining six members to be appointed—three representing Class I railroads and three representing large shipper organizations—serve in a nonvoting, advisory capacity, but are entitled to participate in RSTAC deliberations.

RSTAC is required by statute to meet at least semi-annually. In recent years, RSTAC has met four times a year. Meetings are generally held at the Board's headquarters in Washington, DC, although some are held in other locations.

RSTAC members receive no compensation for their services and are required to provide for the expenses incidental to their service, including travel expenses, as the Board cannot provide for these expenses. RSTAC may solicit and use private funding for its activities, again subject to certain restrictions in ICCTA. RSTAC members currently have elected to submit annual dues to pay for RSTAC expenses.

RSTAC members must be citizens of the United States and represent as broadly as practicable the various segments of the railroad and rail shipper industries. They may not be full-time employees of the United States. According to revised guidance issued by the Office of Management and Budget, it is permissible for federally registered lobbyists to serve on advisory committees, such as RSTAC, as long as they do so in a representative capacity, rather than an individual capacity. *See Revised Guidance on Appointment of Lobbyists to Fed. Advisory Comms., Bds., & Commn's.,* 79 FR 47,482 (Aug. 13, 2014). Members of RSTAC are appointed to serve in a representative capacity.

RSTAC members are appointed for three-year terms. A member may serve after the expiration of his or her term until a successor has taken office. No member will be eligible to serve in excess of two consecutive terms.

Due to the expiration of two RSTAC members' second terms, vacancies exist for a small shipper representative and a Class I railroad representative. Upon appointment by the Chairman, the new representatives will serve for three years and may be eligible to serve a second three-year term following the end of their first terms.

Suggestions for candidates to fill these vacancies should be submitted in letter form, identify the name of the

[1] The Surface Transportation Board Reauthorization Act of 2015, Public Law 114–110 (2015), increased the number of Board Members from three to five. Once additional Board Members are appointed, they will also serve as RSTAC *ex officio,* nonvoting members.

candidate, provide a summary of why the candidate is qualified to serve on RSTAC, and contain a representation that the candidate is willing to serve as a member of RSTAC effective immediately upon appointment. RSTAC candidate suggestions should be filed with the Board by January 9, 2017. Members selected to serve on RSTAC are chosen at the discretion of the Board's Chairman. Please note that submissions will be available to the public at the Board's offices and posted on the Board's Web site under Docket No. EP 526 (Sub-No. 8).

Authority: 49 U.S.C. 1325.

Decided: December 8, 2016.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2016–29974 Filed 12–13–16; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Helicopter Air Ambulance, Commercial Helicopter, and Part 91 Helicopter Operations

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew a previously approved information collection. On February 21, 2014, the FAA published a final rule entitled, ''Helicopter Air Start Printed Page 58673 Ambulance, Commercial Helicopter, and part 91 Helicopter Operations'', to address helicopter air ambulance operations and all commercial helicopter operations conducted under part 135. The FAA also established new weather minimums for helicopters operating under part 91 in Class G airspace.

DATES: Written comments should be submitted by February 13, 2017.

ADDRESSES: Send comments to the FAA at the following address: Ronda Thompson, Room 441, Federal Aviation Administration, ASP–110, 950 L'Enfant Plaza SW., Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Ronda Thompson by email at: *Ronda.Thompson@faa.gov.*

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized 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.

OMB Control Number: 2120–0756.

Title: Helicopter Air Ambulance, Commercial Helicopter, and Part 91 Helicopter Operations.

Form Numbers: None.

Type of Review: Renewal of an information collection.

Background: The final rule, ''Helicopter Air Start Printed Page 58673 Ambulance, Commercial Helicopter, and part 91 Helicopter Operations'', addressed helicopter air ambulance operations and all commercial helicopter operations conducted under part 135. The FAA also established new weather minimums for helicopters operating under part 91 in Class G airspace. The final rule also added § 135.613 to Title 14, Code of Federal Regulations. Section 135.613, Approach/departure IFR transitions, describes the required weather minimums to transition into and out of the IFR environment, aiding in the transition from the minimum descent altitude on an instrument approach procedure, to the point of intended landing.

Respondents: Approximately 1,791 operators.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 81 hours.

Estimated Total Annual Burden: 145,404 hours.

Issued in Washington, DC, on December 8, 2016.

Ronda L. Thompson,

FAA Information Collection Clearance Officer, Performance, Policy, and Records Management Branch, ASP–110.

[FR Doc. 2016–29996 Filed 12–13–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Aircraft Registration

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew a previously approved information collection. The information collected is used by the FAA to register aircraft or hold an aircraft in trust. The information required to register an prove ownership of an aircraft is required by any person wishing to register an aircraft.

DATES: Written comments should be submitted by February 13, 2017.

ADDRESSES: Send comments to the FAA at the following address: Ronda Thompson, Room 441, Federal Aviation Administration, ASP–110, 950 L'Enfant Plaza SW., Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Ronda Thompson by email at: *Ronda.Thompson@faa.gov.*

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized 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.

OMB Control Number: 2120–0042.

Title: Aircraft Registration.

Form Numbers: FAA Form 7480–1.

Type of Review: Renewal of an information collection.

Background: Public Law 103–272 states that all aircraft must be registered before they may be flown. It sets forth registration eligibility requirements and provides for application for registration as well as suspension and/or revocation of registration. The information collected is used by the FAA to register an aircraft or hold an aircraft in trust.

The information requested is required to register and prove ownership.

Respondents: Approximately 146,757 registrants.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 32 minutes.

Estimated Total Annual Burden: 103,982 hours.

Issued in Washington, DC, on December 8, 2016.

Ronda L. Thompson,

FAA Information Collection Clearance Officer, Performance, Policy, and Records Management Branch, ASP–110.

[FR Doc. 2016–30011 Filed 12–13–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Notice of Landing Area Proposal

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew a previously approved information collection. FAA Form 7480–1, Notice of Landing Area Proposal, is used to collect information about any construction, alteration, or change to the status or use of an airport.

DATES: Written comments should be submitted by February 13, 2017.

ADDRESSES: Send comments to the FAA at the following address: Ronda Thompson, Room 441, Federal Aviation Administration, ASP–110, 950 L'Enfant Plaza SW., Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Ronda Thompson by email at: *Ronda.Thompson@faa.gov.*

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized 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.

OMB Control Number: 2120–0036.

Title: Notice of Landing Area Proposal.

Form Numbers: FAA Form 7480–1.

Type of Review: Renewal of an information collection.

Background: FAR Part 157 requires that each person who intends to construct deactivate, or change the status of an airport, runway, or taxiway must notify the FAA of such activity. The information collected provides the basis for determining the effect the proposed action would have on existing airports and on the safe and efficient use of airspace by aircraft, the effects on existing airspace or contemplated traffic patterns of neighboring airports, the effects on the existing airspace structure and projected programs of the FAA, and the effects that existing or proposed manmade objects (on file with the FAA) and natural objects within the affected area would have on the airport proposal.

Respondents: Approximately 1500 applicants.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 45 minutes.

Estimated Total Annual Burden: 1125 hours.

Issued in Washington, DC, on December 8, 2016.

Ronda L Thompson,

FAA Information Collection Clearance Officer, Performance, Policy, and Records Management Branch, ASP–110.

[FR Doc. 2016–30012 Filed 12–13–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Aging Aircraft Program (Widespread Fatigue Damage)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew a previously approved information collection. The ''Aging Aircraft Program (Widespread Fatigue Damage)'' final rule amended FAA regulation pertaining to certification and operation of transport category airplanes to preclude widespread fatigue damage in those airplanes.

DATES: Written comments should be submitted by February 13, 2017.

ADDRESSES: Send comments to the FAA at the following address: Ronda Thompson, Room 441, Federal Aviation Administration, ASP–110, 950 L'Enfant Plaza SW., Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Ronda Thompson by email at: *Ronda.Thompson@faa.gov.*

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized 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.

OMB Control Number: 2120–0743.

Title: Aging Aircraft Program (Widespread Fatigue Damage).

Form Numbers:

Type of Review: Renewal of an information collection.

Background: The rule requires that type certificate and supplemental type certificate holders use documentation to demonstrate to their FAA Oversight Office that they have complied with the rule by establishing limits of validity of the engineering data that supports the maintenance program (LOVs). Operators would submit the LOV to their Principal Maintenance Inspectors to demonstrate that they are compliant with the rule.

Respondents: Approximately 30 operators.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 20 hours.

Estimated Total Annual Burden: 167 hours.

Issued in Washington, DC, on December 8, 2016.

Ronda L. Thompson,

FAA Information Collection Clearance Officer, Performance, Policy, and Records Management Branch, ASP–110.

[FR Doc. 2016–30007 Filed 12–13–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Automatic Dependent Surveillance Broadcast (ADS–B) Out Performance Requirements To Support Air Traffic Control (ATC) Service

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew a previously approved information collection. The final rule titles ''Automatic Dependent Surveillance Broadcast (ADS–B) Equipage Mandate to Support Air Traffic Control Service'', requires performance requirements for certain avionics equipment on aircraft operating in specified classes of airspace within the United States national Airspace System. The rule facilitates the use of ADS–B for aircraft surveillance by FAA air traffic controllers to accommodate the expected increase in demand for air transportation.

DATES: Written comments should be submitted by February 13, 2017.

ADDRESSES: Send comments to the FAA at the following address: Ronda Thompson, Room 441, Federal Aviation Administration, ASP–110, 950 L'Enfant Plaza SW., Washington, DC 20024.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized 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.

FOR FURTHER INFORMATION CONTACT: Ronda Thompson by email at: *Ronda.Thompson@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0728.

Title: Automatic Dependent Surveillance Broadcast (ADS–B) Out Performance Requirements to Support Air Traffic Control (ATC) Service.

Form Numbers:

Type of Review: Renewal of an information collection.

Background: 14 CFR part 91 includes requirements for certain avionics equipment avionics equipment on aircraft operating in specified classes of airspace within the United States National Airspace System (NAS) This collection supports the information needs of the FAA by requiring avionics equipment that continuously transmits aircraft information to be received by the FAA, via automation, for use in providing air traffic surveillance services. This information is collected electronically without input from the human operator. Old information is overwritten on a continuous basis. A 1-hour burden is submitted as a placeholder to allow entry in OMB's burden inventory.

Respondents: Approximately 64,339 operators.

Frequency: Information is collected automatically.

Estimated Average Burden per Response: 1 hour (placeholder).

Estimated Total Annual Burden: 1 hour (placeholder).

Issued in Washington, DC, on December 8, 2016.

Ronda L Thompson,

FAA Information Collection Clearance Officer, Performance, Policy, and Records Management Branch, ASP–110.

[FR Doc. 2016–29993 Filed 12–13–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Commercial Aviation Safety Team Safety Enhancements

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew a previously approved information collection. The FAA is collecting safety-related data regarding the voluntary implementation of Commercial Aviation Safety Team (CAST) safety enhancements (SEs) from certificate holders conducting operations under 14 CFR part 121 and parts 121/135.

DATES: Written comments should be submitted by February 13, 2017.

ADDRESSES: Send comments to the FAA at the following address: Ronda Thompson, Room 441, Federal Aviation Administration, ASP–110, 950 L'Enfant Plaza SW., Washington, DC 20024.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized 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.

FOR FURTHER INFORMATION CONTACT: Ronda Thompson by email at: *Ronda.Thompson@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0757.

Title: Commercial Aviation Safety Team Safety Enhancements.

Form Numbers: None.

Type of Review: Renewal of an information collection.

Background: The FAA is collecting safety-related data regarding the voluntary implementation of Commercial Aviation Safety Team safety enhancements from certificate holders conducting operations under 14 CFR part 121 and parts 121/135. Certificate-holder participation in this data collection will be voluntary and is not required by regulation. As CAST SEs are finalized, the FAA will determine the details of individual information collections in consultation with CAST and certificate holders.

Respondents: Approximately 100 respondents.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 40 minutes.

Estimated Total Annual Burden: 1333.33 hours.

Issued in Washington, DC, on December 8, 2016.

Ronda L Thompson,

FAA Information Collection Clearance Officer, Performance, Policy, and Records Management Branch, ASP–110.

[FR Doc. 2016–29995 Filed 12–13–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Aviation Research Grants Program

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew a previously approved information collection. The FAA Aviation Research and Development Grants Program establishes uniform policies and procedures for the award and administration of research grants to colleges, universities, not for profit organizations, and profit organizations for security research. The collection of data is required from prospective grantees in order to adhere to applicable statutes and OMB circulars.

DATES: Written comments should be submitted by February 13, 2017.

ADDRESSES: Send comments to the FAA at the following address: Ronda Thompson, Room 441, Federal Aviation Administration, ASP–110, 950 L'Enfant Plaza SW., Washington, DC 20024.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized 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.

FOR FURTHER INFORMATION CONTACT: Ronda Thompson by email at: *Ronda.Thompson@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0559.

Title: Aviation Research Grants Program.

Form Numbers: SF–3881, 9550–5, SF–425, SF–424, SF–270.

Type of Review: Renewal of an information collection.

Background: This program implements OMB Circular A–110, Public Law 101–508, Section 9205 and 9208 and Public Law 101–604, Section 107(d). Information is required from grantees for the purpose of grant administration and review in accordance with applicable OMB circulars. The information is collected through a solicitation that has been published by the FAA. Prospective grantees respond to the solicitation using a proposal format outlined in the solicitation in adherence to applicable FAA directives, statutes, and OMB circulars.

Respondents: Approximately 100 grantees.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 6.5 hours.

Estimated Total Annual Burden: 650 hours.

Issued in Washington, DC on December 8, 2016.

Ronda L. Thompson,

FAA Information Collection Clearance Officer, Performance, Policy, and Records Management Branch, ASP–110.

[FR Doc. 2016–30010 Filed 12–13–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Sanctions Actions Pursuant to Executive Order 13224

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 2 individuals and 1 entity whose property and interests in property are blocked pursuant to Executive Order 13224 of September 23, 2001, ''Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism.''

DATES: OFAC's actions described in this notice were effective on December 7, 2016.

FOR FURTHER INFORMATION CONTACT: Associate Director for Global Targeting, tel.: 202–622–2420, Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490, Assistant Director for Licensing, tel.: 202–622–2480, Office of Foreign Assets Control, or Chief Counsel (Foreign Assets Control), tel.: 202–622–2410, Office of the General Counsel, Department of the Treasury (not toll free numbers).

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available from OFAC's Web site (*www.treas.gov/ofac*).

Notice of OFAC Actions

On December 7, 2016, OFAC blocked the property and interests in property of the following 2 individuals and 1 entity pursuant to E.O. 13224, ''Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism'':

Individuals

1. SADIQ AL-AHDAL, Abdallah Faysal (a.k.a. AL-AHDAL, Abdallah Bin Faisal; a.k.a. AL-AHDAL, Abdallah Bin Faysal; a.k.a. AL-AHDAL, Abdallah Faisal; a.k.a. AL-AHDAL, Abdallah Faysal; a.k.a. AL-AHDAL, Abdullah; a.k.a. AL-AHDAL, Abdullah Bin Faisal; a.k.a. AL-AHDAL, Abdullah Bin Faysal; a.k.a. AL-AHDAL, Abdullah Faisal; a.k.a. AL-AHDAL, Abdullah Faysal; a.k.a. AL-AHDEL, Abdullah; a.k.a. AL-ALAHADIL, Abdullah), Ash Shihr District, Hadramawt Governorate, Yemen; DOB Jan 1959; citizen Yemen (individual) [SDGT] (Linked To: AL-QA'IDA IN THE ARABIAN PENINSULA).

2. ALI ALI ABKAR, Al-Hasan (a.k.a. ALI ABKAR, Al-Hassan; a.k.a. ALI ABKAR, Hasan; a.k.a. ALI ALI ABKAR, Al Hassan; a.k.a. ALI ALI ABKAR, Alihasan; a.k.a. BIN ALI ABKAR, Hassan; a.k.a. BIN-ALI ABKAR, Al-Hasan), Al-Ghail district, Al-Jawf Governorate, Yemen; DOB 05 Jun 1962; POB Yemen; citizen Yemen; Passport 02214513 (Yemen) (individual) [SDGT] (Linked To: AL-QA'IDA IN THE ARABIAN PENINSULA).

Entity

1. RAHMAH CHARITABLE ORGANIZATION (a.k.a. AL-RAHMA CHARITY FOUNDATION; a.k.a. AL-RAHMA FOUNDATION; a.k.a. AL-RAHMAH CHARITABLE ASSOCIATION; a.k.a. AL-RAHMAH CHARITY FOUNDATION; a.k.a. AL-RAHMAH CHARITY ORGANIZATION; a.k.a. AL-RAHMAH FOUNDATION; a.k.a. AL-RAHMAH ORGANIZATION; a.k.a. AL-RAHMAH WELFARE ORGANIZATION; a.k.a. AL-RAHMAN WELFARE ORGANIZATION; a.k.a. AR RAHMAH CHARITY FOUNDATION; a.k.a. AR RAHMAH FOUNDATION; a.k.a. EL RAHMAH CHARITY FOUNDATION; a.k.a. EL RAHMAH FOUNDATION; a.k.a. MUASSASSAT AL-RAHMAH; a.k.a. MUASSASSAT AL-RAHMAH AL-KHAYRIYYAH; a.k.a. RAHMA CHARITABLE ORGANIZATION; a.k.a. RAHMA

WELFARE ASSOCIATION; a.k.a. RAHMA WELFARE FOUNDATION), Ash Shihr City, Hadramawt Governorate, Yemen [SDGT] (Linked To: SADIQ AL-AHDAL, Abdallah Faysal).

Dated: December 7, 2016.

Andrea Gacki,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2016–29961 Filed 12–13–16; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF VETERANS AFFAIRS

Reasonable Charges for Medical Care or Services; v3.21, 2017 Calendar Year Update and National Average Administrative Prescription Drug Charge Update

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: This Department of Veterans Affairs (VA) notice updates the data for calculating the ''Reasonable Charges'' collected or recovered by VA for medical care or services. This notice also updates the ''National Average Administrative Prescription Costs'' for purposes of calculating VA's charges for prescription drugs that were not administered during treatment, but provided or furnished by VA to a veteran.

FOR FURTHER INFORMATION CONTACT: Romona Greene, Office of Community Care, Revenue Operations, Consolidated Patient Account Center (CPAC) Rates and Charges (10D1C), Veterans Health Administration (VHA), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 382–2521. This is not a toll free number.

SUPPLEMENTARY INFORMATION: Section 17.101 of 38 Code of Federal Regulations sets forth the ''Reasonable Charges'' for medical care or services provided or furnished by VA to a veteran: ''For a nonservice-connected disability for which the veteran is entitled to care (or the payment of expenses for care) under a health plan contract; For a nonservice-connected disability incurred incident to the veteran's employment and covered under a worker's compensation law or plan that provides reimbursement or indemnification for such care and services; or For a nonservice-connected disability incurred as a result of a motor vehicle accident in a State that requires automobile accident reparations insurance.'' Section 17.101 provides the methodologies for establishing billed amounts for several types of charges; however, this notice will only address partial hospitalization facility charges; outpatient facility charges; physician and other professional charges, including professional charges for anesthesia services and dental services; pathology and laboratory charges; observation care facility charges; ambulance and other emergency transportation charges; and charges for durable medical equipment, drugs, injectables, and other medical services, items, and supplies identified by Healthcare Common Procedure Coding System (HCPCS) Level II codes.

Section 17.101 provides that the actual charge amounts at individual VA facilities based on these methodologies and the data sources used for calculating those actual charge amounts will either be published as a notice in the **Federal Register** or will be posted on the Internet site of the Veterans Health Administration at *http://www.va.gov/CBO/apps/rates/index.asp.* Certain charges are hereby updated as stated in this notice and will be effective on January 1, 2017.

In cases where VA has not established charges for medical care or services provided or furnished at VA expense (by either VA or non-VA providers) under other provisions or regulations, the method for determining VA's charges is set forth at 38 CFR 17.101(a)(8).

Based on the methodologies set forth in § 17.101, this notice provides an update to charges for 2017 HCPCS Level II and Current Procedural Terminology (CPT) codes. Charges are also being updated based on more recent versions of data sources for the following charge types: Partial hospitalization facility charges; outpatient facility charges; physician and other professional charges, including professional charges for anesthesia services and dental services; pathology and laboratory charges; observation care facility charges; ambulance and other emergency transportation charges; and charges for durable medical equipment, drugs, injectables, and other medical services, items, and supplies identified by HCPCS Level II codes. As of the date of this notice, the actual charge amounts at individual VA facilities based on the methodologies in § 17.101 will be posted on the VHA Internet site at *http://www.va.gov/CBO/apps/rates/index.asp* under the heading ''Reasonable Charges Data Tables'' and identified as ''v3.21 Data Tables (Outpatient and Professional).''

The list of data sources used for calculating the actual charge amounts listed above also will be posted on the VHA Internet site at *http://www.va.gov/CBO/apps/rates/index.asp* under the heading ''Reasonable Charges Data Sources'' and identified as ''Reasonable Charges v3.21 Data Sources (Outpatient and Professional) (PDF).''

Acute inpatient facility charges and skilled nursing facility/sub-acute inpatient facility charges remain the same as set forth in the notice published in the **Federal Register** on September 13, 2016 (80 FR 57051).

We are also updating the list of VA medical facility locations. The list of VA medical facility locations, including the first three digits of their zip codes as well as provider-based/non-provider-based designations, will be posted on the VHA Internet site at *http://www.va.gov/CBO/apps/rates/index.asp* under the heading ''VA Medical Facility Locations'' and identified as ''v3.21 (Jan17).''

As indicated in 38 CFR 17.101(m), when VA provides or furnishes prescription drugs not administered during treatment, ''charges billed separately for such prescription drugs will consist of the amount that equals the total of the actual cost to VA for the drugs and the national average of VA administrative costs associated with dispensing the drugs for each prescription.'' Section 17.101(m) includes the methodology for calculating the national average administrative cost for prescription drug charges not administered during treatment.

VA determines the amount of the national average administrative cost annually for the prior fiscal year (October through September) and then applies the charge at the start of the next calendar year. The national average administrative drug cost for calendar year 2017 is $16.36. This change will be posted at *http://www.va.gov/CBO/payerinfo.asp* and identified as ''CY 2017 Average Administrative Cost for Prescriptions.''

Consistent with § 17.101, the national average administrative cost, the updated data, and supplementary tables containing the changes described in this notice will be posted online, as indicated in this notice. This notice will be posted on the VHA Internet site at *http://www.va.gov/CBO/apps/rates/index.asp* under the heading ''Federal Registers, Rules, and Notices'' and identified as ''v3.21 Federal Register Notice 01/01/17 (Outpatient and Professional), and National Administrative Cost (PDF).'' The national average administrative cost, updated data, and supplementary tables containing the changes described will be effective until changed by a subsequent Federal Register notice.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document 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. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on December 9, 2016, for publication.

Dated: December 9, 2016.

Michael Shores,

Acting Director, Regulation Policy & Management Office of the Secretary, Department of Veterans Affairs.

[FR Doc. 2016–30008 Filed 12–13–16; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0043]

Agency Information Collection Activity (Declaration of Status of Dependents (VA Form 21–686c)

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

VA Form 21–686c is necessary to obtain current marital and dependency information in order to determine the proper rate of payment for Veterans and surviving spouses who are entitled to an additional allowance for dependents.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before February 13, 2017.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0043'' in any correspondence. During the comment period, comments may be viewed online through the FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 632–8924 or FAX (202) 632–8925.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–21), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Declaration of Status of Dependents (VA Form 21–686c).

OMB Control Number: 2900–0043.

Type of Review: Extension of an approved collection.

Abstract: VA Form 21–686c is necessary to obtain current marital and dependency information in order to determine the proper rate of payment for Veterans and surviving spouses who are entitled to an additional allowance for dependents.

Affected Public: Individuals or households.

Estimated Annual Burden: 56,500 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 226,000.

By direction of the Secretary:

Cynthia Harvey-Pryor,

VA Clearance Officer, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–29980 Filed 12–13–16; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Joint Biomedical Laboratory Research and Development and Clinical Science Research and Development Services Scientific Merit Review Board Amended; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463; Title 5 U.S.C. App. 2 (Federal Advisory Committee Act) that the Joint Biomedical Laboratory Research and Development and Clinical Science Research and Development Services Scientific Merit Review Board (JBL/CS SMRB) teleconference meeting will convene on January 26, 2017, from 3:00 p.m. to 3:45 p.m. and will be open to the public. This Notice of Meeting is being amended due to clarification of the meeting being open.

This meeting is conducted to meet with the JBL/CS Service Directors to discuss the overall policies and process for Merit Review as well as disseminate information among the subcommittee chairs regarding the VA research priorities.

Members of the public who wish to attend the open JBL/CS SMRB teleconference may dial 1–800–767–1750, participant code 95562. Members of the public who wish to make a statement at the JBL/CS SMRB meeting must notify Dr. Alex Chiu, Designated Federal Officer, via email at *alex.chiu@va.gov* by January 19, 2017.

Dated: December 9, 2016.

LaTonya L. Small,

Advisory Committee Management Officer.

[FR Doc. 2016–30025 Filed 12–13–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0655]

Agency Information Collection Activity (Residency Verification Report-Veterans and Survivors (FL 21–914))

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of

information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

VA Form Letter 21–914 gathers the information necessary to verify that a Filipino veteran or beneficiary who is receiving benefits at the full-dollar rate based on U.S. residency continues to meet the residency requirements. The proper rate of payment could not be determined without this information.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before February 13, 2017.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0655'' in any correspondence. During the comment period, comments may be viewed online through the FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 632–8924 or FAX (202) 632–8925.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–21), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Residency Verification Report-Veterans and Survivors (FL 21–914).

OMB Control Number: 2900–0655.

Type of Review: Extension of an approved collection.

Abstract: VA Form Letter 21–914 gathers the information necessary to verify that a Filipino veteran or beneficiary who is receiving benefits at the full-dollar rate based on U.S. residency continues to meet the residency requirements. The proper rate of payment could not be determined without this information.

Affected Public: Individuals or households.

Estimated Annual Burden: 417 hours.

Estimated Average Burden per Respondent: 20 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 1,250.

By direction of the Secretary:

Cynthia Harvey-Pryor,

VA Clearance Officer, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–29982 Filed 12–13–16; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0215]

Agency Information Collection Activity: (Request for Information To Make Direct Payment to Child Reaching Majority (FL 21–863))

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

VA Form Letter 21–863 is used to gather the necessary information to determine a schoolchild's continued eligibility to VA death benefits and eligibility to direct payment at the age of majority.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before February 13, 2017.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0215'' in any correspondence. During the comment period, comments may be viewed online through the FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 632–8924 or FAX (202) 632–8925.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104–13; 44 U.S.C. 3501–21), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Request for Information to Make Direct Payment to Child Reaching Majority (FL 21–863).

OMB Control Number: 2900–0215.

Type of Review: Extension of an approved collection.

Abstract: VA Form Letter 21–863 is used to gather the necessary information to determine a schoolchild's continued eligibility to VA death benefits and eligibility to direct payment at the age of majority.

Affected Public: Individuals or households.

Estimated Annual Burden: 3 hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 20.

By direction of the Secretary.

Cynthia Harvey-Pryor,

VA Clearance Officer, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–29981 Filed 12–13–16; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0568]

Agency Information Collection Activity Under OMB Review: (Submission of School Catalog to the State Approving Agency)

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 13, 2017.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov*, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th Street NW., Washington, DC 20503, or sent through electronic mail to *oira_submission@omb.eop.gov*. Please refer to ''OMB Control No. 2900–0568'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–5870 or email *cynthia.harvey-pryor@va.gov*. Please refer to ''OMB Control No. 2900–0568.''

SUPPLEMENTARY INFORMATION:

Title: Submission of School Catalog to the State Approving Agency.

OMB Control Number: 2900–0568.

Type of Review: Revision of an approved collection.

Abstract: Accredited and nonaccredited educational institutions, with the exceptions of elementary and secondary schools, must submit copies of their catalog to State approving agency when applying for approval of a new course. State approval agencies use the catalog to determine what courses can be approved for VA training. VA pays educational assistance to veterans, persons on active duty or reservists, and eligible persons pursuing an approved program of education. Educational assistance is not payable when claimants pursue unapproved courses.

The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on October 5, 2016 at 81 FR 69576, page 2016–24160.

Affected Public: Not-for-profit institutions.

Estimated Annual Burden: 2,487 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 9,948.

By direction of the Secretary.

Cynthia Harvey-Pryor,

VA Clearance Officer, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–29977 Filed 12–13–16; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0783 (10–10073, 10073a, 10073b, 10073c)]

Agency Information Collection Activity: (Nonprofit Research and Education Corporations (NPCs) Data Collection)

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Health Administration (VHA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 13, 2017.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov*, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov.* Please refer to ''OMB Control No. 2900–0783'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–5870 or email *cynthia.harvey-pryor@va.gov.* Please refer to ''OMB Control No. 2900–0783.''

SUPPLEMENTARY INFORMATION:

Titles: Nonprofit Research and Education Corporations (NPCs) Data Collection.

a. Annual Report Template, VA Form 10–10073.

b. Audit Actions Items Remediation Plans, VA Form 10–10073 A.

c. NPPO Internal Control Questionnaire, VA Form 10–10073 B.

d. NPPO Operations Oversight Questionnaire, VA Form 10–10073 C.

OMB Control Number: 2900–0783.

Type of Review: Extension of a currently approved collection.

Abstract: The combined NPC Annual Report to Congress is described in Section 7366 (d) ''The Secretary (DVA) shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives an annual report on the corporations (NPCs) established under this subchapter.'' Section 7366(d) goes on to list some of the specific information required by Congress. The sources for all of the information contained in the NPC Annual Report to Congress are the individual NPC Annual Report Templates submitted by each of the NPCs.

Affected Public: Individuals or households.

Estimated Annual Burden: 858 burden hours.

a. NPC Annual Report Template—301 hrs.

b. NPC Audit Actions Items Remediation Plans—84 hrs.

c. NPPO Internal Control Questionnaire—344 hrs.

d. NPPO Operations Oversight Questionnaire—129 hrs.

Estimated Average Burden per Respondent:

a. NPC Annual Report Template—210 minutes.

b. NPC Audit Actions Items Remediation Plans—120 minutes.

c. NPPO Internal Control Questionnaire—240 minutes.

d. NPPO Operations Oversight Questionnaire—90 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents: 300.

a. NPC Annual Report Template—86.

b. NPC Audit Actions Items Remediation Plans—42.

c. NPPO Internal Control Questionnaire—86.

d. NPPO Operations Oversight Questionnaire—86.

By direction of the Secretary.

Cynthia Harvey-Pryor,

VA Clearance Officer, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–29978 Filed 12–13–16; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 81 Wednesday,

No. 240 December 14, 2016

Part II

Department of Transportation

National Highway Traffic Safety Administration

49 CFR Parts 571 and 585

Federal Motor Vehicle Safety Standards; Minimum Sound Requirements for Hybrid and Electric Vehicles; Final Rule

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Parts 571 and 585

[Docket No. NHTSA–2016–0125]

RIN 2127–AK93

Federal Motor Vehicle Safety Standards; Minimum Sound Requirements for Hybrid and Electric Vehicles

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: To reduce the risk of pedestrian crashes, especially for the blind and visually-impaired, and to satisfy the mandate in the Pedestrian Safety Enhancement Act (PSEA) of 2010 this final rule establishes a new Federal motor vehicle safety standard (FMVSS) setting minimum sound requirements for hybrid and electric vehicles. This new standard requires hybrid and electric passenger cars, light trucks and vans (LTVs), and low speed vehicles (LSVs) to produce sounds meeting the requirements of this standard. This final rule applies to electric vehicles (EVs) and to those hybrid vehicles (HVs) that are capable of propulsion in any forward or reverse gear without the vehicle's internal combustion engine (ICE) operating. This standard will help to ensure that blind, visually impaired, and other pedestrians are able to detect and recognize nearby hybrid and electric vehicles, as required by the PSEA.

DATES: *Effective date:* This rule is effective February 13, 2017.

Compliance date: Initial compliance is required, in accordance with the phase-in schedule, on September 1, 2018. Full compliance is required on September 1, 2019.

Petitions for reconsideration: Petitions for reconsideration of this final rule must be received not later than January 30, 2017.

Incorporation by Reference: The incorporation by reference of certain publications listed in the standard is approved by the Director of the Federal Register as of February 13, 2017.

ADDRESSES: Petitions for reconsideration of this final rule must refer to the docket and notice number set forth above and be submitted to the Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT:

For non-legal issues, Mr. Mike Pyne, Office of Crash Avoidance Standards (telephone: 202–366–4171) (fax: 202–493–2990). Mr. Pyne's mailing address is National Highway Traffic Safety Administration, NVS–123, 1200 New Jersey Avenue SE., Washington, DC 20590.

For legal issues, Mr. Thomas Healy, Office of the Chief Counsel (telephone: 202–366–2992) (fax: 202–366–3820). Mr. Healy's mailing address is National Highway Traffic Safety Administration, NCC–112, 1200 New Jersey Avenue SE., Washington, DC 20590.

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- Regulation Identifier Number (RIN)

I. Executive Summary

The PSEA requires NHTSA to establish performance requirements for an alert sound that is recognizable as a motor vehicle in operation that allows blind and other pedestrians to detect nearby electric vehicles or hybrid vehicles operating at lower speeds. This final rule establishes FMVSS No.141, *Minimum Sound Requirements for Hybrid and Electric Vehicles,* which requires hybrid and electric passenger cars and LTVs with a gross vehicle weight rating (GVWR) of 4,536 kg (10,000 lbs.) or less and LSVs, to produce sounds meeting the requirements of this standard so both blind and sighted pedestrians can more easily detect and recognize by hearing these vehicles. Both blind and sighted pedestrians have greater difficulty detecting hybrid and electric vehicles at low speeds than vehicles with ICE engines because hybrid and electric vehicles produce measurably less sound at those speeds.[1] At higher speeds, in contrast, tire and wind noise are the primary contributors to a vehicle's noise output, so the sounds produced by hybrid and electric vehicles and ICE vehicles are similar.

Hybrid vehicles with gross vehicle weight rating (GVWR) of 4,536 kg (10,000 lbs.) or less are 1.18 times more likely than an ICE vehicle to be involved in a collision with a pedestrian and 1.51 times more likely to be involved in a collision with a pedalcyclist. NHTSA assumes that this difference in accident rates is mostly attributable to the pedestrians' inability to detect the presence of these vehicles through hearing.

To further evaluate the assumption that the difference in crash rates is mostly attributable to differences in vehicle emitted sound, the agency conducted research to see if there was a difference in the ability of pedestrians to detect approaching hybrid and electric vehicles versus ICE vehicles. The agency also conducted research to examine how the frequency composition of a sound influenced the ability of pedestrians to detect that sound in the presence of ambient noise. Section II.C provides much more information on this research and how the agency used it in the context of this rulemaking.

[1] Garay-Vega, L; Hastings, A.; Pollard, J.K.; Zuschlag, M. & Stearns, M. (2010, April). Quieter Cars and the Safety of Blind. Pedestrians: Phase 1. DOT HS 811 304. Washington, DC: National Highway Traffic Safety Administration.

A. Summary of Requirements of the Final Rule

On January 14, 2013, NHTSA published a notice of proposed rulemaking (NPRM) specifying minimum sound requirements for hybrid and electric vehicles.[2] The NPRM discussed three alternative means for the agency to establish requirements for, and measure compliance with, minimum levels of vehicle emitted sound. In the NPRM, the agency proposed its preferred alternative which was to establish minimum requirements for vehicle emitted sound using a psychoacoustic model. Sounds meeting the proposed requirements would contain acoustic elements designed to enhance detection and to aid pedestrians in recognizing the sound as coming from a motor vehicle. We believed that the preferred alternative placed the greatest emphasis on ensuring the vehicle emitted sounds were detectable to pedestrians. In addition to the preferred alternative, the NPRM also discussed minimum sound requirements for HVs and EVs designed to resemble sounds produced by ICE vehicles. This alternative would place a greater emphasis on recognizability than the preferred alternative. Compliance with both of these alternatives would be determined using a compliance test that measured the sound produced by the vehicle.

In order to provide an alternative that would allow the most flexibility in the types of sounds that manufacturers could choose to add to vehicles to alert pedestrians, we also discussed using human factors testing to determine whether a sound used to alert pedestrians was recognizable as a motor vehicle.

After careful consideration of all available information, including the public comments submitted in response to the NPRM,[3] the agency has decided to adopt the preferred alternative in the NPRM and many of the elements of the proposed rule. In the final rule, as proposed, the agency requires hybrid and electric vehicles to emit sound while the vehicle is stationary with the vehicle propulsion system activated. (However, in the final rule this requirement does not apply to vehicles that are parked with the propulsion system activated—see below.) Also as proposed, the agency requires hybrid and electric vehicles to emit minimum sound levels while in reverse and while the vehicle is in forward motion up to 30 km/h. The final rule also adopts the agency's proposal to conduct compliance testing outdoors.

With regard to the scope of the final rule and what level of sound to emit and when, however, the agency is adopting numerous changes to the proposal in response to additional analysis conducted by the agency and in response to comments, including the following:

- The final rule will only apply to four-wheeled hybrid and electric vehicles with a gross vehicle weight rating (GVWR) of 4,536 kg (10,000) pounds or less. The NPRM proposed that this rule would also apply to hybrid and electric vehicles with a GVWR over 4,536 kg (10,000) pounds and to electric motorcycles. We believe that we do not have enough information at this time to apply the minimum acoustic requirements of this final rule to these vehicles.
- In this final rule, the agency is reducing the number of one-third octave bands for which there are minimum requirements. The NPRM proposed that vehicles would have to emit sound meeting minimum requirements in eight one-third octave bands. To comply with this final rule, hybrid and electric vehicles will instead have to meet a requirement specifying either two or four one-third octave bands. Vehicles complying with the four-band requirement must meet minimum sound pressure levels in any four non-adjacent one-third octave bands between 315 Hz and 5000 Hz, including the one-third octave bands between 630 Hz and 1600 Hz (these bands were excluded in the NPRM). Vehicles complying with the two-band requirement must meet minimum sound pressure levels in two non-adjacent one-third octave bands between 315 Hz and 3150 Hz. For the two-band requirement, one band must be below 1000 Hz and the second band must be at or above 1000 Hz, and the two bands used to meet the two-band requirement also must meet a minimum band sum requirement.
- The NPRM proposed that the fundamental frequency of the sound emitted by a hybrid or electric vehicle must vary as the vehicle changes speed by one percent per km/h for speeds between 0 and 30 km/h to allow pedestrians to detect vehicle acceleration and deceleration. This requirement was referred to as ''pitch shifting,'' and it is not required in the final rule. Instead, the final rule assists pedestrians in detecting increases in vehicle speed by requiring vehicle-emitted sound to increase in sound pressure level by a specified amount as the vehicle's speed increases. The agency acknowledges that the concept of increasing sound pressure level with increased speed is not a direct replacement for pitch shifting, but we believe it is a reasonable alternative that will provide useful audible information to pedestrians about the operating state of nearby vehicles.
- The NPRM proposed that sound emitted by hybrid and electric vehicles must contain one tone no higher than 400 Hz and emit broadband content including each one-third octave band from 160 Hz to 5000 Hz so that sounds emitted by these vehicles would be recognizable as motor vehicles. The final rule does not adopt these proposed requirements. We believe that pedestrians will use other cues to recognize EVs and HVs such as the location of the sound source and the frequency and level changes caused by the motion of the sound.
- In order to ensure that hybrid and electric vehicles of the same make, model, and model year emit the same sound, as required by the PSEA, the NPRM proposed that vehicles of the same make, model, and model year must emit the same level of sound, within 3 dB(A), in each one-third octave band from 160 Hz to 5000 Hz. We have instead decided to ensure that EVs and HVs of the same make, model, and model year emit the same sound by requiring that all vehicles of the same make, model, and model year use the same alert system hardware and software, including specific items such as the same digital sound file where applicable, to produce sound used to meet the minimum sound requirements in today's final rule.
- The NPRM proposed that each hybrid and electric vehicle must meet minimum sound requirements anytime the vehicle's propulsion system is activated, including when the vehicle is stationary. The final rule requires each hybrid and electric vehicle to meet minimum sound requirements any time the vehicle's propulsion system is activated, including when the vehicle is stationary, unless the vehicle's gear selector is in the ''park'' position or the parking brake is applied (the latter for HVs and EVs with manual transmissions).
- The NPRM proposed a phase-in schedule that required each manufacturer of hybrid and electric vehicles to begin meeting the requirements of the final rule with 30 percent of the hybrid and electric vehicles they produce three years before the date for full compliance established in the PSEA. In the final rule, we have modified the phase-in schedule to provide additional time for compliance

[2] 78 FR 2797.

[3] ''Federal Motor Vehicle Safety Standards; Minimum Sound Requirements for Hybrid and Electric Vehicles,'' 78 FR 2798 (January 14, 2013).

for manufacturers of light vehicles; 50 percent of each manufacturer's HV and EV production must comply with this final rule one year before the date for full compliance established in the PSEA of September 1, 2019.

B. Costs and Benefits

As discussed in detail in Section V of this notice, the benefits of this final rule will accrue from injuries to pedestrians that will be avoided, based on the anticipated ability of this rule to reduce the pedestrian injury rate for HVs and EVs to that of ICE vehicles. As discussed in Section II.B, a traditional analysis of pedestrian fatalities is not appropriate for this rulemaking. If we assume that HVs and EVs increase their presence in the U.S. fleet to four percent of all vehicle registrations in model year 2020, a total of 2,464 injuries to pedestrians and pedalcyclists would be expected over the lifetime of the 2020 model year fleet due to the pedestrians' and pedalcyclists' inability to detect these vehicles by their sense of hearing. Taking into account the agency's estimate of detectability of vehicle alert sounds complying with this final rule, which is discussed in the Final Regulatory Impact Assessment, we estimate that the benefit of reducing the pedestrian and pedalcyclist injury rate per registered vehicle for EVs HVs to ICE vehicles when four percent of the fleet is HVs and EVs would be 2,390 fewer injured pedestrians and pedalcyclists. We do not include any quantifiable benefits in pedestrian or pedalcyclist injury reduction for EVs because we believe it is reasonable to assume that EV manufacturers would have installed alert sounds in their cars without passage of the PSEA and this proposed rule.[4] We also estimate that this rule will result in 11 fewer injured pedestrians and pedalcyclists caused by LSVs.

TABLE 1—DISCOUNTED BENEFITS FOR PASSENGER CARS AND LTVS, MY2020, 2013$

3% Discount	Pedestrians			Pedalcyclists			Total PED + CYC		
	3% Discount factor	Total monetized benefits	Total ELS	3% Discount factor	Total monetized benefits	Total ELS	3% Discount factor	Total monetized benefits	Total ELS
(PC)	0.8024	$132.3M	9.70	0.80243	$168.8M	14.55	0.8024	$301.1M	24.25
(LTV)	0.7867	7.9M	0.58	0.78673	9.4M	0.80	0.7867	17.4M	1.39
Total	0	140.3M	10.29	0	178.3M	15.35	0	318.5M	25.64
7% Discount	7% Discount factor	Total monetized benefits	Total ELS	7% Discount factor	Total monetized benefits	Total ELS	7% Discount factor	Total monetized benefits	Total ELS
(PC)	0.6268	$102.5M	7.50	0.62684	$130.5M	11.24	0.6268	$233.0M	18.74
(LTV)	0.6077	6.1M	0.45	0.60775	7.2M	0.61	0.6077	13.3M	1.06
Total	0	108.6M	7.94	0	137.7M	11.85	0	246.3M	19.80

TABLE 2—TOTAL COSTS FOR PCS AND LTVS, MY2020, 2013$

	Sales	Sales impacted	Fuel costs/veh	Fuel costs (total)	Avg. install costs/veh	Install costs total	Total cost/veh	Total costs
3% discount:								
(PC)	8,000,000	483,462	$4.70	$2,272,270	$74.36	$35,951,512	$79.06	$38,223,782
(LTV)	8,000,000	46,428	5.30	246,067	71.97	3,341,333	77.27	3,587,400
Total	16,000,000	529,889	$4.75	$2,518,337	$74.15	$39,292,845	$78.91	$41,811,182
7% discount:								
(PC)	8,000,000	483,462	$3.80	$1,837,155	$74.36	$35,951,512	$78.16	$37,788,667
(LTV)	8,000,000	46,428	4.20	194,996	71.97	3,341,333	76.17	3,536,329
Total	16,000,000	529,889	3.84	2,032,151	74.15	39,292,845	77.99	41,324,996

TABLE 3—COSTS AND SCALED BENEFITS FOR LSVS, MY2020[5]

Discount rate (%)	Sales ratio LSV to light vehicle (%)	Sales	Scaled costs	Scaled injuries (undisc.)	Scaled ELS	Scaled benefits	Scaled benefits minus scaled costs
3	0.47	2,500	$197,264	11.28	0.1210	$1,502,807	$1,305,543
7	0.47	2,500	194,970	11.28	0.0934	1,161,989	967,019

[4] As further discussed in the agency's Final Regulatory Impact Analysis, due to foresight on the part of light electric vehicle manufacturers, paired with consumer expectations and style choices, light vehicle EVs are all assumed to be equipped with speaker systems. NHTSA assumes the sound alert benefits for these vehicles are attributable to the market and not the rule. This assumption makes our benefit figures conservative. On the other hand, we did not assume that electric LSVs would be voluntarily equipped with speaker systems since none of these vehicles were known to have such systems currently.

[5] Scaled benefits and costs for low-speed vehicles (LSVs) are estimated to be directly proportional to costs for light vehicles based on sales. Scaled costs include both installation costs for the system and fuel costs.

NHTSA estimates that the fuel and installation cost of adding a speaker system in order to comply with the requirements of this rule is $129.84 per vehicle for unequipped hybrid light vehicles (*i.e.,* vehicles that did not previously have any alert system components installed), and $54.99 for electric light vehicles. We estimate that for model year (MY) 2020, which is the first model year to which the requirements of this final rule will apply to the entire light vehicle fleet, this final rule will apply to 529,889 passenger cars and LTVs. The estimated costs for manufacturers of complying with this rule is $39.29M in MY 2020, and we would expect that due to the additional weight that these components add to the vehicles in which they are installed, if manufacturers make no other changes to reduce vehicle weight, these vehicles would consume an additional 2.3 more gallons of fuel over the lifetime of a passenger car and 2.5 more gallons of fuel over the lifetime of a light truck which would result in an average fuel cost of $4.75 per vehicle for over the lifetime of MY 2020 vehicles subject to the rule at the 3-percent discount rate and $3.84 per vehicle for over the lifetime of MY 2020 vehicles subject to the rule at the 7-percent discount rate.).

To more easily compare the costs and benefits of this rulemaking, we have converted pedestrian and pedalcyclist injuries avoided into equivalent lives saved. We estimate that the impact of this rule in pedestrian and pedalcyclist injury reduction in light vehicles and LSVs will be 25.76 equivalent lives saved at the 3-percent discount rate and 19.92 equivalent lives saved at the 7-percent discount rate (summing values from Table 1 and Table 3). Converting that to dollars, the benefits of this rule for the HV portion of the MY 2020 light vehicle and LSV fleet are $320.0 million at the 3-percent discount rate and $247.5 million at the 7-percent discount rate (Table 4).[6] NHTSA estimates that the cost per equivalent life saved for the light EV, HV, and LSV fleet would range from a cost of $1.67 million to a cost savings of $0.10 million across the 3-percent and 7-percent discount levels, respectively. When compared to our comprehensive cost estimate of the value of a statistical life of $9.2 million, this final rule is cost effective.

TABLE 4—TOTAL BENEFITS AND COSTS SUMMARY FOR LIGHT VEHICLES AND LOW SPEED VEHICLES, MY2020, 2013$

	3% Discount rate	7% Discount rate
Total Monetized Benefits	$320.0M	$247.5M
Total Costs (Install + Fuel)	42.M	41.5M
Total Net Impact (Benefit − Costs)	278.0M	205.9

II. Background and Summary of Notice of Proposed Rulemaking

A. Pedestrian Safety Enhancement Act and National Traffic and Motor Vehicle Safety Act

On January 4, 2011, the Pedestrian Safety Enhancement Act of 2010 (Pub. L. 111–373) was signed into law. The Pedestrian Safety Enhancement Act (PSEA) requires NHTSA to conduct a rulemaking to establish a Federal Motor Vehicle Safety Standard (FMVSS)[7] requiring an ''alert sound''[8] for pedestrians to be emitted by all types of motor vehicles[9] that are electric vehicles[10] (EVs) or hybrid vehicles[11] (HVs). Trailers are specifically excluded from the requirements of the PSEA.

The PSEA requires NHTSA to establish performance requirements for an alert sound that allows blind and other pedestrians to reasonably detect a nearby EV or HV. The PSEA defines ''alert sound,'' as that term is used in the statute, as a vehicle-emitted sound that enables pedestrians to discern the presence, direction,[12] location, and operation of the vehicle.[13] Thus, in order for a vehicle to satisfy the requirement in the PSEA to provide an ''alert sound,'' the sound emitted by the vehicle must satisfy that definition. The alert sound must not require activation by the driver or the pedestrian, and must allow pedestrians to reasonably detect an EV or HV in critical operating scenarios such as constant speed, accelerating, or decelerating.

In addition to those operating scenarios, the definition of alert sound in the PSEA requires the agency to establish requirements for a sound while the vehicle is stationary but active and when the vehicle is operating in reverse. PSEA states that the alert sound must allow pedestrians to ''discern vehicle presence, direction, location, and operation.''[14] We read the requirement that pedestrians be able to ''discern vehicle presence'' along with the requirements that the sound allow pedestrians to discern direction, location, and operation. The term ''presence'' means something that is in the immediate vicinity. The term ''operation'' means a state of being functional or operative. Read together, the definition of alert sound requires that pedestrians be able to detect vehicle presence when the vehicle is in operation. A vehicle with its gear selector not in ''park'' is in an operational state even though it may not be moving. It is therefore the agency's position that the provision of the PSEA that requires pedestrians to be able to detect the presence of a vehicle in operation requires that the vehicle emit a minimum sound level when its gear selector is in any position other than ''park,'' whether that be when the vehicle is moving forward, stationary, or operating in reverse.

[6] NHTSA's benefits calculation does not include light EVs because manufacturers of light EVs were already adding sound to those vehicles prior to NHTSA issuing the NPRM. However, this analysis includes LSVs because those vehicles currently do not have added sound.

[7] NHTSA is delegated authority by the Secretary of Transportation to carry out Chapter 301 of Title 49 of the United States Code. *See* 49 CFR 501.2. This includes the authority to issue Federal motor vehicle safety standards. *See* 49 U.S.C. 30111.

[8] The definition of the term ''alert sound'' is discussed below.

[9] Section 2(4) of the PSEA defines the term ''motor vehicle'' as having the meaning given such term in section 30102(a)(6) of title 49, United States Code, except that such term shall not include a trailer (as such term is defined in section 571.3 of title 49, Code of Federal Regulations). Section 30102(a)(6) defines ''motor vehicle'' as meaning a vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways, but does not include a vehicle operated only on a rail line.

[10] Section 2(10) of the PSEA defines ''electric vehicle'' as a motor vehicle with an electric motor as its sole means of propulsion.

[11] Section 2(9) of the PSEA defines ''hybrid vehicle'' as a motor vehicle which has more than one means of propulsion. As a practical matter, this term is currently essentially synonymous with ''hybrid electric vehicle.''

[12] The PSEA does not specify whether vehicle ''direction'' is to be defined with reference to the vehicle itself (thus meaning forward or backward) or the pedestrian.

[13] PSEA Section 2(2).

[14] Public Law 111–373, 2(2), 124 Stat. 4086 (2011).

The agency believes that it is reasonable to conclude that Congress intended the term ''operation'' in the PSEA to be the condition in which a driver is operating the vehicle, as opposed to just the operation of the vehicle's propulsion system. It is the operation of the vehicle by a driver, not the operation of the vehicle's propulsion system, that creates the safety risk to pedestrians who fail to detect hybrid and electric vehicles. Consequently, when the vehicle's gear selector is in ''park,'' the propulsion system may or may not be activated but, in such a condition when the propulsion system is activated, the vehicle is not operable by the driver until the gear selector is moved from ''park'' to some other gear selector position. Therefore, we have determined that the PSEA does not require us to establish minimum sound requirements for when a vehicle has its gear selector control in the ''park'' position.

Because the PSEA directs NHTSA to issue these requirements as an FMVSS under the National Traffic and Motor Vehicle Safety Act (Vehicle Safety Act),[15] the requirements must comply with that Act as well as the PSEA. The Vehicle Safety Act requires each safety standard to be performance-oriented, practicable [16] and objective [17] and meet the need for safety. In addition, in developing and issuing a standard, NHTSA must consider whether the standard is reasonable, practicable, and appropriate for each type of motor vehicle covered by the standard.

As an FMVSS, the minimum sound standard in today's final rule will be enforced in the same fashion as other safety standards issued under the Vehicle Safety Act. Thus, violators of the standard will be subject to civil penalties.[18] Vehicle manufacturers will be required to conduct a recall and provide remedy without charge if their vehicles are determined to fail to comply with the standard or if the vehicle's alert sound were determined to contain a safety related defect.[19]

Under the PSEA, the standard must specify performance requirements for an alert sound that enables blind and other pedestrians to reasonably detect EVs and HVs operating below their crossover speed.[20] The PSEA specifies several requirements regarding the performance of the alert sound to enable pedestrians to discern the operation of vehicles subject to the Act. First, the alert sound must be sufficient to allow a pedestrian to reasonably detect a nearby EV or HV operating at constant speed, accelerating, decelerating or operating in any other scenarios that the Secretary deems appropriate.[21] Second, it must reflect the agency's determination of the minimum sound level emitted by a motor vehicle that is necessary to allow blind and other pedestrians to reasonably detect a nearby EV or HV operating at or below the crossover speed.[22] Today's final rule will ensure that EVs and HVs are detectable to pedestrians by specifying performance requirements for sound emitted by these vehicles so that they will be audible to pedestrians across a range of ambient noise environments, including those typical of urban areas.

Nothing in the PSEA specifically requires the alert sound to be electrically generated. Therefore, if manufacturers wish to meet the minimum sound level requirements specified by the agency through the use of sound generated by the vehicle's power train or any other vehicle component, there are no conflicts with the PSEA to limit their flexibility to do so.

The alert sound must also reflect the agency's determination of the performance requirements necessary to ensure that each vehicle's alert sound is recognizable to pedestrians as that of a motor vehicle in operation.[23] We note that the requirement that the alert sound be recognizable as a motor vehicle in operation does not mean that the alert sound be recognizable as a vehicle with an internal combustion engine (ICE). The PSEA defines ''conventional motor vehicle'' as ''a motor vehicle powered by a gasoline, diesel, or alternative fueled internal combustion engine as its sole means of propulsion.'' [24] We believe that if Congress had intended the alert sound required by the PSEA to be recognizable as an ICE vehicle, Congress would have specified that the sound must be recognizable as a ''conventional motor vehicle'' in operation rather than a motor vehicle because Congress acts purposefully in its choice of particular language in a statute.[25]

While the mandate that NHTSA develop performance requirements for an alert sound that is recognizable as a motor vehicle does not mean that the sound must be based solely on sounds produced by ICE vehicles, the mandate does impose substantive requirements that the agency must follow during the rulemaking. The Vehicle Safety Act defines a motor vehicle as a ''vehicle driven or drawn by mechanical power and manufactured primarily for use'' on public roads.[26] The requirement that the agency develop performance requirements for recognizability means that the pedestrian alert sound required by this standard must include acoustic characteristics common to all sounds produced by vehicles driven by mechanical power that make those sounds recognizable as a motor vehicle based on the public's experience and expectations of those sounds.

The PSEA mandates that the standard shall not require the alert sound to be dependent on either driver or pedestrian activation. It also requires that the safety standard allow manufacturers to provide each vehicle with one or more alert sounds that comply, at the time of manufacture, with the safety standard. Thus, a manufacturer may, if it so chooses, equip a vehicle with different sounds to denote different operating scenarios, such as stationary, forward or reverse. Each vehicle of the same make and model must emit the same alert sound or set of sounds. The standard is required to prohibit manufacturers from providing anyone, other than the manufacturer or dealers, with a device designed to disable, alter, replace or modify the alert sound or set of sounds emitted from the vehicle. This language prohibits NHTSA from allowing

[15] 49 U.S.C. Chapter 301.

[16] In a case involving passive occupant restraints, the U.S. Circuit Court of Appeals for the District of Columbia said that the agency must consider public reaction in assessing the practicability of required safety equipment like an ignition interlock for seat belts. Pacific Legal Foundation v. Department of Transportation, 593 F.2d 1338 (D.C. Cir. 1978). cert. denied, 444 U.S. 830 (1979).

[17] In a case involving passive occupant restraints, the U.S. Circuit Court of Appeals for the 6th Circuit said, quoting the House Report (H.R. 1776, 89th Cong. 2d Sess. 1966, p. 16) for the original Vehicle Safety Act, that ''objective criteria are absolutely necessary so that 'the question of whether there is compliance with the standard can be answered by objective measurement and without recourse to any subjective determination.' '' *Chrysler* v. *Department of Transportation,* 472 F.2d 659 (6th Cir. 1972).

[18] 49 U.S.C. 30112 and 30165.

[19] 49 U.S.C. 30118–30120.

[20] Section 2(3) of the PSEA defines ''crossover speed'' as the speed at which tire noise, wind resistance, or other factors make an EV or HV detectable by pedestrians without the aid of an alert sound. The definition requires NHTSA to determine the speed at which an alert sound is no longer necessary.

[21] PSEA Section 3(a). Under the PSEA, as with most legislation like it, the Secretary of Transportation delegates responsibility for achieving the legislation's objectives to the appropriate Department of Transportation Administration, in this case NHTSA.

[22] PSEA Section 3(b).

[23] PSEA Section 3(b)(2).

[24] PSEA Section 2(5).

[25] *See Keene Corp.* v. *United States,* 508 U.S. 200, 208 (1993) (stating the cannon of statutory construction that ''where Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'').

[26] 49 U.S.C. 30102(a)(6).

manufacturers from installing an off switch or volume control switch that allows the driver to turn off or turn down the alert sound used to meet the requirements of this standard.

Additionally, vehicle manufacturers, distributors, dealers, and motor vehicle repair businesses would be prohibited from rendering the sound system inoperative under Section 30122 of the Vehicle Safety Act. A manufacturer or a dealer, however, is allowed to alter, replace, or modify the alert sound or set of sounds in order to remedy a defect or non-compliance with the safety standard.

It is the agency's intention that the requirements of this standard be technology neutral. For this reason, we have chosen to establish minimum sound requirements for a vehicle-level test, as opposed to a component-based bench test or some other type of test, to ensure any kind of technology used can be properly tested.

The agency interprets the requirement in the PSEA that each vehicle of the same make and model emit the same sound as applying only to sound added to a vehicle for the purposes of complying with this standard. We also interpret the PSEA requirement that NHTSA prohibit manufacturers from providing anyone with a means of modifying or disabling the alert sound and the prohibition on making required safety systems inoperative contained in Section 30122 of the Vehicle Safety Act as applying only to sound added to a vehicle for the purposes of complying with this proposed standard.

Many changes to a vehicle could affect the sound produced by that vehicle. In issuing this proposal the agency does not wish to prevent manufacturers, dealers, and repair businesses from making modifications to a vehicle such as adding a spoiler or changing the vehicle's tires that may have the effect of changing the sound produced by the vehicle.

The PSEA requires that the final rule provide a phase-in period, as determined by the agency. In response to that requirement, full compliance with the standard must be achieved for all vehicles manufactured on or after September 1st of the calendar year beginning three years after the date of publication of the final rule. This final rule is establishing the requirement for 100-percent compliance for all light vehicles subject to the requirements of this rule produced for sale in the U.S. by all manufacturers no later than September 1, 2019. This requirement includes a one-year, 50-percent phase-in period beginning September 1, 2018.

B. Safety Problem

Comparing the Vehicle-to-Pedestrian Crash Experience of ICE Vehicles to HVs and EVs

Crash Risk

Public safety advocacy groups have raised pedestrian safety concerns regarding HVs because a vehicle using an electric motor may be quieter than an ICE vehicle and may not emit the sounds that non-motorists rely on for warning as vehicles approach them.

In 2009, NHTSA released the report ''Incidence of Pedestrian and Bicyclist Crashes by Hybrid Electric Passenger Vehicles'' which found that, when comparing similar vehicles, 77 out of 8,387 total HVs reported to be in any crash incident were involved in pedestrian crashes, and 3,578 out of 559,703 total ICE vehicles were involved in similar pedestrian crashes.[27] The report used data collected from 12 individual states. The years for which data were available varied across different states. Generally, the data used ranged from the years 2000 to 2006. The ratio of pedestrian crashes to overall crashes was 40-percent higher for HVs than for other vehicles. In situations involving certain low-speed maneuvers, HVs were twice as likely to be involved in a pedestrian crash as ICE vehicles in similar situations.

In 2011 NHTSA released a second report ''Incidence Rates of Pedestrian And Bicyclist Crashes by Hybrid Electric Passenger Vehicles: An Update'' which verified these previous findings [28] by adding additional years of state crash files as well as by increasing the number of states included in the analysis from 12 to 16, which increased the number of crashes included in the analysis. Overall, a statistical approach referred to as odds ratios indicated that the odds of an HV being in either a pedestrian or bicycle crash is greater than the odds of an ICE vehicle being in a similar crash, 19-percent higher for pedestrian crash odds and 38-percent higher for bicycle crash odds.[29] The crash factors of speed limit, vehicle maneuver, and location were examined to determine the relative incidence rates of HVs versus ICE vehicles and whether the odds ratio was different under different circumstances. The analysis also indicated that the largest differences between the involvement of HVs and ICE vehicles in pedestrian crashes occur with speed limits of 35 mph and lower and during certain maneuvers typically executed at low speed such as making a turn, starting up, and pulling into or backing out of a parking space. HVs were about 1.38 times more likely to be involved in a pedestrian crash than a vehicle with an ICE during a low speed maneuver. The results of the updated analysis show trends similar to those first reported in our 2009 analysis. The sample sizes of pedestrian and bicycle crashes were re-examined to verify that there was sufficient statistical power in this updated analysis.

The state data set that NHTSA used to determine the pedestrian and pedalcyclist crash rates for HVs did not include any information about the vision status of the pedestrians involved in the crashes, so we were unable to determine whether any of the pedestrians involved in these crashes were blind or visually-impaired.

While this updated analysis provides insightful comparisons of the incidence rates of HVs versus ICE vehicles involved in pedestrian crashes, there are some limitations to consider: The use of data from 16 states cannot be used to directly estimate the national problem size; and there is still not enough data to draw conclusions in all scenarios of interest such as for individual low-speed maneuvers such as making a turn, starting up, or in parking lots.

It has been an ongoing concern that HVs have a very small share among all vehicles (approximately 0.5 percent). The conditional probability of HV pedestrian or pedalcyclist crashes is very small if whole populations of both HV and ICE are included. Therefore, the sample size of HV may have an impact on the comparison of crash rates between HVs and ICE vehicles. For this reason, NHTSA has further updated the comparison between HV and ICE crash data in order to include additional HV crashes.

[27] R. Hanna (2009) Incidence of Pedestrian and Bicyclists Crashes by Hybrid Electric Passenger Vehicles, Report No. DOT HS 811 204. U.S. Dept. of Transportation, Washington, DC.

Available at *http://www-nrd.nhtsa.dot.gov/Pubs/811204.PDF.*

[28] Wu, et al. (2011) Incidence Rates of Pedestrian And Bicyclist Crashes by Hybrid Electric Passenger Vehicles: An Update, Report No. DOT HS 811 526. Dept. of Transportation, Washington, DC. Available at *http://www-nrd.nhtsa.dot.gov/Pubs/811526.pdf.*

[29] The incidence rates for pedestrian and pedalcyclist crashes involving HVs and EVs were calculated from the State data by comparing the pedestrian and pedalcyclist crash rates for all HVs contained in the State data set with the crash rates for all ICE vehicles from that data set. Because this proposal does not apply to HVs that always have their ICE turned on while moving, the agency removed the Honda Civic and the Honda Accord from the HV category and included those vehicles in the calculations as ICE vehicles in estimating the incidence rate used in the benefit calculations.

In our recent calculations [30] we used the latest State data available up to 2011 from the same 16 states, in which the sample sizes of HV vehicles of all crashes are increased to 68,950 (with 420 pedestrian crashes for all hybrid vehicle models). The earlier research obtained the pedestrian crash odds ratios of HV versus ICE vehicle with much smaller sample sizes. The new analysis showed that after the Honda Civic and Accord models are moved from the hybrid category to the ICE category the odds ratio of HV vs. ICE pedestrian crashes for all speeds is 1.21 and the odds ratio for slower speed maneuvers is 1.52. This analysis also shows that the odds ratio of HV vs. ICE pedalcyclist crashes is 1.58 for all speeds including all speed maneuvers, and 1.50 for slower maneuvers.

In the NPRM, the agency asked for comments on whether the differences in pedestrian crash rates between HV and ICE vehicles are solely due to pedestrians' inability to detect these vehicles based on sound, or whether there may be other factors that we have not identified that affect the difference in crash rates.

Ideally, in order to determine whether this lack of sound is causing accidents, NHTSA would have compared accident rates for HVs and EVs with and without sound. However, there have not been enough HVs and EVs with sound for a long enough period of data to be able reasonably conduct this analysis. NHTSA has also been unable to directly measure the pedestrian and pedalcyclist crash rates per mile travelled for HVs and EVs to the rates for ICEs because the Agency does not have data on VMT for HVs and EVs. Therefore, we have instead used the number of other types of crashes vehicles are involved in and using that as a proxy for VMT. While this is a standard technique in analyzing crash risk, it does raise the possibility that there may be other explanations than the lack of sound for hybrids having higher-than-average rates of pedestrian and pedalcyclist crashes relative to other crashes.

Various comments noted that the agency should consider the possibility that factors other than sound will have an impact on the difference in crash rates between HVs and ICE vehicles. Commenters stated that driver characteristics and higher rates of exposure to pedestrians were factors that could contribute to the higher rate of pedestrian crashes among HVs when compared to ICE vehicles.

Nissan North America, Inc. (Nissan) stated that NHTSA should take into account the fact that the ''making a turn'' and ''backing'' maneuvers, which constitute a majority of the low speed maneuvers examined in the agency's crash analysis, are maneuvers during which it is difficult for drivers to detect pedestrians. American Honda Motor Co. (Honda) stated that NHTSA should examine whether there is a significant difference between HEV/EV pedestrian crashes and ICE pedestrian crashes for vehicles starting from stationary.

Advocates stated that elevated crash rates between EVs/HEVs and pedestrians and pedalcyclists, concerns of blind advocacy groups, and the international attention focused on the issue support the conclusion that minimum sound requirements for EVs and HEVs will reduce the rate of pedestrian crashes involving these vehicles. The Insurance Institute for Highway Safety stated that, according to research from the Highway Data Loss Institute (HDLI), hybrid vehicles where 17.2 percent more likely to cause injuries to pedestrians than their ICE vehicle counterparts.

Agency Response to Comments

After review of the comments received on the NPRM, we utilized a multivariate logistic regression model to examine whether other variables besides type of powertrain in the State Data System contributed to increased risk of pedestrian collisions. In addition, we utilized the calculated odds ratio to compare HVs and ICEs using a case-control analysis. The variables that NHTSA examined in the regression are: Whether the vehicle was an HV or ICE; whether the vehicle was involved in a low-speed maneuver at the time of the crash; city size; driver age; vehicle age; and calendar year. The results of the regression analysis show that an HV may have 1.18 times higher likelihood of hitting a pedestrian than an ICE after accounting for these other confounding risk factors included in the State Data System. NHTSA believes that our case-control analysis, the results of our multivariate logistic regression, and the results of HDLI's research show that there is a difference in crash rates between HVs and ICE vehicles that is attributable to sound. We note that we were unable to calculate a statistically significant difference in crash rates between HVs and ICE vehicles for pedestrian crashes when the vehicle was starting from a stopped position because of the small number of crashes involving HVs in the State Data System.

We have considered the fact that many of the crashes in the low-speed maneuver data in our crash analysis include crashes in which the driver was making a turn or backing and may have had an obstructed view of the pedestrian. Because backing crashes are addressed by our recent final rule to increase the field of view requirements of FMVSS No. 111, *Rear Visibility,* we have adjusted our benefits calculation for this rulemaking to remove those crashes addressed by FMVSS No. 111. Also, the fact that the driver's view may have been obstructed supports the need to establish minimum sound requirements for HVs and EVs so that pedestrians can detect when those vehicles are pulling out or approaching in situations in which the pedestrian is potentially obscured from the driver's view.

Fatalities

The Fatality Analysis Reporting System (FARS) contains a census of all traffic fatalities. HVs and EVs that struck and killed a pedestrian were identified using the Vehicle Identification Numbers (VINs) contained in the 2001 through 2009 FARS files. During this period, there were 53 pedestrian fatalities attributed to crashes involving 47 HVs and three EVs. Almost all of these fatalities (47 of the 53) involved vehicles that were identified as passenger vehicles. In 2008, there were 10 HVs or EVs that struck and killed 10 pedestrians, and in 2009, there were 11 HVs or EVs that struck and killed 11 pedestrians.

However, these fatalities are not included in the target population for analysis under this rulemaking for two reasons. The first is that pedestrian fatalities are not as likely to occur at low speeds for which the rate of HV pedestrian collisions is significantly higher than collisions between ICE vehicles and pedestrians. Today's final rule establishes minimum sound requirements for hybrid and electric vehicles operating at speeds up to 30 km/h (18.6 mph). A majority of pedestrian fatalities occur when the vehicle involved in the collision is not travelling at a low speed. Overall, 67 percent of the pedestrian fatalities involving HVs or EVs and with known speed limits occurred at a speed limit above 35 mph.[31] For all pedestrian fatalities with known speed limits, 62 percent occurred at a speed limit above 35 mph and 61 percent of those

[30] Wu, J., 2015, ''Updated Analysis of Pedestrian and Pedalcyclist Crashes of Hybrid Vehicles with Larger Samples and Multiple Risk Factors.''

[31] For those pedestrian fatalities that occurred on roads with a posted speed limit of 35 mph or less, we do not have any data on actual travel speed of the vehicles involved. Therefore, we are not able to tell if the vehicles involved were travelling at a speed at which they would be required to meet the requirements of the final rule.

involving passenger vehicles occurred at a speed limit above 35 mph.[32] The goal of this rule is to prevent injuries to pedestrians that result from pedestrians being unable to hear nearby hybrid and electric vehicles operating at low speeds. At speeds of 35 mph and above, at which a majority of fatal crashes involving pedestrians occur, it is very unlikely that lack of sound is the cause as the sound levels produced by hybrid and electric vehicles at those speeds are the same as the sound levels produced by ICE vehicles. Establishing minimum sound requirements for hybrid and electric vehicles operating at speeds up to 30 km/h is expected to prevent injury crashes but not necessarily have an impact on those crashes involving pedestrian fatalities, based on existing data.

The second reason is that the rate of pedestrian fatalities per registered vehicle for HVs and EVs is not larger (and is in fact smaller) than that for ICE vehicles. Using 2008 data, the fatality rate for pedestrians in crashes with HVs and EVs is 0.85 fatalities per 100,000 registered vehicles, and the corresponding rate for ICE vehicles is 1.57 per 100,000 vehicles.

There also could be fatalities involving HVs and EVs that occur in non-traffic crashes in places such as driveways and parking lots. However, a comprehensive search for HVs and EVs involved in pedestrian fatalities could not be undertaken because NHTSA's Not in Traffic Surveillance (NiTS) system does not provide VINs, and a search for model names that indicate hybrid or electric vehicles did not identify any crashes involving pedestrian fatalities.

Low-Speed Vehicles

NHTSA has no data on pedestrian or pedalcyclist crash rates for low-speed vehicles due to the low rate of sales of these vehicles as a percentage of the light vehicle fleet. NHTSA also has not found any examples of crashes involving LSVs and pedestrians or pedalcyclists that appear to be caused by the lack of sound in LSVs. However, we assume that the safety problem with these vehicles will be similar to that for HVs based on the acoustic profile of these vehicles.

Need for Independent Mobility of People Who Are Visually-Impaired

In addition to addressing the safety need in the traditional sense of injuries avoided as a result of preventing vehicle-pedestrian crashes, NHTSA believes it is important to note another dimension of safety that should be taken into account with respect to pedestrians who are blind or visually-impaired. Pedestrians who are blind or visually-impaired need to be able to travel independently and safely throughout their communities without fear and risk of injury, both as a result of collisions with motor vehicles and as a result of other adverse events in the environments they must negotiate. To a far greater extent than is the case for sighted people, vehicle sounds help to define a blind or visually-impaired person's environment and contribute to that person's ability to negotiate through his/her environment in a variety of situations.[33]

The modern white cane and the techniques for its use help the user to navigate and allow sighted people to recognize that a person is blind or visually-impaired. Today, the ''structured discovery'' method of teaching independent travel for visually-impaired people emphasizes learning to use information provided by the white cane, traffic sounds, and other cues in the environment to travel anywhere safely and independently, whether the individual has previously visited the place or not.

Whether a blind or visually-impaired person uses a white cane or guide dog, the primary purpose of both travel tools is to help the blind traveler identify and/or avoid obstacles in his or her path using the sense of touch. The remaining information needed by a blind or visually-impaired person to safely and independently travel is provided primarily through the sense of hearing.

When traveling with a white cane or guide dog, the primary sound cue used by blind pedestrians is the sound of vehicle traffic, which serves two purposes: navigation and collision avoidance. Navigation involves not only ascertaining the proper time to enter a crosswalk and maintain a straight course through an intersection while crossing, but also the recognition of roadways and their traffic patterns and their relationship to sidewalks and other travel ways a blind or visually-impaired person might use.

Sound emitted by individual vehicles, as opposed to the general sound of moving traffic, is critical. The sound of individual vehicles helps to alert blind travelers to the vehicle's location, speed, and direction of travel. For example, a blind or visually-impaired person moving through a parking lot can hear and avoid vehicles entering or exiting the lot or looking for parking spaces; a blind person walking through a neighborhood can hear when a neighbor is backing out of a driveway. The vehicle sound also indicates to a blind or visually-impaired pedestrian whether a vehicle is making a turn, and if so, in which direction. The sound of individual vehicles also allows the blind traveler to detect and react to unusual or unexpected vehicle movement. The sound of a vehicle that has an activated starting system but is stationary (usually referred to as ''idling'' for vehicles with internal combustion engines) alerts the blind or visually-impaired traveler to the fact that the vehicle is not simply parked and that it may move at any moment. If a blind person is approaching a driveway and notes a vehicle that is stationary but running he or she will wait for the vehicle to pull out, or for an indication that it will not, for example by noting that the vehicle remains stationary for some time, indicating that the driver has no immediate plans to move.

In the NPRM, the agency described how the acoustic cues provided by vehicles help blind pedestrians discern changes in the road-way, determine whether an intersection has a traffic control device, and navigate intersections with unusual characteristics such as three-way intersections or roundabouts. The sounds made by traffic including the sounds of idling vehicles allow blind pedestrians to determine when it is safe to cross the street and maintain a straight travel path while walking through the intersection.

Using the white cane or guide dog and the sound of traffic, people who are blind or visually-impaired have been able to navigate safely and independently for decades. Blind and visually-impaired people travel to school, the workplace, and throughout their communities to conduct the daily functions of life primarily by walking and using public transportation. Safe and independent pedestrian travel is essential for blind or visually-impaired individuals to obtain and maintain employment, acquire an education, and fully participate in community life. Short of constantly traveling with a human companion, a blind or visually-impaired pedestrian simply cannot ensure his or her own safety or navigate effectively without traffic sound. To the extent that there are more and more HVs and EVs on the road that are hard to

[32] Data particularly tied to other speeds, such as 20 mph, is not available because of the structure of the databases used, *i.e.,* the relevant data variable is whether the speed limit was above or below 35 mph at the crash location.

[33] National Federation of the Blind (2011) How People Who are Blind Use Sound for Independent Travel, memorandum to the docket, NHTSA–2011–0148–0028, Washington, DC. That memorandum is the source for this information.

detect, people who are blind or visually-impaired will lose a key means—the sound of traffic—by which they determine when it is safe to cross streets, but also by which they orient themselves and navigate safely throughout their daily lives, avoiding dangers other than automobiles.

C. Research on Vehicle Emitted Sounds and Detectability

Early Research on Quiet Vehicles and Public Meeting

NHTSA began collaborating with a working group within the Society of Automotive Engineers International (SAE) in August 2007 to identify effective ways to address the safety issue of quiet hybrid and electric vehicles. This working group included representatives from the Alliance of Automobile Manufacturers, Global Automakers, the visually impaired community and NHTSA.

On June 23, 2008, NHTSA held a public meeting to bring together government policymakers, stakeholders from the visually impaired community, industry representatives, and public interest groups to discuss the technical and safety policy issues associated with hybrid vehicles, electric vehicles, and quiet internal combustion engine (ICE) vehicles, and the risks they present to visually impaired pedestrians. After this public meeting, NHTSA issued a research plan to investigate hybrid and electric vehicles and pedestrian safety.[34] The objectives of the research plan were to identify critical safety scenarios for visually impaired pedestrians, identify requirements for blind pedestrians' safe mobility (emphasizing acoustic cues from vehicles and ambient conditions), identify potential countermeasures, and describe the countermeasures' advantages and disadvantages.

In 2009 NHTSA issued the report ''Incidence of Pedestrian and Bicyclist Crashes by Hybrid Electric Passenger Vehicles,'' discussed in Section II.B of this notice, and a report titled ''Research on Quieter Cars and the Safety of Blind Pedestrians, A Report to Congress.'' [35] The report to Congress briefly discussed the quieter vehicle safety issue, how NHTSA's research plan would address the issue, and the status of the agency's implementation of that plan.

In 2010 through 2014 the agency continued relevant quiet car research as briefly discussed below.

Phase 1 Research

In April 2010, NHTSA issued a report that began addressing the tasks listed in the research plan. This report, titled ''Quieter Cars and the Safety of Blind Pedestrians: Phase I,'' documents the overall sound levels and general spectral content for a selection of ICE vehicles and HVs in different operating conditions, evaluates vehicle detectability for two background noise levels, and considers the viability of countermeasure concepts categorized as vehicle-based, infrastructure-based, and systems requiring vehicle-pedestrian communications.[36]

The results show that the overall sound levels for the HVs tested are noticeably lower at low speeds than for the ICE vehicles tested. Overall, study participants were able to detect any vehicle sooner in the low ambient noise condition. ICE vehicles tested were detected sooner than their HV counterpart vehicles except for the test scenario in which the target vehicle was slowing down. In this scenario, HVs were detected sooner because of the distinctive sound emitted by the regenerative braking system on the HVs. Response time to detect a target vehicle varies by vehicle operating condition, ambient sound level, and vehicle type (*i.e.,* ICE vehicle versus HV or EV mode).

As part of Phase 1 research, NHTSA sought to identify operating scenarios necessary for the safety of visually impaired pedestrians. The researchers identified these scenarios based on crash data, literature reviews, and unstructured conversations with blind pedestrians and orientation and mobility specialists. Scenarios were defined by combining pedestrian vehicle environments, vehicle type, vehicle maneuver/speed/operation, and considerations of ambient sound level. The operating scenarios identified in Phase 1 were: Vehicle approaching at low speed; vehicle backing out (as if coming out of a driveway); vehicle travelling in parallel and slowing (like a vehicle that is about to make a turn); vehicle accelerating from a stop; and a vehicle that is stationary.

In Phase 1, NHTSA also compared the auditory detectability of HVs and ICE vehicles by pedestrians who are legally blind. Forty-eight independent travelers, with self-reported normal hearing, listened to binaural [37] audio recordings of two HVs and two ICE vehicles in three operating conditions, and two different ambient sound levels. The operating conditions included a vehicle: Approaching at a constant speed (6 mph); backing out at 5 mph; and slowing from 20 to 10 mph (as if to turn right). The ambient sound levels were a quiet rural (31.2 dB(A)) and a moderately noisy suburban ambient (49.8 dB(A)). Overall, participants took longer to detect the two HVs tested (operated in electric mode), except for the slowing maneuver. Vehicle type, ambient level, and operating condition had a significant effect on response time.

Table 5 shows the time-to-vehicle arrival at the time of detection by vehicle type, and ambient condition. Considering all three independent variables, there was a main effect of vehicle, vehicle maneuver, and ambient sound level. Similarly, there were interaction effects between vehicle type and ambient, vehicle type and maneuver, ambient and vehicle maneuver, and a three way interaction between ambient, vehicle type and vehicle maneuver.

TABLE 5—AVERAGE TIME-TO-VEHICLE ARRIVAL BY SCENARIO, VEHICLE TYPE, AND AMBIENT SOUND

Scenario	Low ambient		High ambient	
	HVs	ICE vehicles	HVs	ICE vehicles
Approaching at 6 mph	4.8	6.2	3.3	5.5
Backing out at 5 mph	3.7	5.2	2.0	3.5

[34] A copy of the research plan is available at *www.regulations.gov* (Docket No. NHTSA–2008–0108–0025).

[35] Research on Quieter Cars and the Safety of Blind Pedestrians, A Report to Congress. U.S. Dept. of Transportation, Washington, DC, October 2009, available at *http://www.nhtsa.gov/DOT/NHTSA/NVS/Crash%20Avoidance/Technical%20Publications/2010/RptToCongress091709.pdf.*

[36] Garay-Vega, et al. (2010) Quieter Cars and the Safety of Blind Pedestrians: Phase I, Report No. DOT HS 811 304, U.S. Dept. of Transportation, Washington, DC. Available at *http://www.nhtsa.gov/DOT/NHTSA/NVS/Crash%20Avoidance/Technical%20Publications/2010/811304rev.pdf.*

[37] Binaural recordings reproduce the acoustic characteristics of the sound similar to how a human perceives it. Binaural recordings reproduce a more realistic three dimensional sensation than conventional stereo and are intended for playback through headphones, rather than loudspeakers.

TABLE 5—AVERAGE TIME-TO-VEHICLE ARRIVAL BY SCENARIO, VEHICLE TYPE, AND AMBIENT SOUND—Continued

Scenario	Low ambient		High ambient	
	HVs	ICE vehicles	HVs	ICE vehicles
Slowing from 20 to 10 mph	2.5	1.3	2.3	1.1

The Phase 1 research showed that HVs were more difficult for pedestrians to detect by hearing than ICE vehicles. The Phase 1 research report also discussed various countermeasures to mitigate pedestrian safety risks associated with quiet vehicles. The Phase 1 report also concluded that a vehicle-based audible alert signal was the countermeasure that both provided all the necessary information to blind pedestrians to make safe travel decisions and produced benefits for other pedestrians and for pedalcyclists.

Phase 2 Research

In October 2011 NHTSA released a second report examining issues involving hybrid and electric vehicles and blind pedestrian safety titled ''Quieter Cars and the Safety of Blind Pedestrians, Phase 2: Development of Potential Specifications for Vehicle Countermeasure Sounds.'' [38] The Phase 2 research developed various methods to specify a sound to be used as a vehicle-based audible alert signal that could be used to provide information at least equivalent to the cues provided by ICE vehicles, including speed change, and evaluated sounds using human factors testing to examine whether the sounds could be detected and recognized as vehicle sounds. This research used acoustic data acquired from a sample of ten ICE vehicles to examine the sound levels at which synthetic vehicle sounds used could be set, and used psychoacoustic models to examine issues of detectability and masking of ICE-like sounds and alternative sounds, and also included a human factors study to examine the detectability of synthetic sounds.

The methods for specifying sounds discussed in the Phase 2 final report assumed that the vehicle acoustic countermeasure should:

- Provide information at least equivalent to that provided by ICE vehicles, including speed change; and
- Provide for detection of a vehicle in residential, commercial, and other suburban and urban environments in which blind pedestrians would expect to be able to navigate using acoustic cues. **Note:** Human factors tests for Phase 2 were conducted in an ambient of approximately 58–61 dB(A).

As part of the Phase 2 research, Volpe conducted a human factors study to compare the auditory detectability of potential sounds for hybrid and electric vehicles operating at a low speed and how those sounds compared to an ICE control vehicle. The human factors testing in Phase 2 suggested that synthetic sounds resembling an ICE produce similar detection distances as actual ICE vehicles. In some instances, the results indicated that synthetic sounds designed according to psychoacoustic principles can produce double the detection distances relative to the reference vehicle. The results also suggested that synthetic sounds that contain only the fundamental combustion noise are relatively ineffective. None of the analyses found a significant effect of vision ability.[39] Participants who were legally blind, on average, were no better or worse than sighted participants in detecting the approach sounds.

Phase 3 Research

In order to develop possible test procedures and requirements for an FMVSS proposing to establish minimum acoustic requirements for hybrid and electric vehicles, NHTSA initiated a third phase of research to develop an objective, repeatable test procedure and objective specifications for minimum sound requirements. NHTSA's Vehicle Research and Test Center (VRTC), as part of its effort to develop a test procedure, conducted acoustic measurements and recordings of several HVs and EVs and those vehicle's ICE pair vehicles.[40] Volpe used these recordings as well as data from the Phase 1 and Phase 2 research to identify parameters and criteria for sounds to be detectable and recognizable as a motor vehicle.

VRTC Acoustic Measurements

The primary focus of Phase 3 research conducted by VRTC was to develop an objective and repeatable test procedure to measure vehicle-emitted sound. This work consisted mainly of evaluation of the new SAE J2889–1, *Measurement of Minimum Noise Emitted by Road Vehicles,* test method, and several variations used to test operating conditions that were not included in SAE J2889–1, and development of a practical test procedure for collecting test track acoustic data from HVs, EVs and ICE vehicles. The data collected was then evaluated to begin establishing potential performance criteria. The draft version of SAE J2889–1 used by VTRC included recommended procedures for measuring minimum sound pressure levels of vehicle-emitted sound but did not include any recommended performance requirements for minimum levels of vehicle-emitted sound. SAE J2889–1 was still in draft form at the start of the research, but the version published in September 2011 was not significantly different from the draft.

The research was conducted using three HVs, one EV, and four ICE vehicles. The vehicles were used to gather sample data on the difference in sound pressure levels between ICE sounds and EV or HV sounds. VRTC also gathered data to determine how synthetic vehicle sounds emitted from speakers projected around the vehicle, as referred to as the directivity of the sound, and sound quality levels. Some of the hybrid and electric vehicles were tested with multiple alert sounds. Some of the hybrid and electric vehicles were also tested with no alert sound at all, to examine the difference between the sound pressure level produced by hybrid and electric vehicles and ICE vehicles.

One of the purposes of the Phase 3 acoustic measurements was to gather additional data on the difference in sound levels between ICE vehicles and EVs and HVs operating in electric mode. For the pass-by tests at 10 km/h in Phase 3, the ICE vehicles were between 6.2 and 8.5 dB(A) louder than the EV/

[38] Garay-Vega, et al. (2011) Quieter Cars and the Safety of Blind Pedestrians, Phase 2: Development of Potential Specifications for Vehicle Countermeasure Sounds, Report No. DOT HS 811 496. Dept. of Transportation, Washington, DC. Available at *http://www.nhtsa.gov/DOT/NHTSA/NVS/Crash%20Avoidance/Technical%20Publications/2011/811496.pdf.*

[39] All participants were required to wear a blindfold during the study.

[40] Evans and Harris. (2012) Quieter Vehicle Performance Test Development Research Report, U.S. Dept. of Transportation, Washington, DC. Available at *www.regulations.gov*, Document ID: NHTSA–2011–0148–0047.

HVs without added sound. At 20 km/h the difference between the HV/EVs and ICE vehicles varied, but the average delta was 3.5 dB(A) louder for the ICE vehicles. At 30 km/h the sound levels of the HV/EVs approached the levels of the ICE vehicles and the individual measurements for the two types of vehicles have considerable overlap. Table 6 shows the results of HV/EV vehicles with no sound alert as compared to their ICE counterparts.

TABLE 6—PASS-BY SOUND LEVEL FOR HV/EV VEHICLES WITHOUT ALERT SOUND VERSUS COUNTERPART ICE VEHICLES

Manufacturer	Speed, km/h	HV/EV Sound Level, dB	ICE Sound Level, dB	ICE minus HEV/EV, dB
Nissan	10	50.5	56.6	6.1
	20	60.0	62.3	2.3
	30	66.5	68.1	1.6
Prototype Vehicle G	10	51.4	59.9	8.5
	20	60.5	63.1	2.6
	30	67.0	67.5	0.5
Prototype Vehicle H	10	51.2	59.7	8.5
	20	59.3	64.5	5.2
	30	65.3	69.2	3.9
Average	10	51.0	58.7	7.7
	20	59.9	63.3	3.4
	30	66.3	68.3	2.0

The measurements from the startup and stationary but active scenarios were used to measure the directivity of the vehicles' sound. The purpose of measuring the directivity pattern of the vehicles was to compare the directivity pattern of ICE vehicles to those hybrid and electric vehicles equipped with a speaker system. For the ICE vehicles, the sound pressure level behind the vehicle was 6 to 10 dB lower than that directly in front of the vehicle. For the hybrid and electric vehicles with a speaker system, the sound level behind the vehicle was 12 to 15 dB lower behind the vehicle. There was a systematic difference from left to right for some vehicles, particularly with an artificial sound.

Volpe Acoustic Analysis

As another part of the Phase 3 research, Volpe conducted an analysis of existing acoustic data and data collected during the previously mentioned VTRC testing to develop recommendations for performance requirements for minimum levels of vehicle emitted sound to be proposed in the NPRM. This work consisted of examining the frequency ranges, minimum sound levels for selected one-third octave bands, and requirements for broadband noise and tones as possible criteria for setting minimum requirements for vehicle-emitted sound. Evaluations were conducted using a loudness model [41] to determine when the sounds might be detectable in a given ambient. Of the several different loudness models examined by Volpe, Moore's Loudness provided the most pertinent information about the perceived loudness and detectability of a sound. Two approaches were used to identify potential detectability specifications for alert sounds to be included in the NPRM: (1) Sound parameters based on a loudness model and detection distances and (2) sound parameters based on the sound of ICE vehicles.

Volpe's work in developing the sound specifications based on a loudness model and detection distances was guided by several aspects of the agency's Phase 1 and Phase 2 research. Volpe analyzed the acoustic data of the sounds used in the human factors research in Phase 2 from a psychoacoustic perspective to determine the loudness of the sounds and whether the sounds would be detectable in several different ambient environments. Because the response of the study participants in the human factors experimentation in Phase 2 varied significantly due to variations in the ambient,[42] Volpe determined that any analysis of sounds using a loudness model should use a synthetic ambient that did not vary with respect to the frequency profile or overall sound pressure level. Volpe used a synthetic ambient sound with the loudness model during Phase 3 in developing the specifications contained in the NPRM.

This research showed that pedestrians' ability to detect synthetic sounds would be maximized if the alert signal contains detectable components over a wide frequency range. The research also explored how tones and broadband content could enhance the detectability of synthetic alert sounds. The report used acoustic data for directivity to estimate minimum sound levels for 'reverse' or 'backing' maneuvers. Volpe then used the results of this analysis of the detectability of sounds as estimated by psychoacoustic models to make recommendations for potential minimum sound levels for the NPRM.

In addition to using psychoacoustic models to develop recommendations for minimum sound specifications, Volpe created a set of minimum sound specifications based on the sound produced by ICE vehicles. Volpe considered multiple minimum sound specifications in an attempt to derive at the most optimal approach for defining sound specification requirements in order to provide recommendations for a variety of sound specifications for NHTSA to seek comment on in the NPRM. Volpe created the specification based on the sound produced by ICE vehicles (using data captured during Volpe's Phase 2 research) and recordings of vehicles provided by automobile manufacturers. Volpe aggregated this data to create minimum acoustic specifications based on the mean sound levels of ICE vehicles and the mean sound levels of ICE vehicles minus one standard deviation.

Agency Research and Analysis Conducted Since the NPRM

After the NPRM was issued, NHTSA conducted research to examine additional aspects of minimum sound requirements for hybrid and electric vehicles. The research involved human

[41] Loudness models are computer simulations used to estimate the minimum sound levels needed for alert sounds to be detectable in the presence of ambient noise.

[42] Garay-Vega, et al. (2011) Quieter Cars and the Safety of Blind Pedestrians, Phase 2: Development of Potential Specifications for Vehicle Countermeasure Sounds, Report No. DOT HS 811 496. Dept. of Transportation, Washington, DC. Available at *http://www.nhtsa.gov/DOT/NHTSA/NVS/Crash%20Avoidance/Technical%20Publications/2011/811496.pdf.*

factors testing and acoustic modeling to examine the detectability of sounds with different acoustic characteristics. The research also involved acoustic measurement of heavy-duty vehicles and motorcycles, analysis of indoor testing conducted by Transport Canada, and additional light vehicle testing to refine the test procedure proposed in the NPRM. The research is documented in multiple separate research reports and is summarized below. In some cases, as identified below, more details of the research are provided in the appropriate sub-sections of Section III of this preamble. In those cases, the agency discusses the important aspects of the research that were utilized to make decisions finalized in this rule.

Human Factors Research and Acoustic Modeling

In the NPRM, NHTSA proposed minimum sound pressure levels for a specific set of one-third octave bands that included low frequency bands (315, 400, and 500 Hz) and high-frequency bands (2000, 2500, 3150, 4000, and 5000 Hz) for various operating conditions. These proposed specifications for minimum sound pressure levels were identified based on a psychoacoustic loudness modeling approach and safe detection distances.[43] After the NPRM was published, the agency conducted a study to quantify the differences between predicted detection levels of vehicle sounds in the presence of an ambient (as indicated by the loudness model) and the actual responses by participants listening to these vehicle sounds through headphones. This was done in order to evaluate the accuracy of the psychoacoustic model in predicting when sounds would be detected. The study also explored the effect of different factors such as the number of bands at threshold, adjacent and non-adjacent bands, and signal type (*e.g.,* pure tones, bands of noise).[44] In addition to the human factors study, Volpe also conducted an analysis of acoustic data in order to predict the probability that a sound would be detected in different ambients as the number of one-third octave bands making up the sound changes.

The key performance metrics for the human factors study were the response time and associated time-to-vehicle arrival. Response time is the elapsed time, in seconds, from the start of the trial to the instant the participant presses the push-button as an indication he/she detected the target signal. The time-to-vehicle arrival is the elapsed time, in seconds, from first detection of a target signal to the instant the vehicle passes the pedestrian location. The detection distance is the separation between the vehicle and the pedestrian location at the moment of detection. The detection distance can be computed from the time-to-vehicle arrival and vehicle speed. Signals meeting the minimum sound levels, computed according to the approach described in the NPRM, are expected to be detectable at least 2.0 seconds or 5 meters away (for a vehicle approaching at 10 km/h). Table 7 shows the time-to-vehicle arrival and detection distances for the signals examined in this study. The signals used in the study included sounds developed by Volpe to test different hypotheses involving the detection model, recordings of prototype synthetic sounds provided by vehicle manufacturers, and a recording of an ICE vehicle. The ''Source'' column in Table 7 describes the origin of each sound.

TABLE 7—SOUND STIMULI TESTED

Signal ID	Significant component frequencies, Hz	Levels, dB(A)	Source	Comment	Time-to-vehicle arrival, s	Vehicle distance at detection, m
3	315, 400, 500, 630, 2000, 2500, 3150, 4000, 5000.	Threshold	Simulation	Tone @315 Hz, TNR 9 dB.	4.9	13.6
6	315, 400, 500, 630, 2000, 2500, 3150, 4000, 5000.	Threshold	Simulation	Tone @630 Hz, TNR 9 dB.	4.3	11.9
9	315, 400, 500, 630, 2000, 2500, 3150, 4000, 5000.	Threshold	Simulation	Tone @2500 Hz, TNR 9 dB.	4.5	12.5
10	315, 400, 500, 630, 2000, 2500, 3150, 4000, 5000.	Threshold	Simulation	NNPRM + 630 Hz	4.4	12.2
11	315	Threshold	Simulation	Single Noise Band	2.3	6.4
12	630	Threshold	Simulation	Single Noise Band	2.9	8.1
13	2500	Threshold	Simulation	Single Noise Band	2	5.6
14	315, 400, 500, 2000, 2500, 3150, 4000, 5000.	Threshold	Simulation	NPRM	4.3	11.9
15	50 to 10,000	Threshold	Simulation	Noise in all Bands	4.6	12.8
17	315, 400, 500	46, 54, 48	Prototype Recording.	ASG as Recorded (No calibration).	5.8	16.1
18	315, 400, 500, 2000, 2500, 3150, 4000, 5000.	Threshold	Prototype Recording.	ASN (Calibrated to match NPRM).	4.5	12.5
19	2500	56	Prototype Recording.	ASN as Recorded (No calibration).	5.8	16.1
20	315, 400, 500, 2000, 2500, 3150, 4000, 5000.	Threshold	Prototype Recording.	ASV Sound4 (Calibrated to match NPRM).	6.7	18.6
23	4000, 5000, 6300, 8000, 10000	37, 36, 34, 32, 31.	ICE Recording	ASF ICE (No Calibration).	3.1	8.6
25	315, 400, 500	Threshold	Simulation	Low Frequency Noise	4.2	11.7
26	315, 630, 2000, 5000	Threshold	Simulation	Non-adjacent Noise	4.5	12.5
27	630, 800, 1000, 1250, 1600	Threshold	Simulation	Mid-frequency Noise	3.7	10.3
28	800, 2500	39, 45	Simulation	1 below threshold, 1 at threshold.	2.2	6.1
29	800, 2500	45, 39	Simulation	both below threshold	1.4	3.9

[43] Hastings, et al. (2012). Research on Minimum Sound Specification for Hybrid and Electric Vehicles. Docket NHTSA–2011–0148–0048.

[44] Hastings, et al. Detectability of Alert Signals for Hybrid and Electric Vehicles: Acoustic Modeling and Human Subjects Experiment. (2015) Washington, DC: DOT/NHTSA.

TABLE 7—SOUND STIMULI TESTED—Continued

Signal ID	Significant component frequencies, Hz	Levels, dB(A)	Source	Comment	Time-to-vehicle arrival, s	Vehicle distance at detection, m
30	800, 2500	50, 50	Simulation	1 ~ threshold, 1 above threshold.	3.6	10.0
31	2000, 2500, 3150, 4000, 5000	Threshold	Simulation	High Frequency Noise	3.2	8.9
32	315	Threshold	Simulation	Pure Tone	3.1	8.6
33	630	Threshold	Simulation	Pure Tone	2.9	8.1
34	2500	Threshold	Simulation	Pure Tone	2.4	6.7

The data showed that all signals tested in the study exceeded the 2.0-second detection criterion except for signal 29, which was detected 1.4 seconds before pass-by.[45] Exceeding the 2.0-second detection criterion was expected for signals with content in more than one one-third octave band, since the modeled thresholds were based on a signal with content in a single band. Content in multiple one-third octave bands could increase the time-to-vehicle arrival if subjects aggregated the energy across bands or if they utilized a 'best' single band strategy. That is, with more one-third octave bands, the signal can be more easily detected either because it is stronger overall or because, given the many possible random factors that could affect detectability, more components creates a greater probability that at least one band will be easier to detect.

An ICE vehicle (signal 23), without calibration to minimum one-third octave band levels for detection used in the NPRM, was detected 3.1 seconds away on average. Two prototype alert signals (signals 17, 19), without calibration to minimum one-third octave band levels for detection used in the NPRM, were detected 5.8 seconds away. In general, signals with a pure tone (signals 32, 33, 34) were detected sooner than signals with a single band of noise at the same frequency (signals 11, 12, 13). For example, the average time-to-vehicle arrival was 3.1 seconds for a pure tone at 315 Hz and 2.3 seconds for a single band of noise at the same frequency. A statistical analysis also found that the interaction of sound type (tones or noise) and frequency was significant.

The study results indicated that, except for frequency sensitivity for high frequency components, the modeling approach for determining detection thresholds was conservative, meaning that the study participants were able to detect sounds sooner than predicted by the model. In order to correct for frequency sensitivity differences and to develop the best agreement between modeled detection thresholds and those of the participants so that the minimum one-third octave band levels for detection in the final rule more closely align with pedestrians' ability to detect sounds in the real world, Volpe performed a linear regression to reconcile the predicted detection values in the model and the performance of the participants in the experiment.

In order to ensure that the model was as predictive of real-world experience as possible, that is, in order to obtain the best agreement between modeled detection thresholds and those of the participants, and also to correct for frequency sensitivity differences, Volpe did a series of linear regressions using different loudness metrics. The best agreement between modeled and actual participant detection times occurred when a detection threshold of 0.079 sones[46] per ERB was used[47] (see Figure 1). The R-squared value achieved for this model was 0.72, indicating that the model performs well on average although, as anticipated, outcomes are not always exactly the same due to random variation and other differences between the model predictions and participant performance. Thus, the agency chose to use the detection threshold of 0.079 sones per ERB in the Moore's model as the basis for deriving the revised minimum levels for each of the one-third octave bands in the final rule.

[45] Signal 29 had two components, and the levels were set below the minimum detection thresholds.

[46] Sone is a unit of subjective loudness on a linear scale. The Moore's Loudness model used by the agency in the NPRM and this final rule utilizes loudness (in sones) and partial loudness (in sones per equivalent rectangular bandwidth or ''ERB'') parameters as a basis for determining thresholds, *i.e.,* minimum sound levels, required for vehicle detection.

[47] Hastings A.; and McInnis, C. ''Detectability of Alert Signals for Hybrid and Electric Vehicles: Acoustic Modeling and Human Subjects Experiment'' Docket NHTSA–2011–0148. Washington, DC: DOT/NHTSA.

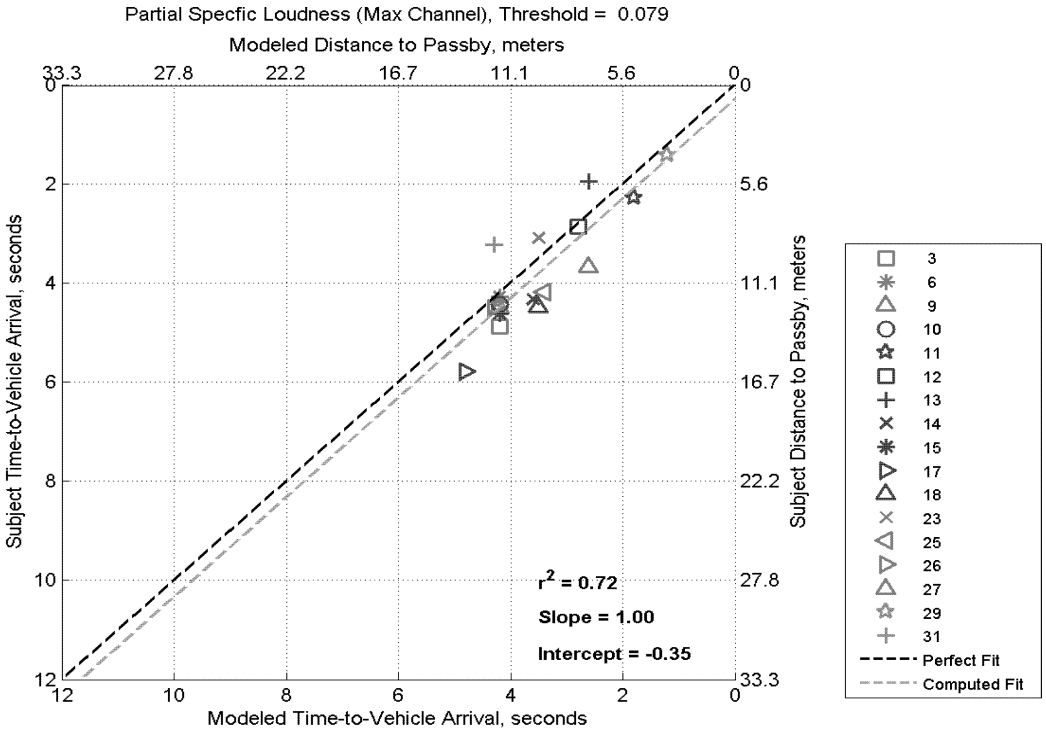

Figure 1. Metric and Criterion with Best Agreement between Modeled and Subject Time-to-Vehicle Arrival. (Signal identification numbers are explained in Section II.C)

The agency also conducted an analysis of acoustic recordings to evaluate the detectability of signals with varying numbers of non-adjacent components in the presence of additional ambient conditions different from the standardized ambient used to develop the one-third octave band minimum levels for detectability in the NPRM or this final rule. The analysis provides an estimate of how often pedestrians would be able to detect a sound signal in a 55 dB(A) ambient, with expected spectral variation, as a function of the number of one-third octave bands meeting the revised minimum thresholds.[48] Ambient data were collected at 17 locations along Centre Street in Newton, Massachusetts, signalized and stop-controlled intersections (some with relatively high traffic volume and some removed from the main road), one-way streets, and side streets or driveways. The spectral shape of the ambient varies from sample to sample, as would be expected given the different locations in which they were collected. Some samples are dominated by low frequency content while other samples are dominated by high frequency content or have a mix of high and low frequency content. Each ambient sample was normalized to an overall sound pressure level of 55 dB(A), so that the effect of the spectral content of each ambient on the detectability of a signal could be examined in isolation from other variables. This analysis differs from the modeling approach used to develop the minimum one-third octave band levels for detection in the NPRM and the final rule because that approach used a single ambient that was chosen for consistency in development of minimum standards. NHTSA refers to the resistance to masking of a signal evaluated using this analysis as the ''robustness'' of the signal. Signals evaluated for robustness contained from one to seven non-adjacent components within the 315 to 5000 Hz frequency range. In most cases, these signals were scaled so that the components just met the minimum one-third octave band levels for detectability derived from the human factors study.

This analysis predicted that, as ambient conditions vary, the probability that at least one component is detectable increases with increasing number of components when each component is set to the minimum detection levels calculated based on the human factors study. This is true for all operating conditions. For signals with content in 1, 2, 3, 4, 5, 6, and 7 one-third octave bands, the predicted probabilities were about 55, 81, 93, 97, 98, 100, and 100 percent, respectively. The analysis indicates that there is a rapid increase in detectability as the number of components increases from 1 band to 4 bands when each band is set at the specified minimum detectable level. Additional bands beyond 4 do not appear to increase the detectability level significantly. An eight-band sound was not included in the analysis because eight non-adjacent one-third octave bands do not fit in the frequency range over which we are establishing minimum requirements in the final rule. This analysis also showed that some signals with content in only 2 one-third octave bands are expected to be detected with the same frequency in multiple ambients as signals with content in 4 one-third octave bands. Because signals with content in 2 one-third octaves bands could be equally detectable as sounds with content in 4 one-third octave bands the agency decided to include minimum requirements for content in either 2 or 4 one-third octave bands in the final rule.

Heavy Vehicle and Motorcycle Testing

The research NHTSA conducted prior to the NPRM focused exclusively on

[48] For practical reasons, this analysis is limited in that it includes 17 measurement locations for the ambient that are in one State, Massachusetts. Also, ambient samples were not categorized or weighted according to 'preferred crossable' opportunities for pedestrians.

light vehicles. However, since issuing the NPRM, the agency has conducted some acoustic measurements on hybrid and electric heavy-duty vehicles (GVWR over 10,000 lb.) and electric motorcycles.[49] The test protocol used for those measurements followed procedures in SAE–2889–1 (May 2012).

Two electric motorcycles were tested at the Transportation Research Center in Columbus, Ohio, on a test surface conforming to ISO 10844–2011 specifications. NHTSA was able to apply the proposed test procedure to the motorcycles without major issues.[50] The overall sound pressure levels for a 2012 model Brammo Enertia were 57.0, 63.2 and 66.5 dB(A) for the 10, 20, and 30 km/h pass-by, respectively. The overall sound pressure levels for a 2012 model Zero S were between 6.2 to 7.9 dB lower with 49.1, 57.0 and 59.6 dB(A) for the 10, 20, and 30 km/h pass-by, respectively.

The one-third octave band levels for the two motorcycles were computed and compared to the minimum levels needed for detection (as determined in NHTSA's research described in Section II.C[51]) in the frequency range from 315 Hz to 5000 Hz. Results for the 2012 Brammo Enertia show that the measured levels were equal or greater than the minimum levels in two bands for the 10 km/h pass-by and in three bands for the 20 km/h pass-by. Sound levels for the Enertia for the 30 km/h pass-by did not meet the minimum levels for detection in any one-third octave bands from 315 Hz to 5000 Hz. Sound levels for the 2012 Zero S did not meet the minimum levels for detection in any of the bands for all pass-by tests (*i.e.,* 10, 20, and 30 km/h). While there is an appreciable difference between the two models tested, these results indicate that both models operate quietly over all or part of the range of speeds up to 30 km/h.

As discussed in Section III.B, the agency has determined that, as with other types of hybrid and electric vehicles, it is appropriate that the requirements of this final rule should apply to hybrid and electric motorcycles.

NHTSA also collected acoustic data for a pure electric heavy vehicle (Navistar eStar two-axle delivery van) on a surface compliant with ISO 10844 and suitable for heavy vehicles. No issues were encountered in applying the test protocol to the heavy vehicle tested. It is important to note that only this one delivery truck was tested. The agency was unable to obtain electric or hybrid heavy-duty vehicles with different sizes and configurations for testing. The overall sound pressure levels for the Navistar eStar were 55.4, 64.5, 73.4, and 75.2 dB(A) for the stationary, 10, 20, and 30 km/h pass-by scenarios, respectively. The acoustic measurements for this vehicle were computed and compared to the minimum levels needed for detection in the frequency range from 315 Hz to 5000 Hz.[52] The data showed that the measured one-third octave band levels for the e-Star heavy vehicle are equal to or greater than the minimum levels for detection in seven bands for stationary, nine bands for the 10 km/h pass-by, eight bands for the 20 km/h pass-by, and seven bands for the 30 km/h pass-by. Thus, this vehicle generated appreciable sound at low speeds without the addition of a pedestrian alert system, and we would expect this vehicle to be detectable. However, because this testing was limited to only one electric truck, the agency is not able to reach any general conclusions that hybrid and electric heavy vehicles should be exempt from the final rule.

The agency also collected ''screening'' data for four hybrid and electric heavy-duty vehicles. Screening tests were conducted in the field (not on ISO 10844 sound pads) at convenient locations using portable sound level meters. We note that the test protocol used for the screening tests did not fulfill all the parameters stated in SAE–J2889–1, and the measurements may not have been within the constraints of the SAE standard for acoustic environment, operating conditions, test surface, number of microphones, and microphone position. The results obtained from screening data therefore may deviate appreciably from results obtained using protocols and test conditions that strictly adhere to the SAE standard. Data were collected at three locations, Dayton, Ohio; Washington, DC; and Cambridge, Massachusetts. The four vehicles in the screening tests were all transit buses and included a New Flyer diesel-electric hybrid bus in Washington, DC; a trackless electric trolley bus and a diesel-electric hybrid trolley bus in Dayton, and a Neoplan trackless electric trolley bus in Cambridge. Each vehicle was tested in as many of the applicable operating scenarios (stationary, 10, 20, and 30 km/h pass-by) as possible. However, due to vehicle or site limitations, not all vehicles were tested in all of those operating scenarios.

The screening data showed that the overall levels for these vehicles range from 55.9 to 59.0 dB(A) for a stationary test; 61.7 to 69.3 dB(A) for a 10 km/h pass-by test; and 66 to 70.3 dB(A) for a 20 km/h pass-by test. The acoustic measurements for these vehicles were computed and compared to the NPRM minimum levels for detection in the frequency range from 315 Hz to 5000 Hz, for the eight bands included in the NPRM.[53] The data showed that the measured levels for the heavy vehicles tested are equal to or greater than the minimum levels in five to seven bands for stationary; five to eight bands for the 10 km/h pass-by; two to five bands for the 20 km/h pass-by; and seven bands for the 30 km/h pass-by. The screening data were informative about hybrid and electric medium-duty and heavy-duty vehicle noise levels, but they were not intended to be conclusive, and thus the agency did not determine from this testing that it would be appropriate to exclude medium and heavy vehicles from the final rule.

Analysis of Indoor Test Data

NHTSA also analyzed acoustic data measured in hemi-anechoic chambers equipped with a chassis dynamometer.[54] The data acquired at indoor test facilities included measurements of electric, hybrid, and internal combustion engine vehicles. NHTSA's analyses examined ambient noise, repeatability, and reproducibility of the indoor acoustic measurements. Acoustic data were collected at two indoor facilities: The General Motors Milford Proving Grounds (MPG), in Milford, MI and the International Automotive Components (IAC) facility,

[49] Hastings, et al. Acoustic Data for Electric Heavy Vehicles and Electric Motorcycles. (2014) DOT/NHTSA.

[50] One notable change is that the motorcycles were run just to the right of the center of the lane with respect to the direction of travel. This was done so the motorcycles' tires were not rolling on the painted center line, since it was important to keep the tires on the portion of the test track which had pavement meeting the ISO specification (the painted center line is not intended to meet the ISO specification.) Additionally, motorcycles were not tested in reverse since they did not have reverse capabilities.

[51] Hastings, et al. Detectability of Alert Signals for Hybrid and Electric Vehicles: Acoustic Modeling and Human Subjects Experiment. (2015) Washington, DC: DOT/NHTSA. As described in this report, the minimum levels needed for detection were determined using an acoustic loudness model that was adjusted for actual human hearing responses to vehicle sounds and other sounds by using the results of a series of human factors experiments conducted by Volpe for NHTSA.

[52] Hastings, et al. Detectability of Alert Signals for Hybrid and Electric Vehicles: Acoustic Modeling and Human Subjects Experiment. (2015) Washington, DC: DOT/NHTSA.

[53] Hastings, et al. Detectability of Alert Signals for Hybrid and Electric Vehicles: Acoustic Modeling and Human Subjects Experiment. (2015) Washington, DC: DOT/NHTSA.

[54] Hastings, et al. Analysis of Acoustic Data for Hybrid and Electric Vehicles measured on Hemi-Anechoic Chambers. Washington, DC: DOT/NHTSA. A hemi-anechoic chamber is a specially-designed room with walls that absorb sound waves for better acoustic analysis.

in Plymouth, MI. Indoor test data was provided to NHTSA by Transport Canada.[55] Outdoor test data were collected by NHTSA's Vehicle Research and Test Center (VRTC) at the Transportation Research Center (TRC), East Liberty, OH, and NHTSA did a comparison of indoor and outdoor measurements. The dataset available to support these analyses included eight vehicles. Test vehicles were transported between the Milford and Plymouth facilities so that the exact same vehicles were used at both indoor test sites. Vehicle make and model were consistent between indoor and outdoor testing,[56] but the outdoor test results have been aggregated over several testing efforts and do not in all cases represent the exact same test vehicles.

Repeatability at each indoor test site was evaluated by computing the standard error of the mean for each one-third octave band from the sound pressure measurements, considering each measurement as an estimate of the mean for each vehicle. The standard errors for these two indoor test sites were typically around 0.5 to 0.75 dB for the 315 Hz one-third octave band and above. This indicates that about 95 percent of measured one-third octave band levels for a given vehicle and operating speed will be within a range of ±1 to ±1.5 dB and, when estimating a mean value using four samples, the mean value should be within about 0.5 to 0.75 dB of the true mean with 95-percent confidence.

Measurement reproducibility between the two indoor test sites was evaluated by comparing the average values of each vehicle at each one-third octave band for each speed. The differences between sites were about 2 dB on average at 10 km/h and only about 1 dB on average at 20 and 30 km/h. Although the average difference is generally less than 2 dB between the two sites, differences for specific vehicle/speed/frequency pairs are still significant. When considering site-to-site differences, the 95-percent confidence intervals for estimated means range from ±2.5 dB to ±6.7 dB depending on the one-third octave band. Bands at and below 400 Hz consistently have standard deviations greater than 2 dB and bands 500 Hz and above typically have standard deviations less than 2 dB (exceptions being 630 Hz and 800 Hz). The reproducibility between sites appears good. We believe the measurement differences are due to inherent test variability, as discussed in section III.K of this document, and also to differences in each site's dynamometer/tire interaction.

In addition to comparing the two indoor test sites to one another, both facilities were also compared with outdoor measurements made at TRC. Measurement reproducibility between each indoor test facility and the outdoor test facility was evaluated by comparing the average sound pressure levels of each vehicle at each one-third octave band for each speed at the respective sites. Results showed that the indoor facilities tend to have higher sound pressure levels, especially at 20 and 30 km/h. Because the differences are smaller at 10 km/h, it is not likely that the differences in acoustic reflections from the indoor floor and the outdoor pavement are causing the difference. Rather, it is likely that the tire/dynamometer interaction is producing the higher sound pressure levels. Considering confidence intervals of estimated mean values for individual vehicle/speed/frequency pairs, the standard deviation between TRC and MPG was as high as 5 dB and the standard deviation between TRC and IAC was as high as 4.7 dB. Therefore, tolerance values associated with 95-percent confidence intervals would be as large as ±9.8 and ±9.2 dB respectively.

These confidence intervals include site-to-site differences and differences as a result of using different vehicles and in some cases different model years. It is anticipated that this confidence interval would be reduced if identical vehicles were tested. This indoor/outdoor analysis involved only a very limited amount of data and the data in some cases was not from the exact same vehicle. The agency would prefer to conduct additional testing in a more highly controlled fashion to allow for more conclusive results. In the absence of that, we have not changed our position on using outdoor testing as proposed in the NPRM.

Acoustic Measurements of Hybrid and Electric Vehicles

NHTSA's VRTC conducted additional acoustic measures for hybrid vehicles, electric vehicles, low speed electric vehicles, and internal combustion engine (ICE) vehicles to collect additional sound measurements and to evaluate the repeatability of the test procedure proposed in the NPRM.[57] Sound levels were measured while vehicles were stationary and while they were driving or coasting past microphones at constant speeds of 10, 20, and 30 km/h.

The repeatability of the measurement of the sound pressure level was assessed by performing multiple tests with one vehicle (a 2010 Ford Fusion) on one surface. The TRC ISO-compliant surface was used for this work and tests were performed twice a month from April to October 2012. Each test consisted of eight individual measurements for each scenario. Results showed that the 95-percent confidence interval of the overall sound pressure level ranged from ±0.7 dB to ±1.9 dB for the various scenarios. There was no significant systematic change in overall sound pressure levels over the six month period.

Data were also collected at different ISO 10844-compliant surfaces to examine test reproducibility. The reproducibility of sound pressure levels was estimated by testing the 2010 Ford Fusion twice on two other ISO-compliant surfaces (at Ford Motor Company Proving Ground in Romeo, Michigan, and at the Navistar Test Track in Fort Wayne, Indiana). The average sound pressure levels for all scenarios on the other ISO surfaces fell within the experimental errors of the average sound pressure levels measured on the TRC ISO surface. The 95-percent confidence interval of site-to-site variation for overall sound pressure level ranged from ±0.6 dB to ±2.1 dB and the 95-percent confidence estimates for reproducibility, including the repeatability of the measurements, ranged from ±1.3 dB to ±2.4 dB.

To determine if acoustic testing locations could include test areas with surfaces that are not ISO-compliant, the agency investigated using correction factors to adjust data from non-ISO-compliant surfaces, the agency compared overall sound pressure levels measured on ISO 10844-compliant surfaces to overall sound pressure levels measured on three other asphalt surfaces of varying characteristics. The alternative surfaces were located at TRC in East Liberty, OH, and included: A new asphalt surface in the vehicle dynamics area; a sealed asphalt surface; and a skid calibration lane. These pavements were appropriate examples of potential test surfaces that are not ISO-compliant to examine the impact that testing using different surfaces may have on measuring vehicle sound.

Overall sound pressure levels on the three asphalt surfaces were compared to the results on the TRC ISO surface using the 2010 Ford Fusion, and an EV with

[55] Whittal, I.; Jonasch, R.; and Meyer, N. Quiet Vehicle Sounds Test Data (2013) Transport Canada. Docket NHTSA–2011–0148–0321.

[56] Indoor results from a 2012 Nissan Leaf were compared to outdoor results from a 2010 Nissan Leaf.

[57] Garrott, W. R., Hoover, R. L., Evans, L. R., Gerdus, E., and Harris, J. R., ''2012 Quieter Vehicle Testing Report: Measured Sound Levels for Electric, Hybrid Electric, and Low Speed Vehicles'' Washington, DC, DOT/NHTSA, November 2016.

an active external sound generator, as well as an EV without an active external sound generator. Results showed that one surface tended to produce overall sound pressure levels significantly lower than the ISO-compliant surface at 0 and 10 km/h. Researchers concluded that this was due to greater absorptivity of this asphalt composition. The other two surfaces tended to generate results not significantly different than the ISO-compliant surface when the vehicles were stationary or traveling at 10 km/h. On these surfaces, sound levels increased more rapidly than for the ISO surface as the vehicle speed increased. The overall sound pressure levels at 20 and 30 km/h tended to be significantly higher for these two surfaces compared to the ISO surface. Researchers concluded that these surfaces tended to generate more tire noise than the ISO-compliant surface. An attempt to use the data from the Ford Fusion to normalize the sounds from the different surfaces was unsuccessful. Consequently, we did not conclude that it is feasible to test on surfaces other than an ISO-compliant one.

To examine the sound levels emitted by low speed electric vehicles (LSVs), VRTC tested five of examples of these vehicles. LSVs typically are lighter than EVs and often use different tires, so it was prudent to conduct separate measurements of LSVs rather than assume they are as quiet as EVs. The sound levels produced by the LSVs were very similar to those of the EVs, with the main difference being that four of the LSVs were equipped with back-up beepers of varying sound pressure levels. Other than during reverse acceleration, the LSVs showed overall sound levels with standard deviations ranging from about 1 to 2.5 dB.

To provide data for the agency's analysis of the crossover speed of HVs and EVs, the agency tested additional HVs and one EV as well as a number of ICE peer vehicles (in cases where a peer vehicle was available for the HVs and the EV selected for testing) and compared the ICE peer vehicle test results to the HV and EV results. At 10 km/h, the three HVs tested (none with external sound generators) had an average SPL 2.4 dB lower than their ICE peer vehicles. An EV without an active external sound generator had an average SPL 7.3 dB lower than its ICE peer vehicle. At 20 km/h, the three HVs (none with external sound generators) had an average sound pressure level 1.1 dB lower than their ICE peer vehicle and the EV without external sound had an average sound pressure level of 3.5 dB below its ICE peer vehicle. At 30 km/h the HVs and EV had sound pressure levels that were not significantly different from their ICE peer vehicles. One-third octave band data and comparisons were also reported.

In addition, the agency compared the sound pressure levels of ICE vehicles in motion with their engines running to the same ICE vehicles coasting past the microphones with their engines turned off. These comparisons were made at 10, 20, and 30 km/h. The sound pressure levels for the vehicles with their engines running were an average of 7.9 dB higher than in the coasting (engine-off) condition at 10 km/h (min. 4.3 dB, max. 11.6 dB); 2.2 dB higher than in the coasting (engine off) condition at 20 km/h (min. 0.6 dB, max. 5.7 dB); and 0.9 dB higher than in the coasting (engine off) condition at 30 km/h (min. 0.5 dB; max. 1.7 dB).

D. Notice of Proposed Rulemaking

In the NPRM we proposed to apply the minimum sound requirements to all hybrid and electric passenger cars, light trucks and vans (LTVs), medium and heavy-duty trucks and buses, low speed vehicles (LSVs), and motorcycles, that are capable of propulsion in any forward or reverse gear without the vehicle's ICE operating.

The proposed minimum sound requirements would apply to these HVs and EVs in three circumstances: (1) When operating up to 30 km/h (18 mph), (2) when the vehicle's starting system is activated but the vehicle is stationary,[58] and (3) when the vehicle is operating in reverse. The NPRM also contained requirements for the sound produced by hybrid and electric vehicles to increase and decrease in pitch as the vehicle increases and decreases speed so that pedestrians would be able to detect those changes. We proposed a crossover speed of 30 km/h because this was the speed at which tire noise, wind resistance noise, and other noises from the vehicle become the dominant noise and eliminate the need for added alert sounds.[59]

The agency proposed to require HVs and EVs to make a minimum amount of sound in each of eight different one-third octave bands, under each of several test conditions. The agency developed the minimum sound levels for each one-third octave band using a detection model that estimated the distance at which a pedestrian would be able hear a given sound in the presence of a given ambient sound profile. In the NPRM, NHTSA proposed to require eight one-third octave bands with the perspective that required sounds should be detectable in a wide variety of ambients, including ambients that had different acoustic characteristics from the ambient that we used with our detection model. The NPRM also required that sound produced by EVs and HVs be recognizable to pedestrians as motor vehicle sounds by containing low frequency tones and broadband content because these are characteristics commonly associated with sounds produced by internal combustion engines.

The compliance test procedure specified in the NPRM was to be performed outdoors and was based in part on SAE J2889–1 SEPT 2011. The compliance test procedure contained tests for stationary, reverse, and pass-by tests conducted at 10 km/h, 20 km/h, and 30 km/h. We explained in the NPRM that NHTSA believed that outdoor pass-by testing would be preferable to indoor testing in hemi-anechoic chambers using dynamometers because outdoor testing is more representative of the real-world interactions between pedestrians and vehicles. We also expressed concern that specifications for indoor testing were not as developed and did not have the same level of objectivity, repeatability, and reproducibility as test specifications for outdoor testing.

The NPRM proposed a phase-in schedule consistent with the PSEA which would require ''full compliance with the required motor vehicle safety standard for motor vehicles manufactured on or after September 1st of the calendar year that begins 3 years after the date on which the final rule is issued.'' In the NPRM we stated that if the final rule was issued January 4, 2014, compliance would commence on September 1, 2015, which would mark the start of a three-year phase-in period. The NPRM proposed the following phase-in schedule:

- 30 percent of the subject vehicles produced on or after September 1 of the first year of the phase-in;
- 60 percent of the subject vehicles produced on or after September 1 of the second year of the phase-in;
- 90 percent of the subject vehicles produced on or after September 1 of the third year of the phase-in; and
- 100 percent of all vehicles produced on or after, by September 1 of

[58] The NPRM contained minimum sound requirements for the stationary but active condition because the definition of alert sound in the PSEA requires the agency to issue minimum sound requirements to allow pedestrians to detect the operation of nearby hybrid and electric vehicles, including those vehicles that are operating but stationary.

[59] For additional details about how and why the agency selected the crossover speed of 30 km/h refer to section III.D. in this document.

the year that begins three years after the date that the final rule is issued.

In the NPRM, we tentatively concluded that this phase-in schedule was reasonable for manufacturers and allowed the fastest implementation of the standard for pedestrian safety.

E. Summary of Comments to the NPRM

The agency received comments to the NPRM from a wide variety of commenters, including trade associations,[60] vehicle manufacturers,[61] advocacy groups,[62] suppliers,[63] academia,[64] standards-development organizations,[65] governments,[66] and approximately 225 individuals.

The primary issues raised by the advocacy groups and manufacturers concerned our proposal to require sound while hybrid and electric vehicles are stationary but active and our proposal to establish minimum sound requirements up to a speed of 30 km/h. Manufacturers and trade association groups argued that a sound at stationary is not required for safety. These commenters stated NHTSA should instead mandate a commencing motion sound that activated when the driver of an HV/EV removed her foot from the brake pedal. Manufacturers and trade associations also commented that the agency should only establish minimum sound requirements up to 20 km/h, arguing that above 20 km/h tire and wind noises are the dominant contributors to the sound produced by moving vehicles, and provide enough sound for pedestrians to safely detect hybrid and electric vehicles.

NFB and ACB supported the agency's proposal to require that hybrid and electric vehicles produce sound in the stationary but active operating condition, because it would help blind and visually-impaired pedestrians be aware of nearby vehicles and avoid collisions. NFB, ACB, and Advocates also supported the agency's proposal to establish minimum sound requirements for speeds up to 30 km/h, stating that they believe that the agency's research supports establishing minimum sound requirements to those limits.

Manufacturers and groups that represent manufacturers were supportive of the concept of adding sound to EVs and HVs to enhance pedestrian detection but expressed concern that the minimum sound requirements proposed in the NPRM were more restrictive than necessary to accomplish this goal. They argued that sounds meeting the requirements proposed in the NPRM would be annoying to consumers and might negatively affect sales of hybrid and electric vehicles. Regarding the agency's proposed compliance test procedure, manufacturers and groups that represent manufacturers requested the option to conduct compliance testing in indoor hemi-anechoic chambers using dynamometers, arguing that that is a more accurate and consistent method of testing because it is a more controlled environment that minimizes the kind of ambient variations that are expected in outdoor environments. They also raised issues regarding the agency's proposed method of measuring a vehicle's change in pitch as it increases or decreases speed, commenting that pitch shifting should be measured using a component-level test, *i.e.,* a bench test procedure, rather than testing the entire vehicle.

Manufacturers also disagreed with the agency's estimate of the cost of speaker systems needed to produce sounds capable of complying with the requirements in the NPRM, stating that speakers capable of producing the low frequency content specified in the proposed minimum sound requirements were more expensive than the agency estimated.

Organizations that represent manufacturers of motorcycles and heavy-duty and medium-duty vehicles took issue with the agency's basis for applying the rule to the vehicles they manufacture, stating that the agency had not shown a safety need based on crash data. They stated that the final rule should not apply to those vehicles because hybrid and electric motorcycles and heavy- and medium-duty trucks and buses do not pose an increased risk to pedestrians over ICE vehicles.

A number of individual commenters either expressed general support for the rule or general opposition to increasing the amount of sound produced by hybrid and electric vehicles. Several individuals also questioned why the agency was limiting the scope of the proposed rule to hybrid and electric vehicles. These commenters stated that the minimum sound requirements in the NPRM should apply to all vehicles including ICE vehicles that do not produce enough sound to be safely detected by pedestrians.

III. Final Rule and Response to Comments

A. Summary of the Final Rule

Today's final rule generally adopts the proposed standard but modifies the requirements in several ways. As proposed, we will require hybrid and electric vehicles to emit sound at minimum levels while the vehicle is stationary (although not necessarily at all times when the vehicle propulsion system is active); while the vehicle is in reverse; and while the vehicle is in forward motion up to 30 km/h. Today's final rule also adopts the agency's proposal to conduct compliance testing outdoors.

The agency is adopting numerous changes to the proposal in response to additional analysis conducted by the agency and in response to the comments on the proposal. The most significant change relates to the scope of the final rule. This final rule only applies to hybrid and electric passenger cars and LTVs with a GVWR of 4,536 kg (10,000) pounds or less and LSVs. This final rule does not apply to medium and heavy duty trucks and buses with a GVWR over 4,536 kg (10,000) pounds or to motorcycles. Based on a review of the available acoustic data regarding these vehicles and the comments, we have determined that we do not have enough information at this time to apply this final rule to medium and heavy duty vehicles and motorcycles.

We have determined the final rule should apply to LSVs, because unlike electric motorcycles and medium and heavy duty trucks and buses with a GVWR over 4,536 kg (10,000) pounds, we have acoustic data showing that LSVs are quiet. Therefore, we do not have any justification to exclude them

[60] The trade associations representing manufacturers that submitted comments included the International Motorcycle Manufacturers Association (IMMA), the Truck and Engine Manufacturers Association (EMA), the Electric Drive Transportation Association (EDTA), the Motorcycle Industry Council (MIC) and the Organization Internationale DES Constructeurs d' Automobiles (OICA). The Alliance of Automobile Manufacturers and Global Automakers submitted a joint comment that is referenced here as the ''Alliance/Global'' comment.

[61] Such as Toyota Motor North America (Toyota), Volkswagen Group of America (Volkswagen), Porsche Cars North America (Porsche), Ford Motor Company (Ford), American Honda Motor Co. (Honda), Mercedes-Benz USA (Mercedes), General Motors Company (General Motors), Mitsubishi Motors R&D of America (Mitsubishi), Chrysler Group LLC (Chrysler), Navistar, Inc. (Navistar), Nissan North America, Inc. (Nissan) and BMW of North America, LLC (BMW).

[62] The public safety advocacy groups submitting comments to the proposal included National Federal of the Blind (NFB), National Council of State Agencies of the Blind, the Advocates for Highway Safety (the Advocates), Noise Pollution Clearinghouse, the Insurance Institute for Highway Safety (IIHS), Safe Kids Worldwide, the World Blind Union, and American Council of the Blind (ACB).

[63] Such as Denso International America, Inc. (Denso) and Hear for Yourself, LLC.

[64] Such as the Mercatus Center at George Mason University, Western Michigan University (Western Michigan), and Accessible Designs for the Blind (ADB).

[65] SAE International.

[66] The European Commission Enterprise and Industry Directorate-General (DG Enterprise), and the Disability and Communication Access Board of Hawaii.

from the coverage of the final rule given the requirements of PSEA.

We have also made significant changes to the detectability specifications in the NPRM, *i.e.,* what sounds HV/EVs are permitted to make that the agency would consider compliant with the standard. After further consideration of the NPRM specifications, we are establishing new specifications in this final rule that provide greater flexibility for manufacturers in this respect, but that will still allow pedestrians to safely detect EVs and HVs. Specifically, whereas in the NPRM we proposed that HV/EVs would have to meet minimum acoustic requirements in eight separate one-third octave bands, in this final rule, the agency is providing two alternative acoustic specifications, either of which the agency would consider to be compliant, and both of which reduce the number of one-third octave bands for which there are minimum levels. Under the first compliance option, hybrid and electric vehicles would have to meet minimum acoustic requirements in four one-third octave bands instead of eight. Under the second compliance option, hybrid and electric vehicles would have to meet minimum acoustic requirements in two one-third octave bands, plus meet an overall sound pressure minimum.

Under the four one-third octave band compliance option, the minimum sound requirements for each band would be slightly lower than the values proposed in the NPRM and the overall sound pressure of sounds meeting the four one-third octave band compliance option will be similar to those meeting the proposed requirements for eight bands in the NPRM. Under the two one-third octave band compliance option, the minimum sound requirements for each band are lower than those of the eight one-third octave band proposal in the NPRM for the low and mid frequency bands and higher than the minimum values in the NPRM for the high frequency one-third octave bands centered at 4000 Hz and 5000 Hz. Neither the four-band compliance option nor the two-band compliance option include requirements for tones or broadband content contained in the NPRM.

For both the two-band and four-band compliance options, the final rule expands the range of acceptable one-third octave bands to include those between 630 Hz and 1600 Hz (these bands were excluded in the NPRM). Reducing the number of required one-third octave bands while expanding the number of possible bands that manufacturers can use to meet the minimum requirements provides additional flexibility to manufacturers for designing pedestrian alert systems. Sounds meeting these new requirements will have a similar overall sound pressure level to those meeting the requirements in the NPRM. These changes preserve the agency's goal of establishing requirements that will lead to pedestrian alert sounds that are detectable in ambient sound environments with different spectral shapes. The detectability specifications are discussed further in Section III.E of this final rule.

The agency originally proposed to require ''pitch shifting,'' meaning that as HV/EVs increased or decreased in speed (from stationary up to the cutoff of 30 km/h), the frequency of the sound produced by the HV/EV had to vary up or down with speed by one percent per km/h. After further consideration, we have concluded that the proposed pitch shifting compliance test is likely to have repeatability issues and may involve subjective assessments in compliance evaluations. For those reasons, and also in response to information raised in manufacturers' comments, the agency has decided instead to require simply that the vehicle-emitted sound increase and decrease in volume by a specified amount as the vehicle's speed increases and decreases. The agency believes this revised requirement, like the proposed pitch shifting requirement, will appropriately convey to pedestrians when a vehicle is accelerating or decelerating. This approach also has a testing advantage in that changes in vehicle speed and corresponding changes in vehicle-produced sound can be determined using the same data collected during the stationary and constant-speed pass-by tests. This issue is discussed further in Section III.G of this final rule.

The agency also proposed to require the pedestrian alert sound to contain a low frequency tone under 400 Hz to aid recognizability by pedestrians, stating that this would make the required alert sounds more similar to ICE vehicle sounds which typically include low frequencies. Based on additional analysis indicating that low-frequency tones are not essential for vehicle-emitted sounds to be recognized as motor vehicles in operation, and manufacturer comments arguing that low-frequency tones would be intrusive to vehicle occupants and expensive to reproduce, we have decided against including the proposed requirement in the final rule. Section III.F discusses this issue in more detail.

Also to aid recognizability, we originally proposed to require that the vehicle-emitted sounds contain broadband sound between 160 Hz and 5000 Hz. This means sound across a wide range of frequencies, and reflects the fact that ICE vehicles produce broadband sound when operating at low speed. We agree with commenters that this requirement is not critical for sound recognition because we believe that pedestrians will use other sound cues that provide more information in order to recognize sounds meeting the requirements of the final rule as vehicle-emitted sounds. In addition to the revised requirement that the alert sound level must increase as a vehicle increases speed, we believe that pedestrians would use other cues to recognize EVs and HVs such as the location of the sound source and the frequency and level changes caused by the motion of the sound, so tones and broadband content are not essential for these vehicles to be recognizable. This issue is discussed more in Section III.F of this final rule.

With regard to test procedures, the final rule also makes a number of changes from the proposal. We have modified the procedure for determining whether the sound produced by two hybrid or electric vehicles of the same make, model, and model year is the same. After further analysis, we have determined that requiring the sound produced by two hybrid or electric vehicles of the same make, model, and model year to be within three dB(A) for every one-third octave band between 315 Hz and 5000 Hz would not guarantee that the sound produced by the two vehicles would be the same. We have instead decided to ensure that EVs and HVs of the same make, model, and model year produce the same sound by requiring that all vehicles of the same make, model, and model year use the same alert system hardware and software, including specific items such as the same digital sound file where applicable, to produce sound used to meet the minimum sound requirements in today's final rule. We have also made numerous other changes to the proposed test procedures in response to comments.

While we have retained the requirement that EVs and HVs must generate an alert when stationary, the final rule requires an alert only when a vehicle's transmission gear selector is not in the ''Park'' position. We have changed the test procedure accordingly, and we will test this condition with the vehicle's gear selector in ''Drive'' or any forward gear. We believe that this modification to the stationary requirement will provide pedestrians with a way to detect those vehicles that

pose the greatest risk to them (*i.e.,* those vehicles that could begin moving at any moment) while ensuring that EVs and HVs do not produce unwanted sound in situations in which they do not pose a threat to pedestrians, such as when they are parked. The final rule requirements and procedures also address vehicles with manual transmission. Test procedures are discussed in more detail in Sections III.J and III.K of this preamble.

With regard to the phase-in schedule for the standard, we have simplified the proposed phase-in schedule by shortening it to include a single year of phase-in, rather than the three-year phase-in that the agency proposed in the NPRM. This simplification provides somewhat greater lead-time and responds to vehicle manufacturers' comments that the proposed phase-in was unnecessarily complex. Half of each manufacturer's HV and EV production must comply with this final rule by September 1, 2018, and 100 percent of each manufacturer's HV and EV production must comply with this final rule by September 1, 2019. The phase-in does not apply to multi-stage and small volume manufacturers: 100 percent of their HV and EV production must comply with this final rule by September 1, 2019.

B. Applicability of the Standard

Definition of a Hybrid Vehicle

The PSEA defines ''hybrid vehicle'' as ''a motor vehicle which has more than one means of propulsion.'' As discussed in the NPRM, we concluded that the definition in the PSEA requires the agency to apply the standard only to hybrid vehicles that are capable of propulsion without the vehicle's ICE operating, because if the ICE is always running when these vehicles are operating, then the fact that these vehicles may not provide sufficient sound for pedestrians to detect them cannot be attributed to the type of propulsion. Under the agency's interpretation of the definition of ''hybrid vehicle'' in the PSEA, more than one means of propulsion therefore means more than one *independent* means of propulsion. This definition of ''hybrid vehicle'' would exclude from the applicability of the proposed standard those vehicles that are equipped with an electric motor that runs only in tandem with the vehicle's ICE to provide additional motive power, for example a vehicle that cannot operate in a purely electric drive mode.

The NPRM also stated that the PSEA did not limit the definition of ''hybrid vehicle'' to hybrid-electric vehicles, so the proposed rule would apply to any vehicle with multiple independent means of propulsion. However, the definitions section of the NPRM regulatory text did not include a specific definition of ''hybrid vehicle.''

Alliance/Global and OICA disagreed with the agency's proposal that the standard should apply to any vehicle with multiple independent means of propulsion, and argued that it should apply only to those vehicles that have an electric motor as the additional means of independent propulsion. Alliance/Global and OICA stated they do not believe that vehicles with non-electric hybrid powertrains should be subject to the requirements of the final rule, because the agency has not demonstrated that those vehicles are quiet. Alliance/Global and OICA also stated that the final rule should include a definition of ''hybrid vehicle'' in paragraph S4 of the regulatory text.

Agency Response to Comments

We agree that a definition of ''hybrid vehicle'' should be included in the rule and have added one. The definition appears in Section S4 of the regulatory text, and is based on the definition for a hybrid vehicle that was presented in the ''Application'' section of the NPRM preamble, where we stated that a hybrid vehicle is ''a motor vehicle that has more than one means of propulsion for which the vehicle's propulsion system can propel the vehicle in the normal travel mode in at least one forward drive gear or reverse without the internal combustion engine operating.''

In response to the industry request to limit the scope of the rule to only HVs with an electric motor as the additional means of propulsion, we are aware that some alternative hybrid vehicles may use something other than an electric drive system in conjunction with an ICE, for example, a hybrid that uses hydraulic or flywheel energy storage in place of electric motor and batteries, although we currently are not aware of hybrid vehicles other than hybrid-electrics that are for sale in the U.S.

Regardless of whether such vehicles are currently available for sale, however, we continue to believe that any hybrid operating under an independent, non-ICE means of propulsion should be required to meet the minimum sound requirements of this standard because we have no evidence that they may *not* be capable of operating as quietly as electric hybrids. From a safety perspective, the agency is concerned with all hybrids that might operate quietly, regardless of the power source for their non-ICE propulsion, and commenters provided no information about whether hybrid vehicles other than hybrid-electrics would be any less quiet than hybrid-electric vehicles when not equipped with pedestrian alert systems. As for hybrids other than electric ones, if the vehicle produces sound levels in excess of those required by this final rule then no additional alert would be required; if not, an additional alert would be required.

Vehicles With a GVWR Over 10,000 lbs.

In the NPRM, we stated that the PSEA requires the agency to apply the requirements of the standard to all hybrid and electric motor vehicles which includes cars, multipurpose passenger vehicles, trucks, buses, low-speed vehicles and motorcycles.[67] However, we acknowledged that ICE vehicles with a gross vehicle weight rating (GVWR) over 10,000 pounds (lbs.) have a lower rate of collisions involving pedestrians than light ICE vehicles,[68] and we stated that we were not able to calculate a separate incidence rate for collisions between pedestrians and hybrid and electric vehicles with a GWVR over 10,000 lbs. because the number of those vehicles in the on-road vehicle fleet was extremely limited. Because we were not able to calculate a separate incidence rate for collisions involving pedestrians and hybrid and electric heavy vehicles, we did not calculate the benefits of applying the rule to them in the NPRM. We stated in the NPRM that we believe that as the number of these vehicles in the fleet increases, the difference in pedestrian collision rate between heavy HV/EVs and heavy ICE vehicles would be similar to the difference in pedestrian collision rate between light HV/EVs and light ICE vehicles.

The agency also recognized at the time of the NPRM that we had very limited data about the sound levels produced by hybrid and electric heavy vehicles. We also acknowledged that there are a limited number of test pads having pavements that meet ISO 10844, *Acoustics—Specification of test tracks for measuring noise emitted by road vehicles and their tires,* that can accommodate the extra weight of heavy vehicles.

Manufacturers and organizations that represent manufacturers of heavy-duty vehicles stated that NHTSA should not apply the final rule to heavy-duty vehicles because the agency had not established that these vehicles are quiet, could not demonstrate a safety need to

[67] The PSEA specifically excludes trailers from the scope of the required rulemaking.

[68] For the purposes of this document we refer to all motor vehicles with a GVWR over 10,000 lbs. as ''heavy-duty vehicles.''

merit applying the requirements of the proposal to these vehicles, and had not developed appropriate requirements and compliance tests for these vehicles. Safety advocacy organizations and organizations that represent individuals who are blind and visually-impaired, in contrast, stated that NHTSA should apply the requirements of the final rule to heavy-duty vehicles because these vehicles would pose an increased risk of collision with pedestrians if they were quiet.

EDTA stated in its comments that NHTSA should defer application of minimum sound requirements in the final rule to heavy-duty vehicles, motorcycles and low-speed vehicles until the agency establishes a more complete record showing the need for these vehicles to meet those requirements. EDTA further stated that if the agency found that the requirements in the final rule should apply to heavy-duty vehicles, motorcycles and low-speed vehicles, the agency should develop audibility specifications that reflect the technologies, duty cycles and uses, and sound profiles specific to these types of vehicles.

EMA and Navistar stated that NHTSA should exclude hybrid and electric vehicles with a GVWR over 10,000 lb. from the scope of this rulemaking until the agency identifies a potential unreasonable risk to safety caused by the quiet nature of these vehicles, develops acoustic requirements specifically for these vehicles, and develops appropriate compliance test procedures.

EMA stated that, in addition to the incidence rate of collisions between pedestrians and heavy vehicles, NHTSA also should consider the exposure level of pedestrians to being struck by heavy-duty vehicles. EMA stated that certain heavy vehicles such as truck tractors do not typically operate in environments where pedestrians are present, so their risk of collision with pedestrians is much lower than the risk for passenger cars. In addition to having lower rates of exposure to pedestrians, heavy-duty vehicles make up a small fraction of the on-road vehicle fleet when compared to light vehicles. EMA suggested that the risk of a pedestrian being struck by a heavy-duty vehicle is much lower than the risk of a pedestrian being struck by a light vehicle when the percentage of heavy vehicles in the on-road fleet and their exposure to pedestrians are considered. EMA further suggested that lower rate of collisions with pedestrians and the low exposure show that NHTSA should not apply a single countermeasure with the same test procedures to all hybrid and electric vehicles.

EMA stated that NHTSA does not have any acoustic data that shows that heavy-duty hybrid and electric vehicles are quieter than heavy ICE vehicles and pose a safety risk to blind and other pedestrians. EMA stated that the NPRM did not contain any data comparing the sound produced by heavy-duty ICE vehicles to heavy-duty hybrid and electric vehicles. EMA stated that without acoustic data on heavy vehicles, NHTSA is unable to know what the crossover speeds are for heavy-duty vehicles or whether heavy-duty vehicles produce sufficient sound that they do not need to be equipped with a sound generation device. In addition, EMA stated that the crossover speed developed for light vehicles might be inappropriate for heavy-duty vehicles. Because these vehicles have larger tires than light vehicles and often have more tires and have a less aerodynamic body design they produce more sound than light vehicles under the same operating conditions.

EMA stated in its comments that applying the requirements in the NPRM to heavy-duty vehicles would violate the PSEA because NHTSA has not determined a separate crossover speed for heavy vehicles. EMA stated that to comply with the PSEA NHTSA must determine the crossover speed for each type of heavy-vehicle to which the final rule would apply. EMA stated further that applying the NPRM to heavy-duty vehicles violates the Vehicle Safety Act because the NPRM did not assess whether a different standard was needed for heavy vehicles.

Advocates commented that NHTSA should apply the final rule to hybrid and electric heavy vehicles. Advocates suggested that as advances in alternative energy increase, there will be a greater number of these types of vehicles. Advocates stated ''the agency should consider its findings that pedestrians and pedalcyclists, especially the visually-impaired, utilize the different sound of heavy vehicles when compared with light vehicles to modify their estimation of when it is safe to undertake a movement, like crossing a road, which may vary with vehicular traffic.'' [69] For that reason, Advocates suggested NHTSA should consider establishing different acoustic requirements to ensure that pedestrians and others can accurately identify and distinguish between heavy and light EVs and HVs. Advocates further stated that NHTSA should standardize the backing sound across all heavy vehicles so that pedestrians and bicyclists can differentiate backing heavy vehicles from other vehicles.

ACB and NFB stated that the final rule should apply to heavy-duty hybrid and electric vehicles because these vehicles pose the same safety risks to pedestrians as light vehicles, and the number of these vehicles in the fleet will likely increase in the future.

Western Michigan University stated that if the intent of the rule is to address potential hazards to the travel of blind pedestrians, then potentially quiet hybrid and electric heavy-duty vehicles should be required to meet the minimum sound requirements in the final rule. WMU stated that it was not aware of research on the audibility of hybrid and electric buses or light rail vehicles but that it seemed better to err on the side of caution and include heavy-duty hybrid and electric vehicles in the coverage of the final rule.

Agency Response to Comments

Despite what was proposed in the NPRM, we have decided not to apply the requirements of this final rule to heavy-duty hybrid and electric vehicles. We reached this decision because we do not believe that we currently have enough information to determine whether the acoustic requirements or the crossover speed in this final rule are appropriate for heavy-duty hybrid and electric vehicles. Therefore, we plan to conduct further research on sound emitted by heavy-duty hybrid and electric vehicles before issuing a new NPRM proposing acoustic requirements for these vehicles.

As described in Section II.C, after NHTSA issued the NPRM, we conducted testing to examine the sound levels produced by heavy-duty electric and hybrid vehicles. The agency tested the Navistar eStar Electric Heavy Vehicle following the procedures in SAE J2889–1, MAY 2012, using an ISO asphalt pad meeting the specifications of International Standards Organization (ISO) 10844 ''Acoustics—Specification of test tracks for measuring noise emitted by road vehicles and their tyres.'' [70] The agency compared the acoustic recordings of the Navistar eStar to the four-band acoustic specifications in today's final rule. The eStar met or exceeded a number of minimum one-third octave levels at the 10, 20, and 30 km/h pass-by test conditions. According to the agency's detection model, given a background noise level at the standard ambient, a vehicle is detectable if it

[69] Document No. NHTSA–2011–0148–0270.

[70] Hastings, et al., (2014) Acoustic Data for Hybrid and Electric Heavy-duty Vehicles and Electric Motorcycles.

meets or exceeds the minimum levels for detection in at least one of thirteen one-third octave bands. So the eStar without any noise enhancements would be expected to be detectable at least in the standard ambient at the tested pass-by speeds. For the stationary test, the eStar had acoustic content that met or exceeded the minimum values in three non-adjacent one-third octave bands. So in many ambient environments, in addition to the standard ambient, the eStar without any enhancements would be expected to be detectable at stationary.

The agency also conducted screening tests in the field of the sound levels of a selection of other heavy-duty EVs and HVs using a simplified procedure. For these screening tests, NHTSA measured four different electric or hybrid-electric transit buses, as described in the agency's report ''Acoustic Data for Hybrid and Electric Heavy-duty Vehicles and Electric Motorcycles'' [71] which provides details of those measurements.[72] These screening tests were basic evaluations of the sound characteristics of these vehicles, and they were conducted at facilities belonging to transit agencies or at other suitable locations. Therefore they did not utilize an asphalt pad meeting the specifications in ISO 10844. Additionally, for these screening tests the agency used hand-held (or tripod-mounted) sound level meters rather than the requisite microphone array specified in SAE J2889–1.

In conducting these screening measurements, the agency only recorded results for the eight one-third octave bands for which we proposed requirements in the NPRM. The agency compared the measurements to the revised minimum detectability thresholds based on our human factors research.

Of the three vehicles the agency evaluated in the stationary condition, all had sound content in several bands, and all would have been detectable in some ambient conditions according to the agency's detection model. At the 10 km/h pass-by, all of the vehicles tested would be expected to be detectable according to the detection model. At the 20 km/h pass-by, three of the vehicles would be expected to be detectable according to the detection model, and two would have met the requirements of the final rule.[73]

This heavy vehicle screening data showed that some hybrid and electric heavy-duty vehicles may already make sufficient sound in some operating conditions to be detected by pedestrians according to the agency's model. Because the data the agency collected during screening testing is limited in scope and was not obtained on an ISO 10844 compliant surface, the agency needs to conduct further evaluation in this area before we can draw conclusions regarding the sound levels produced by these vehicles.

Furthermore, the agency does not have any data on the crossover speed of heavy vehicles. Given that heavy vehicles have very different tires and wind noise characteristics than light vehicles, and these factors heavily influence crossover speed, it is possible that the light vehicle crossover speed is inappropriate for heavy vehicles. The agency anticipates conducting further research and evaluation to make these determinations and, if it proves necessary, to develop separate acoustic requirements for these vehicles.

Regarding EMA and Advocates comments that the agency should develop a separate acoustic specification for heavy-duty vehicles, for the reasons discussed above NHTSA agrees and plans to conduct further evaluations on this issue.

Given that NHTSA has not yet established that heavy hybrid and electric vehicles are too quiet to be detected without a pedestrian alert system, and the agency has not determined that the same acoustic requirements and crossover speed for light vehicles in today's final rule are appropriate for heavy vehicles, we are excluding both those categories from the applicability section of today's final rule, and we anticipate conducting a separate rulemaking effort to address the potential need for pedestrian alert systems on those vehicles.

Electric Motorcycles

In the NPRM, we stated that we had tentatively concluded that the proposed rule should apply to electric motorcycles, because Congress defined ''electric vehicle'' broadly in the PSEA and did not exclude motorcycles from the definition. We acknowledged that the agency was not able to determine whether the incidence rate of collisions between pedestrians and electric motorcycles is different than the incidence rate of collisions between pedestrians and motorcycles with ICEs, but stated that we expected that the difference in pedestrian collision rates between electric motorcycles and their traditional ICE counterparts would be similar to the difference in pedestrian collision rates between light HVs and light ICE vehicles should the number of electric motorcycles in the fleet match the current market penetration of light HVs and EVs. Additionally, while we did not have data on the extent to which electric motorcycles are quieter than ICE motorcycles of the same type, we also noted that neither did we have information indicating whether electric motorcycles produced sound levels sufficient to allow pedestrians to detect these vehicles in time to avoid collisions. The NPRM did, however, cite crash statistics contained in BMW's comments on the NOI regarding incidents of motorcycle collisions with pedestrians. BMW cited data from NHTSA's General Estimates System (GES) for the period between 2005 and 2009 shows that 1.07 percent of the pedestrians injured in motor vehicle crashes were injured in crashes involving motorcycles to illustrate the low rates of crashes between motorcycles and pedestrians.[74]

We also stated in the NPRM that the proposal was technology-neutral and that it would be possible for electric motorcycles to meet the requirements in the NPRM without the use of a speaker system if they already produced sufficient sound to meet the performance requirements. We sought comment on whether the minimum sound requirements should be applied to electric motorcycles.

The comments that the agency received in response to the NPRM from organizations that represent motorcycle manufacturers for the most part reiterated the concerns expressed by MIC and BMW in response to the NOI. BMW and MIC stated in their comments to the NOI that, because of the unique attributes of motorcycles, there is no safety need for NHTSA to establish minimum sound levels for electric motorcycles. MIC reiterated this point in their NPRM comments. According to

[71] Hastings, et al., (2014) Acoustic Data for Hybrid and Electric Heavy-duty Vehicles and Electric Motorcycles.

[72] Using the informal measurement procedures to capture these recordings allowed the agency to gather data on heavy-duty hybrid and electric vehicles without the difficulty and expense of transporting these vehicles to a location where they could tested on a sound pad meeting the specifications of International Standards Organization (ISO) 10844 ''*Acoustics—Specification of test tracks for measuring noise emitted by road vehicles and their tyres*'' as required by SAE J2889–1.

[73] The agency only tested one of the four vehicles at 30 km/h.

[74] BMW's comments on the NOI. *Available at http://www.regulations.gov*, Docket No. NHTSA–2011–0100–0020. Referring to the data cited, BMW argued in its NOI comments that based on the number of crashes between motorcycles and pedestrians and the percentage of all pedestrian crashes involving motorcycles, there is no safety need for minimum sound requirements for electric motorcycles.

MIC and BMW, motorcycle riders are able to better see and avoid pedestrians than automobile drivers because their view is unobstructed by pillars and sun visors and they are more alert because they themselves are vulnerable road users. BMW and MIC maintained that because motorcycles are unstable at low speeds, riders are required to maintain a high level of alertness, which minimizes the likelihood of collisions with pedestrians during low speed maneuvers.

Also in their NOI comments, both BMW and MIC stated that adding a speaker system to a motorcycle could involve technical challenges not present for other vehicles because there is less space on the motorcycle to install the speaker and the weight of the speaker would have a greater impact on the vehicle's range. MIC and BMW also suggested that electric motorcycles should not be subject to the minimum sound level requirements in this proposal because electric motorcycles are not quiet.[75]

MIC commented in response to the NPRM that motorcycles should be exempt from meeting the minimum sound requirements in the final rule because motorcycles, both electric and ICE, pose less of a risk to pedestrians than other vehicles, citing statistics that the collision rate between motorcycles and pedestrians is 0.27 percent compared with 0.76 percent for other vehicles under conditions most likely to pose a threat to pedestrians (backing up, turning, entering or leaving parking spaces, starting, or slowing).[76]

MIC argued that NHTSA's assumption that electric motorcycles will show a similar increase in rate of pedestrian collisions as four-wheeled ''HEVs'' (MIC's term for hybrid and electric vehicles, collectively) is invalid because four-wheeled HEVs in fact do not pose a greater threat to pedestrians than ICE vehicles. MIC stated that the higher incidence of collisions between pedestrians and HEVs does not mean that HEVs collide with pedestrians at a higher frequency, arguing that NHTSA's comparison of incidence rates of pedestrian collisions between ICEs and HEVs to determine the overall frequency of pedestrian crashes between each group of vehicles is only valid if both classes of vehicles have similar overall crash rates. However, according to MIC, that is not the case, and the difference in overall crash rates is supported by FARS data which indicate that the overall crash rate for HEVs is only half of the overall crash rate for ICEs. MIC stated that the higher incidence rate of HEV-pedestrian collisions is likely to be artificial and driven by demographic factors other than sound, mainly that HEV drivers actually tend to be safer drivers on average, which makes their overall crash rate lower and which inflates their rate of pedestrian crashes as a percentage of all crashes. MIC pointed out that motorcycle pedestrian crash frequency is actually no higher than for ICEs. MIC stated that crash rate differences due to demographic factors are not uncommon and are, for example, what explain large differences in fatality rates between different types of motorcycles (*e.g.,* touring bikes compared to sport bikes). Overall, MIC concluded that, because motorcycles have a lower overall crash rate than four-wheeled vehicles, the risk they pose to pedestrians is actually lower than the incidence rate of motorcycle-pedestrian crashes might indicate.

MIC also argued that it is logical that motorcycles should have a lower rate of collisions with pedestrians because motorcycles require two hands to operate so there is a lower chance of the operator being distracted, which should decrease the risk to pedestrians.

MIC stated that, in addition to having a low rate of crashes involving pedestrians, electric motorcycles are not quiet. MIC referenced a report submitted in response to the NPRM by Brammo, Inc., a manufacturer of electric motorcycles, that MIC believes shows that by design, electric motorcycles are not silent vehicles when moving.[77] MIC stated that unlike EV automobiles, the engine and drivetrain are open and exposed to the surrounding environment, and will produce sound levels that exceed the sound level minimums proposed by NHTSA. MIC stated that two motorcycles tested by Brammo, the Empulse and the Enertia Plus, produced sound levels that were 8 to 18 dB(A) higher than the minimum requirements in the NPRM.

MIC also stated that the NPRM did not take into account that motorcycles do not have a reverse gear and therefore do not collide with pedestrians while backing.

MIC stated that NHTSA should not establish minimum sound requirements for electric motorcycles until there is evidence that these vehicles pose a safety risk to pedestrians. MIC stated that if NHTSA does decide to establish minimum sound requirements for motorcycles, it should extend the exemption for small-volume manufacturers indefinitely.

IMMA suggested that electric motorcycles do not introduce a new threat to blind and visually impaired pedestrians because blind and visually impaired pedestrians already are exposed to pedalcyclists on both the road and on sidewalks (and bicycles would not be any louder than electric motorcycles). Operators of electric motorcycles, like pedalcyclists, have the advantage of greater awareness of nearby pedestrians and greater ability to avoid them.

IMMA stated that limited data exists on crashes between motorcycles and pedestrians and pedalcyclists but that there are a significant number of incidences of crashes involving motorcycles and four-wheeled vehicles, which it argued showed the high vulnerability of motorcycle riders and their inherent alertness to other road users including pedestrians. They also commented that motorcycles by design provide the operator with better vision of the surrounding environment which increases awareness of nearby pedestrians and pedalcyclists.

IMMA commented that studies have shown that pedestrians are at greater risk of being struck by HVs while the vehicle is operating in reverse, but this is not a concern for motorcycles because the vast majority of motorcycles do not have a reverse gear and those that do cannot move quickly in reverse.

IMMA stated that preliminary data shows that electric motorcycles are not quiet and suggested that this data, coupled with the fact the electric motorcycles do not pose an increased risk to pedestrians, shows that electric motorcycles should not be subject to the minimum sound requirements in the final rule.

DG Enterprise stated that the detectability parameters determined for EVs and HEVs in the NPRM may require the installation of an alert sound system on other quiet vehicles such as electric motorcycles and mopeds as well as electrically assisted bicycles. DG Enterprise inquired whether NHTSA plans to mandate the installation of and ''AVAS'' (Acoustic Vehicle Alerting Systems) in all these vehicle categories.

Western Michigan stated that all quiet vehicles traveling at the slow speeds covered by the NPRM, whether they are light-duty EVs and HVs or electric motorcycles, have the potential of

[75] MIC submitted measurements of overall sound pressure level of two electric vehicle models recorded at 8 km/h (5 mph) and 16 km/h (10 mph) in its comments to the NOI. MIC did not provide any measurements of overall sound pressure level for ICE motorcycles as a comparison. *Available at, www.regulations.gov*, Docket No. NHTSA–2011–0100–0028.

[76] Docket No. NHTSA–2011–0148–0268.

[77] The report submitted by Brammo, Inc. is available through *www.regulations.gov,* Docket No. NHTSA–2011–0148–0268.

causing harm to pedestrian who are blind.

Agency Response to Comments

Although the agency proposed in the NPRM to include motorcycles in the final rule, we have decided not to apply the requirements of this final rule to electric motorcycles. As is the case with heavy hybrid and electric vehicles, we currently do not have enough information to determine whether the light vehicle acoustic requirements or the crossover speed in this final rule are appropriate for electric motorcycles. Instead, the agency is planning to conduct further research on sound emitted by electric motorcycles before issuing a new NPRM, if needed, to propose acoustic requirements for these vehicles.

As described in Section II.C of this notice, after issuing the NPRM the agency conducted acoustic testing on two electric motorcycles following the procedures in SAE J2889–1, MAY 2012.[78] The agency compared the one-third octave band measurements of these electric motorcycles to the minimum levels needed for detection based on the agency's detection model. The first motorcycle, the 2012 Brammo Enertia, had two one-third octave band measurements at the 10 km/h pass-by that met or exceeded the minimum levels for detection out of the thirteen one-third octave bands in the range of interest (315Hz to 5kHz); for the 20 km/h pass-by, the Enertia met or exceeded the minimum in three of the thirteen bands. The second motorcycle that the agency evaluated, the 2012 Zero S, did not have any one-third octave bands that were equal to or greater than the minimum levels for detection at the speeds tested. The overall sound pressure levels for the Brammo Enertia in the 10 km/h, 20 km/h, and 30 km/h pass-bys were 57 dB(A), 63.2 dB(A), and 66.5 dB(A). The overall sound pressure levels for the Zero S in the 10 km/h, 20 km/h, and 30 km/h pass-bys were 49.1 dB(A), 57 dB(A), and 59.6 dB(A).

According to the agency's detection model, a vehicle is detectable in the 55 dB(A) standard ambient utilized in the agency's acoustic evaluations if it meets or exceeds the minimum levels for detection in at least one of the thirteen one-third octave bands.[79] When compared to the agency's detection model, the Brammo Enertia would be expected to be detectable in the 55 dB(A) standard ambient at 10 and 20 km/h. According to the agency's model, the Zero S would not be expected to be detectable in the 55 dB(A) ambient at any of the three speeds tested.

When compared to the average overall sound pressure level of four-wheeled ICE vehicles, the sound level produced by the Brammo Enertia was similar, based on a broad selection of ICE measurement data which the agency acquired from its own testing and from other sources (shown in Table 13 of the NPRM). The Zero S produced a lower overall sound level than the ICE mean and also was lower than the mean-minus-one-standard-deviation of the same ICE data (shown in Table 14 of the NPRM.)

Based on comparing the one-third octave band data to the agency's detection model and comparing the overall sound pressure levels to the sound produced by four-wheeled ICE vehicles, the agency believes the acoustic data from these two electric motorcycles are inconclusive as to whether electric motorcycles might be too quiet for pedestrians to detect by hearing. Furthermore the agency has not collected any data or conducted any analysis regarding the crossover speed for electric motorcycles, which might be different from that of four-wheeled vehicles. Because our acoustic data show that one of the two electric motorcycles would be detectable by pedestrians within a safe detection distance, but the other one would not be, we believe that further evaluation of electric motorcycles is needed before we can determine if it is appropriate that they be subject to the same acoustic requirements and crossover speed as four-wheeled vehicles.

Commenters stated that adding an alert system to a motorcycle would be a technical challenge because motorcycles are very different from cars in terms of layout and architecture, and a pedestrian alert system which includes a speaker is a significant amount of hardware to integrate into a motorcycle. NHTSA has not determined if this design burden would make it impracticable for electric motorcycles to be required to meet today's final rule.

The agency also needs to further evaluate whether electric motorcycles require distinct specifications separate from four-wheeled vehicles. For example, there is nothing in the minimum sound requirements that would allow pedestrians to specifically recognize a vehicle as a motorcycle. Furthermore, motorcycles do not need a backing sound since they generally are not driven in reverse.[80] For these reasons, this final rule does not apply to motorcycles, and we anticipate conducting a separate rulemaking effort to address the potential need for pedestrian alert systems on electric motorcycles.

Low Speed Vehicles

In the NPRM, we stated that we had tentatively concluded that Low Speed Vehicles (LSV) should be required to meet the minimum sound requirements in the proposed standard. We stated that while we had not conducted any acoustic testing of these vehicles and had limited real-world data on crashes involving LSVs and pedestrians, we expected LSVs equipped with electric motors would be extremely quiet.

EDTA stated that NHTSA should defer application of minimum sound standards to LSVs until a more complete record establishing the need for standards for these vehicles exists. EDTA suggested that if the agency documents a need for LSVs to meet the minimum sound requirements in the final rule, the agency should then develop audibility specifications that reflect the technologies, duty cycles and uses, and sound profiles specific to these types of vehicles.

Western Michigan stated that LSVs should be required to meet the requirements in the final rule because they could pose a potential hazard to blind pedestrians. NFB stated that the rule should apply to LSVs.

Agency Response to Comments

We have decided to apply the minimum sound requirements in today's final rule to LSVs. The PSEA requires NHTSA to establish minimum sound requirements for all motor vehicles that are hybrid or electric motor vehicles. Because trailers are the only vehicles excluded from the scope of the required rulemaking, NHTSA's interpretation is that Congress intended for the agency to apply minimum sound requirements to all other vehicles that are HVs or EVs including LSVs.

The agency tested five LSVs to determine the sound levels produced by these vehicles. The sound levels

[78] Hastings, et al., (2014) Acoustic Data for Hybrid and Electric Heavy-duty Vehicles and Electric Motorcycles.

[79] While a sound with one one-third octave band at the detectable threshold would be expected to be detectable in the 55 dB(A) ambient utilized in the agency's research, such a sound may not be detectable in other ambient conditions with the same overall sound pressure level depending on the spectral shape of the ambient.

[80] One or more models of touring motorcycle are fitted with a reverse feature that uses the engine starter motor to assist in backing, for example when the rider is unable to walk the motorcycle out of an inclined parking space. This feature is intended for limited use. Currently this feature is not present on any electric motorcycles. As a result, reverse operation is not considered to be a safety issue for motorcycles as it is with passenger cars.

produced by the LSVs for the 10 km/h, 20 km/h, and 30 km/h pass-bys were similar to the sound levels produced by the electric passenger cars that the agency evaluated during VTRC's testing in 2012.[81] The sound levels produced by the LSVs when operating in reverse varied significantly because four of the five LSVs were equipped with back-up beepers.

Results of the acoustic testing of these LSVs confirmed the agency's understanding that these vehicles produce similar sound levels as EVs and HVs. Also, they operate in locations where pedestrian exposure is similar to that of EVs and HVs. Therefore, the agency believes that electric LSVs pose an increased risk to pedestrians when they are operating at low speed when compared to conventional vehicles. Vehicles in the LSV category have a maximum speed limitation of 25mph, so by definition LSVs operate at low speeds. These speeds are reflective of those for which HVs and EVs have the highest risk of involvement in pedestrian crashes when compared to ICE vehicles, as noted in Section II.B of today's final rule. The agency is not aware of any factors related to the use of LSVs that would mitigate the risk to pedestrians created by the low sound levels produced by these vehicles. Because of the low sound level produced by LSVs and the fact they operate primarily at low speeds, the agency believes that it is necessary for hybrid and electric LSVs to meet the minimum sound requirements in today's final rule. This is in contrast to electric motorcycles and EVs/HVs with a GVWR over 10,000 for which our test data were inconclusive regarding the sound levels those vehicles achieve before having any sound added.

In response to the comment submitted by EDTA, NHTSA believes that acoustic requirements for light duty EVs and HVs are appropriate for LSVs. LSVs are not sufficiently different from vehicles that are not speed limited when those vehicles are traveling at low speeds, so LSVs do not require a separate acoustic specifications in order for pedestrians to detect them.

Quiet ICE Vehicles

In the NPRM, we chose not to apply the proposed requirements to conventional ICE vehicles for the time being. We acknowledged that it is possible that some ICE vehicles may pose a risk to pedestrians because of the low level of sound that they produce when operating at low speeds. We stated in the NPRM that the agency would decide whether to apply the minimum sound requirements established for HVs and EVs to ICE vehicles after completing the Report to Congress on ICE vehicles, as required by the PSEA.

We also stated in the NPRM that while some of the ICE vehicles the agency tested during our research did not meet the proposed requirements, these vehicles emit sound in areas of the audible spectrum not covered in the proposed requirements. We stated that this characteristic of ICE vehicles made it difficult to compare the detectability of ICE vehicles to hybrid and electric vehicles solely based on acoustic measurements.

In response to the NPRM, we received several comments from members of the general public stating that if the agency chose to establish minimum sound requirements for hybrid and electric vehicles it should also establish requirements for quiet ICE vehicles. These commenters stated that NHTSA should make the determination regarding which vehicles will be subject to the final rule based on whether the vehicle poses an increased risk to pedestrians when operating at low speed not based on the vehicle's propulsion type. These commenters suggested that requiring only hybrid and electric vehicles to meet the requirements of the final rule discriminates against those types of vehicles.

DG Enterprise inquired whether NHTSA had plans to require quiet ICE vehicles to meet the requirements of the final rule. DG Enterprise further inquired whether the agency considered that the minimum sound requirements in the final rule might influence the installation of alert sound systems on quiet ICE vehicles.

WMU stated that, although increases in the number of hybrid and electric vehicles in the on-road fleet have brought about an increased awareness of the safety risks to pedestrians posed by quiet vehicles, there are many modern ICE vehicles that are too quiet to be safely detected by pedestrians who are blind. ADB stated that pedestrians who are blind are at just as much risk from a quiet ICE as they are from an EV or HV. ADB believes that quiet ICE vehicles should be subject to the final rule because the agency has not conducted enough research about the detectability of these vehicles.

Agency Response to Comments

We have chosen to limit the application of the final rule to hybrid and electric vehicles. The PSEA required NHTSA to establish minimum sound requirements for hybrid and electric vehicles. After completing the rulemaking to establish minimum sound requirements for hybrid and electric vehicles, NHTSA is required to complete a study and submit a report to congress on whether there is a safety need to apply the final rule to ICE vehicles. If NHTSA subsequently determines that there is a safety need to apply the rule to ICE vehicles, the agency is required to initiate a rulemaking to do so. Because we have not yet completed the required report to Congress, we have not yet determined whether a safety need exists to apply the requirements of today's final rule to ICE vehicles. Because they agency has not yet determined whether a safety need exists for quiet ICE vehicles to produce additional sound, we have no basis at this time to subject these vehicles to the requirements of today's final rule.

We are aware that some ICE vehicles do not meet the requirements of the final rule, and that this could lead to the inference that some ICE vehicles do not produce sufficient sound to allow pedestrians to detect these vehicles. We do not think that it is appropriate, however, to make the assumption—based solely on the data mentioned above—that some ICE vehicles must produce additional sound to be safely detected by pedestrians. As we stated in the NPRM, ICE vehicles produce sounds in areas of the audible spectrum that make it difficult to draw conclusions about how detectable they are by comparing them to the requirements in today's final rule. In addition, the sound produced by an ICE includes acoustic characteristics such as modulation that enhance detectability that are not included in the final rule. Therefore, it is likely that ICE vehicles that are readily detectable by pedestrians might not meet the requirements of the final rule.

The agency will examine whether there is any crash data that shows that ICE vehicles that produce a lower sound level have an increased risk of crashes with pedestrians as part of the agency's investigation of whether there is a safety need to apply the requirements of today's final rule to ICE vehicles as part of the agency's report to Congress.

C. Critical Operating Scenarios

Stationary but Active

The agency proposed to require hybrid and electric vehicles to meet

[81] Garrott, W.R., Hoover, R.L., Evans, L.R., Gerdus, E., and Harris, J.R., ''2012 Quieter Vehicle Testing Report: Measured Sound Levels for Electric, Hybrid Electric, and Low Speed Vehicles.'' Washington, DC, DOT/NHTSA, November 2016.

minimum sound requirements in the ''stationary but active'' condition. The agency used the term ''stationary but active'' to describe the state of a stationary hybrid or electric vehicle that has its propulsion system active. This is an important scenario to include because these vehicles typically do not idle in the way that an ICE vehicle does. The NPRM explained that the ''stationary but active'' condition included any time following activation of the vehicle's starting system without regard to the transmission gear position or any other factor affecting the vehicle's ability to begin moving (*i.e.,* parking brake application). The NPRM proposed requiring EVs and HVs to meet the minimum sound requirements for the stationary but active condition beginning 500 milliseconds after the vehicle's starting system is activated.[82]

In the NPRM, we explained that the PSEA required the agency to establish minimum sound requirements for this operating condition. The PSEA states that the required safety standard must allow pedestrians ''to reasonably detect a nearby electric or hybrid vehicle in critical operating scenarios including, but not limited to constant speed, accelerating, or decelerating.'' [83] This encompasses the possibility that ''stationary but active'' could be a ''critical operating scenario.'' Also, the PSEA defines ''alert sound'' as ''a vehicle-emitted sound to enable pedestrians to discern vehicle presence, direction, location and operation.'' [84] Thus, in order for a vehicle to satisfy the requirement in the PSEA to provide an ''alert sound,'' the sound emitted by the vehicle must satisfy that definition.[85] We explained in the NPRM that in order to satisfy the definition of alert sound in the PSEA the agency was required to establish minimum sound requirements for EVs and HVs in the stationary but active operating condition.

We also stated that, in addition to being a required operating condition under the PSEA, the agency believed that there was a safety need for hybrid and electric vehicles to emit a sound in the stationary but active condition. A sound emitted by an HV or EV when stationary but active is analogous to the sound produced by an ICE vehicle idling while at a standstill. We stated that this requirement ensures that the responsibility to avoid a collision between a vehicle and a pedestrian is shared between the driver of the vehicle and the pedestrian by providing pedestrians with an acoustic cue that a vehicle may begin moving at any moment. While there are some scenarios in which a driver starting from a stopped position should be able to see a pedestrian in front of the vehicle and thus avoid a crash, the driver may not always be relied upon, especially in situations where the driver may have an obstructed view. A driver pulling out of a parking space in a crowded parking lot is an example of a situation in which a driver might not be able to see a pedestrian and the pedestrian may step into the path of a vehicle just as the vehicle is beginning to move. If the pedestrian is able to hear the vehicle before it begins to move, the pedestrian would be able to exercise caution and avoid a collision by not stepping in the path of the vehicle.

The agency also discussed incidents of HVs colliding with pedestrians when starting from a stopped position that appear in the data that the agency used for the statistical analysis of crashes between hybrid vehicles and pedestrians. The NPRM noted that instances of HVs starting from a stopped position and colliding with pedestrians are present in our data although the sample size is not large enough to prove a statistically significant incidence rate. We stated that this limited data showed there could be a safety risk which, if correct, would grow commensurate with the population of HV/EVs, such that it would be appropriate to require that vehicles provide adequate sound cues while stationary.

In the NPRM, we also noted that sound cues produced by idling ICE vehicles are critical for safe navigation by blind pedestrians. The sound produced by vehicles idling while waiting to pass through an intersection provides a reference to visually-impaired pedestrians so they are able to cross a street in a straight line and arrive safely at the other side. The sound of vehicles idling on the far side of the street while waiting to pass through an intersection also provides visually-impaired pedestrians with a reference for how wide a street is so they can accurately gauge the amount of time needed to safely cross.[86]

The NPRM further stated that the agency did not believe that there would be any incremental increase in cost that would result from requiring a sound at the stationary but active operating condition for vehicles already equipped with an alert sound system and that the draft EA showed that requiring sound at stationary would not have any appreciable impact on ambient noise levels.

In their comments to the NOI and in meetings with agency staff prior to the NPRM, representatives from several auto manufacturers said that the agency should not establish minimum sound requirements for the stationary but active condition. These manufacturers did not believe there was a safety need for an alert sound when vehicles are stationary. They were concerned that the sound of EVs and HVs standing in highway traffic and other scenarios in which pedestrians would not be expected to be present would unnecessarily contribute to increases in environmental noise. Advocacy organizations for individuals who are blind or visually impaired, in contrast, argued prior to the NPRM that NHTSA should establish minimum sound requirements for the stationary but active condition. These organizations stated that sound made by stationary vehicles is necessary for the safety of blind or visually impaired pedestrians to avoid collisions with EVs and HVs operating at low speeds because it allows individuals who are blind to proceed with caution when they hear a nearby ''idling'' vehicle.

The NPRM also discussed and sought comment on a suggestion from Mercedes for alerting nearby pedestrians that a hybrid or electric vehicle was about to begin moving without requiring a sound in the stationary but active condition. Mercedes had suggested that instead of emitting sound when the vehicle was stationary with the propulsion system active, hybrid and electric vehicles should be required to emit a ''commencing motion sound'' that would activate when the vehicle was in ''drive'' and the driver released his or her foot from the brake pedal.

[82] The NPRM proposed that vehicles with manual transmissions meet the stationary but active requirement when the vehicle's gear selection control is in ''neutral.''

[83] Public Law 111–373, 124 Stat. 4086 (January 4, 2011).

[84] *Id.*

[85] Given that the language of the PSEA definition of 'alert sound' uses the conjunction 'and' when listing the circumstances of vehicle operation that a pedestrian must be able to discern, *i.e.,* ''presence, direction, location, and operation,'' it is apparent that a pedestrian must be able to discern any vehicle operation, which would include the condition in which the vehicle could imminently be in motion and present a risk to a pedestrian.

[86] The NPRM also discussed how NHTSA staff traveled to the headquarters of the National Federation of the Blind in Baltimore, Maryland to receive training on white cane travel techniques used by individuals who are blind. This allowed NHTSA staff to experience firsthand the necessity of sound at stationary to the mobility of individuals who are blind. When approaching intersections, NHTSA staff found the sound of idling vehicles necessary for determining whether there was a vehicle present at the intersection and whether it was safe to cross.

When the driver released the brake pedal, the vehicle would emit a sound for a brief period that would be noticeably higher than the sound required at low speed. According to Mercedes, this brief, elevated sound would uniquely signal the onset of vehicle motion. Once the vehicle began to move, the alert sound would revert to a low-speed sound which would have to comply with the acoustic requirements proposed for speeds up to 10 km/h. The agency sought comment on using a ''commencing motion sound'' approach.

The NPRM also solicited comment on whether the final rule should allow the sound at stationary to be reduced or deactivated if the vehicle had been stationary for a prolonged period of time.

Many industry commenters responding to the NPRM raised many of the same points raised in their comments to the NOI and in meetings with agency staff prior to the agency issuing the NPRM. Auto manufacturers and groups that represent them commented that sound at stationary is not necessary for safety, and that Europe and Japan do not require sound at stationary. Industry commenters expressed concern that requiring sound in the stationary but active condition could annoy drivers, which would harm EV and HV sales, and that it also would lead to increases in environmental noise pollution. These commenters also argued that a sound at stationary would mask the sound of other approaching vehicles.

Industry commenters including Alliance/Global, Denso, EDTA, Mercedes, Mitsubishi, OICA, and Volkswagen requested that NHTSA require a ''commencing motion sound'' rather than establishing minimum sound requirements for either when a vehicle is in ''park'' or when the vehicle is in ''drive'' but is stationary. Some of these commenters pointed out that the NPRM did not define ''active'' and argued that NHTSA should define ''stationary but active'' specifically as the condition in which the vehicle's gear selector is in the ''drive'' position and the driver has released the service brake. Alliance/Global commented that requiring a commencing motion sound that activates when a vehicle begins moving would satisfy the requirement in the PSEA that the alert sound allow pedestrians to discern the presence, direction, location, and operation of the vehicle. Honda and Nissan, in addition to opposing a requirement for stationary sound without further research on the need for it, commented that NHTSA should not require a commencing motion sound and should instead leave that as an option for manufacturers. Some manufacturers, including Mercedes and Nissan, said that sound at stationary can mask the sound of other vehicles that are in motion. Mercedes stated that it had enlisted researchers to conduct some experimentation on this topic. They found in preliminary trials that it was easier for pedestrians to detect when a vehicle begins to move if the vehicle did not produce sound when stationary, and that this might be because the sound activates just as the vehicle initiates movement. Nissan also conducted trials that they said indicated that blind pedestrians were less aware of traffic moving adjacent to an alert-emitting stationary vehicle, *i.e.,* when the stopped vehicle emitted no sound, the pedestrians were more aware of the nearby moving traffic.

Volkswagen stated that vehicles that are not moving do not pose a threat to pedestrians or pedalcyclists. Volkswagen argued that it is unlikely that drivers will fail to make sure that the vehicle's path is clear of pedestrians when starting up from a full stop, and that in the rare case in which an inattentive driver begins to accelerate from a stop toward a pedestrian who is in or about to enter the vehicle's path in that case, a ''commencing motion'' sound would provide the pedestrian with a warning that the EV or HV is beginning to move, so that the pedestrian could take appropriate action.

EMA commented that it is unreasonable to require heavy vehicles to emit sound continuously while idling because many types of heavy-duty vehicles must idle for extended periods in order to power a variety of utility functions such as operating on-board equipment like hydraulic lifts or pumps.

Industry commenters also commented that the level of sound for the stationary condition proposed in the NPRM is too high, and sound level is higher than that of ICE vehicles at idle. They stated that, if NHTSA did decide to establish minimum sound levels for when a vehicle is stationary with an active propulsion system, those levels should be lower than the levels in the NPRM. In addition, the sound should be required only when the vehicle's gear selector is in the ''drive'' or ''reverse'' position and not when the gear selector is in the ''park'' position.

Volkswagen noted, ''for the foreseeable future, it is exceedingly unlikely that a blind pedestrian will encounter a line of vehicles stopped at a traffic light that is comprised entirely of EVs and HVs.'' [87] Volkswagen stated that because ICE vehicles will be present a majority of the times that blind pedestrians are attempting to cross at signal-controlled intersections, the sound produced by the idling ICE vehicles will provide the acoustic cues needed to ''shoreline.'' [88] Volkswagen stated that, by the time the market penetration of EVs and HVs increases to the level at which they would make up the majority of vehicles idling at an intersection, technology will eliminate the need for pedestrians who are blind to rely on vehicle-emitted sound to safely navigate intersections.

Alliance/Global stated that NHTSA should follow the European and Japanese guidelines for pedestrian alert sound systems which concluded that there is no safety need for hybrid and electric vehicles to emit sound while stationary. Alliance/Global also suggested that requiring a commencing motion sound as an alternative to requiring sound in the stationary but active condition ''would lower the ambient noise level at intersections, thus making it easier for pedestrians to detect the presence and operating patterns of other moving vehicles.'' [89]

In general, commenters pointed out a number of reasons why sound in the stationary operating condition should not be required. They stated that EVs and HVs should only be required to emit sound when they are capable of moving, because vehicles with their gear selector in the ''park'' position and vehicles with the parking brake engaged are not capable of motion so NHTSA should not establish minimum sound requirements for these conditions. For instance, Toyota stated that, according to NHTSA's interpretation of the PSEA, a vehicle is capable of being ''operated'' even without an operator being present in the vehicle, and that a vehicle that is stationary is inherently incapable of striking a pedestrian, and therefore should not be required to emit sound.[90]

A number of commenters expressed concern about the environmental noise that would be created by alert sounds emitted by stationary vehicles. Alliance/Global stated that if EVs and HVs are required to produce an alert sound as soon as the starting system is activated,

[87] *See* document no. NHTSA–2011–0148–0250, *available at www.regulations.gov.*

[88] ''Shoreline'' refers to the practice by which pedestrians who are blind use walls, handrails, curbs or other features parallel to their direction of travel to help guide them. They may also use traffic sound for shorelining.

[89] *See* document no. NHTSA–2011–0148–0251, *available at www.regulations.gov.*

[90] *See* document no. NHTSA–2011–0148–0272, *available at www.regulations.gov.*

they will be required to make noise under conditions for which there is no threat to pedestrians, which in turn will needlessly increase environmental noise levels. Volkswagen stated that requiring EVs and HVs to emit a sound at stationary would cause many hours of unnecessary sound emissions, which will annoy vehicle owners and add to overall noise pollution. Volkswagen also claimed that requiring sound at stationary would lead to unnecessary wear and tear on the sound generation system components.

Representatives from Nissan, Toyota, Honda, GM, and Mitsubishi conducted a demonstration attended by NHTSA staff [91] to show that a vehicle that emits sound when stationary could mask the presence of other vehicles. They conducted the demonstration to highlight situations in which they believed pedestrians would be able to better detect other approaching vehicles if nearby hybrid and electric vehicles did not emit sound while they are stationary. Their contention was that requiring a stationary hybrid or electric vehicle to emit sound could mask the sound of a moving vehicle that was approaching in an adjacent lane.

Representatives from Nissan met with NHTSA staff and presented their analysis of when a sound at stationary would be beneficial to pedestrians and when it would mask the sound of an approaching vehicle that actually posed a threat to pedestrians.[92] In this analysis, Nissan examined thirty different traffic scenarios. Nissan stated that it had found that requiring EVs and HVs to emit a sound at stationary would make it more difficult to detect an approaching vehicle that posed a threat to pedestrians in twenty of the thirty scenarios, would have no impact in eight of the scenarios, and would aid the pedestrian in detecting the threat vehicle in only two of the scenarios. Nissan indicated that it would be more difficult for pedestrians to detect an approaching vehicle that posed a threat in these twenty scenarios because a stationary EV or HV producing an ''idle'' sound would mask the approaching vehicle that posed the threat.

Organizations that represent individuals who are blind or visually impaired and safety advocates including NFB, ACB, ADB, NCSAB, WBU, WMU, and Advocates stated that the agency should require hybrid and electric vehicles to produce sound when those vehicles are stationary with their propulsion systems active. Among the comments from these organizations was the contention that the sound of ''idling'' vehicles is useful for navigation by pedestrians who are blind in a number of scenarios and makes them aware of the presence of a nearby vehicle that is likely to start moving at any moment so the pedestrian has the opportunity to react safely once that vehicle begins to move. These organizations stated they do not believe that a ''commencing motion sound'' is sufficient to replace the acoustic cues provided by ''idling'' vehicles. However, some of these commenters suggested that they would not be opposed to a commencing motion sound if it is provided in addition to, not in place of, a stationary sound. Advocates commented that the sound required for a stationary vehicle in 'park' could be at a lower acoustic level until such time as the brake pedal is applied.

WMU stated ''pedestrians who are blind gain important information regarding vehicle presence from the sounds of idling vehicles'' [93] and ''blind pedestrians often rely heavily on the sound of vehicles starting up from a stop at an intersection (signalized or not) to decide when to cross and to understand the geometry and operation of the intersection.'' [94] These assertions were reflected to a great extent in comments from other organizations among this group.

WMU also stated that its research has shown that blind pedestrians have great difficulty detecting hybrid and electric vehicles (without an alert system) starting from a stopped position and, consequently, sound in the stationary but active condition should be required when the hybrid or electric vehicle's gear selection control is in ''park'' to alert blind pedestrians of potential conflict. WMU expressed concern that a hybrid or electric vehicle could be put into ''drive'' and begin moving quickly enough that a pedestrian walking near the vehicle would not have time to react.

WMU also stated that, while a commencing motion sound does not replace sound at stationary, it does allow pedestrians to more easily identify vehicles starting from a stopped position. WMU suggested that, if a vehicle has been stationary for a long time, that vehicle is less likely to begin moving and should not be required to produce a sound for a prolonged period.

Agency Response to Comments

As described in Section II.A of this final rule, NHTSA has concluded that the PSEA requires NHTSA's safety standard to specify that vehicles must have sound when stationary. However, based on careful review of the comments received, we have decided to modify the proposed sound at stationary requirement to apply only when a vehicle's gear selection control is not in the ''Park'' position.

The definition of ''alert sound'' in the PSEA requires the agency to establish minimum sound requirements to allow pedestrians to detect the presence of nearby vehicles that are in operation. Of the comments that suggested that the agency define ''stationary but active'' as the condition in which the vehicle's gear selection control is in ''drive'' and the driver is not applying the brake pedal, none of those comments explained how that approach would fulfill the mandate in the PSEA that the minimum sound requirements allow pedestrians to detect the ''presence'' and ''operation'' of a nearby vehicle, including one that is stationary.

The agency believes that adopting the sound at stationary requirements will mitigate the potential risk to pedestrians from HVs and EVs starting from a stopped position. As we stated in the NPRM, there is evidence in the crash data that these types of crashes do occur. A sound at stationary would help both blind and sighted pedestrians because it would alert them to the presence of a vehicle that might start moving so they could avoid walking into the vehicle's travel path. We are concerned that a ''commencing motion'' sound would not always give a pedestrian who was entering the path of a vehicle sufficient time to react to avoid a collision, as argued by ACB and NFB. While we agree that the onset of an alert sound coincident with the commencement of motion on a vehicle that was not emitting sound when it was stationary might be of some benefit, because the contrast provided by the activation of the sound might better help pedestrians who are blind detect when the vehicle begins to move, we do not believe that this outweighs the fact that requiring sound at stationary will help all pedestrians avoid collisions with vehicles starting from a stopped position by providing an audible indication of a nearby vehicle that could begin moving at any time.

While it may be some time in the future before it becomes likely that a pedestrian who is blind will encounter traffic that is comprised exclusively of EVs and HVs (as VW's comment

[91] See document no. NHTSA–2011–0148–0240, *available at www.regulations.gov.*

[92] *See* document no. NHTSA–2011–0148–0051, *available at www.regulations.gov.*

[93] *See* document no. NHTSA–2011–0148–0180, *available at www.regulations.gov.*

[94] *See id.*

suggested), a sound at stationary can assist pedestrians who are blind with navigation and orientation tasks before that scenario becomes a reality. A sound at stationary can assist pedestrians who are blind in performing orientation and mobility tasks in commonplace situations such as when a pedestrian encounters a single EV or HV at an intersection where the traffic flow is light. As stated above, a sound at stationary also would provide immediate benefits to pedestrians who are blind by allowing them to avoid collisions with EVs and HVs starting from a stopped position.

NHTSA does not believe that the possibility that a sound at stationary might mask the sound of other vehicles operating in the vicinity outweighs the benefits of requiring a sound in the stationary but active condition. After reviewing Nissan's analysis of scenarios, NHTSA is unable to determine whether a pedestrian who is blind would attempt to cross in the situations in which Nissan claimed that a sound at stationary would mask the sound of an approaching vehicle. For example, some of those scenarios involve a pedestrian who encounters a stationary vehicle that is being passed by another vehicle travelling in the same direction in an adjacent lane. The agency is unsure whether upon encountering a stationary vehicle, a pedestrian who is blind would proceed to cross in front of the vehicle without waiting for the vehicle to move away so the pedestrian can be sure no other traffic is present and that it is safe to cross.

Nissan presented data showing that some of the company's customers would find the sound at stationary to be unacceptable. In one Nissan study, over 60 percent of the subjects found an alert sound at stationary to be acceptable when the overall sound pressure level was similar to that of sounds meeting the requirements of today's final rule.[95] In a second Nissan study, which was conducted indoors, the number of participants who found an alert sound at stationary unacceptable was 50 percent with the windows of the vehicle rolled up when the overall sound pressure level was similar to that of sounds meeting the requirements of today's final rule.[96] No other commenter provided data or survey results showing that a sound at stationary would affect customer acceptance. Nissan did not submit any data that would indicate that customers would decline to purchase a vehicle equipped with sound at stationary.

NHTSA believes manufacturers will install alert sounds on vehicles that are acceptable to drivers because they do not want to annoy current or potential customers. We do not know whether the second study conducted by Nissan could have been influenced by the fact that the testing in question occurred indoors, and we would expect the circumstances under which a vehicle would be making a sound at stationary indoors to be limited. We do not believe that this second study is representative of the real-world situations in which a driver would be exposed to a sound at stationary. Given our questions about the findings of Nissan's second study, the fact that we do not have any other data on this issue from other manufacturers, and the fact that Nissan's original study showed that over 60 percent of customers would accept a sound at stationary, we do not have enough information to indicate that concerns regarding public acceptance of a sound at stationary are sufficient to outweigh the safety justifications for a sound at stationary or the requirements of the PSEA. Furthermore, a vast majority of ICE vehicles make a sound at stationary, and that sound does not deter customers from buying those vehicles.

In reference to comments about stationary alert sounds having environmental impact, the agency conducted an environmental assessment and concluded that the requirements overall will have a minor impact on environmental noise.[97]

After reviewing the comments and all information provided in response to the NPRM on this issue, the agency has decided to limit the requirements for the stationary but active condition to when an HV or EV's gear selector is not in ''Park.'' As stated in Section II.A, the term ''operation'' means a state of being functional or operative. The agency believes that it is reasonable to conclude that Congress intended the term ''operation'' in the PSEA to be the condition in which a driver is operating the vehicle as opposed to the operation of the vehicle's propulsion system. It is the operation of the vehicle by the driver, not the operation of the vehicle's propulsion system, that creates the safety risk to pedestrians who are unable to detect hybrid and electric vehicles.

We note that, as a result of this decision, the terminology ''Stationary but Active'' as used in the NPRM is no longer accurate because this final rule allows EVs and HVs to be ''active'' without emitting an alert sound. That is, the ignition of an HV or EV can be in the 'on' position while the vehicle is not emitting an alert, assuming the vehicle's gear selector is in Park. This scenario would not have been allowed under the proposed requirement. Therefore, we have chosen to simply use the term ''stationary'' rather than ''stationary but active'' for this operating condition. Furthermore, the regulatory text adequately specifies the conditions for stationary tests, and the words ''but active'' do not clarify any aspects of testing. For these reasons, the phrase ''stationary but active'' is not used in the final rule.

We believe that requiring sound at stationary only if a vehicle's gear selector is not in the ''Park'' position will still allow pedestrians to avoid crashes with HVs and EVs starting from the stopped position, while also minimizing sound in situations in which vehicles may pose no immediate risk to pedestrians, such as when they are parked with their ignition turned on. HVs and EVs that are stationary pose a risk to pedestrians only if they could begin moving at any moment. When a vehicle is in Park, the driver must step on the brake and move the gear selector to Drive or Reverse and then release the brake in order to begin moving, which takes some time. Although there are situations in which a driver could quickly shift a vehicle into Drive and begin moving, there also are situations in which a vehicle in Park with its ignition turned on will remain stationary for a prolonged period of time. Without data to indicate which of these scenarios is predominant, we believe that requiring an alert sound while HVs and EVs are stationary but are not in ''Park'' appropriately balances pedestrian safety, as provided for in the PSEA, with concerns about producing sound when it is not necessary to alert pedestrians. Such concerns were expressed by a number of commenters including vehicle manufacturers but also by a large number of individuals who commented on the NPRM and who stated that adding alert sounds to vehicles will create noise in environments and circumstances that otherwise would be quiet.

As with automatic-transmission HVs and EVs, our intent is that the stationary requirement will ensure that manual-transmission HVs and EVs also emit an alert sound in all routine in-traffic situations but not when they are parked. However, for manual-transmission vehicles, there is no gear selector

[95] *See* document no. NHTSA–2011–0148–0051, *available at www.regulations.gov.*

[96] *See* document no. NHTSA–2011–0148–0320, *available at www.regulations.gov.*

[97] ''Environmental Assessment—Minimum Sound Requirements for Hybrid and Electric Vehicles,'' docket no. NHTSA–2011–0100.

position exactly analogous to the Park position; the Neutral position is similar, but not the same. Automatic-transmission vehicles typically remain in Drive, *i.e.,* not in Park, as long as they are in traffic, but they typically are in Park when stationary for more than a short time. In contrast, manual-transmission vehicles may routinely be in Neutral both in traffic (*e.g.,* vehicles waiting at traffic lights) as well as when parked. If we were to specify that an alert sound is required on manual-transmission HVs and EVs only when the gear selector is in a position other than Neutral, that would fail to achieve the desired safety outcome because some routine in-traffic situations would not be covered (*e.g.,* vehicles waiting at traffic lights). Consequently, we have decided to focus on parking brake usage as an alternative factor to determine when an alert is needed on a stationary HV or EV with a manual transmission. We are specifying in the stationary requirement that the alert sound on manual transmission-equipped HVs and EVs must activate any time the ignition is turned on and the parking brake is not in the applied position. Thus, a vehicle with a manual transmission that is parked and idling will not be required to emit an alert sound as long as the parking brake is applied. We believe that this approach responds to comments, that it is within the scope of the proposal, and that it meets the goal of improving safety for blind and other pedestrians while minimizing non-essential vehicle noise.

As discussed elsewhere in today's final rule, the minimum sound level requirements for the stationary condition are based on the agency's detection model. These minimum requirements represent the sound levels that a pedestrian would need in order to hear a vehicle at a distance of two meters. For more discussion of the minimum sound requirements, see Section II.C in this notice.

Operation in Reverse

In the NPRM, we stated that reverse is a critical operating scenario for which the agency should issue minimum sound requirements for HVs and EVs to provide acoustic cues to pedestrians when the vehicles are backing out of parking spaces or driveways, to prevent collisions between EVs and HVs and pedestrians, and to satisfy the requirements of the PSEA.[98]

We also stated that HVs and EVs should be required to produce a sound while operating in reverse despite the agency's rear visibility requirements in FMVSS No. 111.

The NPRM stated that NHTSA's report on the incidence rates of crashes between HVs and pedestrians found 13 collisions with pedestrians when an HV is backing up.[99] We explained in the NPRM that while we could not establish a statistically significant incidence rate for backing crashes for HVs to compare to backing crashes involving ICEs due to the limited sample size, these accident reports do show that these crashes occur. We also stated that backing incidents occur in parking lots, garages, and driveways, as well as other ''off roadway'' locations that would not be captured in the State Data System, and thus they might be underreported.

Because of difficulties in conducting tests with the test vehicle is in motion in reverse, the NPRM stated that the agency would test the minimum sound requirements for reverse while the vehicle is stationary but with the reverse gear engaged.

Alliance/Global stated that HVs and EVs should not be required to make sound while stationary in reverse. Alliance/Global also stated that HVs and EVs should emit the same overall sound pressure level as in the stationary but active condition when in reverse and only when the vehicle is in motion.

Honda stated that the agency should not require pitch shifting when HVs and EVs are operating in reverse. Honda also stated that NHTSA should consider the role of pending changes to the requirements of FMVSS No. 111 that should serve to increase the driver's level of awareness of pedestrians who may be present while operating a vehicle in reverse.

Agency Response to Comments

We have decided to establish minimum sound requirements applicable to HVs and EVs with their gear selection control in reverse, both when stationary and when moving. We are requiring HVs and EVs to produce a sound in reverse for the reasons stated in the NPRM and in our discussion regarding sound at stationary. An HV or EV with its gear selection control in reverse could start moving at any time and pedestrians should be aware of the presence of such a vehicle so they can avoid walking into the vehicle's path.

As discussed in Section III.C, we are requiring the sound levels when the vehicle is in reverse to be slightly higher than when the vehicle is stationary and lower than the levels required for vehicles moving forward at more than 10 km/h because the vast majority of vehicle operation in reverse is likely to be limited to speeds around 10 km/h. In addition, drivers may be less aware of pedestrians passing behind their vehicle because of obstructed visibility to the rear.

For the reasons discussed in Section III.G, the final rule no longer contains requirements for pitch shifting, so there will be no such requirements when the vehicle is operating in reverse. We note that the requirement in the final rule that the volume of the sound produced by the vehicle increase as the vehicle increases speed does not apply when the vehicle is operating in reverse.

The agency has considered the potential impact on today's final rule of the NHTSA rulemaking on FMVSS No. 111 to expand the required rear field of view.[100] The expanded field-of-view requirements will reduce pedestrian crashes involving backing vehicles of all propulsion types. On the other hand, it will not eliminate those crashes. As we stated in the NPRM, establishing minimum sound level requirements for reverse operation will ensure that both the pedestrian and the driver continue to have the ability to avoid pedestrian-vehicle collisions. Nevertheless, we have adjusted the target population in our assessment of benefits to reflect the recent amendments to FMVSS No. 111 under which many vehicles will be equipped with rear vision cameras.

The proposed requirements in the NPRM for operation in reverse allowed the use of back-up beepers that most heavy vehicles are equipped with as a means of compliance with the pedestrian alert safety standard. As noted elsewhere in this preamble, this final rule does not apply to medium and heavy vehicles, so the proposed requirement to allow the use of back-up beepers is not included in this final rule.

Acceleration and Deceleration

In the NPRM, we did not include separate test procedures to measure vehicles when they are accelerating or decelerating. We stated that we chose not to propose separate requirements when EVs and HVs are accelerating and decelerating because of concerns that it was not feasible to test accelerating or decelerating vehicles accurately and repeatably. We stated that the proposed

[98] Because the PSEA requires NHTSA to issue minimum sound levels to allow pedestrians to discern vehicle presence and operation, and a vehicle moving in reverse is unquestionably operating, a minimum sound level is required for this condition.

[99] Wu et al. (2011) Incidence Rates of Pedestrian And Bicyclist Crashes by Hybrid Electric Passenger Vehicles: An Update, Report No. DOT HS 811 526. Dept. of Transportation, Washington, DC. Available at *http://www-nrd.nhtsa.dot.gov/Pubs/811526.pdf.*

[100] *See* 79 FR 19178, April 7, 2014.

pitch shifting requirements would allow pedestrians to detect the acceleration and deceleration of HVs and EVs, so separate acoustic requirements are not necessary. In the responses to the NPRM, the topic of acceleration and deceleration was not commented on separately from the topic of pitch shifting which is covered in Section III.G of this final rule.

For the reasons stated in Section III.G, we have not included a requirement for pitch shifting in today's final rule. Today's final rule instead contains a requirement that the sound produced by a vehicle must increase and decrease in loudness as the vehicle changes speed. The agency believes that a change in sound level produced by EVs and HVs as their speed changes will provide an acoustic cue for pedestrians to detect acceleration and deceleration.

In the NPRM, the required minimum level in each one-third octave band was greater at higher speeds to allow pedestrians to detect faster moving vehicles from farther away and to account for increased stopping distance at higher speeds. The NPRM, however, did not contain any maximum sound requirements, only minimums, at each operating condition so it would have been possible for an EV or HV to meet the acoustic requirements in the NPRM by producing the same, unvarying sound level from stationary up to 30 km/h. If a manufacturer chose this type of design, pedestrians would not have any acoustic cues to determine if the vehicle was changing speed if the sound produced by the vehicle also did not change in pitch. We believe this would make it more difficult for a blind pedestrian to distinguish a stopped or very slow-moving vehicle from one that is moving faster, and to determine if an approaching vehicle is slowing to a stop. To avoid this situation, the agency is requiring that the sound level produced by EV and HV pedestrian alert systems must increase as vehicle speed increases and must decrease as speed decreases. This requirement is implemented in Section S5.2 of the regulatory text of this final rule.

Vehicles in Forward Motion at Constant Speed

In the NPRM, the agency proposed that EVs and HVs produce sound sufficient to allow pedestrians to detect these vehicles at all speeds between 0 and 30 km/h (18.6 mph). The agency proposed to ensure that EVs and HVs produce a minimum sound level necessary for safe pedestrian detection at constant speeds by measuring vehicle sound output at 10 km/h (6.2 mph), 20 km/h (12.4 mph), and 30 km/h (18.6 mph). The proposal contained minimum acoustic requirements up to the speed of 30 km/h because, for the reasons discussed in the NPRM, the agency believed that 30 km/h was the appropriate crossover speed. The agency believed that it was necessary to include pass-by tests at speeds up to and including the crossover speed to ensure that EVs and HVs meet the minimum sound level requirements for all speeds within the range of speeds covered by the requirements.

The agency received no comments related specifically to the proposed constant speed pass-by performance requirements or associated tests. However, many commenters including manufacturers, manufacturer organizations, and advocacy groups argued either for or against the proposed crossover speed of 30 km/h. The details of the comments on crossover speed are discussed in the next section (Section III.D).

Agency Response to Comments

If a lower crossover speed had been selected for the final rule, the agency would have modified the pass-by test sequence to replace the 30 km/h test speed with the lower crossover speed. However, the agency has decided to maintain the 30 km/h crossover speed. Because of this decision, the constant speed pass-by scenarios in the final rule will remain as proposed in the NPRM.

D. Crossover Speed

In the NPRM, we stated that the agency had tentatively concluded that EVs and HVs should be subject to minimum sound requirements until they reach a speed of 30 km/h. The NPRM explained that the PSEA defined crossover speed as ''the speed at which tire noise, wind resistance, or other factors eliminate the need for a separate alert sound.'' We decided to propose a crossover speed of 30 km/h (18.6 mph) by examining the speed at which EVs and HVs produce a similar overall sound pressure level as their peer ICE vehicles, to determine the speed at which the powertrain noise of the ICE vehicle was no longer the dominant source of the vehicle sound. This peer vehicle method was one that NHTSA had used in research prior to the enactment of the PSEA. As far as the agency was aware, this method was a reasonable way to identify an appropriate crossover speed. We also examined the crash statistics from the State Data System to determine if there was a speed above which the rate of pedestrian crashes for HVs and ICE vehicles were the same.

In the NPRM, we explained that the peer vehicle method measures the speed at which the sound level produced by an HV or EV and the sound level produced by the vehicle's ICE ''peer'' become indistinguishable from one another in terms of overall sound pressure. We stated that this should establish the crossover speed, although that speed may differ depending on the make and model of the test vehicles. This method estimates the speed at which an HV or EV generates a sound level equivalent to the sound level that would be generated if the HV or EV was powered by an ICE rather than by electric power. We stated that our measurements of vehicles showed that a gap in sound level between HVs or EVs and their ICE peer vehicles still existed at 20 km/h (12.4 mph) and became much smaller or negligible in most tests at 30 km/h. For that reason, NHTSA tentatively concluded in the NPRM that ensuring EVs and HVs produce a minimum sound level until they reach a speed of 30 km/h will ensure that those vehicles produce sufficient sound to allow pedestrians to detect them. We requested comment specifically on whether the crossover speed should be 20 km/h instead of 30 km/h.

We also stated in the NPRM that the difference in rates of involvement in pedestrian crashes between HVs and ICEs is highest, according to our crash analysis, when the vehicle involved was executing a low speed maneuver prior to the crash.[101] Low-speed maneuvers do not have a defined speed range, but they include making a turn, slowing or stopping, backing, entering or leaving a parking space or driveway, and starting in traffic. Because vehicle noise increases as a vehicle goes faster, the agency tentatively concluded in the NPRM that a crossover speed of 30 km/h would ensure that EVs and HVs will produce sufficient sound up to the speed at which pedestrians can safely detect EVs and HVs without the aid of an alert system.

We noted in the NPRM that the agency was conducting an Environmental Assessment (EA) in connection with the rulemaking and the draft EA showed that the difference in ambient sound levels if the agency were to establish a crossover speed of 30 km/h compared to a crossover speed of 20 km/h was expected to be negligible.

Several commenters to the NOI and participants in United Nations Economic Commission for Europe

[101] Wu, et al. (2011) Incidence Rates of Pedestrian And Bicyclist Crashes by Hybrid Electric Passenger Vehicles: An Update, Report No. DOT HS 811 526. Dept. of Transportation, Washington, DC. Available at *http://www-nrd.nhtsa.dot.gov/Pubs/811526.pdf.*

(UNECE) informal working group meetings [102] stated that the agency should adopt a crossover speed of 20 km/h.

In the NPRM we discussed research presented by JASIC. JASIC determined the crossover speed for several vehicles by measuring when the tire noise was dominant over engine noise. In this research JASIC compared the sound produced by a vehicle when tested a constant speed with the vehicle's ICE on to the sound produced by the same vehicle when tested with its ICE off. The purpose of this test was to determine the point at which the vehicle produce a similar sound level with its ICE off as it did with its ICE on. JASIC concluded from its research that tire noise was dominant for every ICE and hybrid vehicle tested at speeds that exceeded 20 km/h. Honda and Nissan mentioned the JASIC data as adequate justification for a 20 km/h crossover speed. The data indicated that JASIC evaluated six different vehicles, each found to have a crossover speed very close to 20 km/h. At the time the NPRM was issued, the agency did not believe the JASIC data was sufficient for a 20 km/h crossover speed determination.

In the NPRM, the agency solicited comments on whether 20 km/h should be the crossover speed instead of the proposed speed of 30 km/h. The agency also requested additional research data that could be used to support a 20 km/h crossover speed decision.

All of the vehicle manufacturers and the organizations that represent manufacturers stated in their comments that NHTSA should adopt a crossover speed of 20 km/h in the final rule. These commenters stated that a crossover speed of 30 km/h is overly burdensome and would lead to increases in traffic noise. They also stated that the difference in sound of HVs and EVs compared to ICE vehicles is marginal at 20 km/h, and that a crossover speed of 30 km/h is not necessary to achieve safety goals. Manufacturers stated that at speeds higher than 20 km/h, tire and wind noise interfere with measurement of the alert sound. These commenters also stated that the agency should adopt 20 km/h as a crossover speed to align with UNECE and Japanese government recommended practices for pedestrian alert systems.

Alliance/Global stated that by the time an EV or HV reaches a cruising speed of 20 km/h, the sound it makes is practically indistinguishable from an equivalent ICE vehicle. Alliance/Global claims that at 20 km/h the EV or HV in electric power mode is only slightly quieter than an ICE vehicle. Alliance/Global also stated tire noise above 20 km/h interferes with the alert sound, making the detection and measurement of specific sound content in one-third octave frequencies much more difficult. Alliance/Global stated that a crossover speed above 20 km/h is not needed to fulfil the safety goals of the final rule.

The European Union commented that the limits on crossover or ''threshold'' speed indicated in the NPRM—30 km/h for forward motion and 18 km/h for reverse motion [the agency notes, however, that the latter figure does not reflect any proposed requirement, and may have been an oversight in the EU comment letter]—are considered excessive as many if not most EVs and HEVs produce sufficient noise emissions in the 20–25 km/h and 10–12 km/h speed ranges for forward and reverse motions, respectively. This can be attributed to the fact that EVs and HEVs use low-rolling resistance tires which produce more noise emissions than conventional ones as well as to the increased drivetrain/powertrain noise emissions when the vehicle is in reverse.

Honda said that acoustic data shows a convergence of the vehicle's sound profiles between the engine-on and engine-off condition at 20 km/h, and that acoustic sound requirements at 20 km/h or more might not be necessary.

Toyota explained that data presented by the Quiet Road Transport Vehicles (QRTV) group have indicated that the appropriate crossover speed is 20 km/h, because tire and wind noise exceed the noise of traditional ICE vehicle engines above this speed. Toyota mentioned that existing Japanese and European guidelines have adopted 20 km/h as the appropriate crossover speed and recommended that NHTSA do the same.

Volkswagen stated that the crossover speed in the final rule should be 20 km/h. Volkswagen stated that for customer satisfaction reasons it will design the alert sound to fade out gradually above the crossover speed, rather than abruptly shutting off immediately upon reaching the crossover speed. (Otherwise a driver travelling at the specified crossover speed would be highly aware of, and almost certainly annoyed by, a sound that toggled on and off abruptly as the vehicle crossed and re-crossed this speed.) Volkswagen suggested that other vehicle manufacturers will also implement alert sounds that fade out gradually, further weakening the rationale for setting a higher, 30 km/h, crossover speed in the final rule.

DG Enterprise stated that a 30 km/h crossover speed would be excessive because most EVs and HVs already produce sufficient sound in the 20–25 km/h speed range to be detected by pedestrians. DG Enterprise believes these vehicles make enough sound to be detectable because they use low-rolling resistance tires that produce more noise than conventional tires.

Advocacy groups for individuals who are blind stated in their comments that the crossover speed should be 30 km/h and that NHTSA had provided sufficient data to justify that decision.

NFB stated that the agency should establish a crossover speed of 30 km/h which would ensure that EVs and HVs are detectable when operating on quieter paved surfaces and/or when using quieter tires.

Agency Response to Comments

In this final rule, the agency has decided to maintain the crossover speed of 30 km/h as proposed in the NPRM.

In development of the NPRM and final rule the agency carefully considered the term ''crossover speed,'' what it means, and how it should be determined. The PSEA requires an alert be added to electric and hybrid vehicles up to the ''crossover speed.'' The PSEA defines crossover speed as ''the speed at which tire noise, wind resistance, or other factors eliminate the need for a separate alert sound as determined by the Secretary.'' ''Alert sound'' was itself defined as ''a vehicle-emitted sound to enable pedestrians to discern vehicle presence, direction, location, and operation.''

To date, it has been a common understanding that when ICE vehicles are operated at low speeds, they are detectable primarily due to the sounds generated by their internal combustion engine and drivetrain, and secondarily due to tire noise and wind resistance noise, which are speed dependent, and to other factors. At higher speeds, the sound generated by an ICE vehicle's tires, wind resistance, and other factors become the primary sound source, and the engine sound becomes secondary (there are exceptions, such as vehicles designed to have prominent noise from a tuned exhaust system.) Therefore, ICE vehicles generally are detectable at lower speeds because of the sound produced by the ICE and are detectable at higher speeds because of sound produced by the vehicle's tires, wind resistance, and other factors. A vehicle reaches its crossover speed when it can be detected based on these other, non-ICE sound sources. The effort to

[102] For more information about the agency's participation in the UNECE Quiet Road Transport Vehicles informal working group *see* NPRM, 78 FR 2848.

determine the speed at which this occurs is complicated by the fact that conventional vehicles emit a complex composition of sounds and tones at various overall sound pressure levels, such that crossover speed might not be that same from one vehicle model to another. Furthermore, it would be impractical for the agency to set different crossover speeds for different vehicles. Thus, in order to ensure that all vehicles to which this rule applies can be safely detected by pedestrians, the agency believes it must set crossover speed at a value that captures the higher end of the range of crossover speeds that exists among light vehicles.

The agency explained in the NPRM that, in the absence of a detailed analysis supporting another crossover speed, the agency tentatively concluded that a crossover speed of 30km/h would ensure that pedestrians will be able to safely detect EVs and HVs in situations in which these vehicles pose an increased risk to pedestrians because of their quiet nature.

After considering the comments received and evaluating vehicle measurements utilizing the method proposed by JASIC, as well as an analysis utilizing the agency's vehicle detection criteria, we have decided to require a crossover speed of 30 km/h in this final rule as proposed in the NPRM. No new compelling data was submitted to the agency that can be used to conclude that reducing the crossover speed from the proposed 30 km/h to 20 km/h is justified.

Because other methods (*i.e.,* the peer vehicle method and JASIC method) used to determine the crossover speed were inconclusive, as discussed later in this section, and did not directly answer the question of when the vehicles in the analysis produced enough sound to be detected by pedestrians, NHTSA did some additional evaluation of sounds produced by ICE vehicles with their IC engines turned off using the one-third octave band detectability thresholds from our acoustic model. The model used was the same one that was the source of the agency's minimum detection requirements in this final rule. We conducted this analysis after the NPRM comment period had closed to assist in considering the comments we had received. A technical paper on this crossover speed analysis has been included in the docket.[103]

By applying the detectability model to the measurements of sounds produced by the eleven ICE vehicles listed below with their IC engines turned off, we were able to assess if any of the A-weighted one-third octave band levels from any of the test vehicles met or exceeded the 20 km/h band threshold levels needed for a vehicle to be detectable in a standardized 55 dBA ambient, and to compare that outcome to the number of bands that met or exceeded the thresholds at 30 km/h. (We note that this was a re-analysis of vehicle data already collected, *i.e.,* this evaluation did not involve additional vehicle testing.) Whereas the peer vehicle and JASIC methods are relative measures because they compare one vehicle's overall sound to another vehicle's overall sound, this most recent NHTSA evaluation compared vehicle sounds directly to detection criteria.

The results of this analysis are summarized below according to test speed and vehicle model. The one-third octave bands listed are those for which the given test vehicle met or exceeded the threshold in NHTSA's final rule:

10 km/h with the IC engine off—

- 2012 Mini Cooper at 2000, 2500, 4000,and 5000 Hz
- 2012 Ford Focus at 5000 Hz

20 km/h with the IC engine off—

- 2012 Ford Focus at 800, 1000, and 1600 Hz

30 km/h with the IC engine off—

- 2010 Buick LaCrosse at 1000, and 1600 Hz
- 2012 Mini Cooper at 630, 800, 1000, 1600, 2000 Hz
- 2012 Ford Focus at 800, 1000, 1600 and 2000 Hz
- 2012 Lexus RX 350, 2011 Cadillac CTS, 2011 Honda Odyssey, 2012 Honda Fit, 2012 Toyota Camry, 2012 Toyota Corolla, and 2012 VW Golf ICE at 1600 Hz

These results show that at 20 km/h only one of the eleven tested vehicles had any one-third octave bands that met or exceeded the corresponding threshold for detection.[104] Therefore, ten of the eleven vehicles would not be detectable to pedestrians at 20 km/h only based on the tire and wind noise produced by the vehicle. This indicates that at 20 km/h it is unlikely that pedestrians would be able to detect a majority of EVs and HVs without an alert sound. Therefore, according to this data, a crossover speed of 20 km/h does not meet the requirements of the PSEA. At 30 km/h, four models had multiple bands that met or exceeded thresholds, and another seven models met or exceeded the threshold in the 1600 Hz band.

Our conclusion from this analysis is that at 20 km/h few HVs and EVs make sufficient sound to be detectable to pedestrians without the aid of a pedestrian alert system.

In light of this, and given other uncertainties discussed below, the agency has decided in this final rule to maintain the 30 km/h crossover speed proposed in the NPRM.

Regarding the different analysis relied upon by JASIC and other commenters to support a 20 km/h crossover speed, we sought additional data because the JASIC data was limited to a small number of test vehicles. So, in addition to the agency's detection-based analysis discussed above, in order to address crossover speed comments, NHTSA conducted tests using the same method that JASIC had used to derive its recommended 20 km/h crossover speed. As described previously in this section, the method involves comparing sound pressure levels from the same vehicle measured on the track during coast-down (engine off), which approximates an EV or HV in electric mode, and pass-by (engine on) performance tests. Under this analysis, the speed at which coast-down sound level is similar to the pass-by sound level is considered the crossover speed for that particular vehicle. This method identifies the speed at which the sound level due to all factors including tire and wind resistance noise, which are factors cited in the PSEA, is very close to the sound level of the same vehicle with its ICE operating. This method is similar to the peer vehicle method that the agency used in the NPRM, but it uses a single test vehicle in two operating conditions (engine-on and engine-off).

In other words, at any speed higher than the crossover determined according to this method there is no perceived difference between the sound produced by an HV or EV without an alert and the same vehicle with an ICE because the predominant sound in both test conditions comes from the tires and aerodynamic noise, and these factors are consistent for both test conditions.

NHTSA measured coast-down and pass-by sound pressure levels for eleven different ICE vehicles at 10, 20 and 30 km/h test speeds. The results are shown in Table 8.

[103] Quiet Car Coast Down Analysis (Final Rule) (June 2015).

[104] There are several important caveats in the use of this crossover speed analysis. The most important one is that the vehicle data is for coasting ICE vehicles (because the goal is to measure tire and wind noise), and thus it does not include the engine noise that the test vehicles would have in normal operation. Consequently, this evaluation should not be used to judge the sound level in actual operation of any of the test vehicles. Other caveats are enumerated in the docketed analysis paper.

TABLE 8—PASS-BY VS. COAST-DOWN MEASUREMENTS FOR ELEVEN VEHICLES AT 10, 20, AND 30 KM/H [105]

		Overall SPL (dBA)					
		10 km/h		20 km/h		30 km/h	
		Pass-by (engine on)	Coast-down (engine off)	Pass-by (engine on)	Coast-down (engine off)	Pass-by (engine on)	Coast-down (engine off)
1	2012 Toyota Camry	57.8	48.4	62.1	60.3	67.2	66.6
2	2012 Toyota Corolla	56.5	48.5	61.4	59.8	67.2	66.6
3	2012 VW Golf	57.0	49.4	62.3	60.9	68.3	67.4
4	2012 Mini Cooper	58.7	50.8	65.6	59.9	68.3	67.2
5	2011 Cadillac CTS	56.7	50.4	62.0	60.2	68.1	66.7
6	2012 Toyota Yaris	56.1	46.2	59.9	57.8	65.1	64.4
7	2012 Honda Fit	56.6	48.3	62.2	59.3	66.6	66.1
8	2010 Buick Lacrosse	55.8	49.9	63.8	60.4	68.4	66.7
9	2011 Honda Odyssey	56.5	52.2	63	62.4	69.4	68.8
10	2012 Lexus RX 350	59.7	48.1	61.7	60.1	67.3	66.5
11	2012 Ford Focus	57.5	49.3	62.6	60.8	68.0	67.1
Average		57.2	49.2	62.4	60.2	67.7	66.7

From these data, coast-down measurements were subtracted from pass-by measurements to determine if, and at what speed, crossover occurred for each vehicle. The data are shown in Table 9. As explained in the NPRM,[106] differences in sound pressure level of less than 3dB generally are not distinguishable to humans (differences of 3dB might be noticeable only if two sounds were heard one after the other such that they could be directly compared). Based on this understanding, differences identified in Table 9 of less than 3 dB would indicate that the vehicle crossover speed has been achieved.

Table 9. Pass-by Versus Coast-down Differences

Test Vehicle	10 km/h Pass-by minus Coast-down (dB)	20 km/h Pass-by minus Coast-down (dB)	30 km/h Pass-by minus Coast-down (dB)
2012 Toyota Camry	9.4	1.8	0.6
2012 Toyota Corolla	8.0	1.6	0.6
2012 VW Golf	7.6	1.4	0.9
2012 Mini Cooper	7.9	5.7	1.1
2011 Cadillac CTS	6.3	1.8	1.4
2012 Toyota Yaris	9.9	2.1	0.7
2012 Honda Fit	8.3	2.9	0.5
2010 Buick Lacrosse	5.9	3.4	1.7
2011 Honda Odyssey	4.3	0.6	0.6
2012 Lexus RX 350	11.6	1.6	0.8
2012 Ford Focus	8.2	1.8	0.9

These results indicate that at the vehicle speed of 10 km/h all eleven vehicles had coast-down sound pressure levels significantly less than their associated pass-by levels, meaning that none of the vehicles had attained its respective crossover speed. At 30 km/h, all eleven vehicles had coast-down sound pressure levels close to or within 3 dB of their associated pass-by levels, meaning that every vehicle had reached its respective crossover speed. Thus, the additional testing clarified that 10 km/h would not be sufficient and that all vehicles would reach their crossover speed by 30 km/h (when using the criterion that the results from the two test conditions are within 3 dB.)

The results at 20 km/h were less conclusive. Of the eleven vehicles tested, all had coast-down sound pressure levels below their respective pass-by test levels. However, all but two of the vehicles got to within a 3-dB differential, and the average differential of all vehicles was 2.2 dB. The two vehicles that did not were the Mini and Buick Lacrosse, which had sound differentials greater than 3 dB (5.7 dB and 3.4 dB, respectively) and thus did not reach the crossover speed as defined by the agency. These two vehicle models had the highest pass-by sound pressure levels of the eleven vehicles, and their coast-down sound pressure was close to the average level for all eleven vehicles. While we note that it is possible to interpret this narrow data sample as demonstrating that a lower crossover speed may be sufficient for a portion of the HV/EV fleet, we also conducted additional analysis and considered additional factors in arriving at our decision to maintain the approach to require the pedestrian alert sound up

[105] Garrott, W.R., Hoover, R.L., Evans, L.R., Gerdus, E., and Harris, J.R., ''2012 Quieter Vehicle Testing Report: Measured Sound Levels for Electric, Hybrid Electric, and Low Speed Vehicles'' Washington DC, DOT/NHTSA, November 2016.

[106] *see* NPRM, 78 FR 2838.

to 30 km/h, provided that vehicles are not able to satisfy the performance requirements without an alert sound.

This comparison of the engine-on and engine-off measurements for these vehicles does not directly answer the question of when a vehicle makes enough sound to be detected by pedestrians. We believe that it also demonstrates that at 20 km/h there is a question of whether some vehicles produce enough sound based on tire and wind noise alone to be detected by pedestrians.

Other factors we considered include the difference in pavements encountered in traffic compared to the ISO sound pad that is needed for testing, and the use of tires with low rolling resistance. The test data used to evaluate crossover speed were obtained on an ISO sound pad with a specified asphalt pavement. On public roadways, varying pavement conditions will be encountered that can increase or decrease a vehicle's acoustic sound profile. Also, low rolling resistance tires may tend to increase vehicle sound profiles, but not all vehicles will be operated with low rolling resistance tires. While these factors could increase vehicle noise, they also might decrease it. Selecting the higher crossover speed would ensure safety is not compromised when real-world roadway conditions result in the latter case.

Another consideration is that limitations in available crash data do not permit the agency to make determinations regarding safety benefits at specific speeds. Because the vehicle speed at the time of a crash into a pedestrian is not available in the data set, the agency is not able to quantify what portion of the safety benefits associated with today's final rule would be lost if we were to adopt a value for crossover speed below the real-world values for some specific vehicle models.

However, we continue to believe that this rule will prevent some unqualifiable number of additional injuries by adopting a 30 km/h crossover speed as opposed to a 20 km/h crossover speed. As discussed previously, our crash analysis indicated that the odds ratio of an HV being involved in a crash with a pedestrian was 1.52 when the vehicle in question was executing a low speed maneuver immediately prior to the crash. This means that HVs and EVs are 52 percent more likely to be involved in an incident with a pedestrian than an ICE vehicle under these circumstances. Low-speed maneuvers include making a turn, slowing or stopping, backing, entering or leaving a parking space or driveway, and starting in traffic. The agency also concludes that a crossover speed of 30 km/h (18 mph) will ensure that EVs and HVs will produce sufficient sound to allow pedestrians to safely detect them during low-speed maneuvers in which these vehicles would otherwise pose a risk to pedestrians because of the low sound level they produce. Because we believe that drivers may execute these low speed maneuvers at speeds up to at least 30 km/h, and these maneuvers represent the highest risk of crash between an EV or HV and a pedestrian, more injuries will be avoided due to this rule with a crossover speed of 30 km/h than with a crossover speed of 20 km/h.

As a further consideration, we note that a vehicle is not required to have added alert sound at any speed at which it meets the minimum detection requirements in this final rule. It would be acceptable for an alert system to be designed to turn off at some speed below the 30 km/h crossover speed if it could be demonstrated that, between that lower cut-off speed and 30 km/h, it meets the detectability specifications without the assistance of an alert system.

E. Acoustic Parameters for Detection of Motor Vehicles

In the NPRM, the agency proposed minimum sound levels for a specific set of one-third-octave bands [107] that included low-to-mid-frequency bands (315, 400, and 500 Hz) as well as high-frequency bands (2000, 2500, 3150, 4000, and 5000 Hz) for various vehicle operating conditions including stationary, reverse and forward motion up to 30 km/h. These one-third octave bands were selected in an effort to maximize the detectability of the proposed alert sounds while taking into consideration the masking effects of common ambient noise and the degraded hearing of some pedestrians. Specifying minimum sound pressure levels for a wide range of one-third octave bands means that sounds meeting the specifications will be detected in a wider range of ambient conditions with various acoustic profiles.

Low frequency bands (below 315 Hz) were not included in the proposed specifications due to the expected strong masking effects of the ambient noise at low frequencies and the premise that they do not contribute as much to detection. In addition, alert system devices, particularly speakers, that are able to produce high level, low-frequency sounds would most likely have to be larger, heavier, and more costly. Specifications for the low-to-mid-range frequency bands between 315 and 500 Hz were included to assist pedestrians in detecting HVs and EVs in ambient noise environments such as areas near construction activity with significant high frequency noise. In the NPRM, the agency omitted mid-frequency bands from 630 to 1600 Hz because many common ambient conditions include frequencies within this range. One-third octave band standards in this range would have to be set at a relatively high level to effectively compensate for the masking effects caused by ambient noise conditions. But these bands contribute more than other bands to a vehicle's overall alert sound level for the same increase in detectability. By omitting minimum requirements for the one-third octave bands in the 630 to 1600 Hz frequency range in the proposal, the agency was attempting to ensure that alert sounds allow pedestrians to safely detect nearby EVs and HVs without unnecessarily increasing overall ambient noise levels.[108] The high-frequency bands up to 5000 Hz provide good detectability for pedestrians with normal hearing.

The proposed sound specifications were based on a psychoacoustic modeling approach in combination with safe detection distances. The inherent assumptions for this analytical approach were that: [109]

- A vehicle should be detectable in the presence of a moderate suburban ambient, *i.e.,* ambient at 55 dB(A); [110]
- a psychoacoustic model can be used to determine minimum levels for detection of one-third octave bands in the presence of an ambient;
- sounds should be detectable in multiple one-third octave bands to increase the likelihood that a pedestrian will be able to detect the sound in multiple ambients with differing acoustic profiles; and

[107] Octave band and one-third octave band scales facilitate identifying the specific frequencies of sounds. Octave bands separate the range of frequencies audible to humans into ten bands, and the one-third octave bands split each of the ten octave bands into three smaller frequency bands. Each scale in the breakdown provides more information about the sound being analyzed.

[108] NPRM, ''Federal Motor Vehicle Safety Standards; Minimum Sound Requirements for Hybrid and Electric Vehicles, 78 FR 2829, (Jan. 14, 2013).

[109] Hastings, et al. (2012). Research on Minimum Sound Specification for Hybrid and Electric Vehicles. Docket NHTSA–2011–0148–0048.

[110] In the NPRM we stated that we chose an ambient with a 55 dB(A) overall sound pressure level because this represented a reasonable level below the 60 dB(A) ambient in which pedestrians would no longer be able to reasonably rely on hearing to detect approaching vehicles.

• minimum detection distances can be based on vehicle stopping distances and driver reaction times.

The agency used Moore's Partial Loudness model [111] to estimate the minimum sound levels needed for a sound to be detectable in the presence of an ambient. The first step in our approach was to determine the minimum levels for detection, using Moore's model and a simplified ambient, for a pedestrian at the vehicle location. We stated that the distance at which a pedestrian would need to hear a vehicle is at least as long as the distance travelled during the driver's reaction time, plus the vehicle's stopping distance. We calculated these distances from the guide on highway design [112] of the American Association of State Highway Transportation Officials (AASHTO) according to the following formula:

$$d = 0.278Vt + 0.039\,\frac{V^2}{a}\ \ (meters)$$

Where:

t = brake reaction time, sec.
V = design speed, km/h
a = deceleration rate, m/s²

We explained that we chose a reaction time of 1.5 seconds because that is the mean reaction time for surprise events [113] such as an object suddenly moving into a driver's path. We chose the 5.4 m/s² deceleration rate corresponding to dry pavement braking because most of the pedestrian crashes that the agency identified occurred in clear conditions. If we had decided to use instead a slower deceleration rate for wet pavement conditions, we believe the necessary sound profile for detection would have to be louder and for a longer period because it would take a greater distance to stop, and thus would be unnecessarily loud for most conditions.

Based on calculations using these values, the agency determined that the desired detection distances were 5 meters in front of the vehicle for the 10 km/h (6.2 mph) pass-by, 11 meters for the 20 km/h (12.4 mph) pass-by, and 19 meters for 30 km/h (18.6 mph) pass-by. The results of these computations were rounded to the nearest meter. Moore's Partial Loudness Model was then used to derive the minimum sound levels required for detection for each driving condition and one-third octave band. Levels were increased by 0.5 dB to provide a small safety factor, and were then rounded up to the nearest integer for simplicity. The resulting NPRM levels are shown in Table 10.

TABLE 10—NPRM MINIMUM SOUND LEVELS FOR DETECTION

One-third octave band center frequency, Hz	Stationary but activated	Backing	10 km/h	20 km/h	30 km/h
315	42	45	48	54	59
400	43	46	49	55	59
500	43	46	49	56	60
2000	42	45	48	54	58
2500	39	42	45	51	56
3150	37	40	43	49	53
4000	34	36	39	46	50
5000	31	34	37	43	48
Overall A-weighted SPL Measured at SAE J2889–1 PP' line	49	52	55	62	66

We explained in the NPRM that while we were setting the sound pressure levels for each one-third octave band based on the distance from the vehicle at which we wanted pedestrians to be able to hear approaching vehicles, because of practical reasons we would measure sound emission for compliance purposes at a distance of 2 meters and scale the required levels accordingly. We used the following method to calculate what the sound level would need to be 2 meters from the vehicle's path to be detected within the prescribed stopping distance. Table 11 shows how the sound produced by a vehicle attenuates when measured using the procedure in SAE J2889–1.

TABLE 11—SPL ADJUSTMENT (dBA) FROM SOURCE TO SAE MICROPHONE LOCATION

Speed, km/h	10	20	30
X source, meters	5	11	19
Y source,* meters	2	2	2
r0,** meters	2.3	2.3	2.3
r1,** meters	5.5	11.2	19.1
r doubling	1.2	2.3	3.0
Attenuation, dB	−5.8	−12.3	−16.8

* Assume effective source is at center of vehicle since propagation is forward.
** Assume Z = 1.2.

'X' represents the horizontal distance from the source to the P–P' line while 'Y' is the 45perpendicular distance from the source to the microphones in SAE J2889–1. 'Z' represents the height of the microphone in meters as specified in SAE J2889–1. The values in Table 11 were calculated using the following

[111] Moore, B.C.J., Glasberg, B.R., and Baer, T. (1997). A Model for the Prediction of Thresholds, Loudness and Partial Loudness, J. Audio Eng. Soc. 45, 224–240.

[112] American Association of State Highway and Transportation Officials, *A Policy on Geometric Design of Highways and Streets,* Chapter 3 Elements of Design (2004).

[113] Green (2000) How Long Does It Take to Stop? Methodological Analysis of Driver Perception-Brake Times.'' Transportation Human Factors 2(3) 195–216.

formula and assuming a value of 1.2 meters for Z:

$$r_0 = \sqrt{y^2 + z^2}$$

$$r_1 = \sqrt{x^2 + y^2 + z^2}$$

$$r_{doubling} = \log_{10}(r_1/r_0)/\log_{10}(2)$$

$$Attenuation = -6 \times r_{doubling}\ dB$$ [114]

In the NPRM, the agency also indicated its intent to conduct additional research before issuing a final rule to confirm that sounds meeting the proposed requirements would be detected as predicted by the model, and we sought comments on the following topics (NPRM pp. 2832–2833):

- What improvements would make the acoustic specifications more effective and make alert sounds more detectable?
- Should NHTSA require vehicles to emit sound that meets the four one-third octave band requirements only at 2000 Hz and above as an alternative to requirements for eight one-third octave bands?
- What is the optimum number of bands that should contain minimum sound level requirements, and what should the corresponding levels be?

In addition to requirements with minimum content in the eight one-third octave bands between 315 Hz and 500 Hz and 2000 Hz and 5000 Hz, the NPRM also considered acoustic requirements with minimum content in two one-third octave bands with a minimum requirement for the overall sound pressure level of the sound. NHTSA stated, when discussing this possible two-band approach in the NPRM, that it was seeking comment on the acoustic profile of the minimum sound requirements, as well as on the number of one-third octave bands for which the agency should establish requirements. We stated in the NPRM that the reason we were not proposing to adopt requirements for content in two one-third octave bands was that a sound with content in only two one-third octave bands would not be detectable in as many ambient noise environments as sounds with minimum content in eight one-third octave bands. On the topic of acoustic parameters for detection, the agency received a joint comment from Alliance/Global, as well as comments from OICA, Chrysler, Ford, GM, Honda, Mercedes, Nissan, Porsche, Toyota, the National Federation of the Blind, the American Council of the Blind, the World Blind Union, the National Council of State Agencies for the Blind, the Disability and Communication Access Board, the Insurance Institute for Highway Safety, Advocates for Highway and Auto Safety, Accessible Design for the Blind, and Western Michigan University. Subsequent to the NPRM comment period, NHTSA also received a late comment submitted jointly by the Alliance, Global, the NFB, and the ACB, and the agency had additional correspondence with those commenters, which is recorded in the docket.

Four main issues were discussed by the commenters relating to the acoustic parameters proposed for detection: (1) The number and level of one-third octave bands required; (2) the methods used to determine detection distances and associated sound specifications; (3) the range of frequencies used; and (4) vehicle marketability.

Fifteen of the above commenters discussed the first issue about the number and levels of one-third octave bands required. Alliance/Global [115] stated that NHTSA's proposed specification in the NPRM is too conservative. They suggested deleting the requirement for frequency content in eight one-third octave bands and replacing it with a simplified two-band approach. Specifically, they recommended using a minimum overall SPL and minimum sound levels in at least two octave bands. In their suggested approach, one band would be required in a low frequency range (less than 1000 Hz) and one band would be required in a high frequency range (1000 Hz up to 3150 Hz), separated by at least one one-third octave band. Alliance/Global suggested the following levels (Table 12) but noted that further discussion within the QRTV group that is developing a GTR is needed before these values can be fully recommended:

TABLE 12—ALLIANCE/GLOBAL RECOMMENDED TWO-BAND LEVELS

Test condition [116]	Overall SPL	Individual band SPL (two bands)
Stationary/ Backing.	48 dB	44 dB
10 km/h	53 dB	46 dB
20 km/h	58 dB	51 dB

Alliance/Global stated that NHTSA's target for detectability performance can be achieved with two one-third octave bands set at the levels proposed in the NPRM, and the minimum levels for additional bands can be reduced while maintaining the same detectability performance. Alliance/Global stated that if NHTSA chooses to require in the final rule that sounds emitted by EVs and HVs must have content in more than two one-third octave bands, the agency should reduce the minimum levels for each one-third octave band according to the total number of required bands. Chrysler, GM, Honda, and Mercedes stated that they support the two-band approach suggested by Alliance/Global.

Ford argued that based on its study of this subject, not all eight one-third octave bands are needed for a sound to be detectable 5 meters away. Ford's study consisted of a human factors test where audio recordings of vehicle

[114] Attenuation rate = 4.5 dB for the first distance doubling and 6 dB per distance doubling thereafter.

[115] NHTSA–2011–0148–0251.

[116] The Alliance/Global recommendations did not include suggested minimums for 30 km/h in accordance with their comments that crossover speed should be limited to 20 km/h.

sounds were presented to participants using headphones. Sounds tested by Ford were an ICE vehicle sound, an electric vehicle without an alert sound, and three alert sounds, but those sounds did not meet all of the agency's proposed minimum one-third octave bands levels. Sounds were mixed with a 55 dB(A) masking noise. Twenty-four Ford employees and four visually impaired individuals participated in the study. Ford stated that all vehicles were detected before the 5-meter critical distance, except for the vehicle without an alert. They also reported that participants recognized the vehicles with alert sounds at least at the same rate as the ICE vehicle sound.

Nissan stated that a sound with a sound pressure level equivalent to the ICE fleet minimum with a two-peak sound profile is appropriate for detectability. Nissan stated that having one peak frequency component between 600 and 800 Hz helps detectability for aging pedestrians with high frequency hearing loss. A second peak frequency component between 2000 and 5000 Hz would provide detectability for pedestrians with normal hearing. Nissan also suggested that the required frequency content of alert sounds at around 1000 Hz (the typical frequency for road traffic noise) should be reduced to avoid additional contribution to traffic noise.

Porsche stated that the specified levels in the NHTSA proposal will lead to very loud and unpleasant alert sounds. They suggested specifying at least two bands, but allowing up to eight bands. Porsche explained that the levels to be met should be a function of the number of bands selected. They explained that if more bands are used, the levels per band can be lower to achieve the same detectability. They suggested that, for example, if eight bands are used, then the levels in each band should be reduced by 6 dB (*e.g.,* the agency's proposed minimum level of 43 dB(A) for the 500 Hz one-third octave band for the stationary condition would be reduced to 37 dB(A)), and if four bands are used, the levels in each band should be reduced by 4 dB.

Toyota supported the use of an overall level and at least two one-third octave bands, consistent with the Alliance/Global recommendation. Toyota provided results from a study that it conducted to confirm the detectability performance of the suggested approach. In that study, 33 individuals (from 20 to 49 years old) participated. The ambient noise level varied from 51 to 59 dB(A).[117] The test vehicle was a Toyota Prius V approaching at 20 km/h. The study indicated that the overall level of the test vehicle was 58 dB(A) with sound energy in multiple bands. The sound level in the 800 Hz and 2000 Hz bands were each 51 dB(A), which accounted for nearly half of the sound's acoustic energy. Toyota reported that the measured detection distance exceeded the NHTSA target detection distance in the NPRM for this operating condition.

OICA stated that the proposed specification for eight bands will force very loud devices with unpleasant sounds. They suggested that the sound specifications within the UNECE–GTR development group. They stated that NHTSA should consider requiring a specific number of tones which could be in the same one-third octave band, rather than requiring a specific number of one-third octave bands.[118]

The American Council of the Blind (ACB) stated that the most appropriate approach to the sound specifications would be to set the minimum sound level based on the levels produced by light ICE vehicles because this is the sound pedestrians currently use for safe navigation. ADB stated ''octave bands are not as great at predicting detection as overall sound levels'' based on research conducted by WMU. WMU stated that their research has shown that individual octave bands are not as useful in determining detection as is the overall sound level and that, while some regulatory direction in octave band make-up of alert sounds might be useful, there is limited justification for a requirement as restrictive as the NHTSA proposal. WMU stated that their previous research had shown a limited advantage for content in the 500 Hz band in some situations, and their statistical analysis showed significant predictive value for overall sound pressure levels rather compared to content in any particular band. WMU also commented that detecting a single approaching vehicle may not be the same as detecting quiet vehicles when other vehicles are present. In response to the request for comments on requiring vehicles to emit sound that meets only the one-third octave band requirements for 2000 Hz and above as an alternative to meeting all eight one-third octave bands, WMU stated that for a pedestrian with hearing loss content at lower frequencies is needed and that potential sounds should have a fairly broadband frequency spectrum. WMU suggested that identifying two frequency bands that are most useful for detection, similar to Nissan's approach, may be appropriate.

As mentioned above, NHTSA also received a joint letter, submitted to the docket and treated as a late comment, from the Alliance, Global, the NFB, and the ACB.[119] These commenters agreed on several technical and policy issues. They stated that the number of bands should be reduced from a minimum of eight to at least two, between 160 Hz and either 3150 or 5000 Hz, and that at least one band should be below either 1000 or 1600 Hz. Within each individual frequency band, they stated that sound levels should be revised with input from available research. They also suggested establishing limits on overall sound pressure level, but did not provide specific values.

The second main topic discussed by the commenters concerned the methods used by the agency to determine detection distances and associated sound specifications. Eleven of the commenters listed above provided comments on this topic.

In their joint comment, the Alliance, Global, NFB and ACB agreed with the detection distance methodology in the NPRM and with the values used for the deceleration rate and the brake reaction time. The World Blind Union (WBU), the National Council of State Agencies for the Blind (NCSAB), the Disability and Communication Access Board, and the Insurance Institute for Highway Safety, all agreed that the methodology used by NHTSA to set the minimum sound levels seemed reasonable and appropriate. OICA stated that the NPRM approach to establish detection distance as a function of vehicle speed is reasonable but only when applied to the overall sound pressure level.

Advocates for Highway and Auto Safety also generally agreed with specifications based on detection distance. They commented on the driver reaction time used in the detection distance computation and suggested that the 1.5 sec. used by NHTSA may be too short. They indicated that NHTSA should examine reaction times for drivers in relation to pedestrians and pedalcyclists in establishing this value.

Accessible Design for the Blind (ADB) expressed support for the NPRM approach to minimum sound levels but questioned the detection distance used in NHTSA's analysis. ADB questioned

[117] The Toyota comment did not include details about the spectral shape of the ambient, which would be important to better understand the possible masking conditions and their impact on the test vehicle alert sound acoustic profile.

[118] We note here that this suggestion could result in an alert signal with only one distinct component, for example, a single amplitude-modulated tone.

[119] NHTSA–2011–0148–0322

whether the detection distance used in NHTSA's formulation represents distances that are sufficient for pedestrians to detect, recognize, judge distance and trajectory, decide to initiate a crossing, and initiate a crossing, particularly at busy intersections. They also indicated that the specifications proposed in the NPRM are based on the detection of a single vehicle in the absence of other vehicles, which they believe is not realistic.

WMU indicated that the detection distance used in the development of the sound specification may be too short because it may not correspond to the time needed to detect a vehicle, process the information, and decide to take action. WMU explained that the detection distance formula used does not account for variability among pedestrians including those with hearing loss.

On the third issue about the range of frequencies used, the Alliance/Global, OICA and NFB provided comments. Alliance/Global said that one-third octave bands from 630 to 1600 Hz should not be excluded from the useable range as NHTSA did in the NPRM because ''these frequencies will clearly contribute to the detectability.'' OICA recommended that no sound be required above 2 kHz as they believe that is not representative of vehicle sounds. OICA stated that manufacturers should be allowed to use the range from 125 Hz to 3000 Hz and suggested that low frequencies could aid with detectability but may have cost implications. OICA recommended that low frequencies should be an option for manufacturers and if used, believe the regulatory scheme should give credit to manufacturers for using low frequencies.[120] NFB stated that manufacturers should have flexibility to create sounds that are pleasant and not annoying to vehicle occupants and requested that the agency consider not requiring sound in the lowest one-third octave bands. NFB stated that manufacturers can limit the sound inside the vehicle and meet the safety need of pedestrians without including content in each of the eight proposed one-third octave bands.

The fourth main issue raised in comments relates to vehicle marketability. These comments are addressed in section III.I of this notice.

[120] No explanation was provided by OICA about how or why vehicle manufacturers should be given credit for using low frequencies.

Agency Response to Comments

Detectability Model Conclusions

After considering all comments received in response to the NPRM, and the results of agency research conducted since the NPRM was issued, we have decided to modify the proposed minimum specifications for detection of vehicles subject to this rule. While the number of one-third octave bands for which the agency is establishing requirements for minimum content and the requirements related to detection of changes in vehicle speed differ from the NPRM, the underlying analytical framework on which the minimum acoustic requirements in the final are based has not changed. The minimum acoustic requirements for each one-third octave band in the final rule remain based on the same formula used to develop the requirements proposed in the NPRM albeit with slightly different inputs to that formula. Furthermore, the overall sound pressure level and one-third octave band levels of sounds meeting the requirements of the final rule will be similar to the corresponding levels of sounds meeting the eight one-third octave band requirements in the NPRM.

After considering the comments and the agency's further evaluations conducted in response to comments, we decided to reduce the number of one-third octave bands for which we are requiring content from the eight one-third octave band requirement proposed in the NPRM to either a four one-third octave band compliance option or a two one-third octave band compliance option, the latter including an overall SPL specification.

Under the four one-third octave band compliance option, the minimum sound requirements for each band would be slightly lower than the values proposed in the NPRM, and the overall sound pressure of sounds meeting the four one-third octave band compliance option will be similar to those meeting the proposed requirements for eight bands in the NPRM. Under the two one-third octave band compliance option, the minimum sound requirements for each band are lower than those in the eight one-third octave band proposal in the NPRM for the low and mid frequency bands and higher than the minimum values in the NPRM for the high frequency one-third octave bands centered at 4000 Hz and 5000 Hz.

In the NPRM, NHTSA stated that it planned to conduct additional research once the NPRM was issued to validate the model used to develop the minimum sound requirements in the NPRM. The purpose of this research was to determine whether the model accurately predicted when sounds would be detected by human listeners at the distances predicted by the model.

Volpe conducted a human factors study to quantify differences between predicted detection levels (as indicated by Moore's Partial Loudness model) of vehicle sounds in the presence of a standardized ambient used to calculate the minimum requirements proposed in the NPRM and actual responses of participants listening to these vehicle sounds through headphones.[121] The study also evaluated the effect of several factors on detectability, including the number of one-third octave band components contained in a sound, adjacency of bands, and signal type (*e.g.,* pure tones, bands of noise). Fifty-two demographically diverse subjects were exposed to a simulation of a vehicle passing by them (as a pedestrian) at 10 km/h, in ambient noise conditions of 55 dB(A). In the study, a selection of 24 different sound signals were played back over the participants' headphones. The signals were based on synthesized and recorded sources and included pure tones, single noise bands, multiple adjacent noise bands, multiple non-adjacent noise bands, tones mixed with noise, a signal based on a recorded ICE, and signals from prototype alert systems. Signals with various numbers of bands were included in the study, ranging from one to four non-adjacent bands and from one to twenty-four continuous or semi-continuous bands. With the exception of the ICE vehicle sound, the two recorded prototype alert signals, and the three two-band samples, all signals were calibrated to just meet the NPRM specifications for safe detection in each band with signal content.[122]

The study results indicated that, except for frequency sensitivity of high frequency components, the modeling approach for determining the minimum level needed in each one-third octave band was conservative, meaning that the participants responded to signals

[121] Hastings A.; and McInnis, C. ''Detectability of Alert Signals for Hybrid and Electric Vehicles: Acoustic Modeling and Human Subjects Experiment,'' (2015) Washington, DC: DOT/NHTSA.

[122] The NPRM did not include specifications for the one-third octave bands from 630Hz–1600Hz. Some alert signals considered by Volpe during the human factors study did include one-third octave bands in this range. Volpe derived the appropriate level for those bands the same way the minimum levels for the bands included in the NPRM were developed. For details, refer to the Volpe research report, Hastings A.; and McInnis, C. (2015). ''Detectability of Alert Signals for Hybrid and Electric Vehicles: Acoustic Modeling and Human Subjects Experiment''. Washington, DC: DOT/NHTSA.

somewhat sooner on average than the model predicted. With an understanding that the model was conservative overall but less accurate at the higher frequencies, model adjustments were made as discussed in section II.C of this preamble to provide more accurate results necessary for development of the final minimum one-third octave band levels specified in this rule.

Although not directly tested in the study, we found a general trend that the minimum one-third octave band levels as proposed in the NPRM could be reduced when increasing the number of one-third octave bands. We also found that using non-adjacent one-third octave bands instead of adjacent bands maintained the detectability of sounds more effectively while limiting the overall level. Consequently, we have incorporated non-adjacency as one of the specifications in the final rule alert requirements. We have decided not to adjust the minimum one-third octave band levels to account for the number of required bands because in this final rule we have reduced the number of required bands from eight bands to either two or four bands.

The study results also indicate that sounds with minimum content in eight, four, and two one-third octave bands were all detected by study participants prior to the two-second time-to-vehicle arrival point necessary for safety.

As discussed above, NHTSA received several comments from manufacturers and groups that represent manufacturers stating that agency should adopt the acoustic requirements with content in two one-third octave bands plus a requirement for a minimum overall sound pressure level discussed in the NPRM. These commenters believed that NHTSA's goal in the NPRM of ensuring that sounds produced by hybrid and electric vehicles are detectable to pedestrians in a variety of ambients could be accomplished by requiring minimum acoustic content in two one-third octave bands. In response to these comments and the joint comment submitted by the Alliance, Global, NFB and ACB recommending that the agency require minimum content in only two bands, NHTSA decided to conduct additional analysis to determine the likelihood that sounds with content in fewer than eight bands would be masked in different ambient environments.

The resulting analysis provided an estimate of how often a sound signal would be detected as a function of the number of one-third octave bands. Real-world ambient conditions are not consistent, and we wish to draw conclusions about detectability beyond the standardized 55 dB(A) ambient used to create the proposed requirements in the NPRM. The ambient data used in this analysis was recorded at 17 locations along Centre Street in Newton, Massachusetts.[123] Ambient samples were taken at intersections (signalized and stop-sign-controlled), one-way streets, side streets, and driveways. Samples had a mix of low, mid, and high frequencies. Some samples were dominated by low frequency content, *i.e.,* the environment had other vehicles in close proximity operating at and/or accelerating from low speeds, while other samples were dominated by high frequency content, *i.e.,* the environment had other vehicles in close proximity operating at higher constant speeds. Each ambient sample was normalized[124] to an overall sound pressure level of 55 dB(A) without affecting the spectral variation. Volpe then used the adjusted acoustic model to test how signals with different numbers of components perform across this wide variety of ambient conditions. This approach of testing signals in varying ambient conditions but at a consistent overall level allowed us to determine the performance of signals as a function of the number of components in the signal. Specifically, this method provides a measure of ''robustness'' of the signal which is the metric we use to gauge how likely it is that one or more of the signal components will be heard by pedestrians in a range of ambient conditions.

NHTSA's approach in evaluating various signals was to set the band levels for each component at the appropriate psychoacoustic thresholds according to the modified Moore's model after the model had been adjusted using the results of Volpe's human factors experiment. The adjusted acoustic model was used to measure the performance of signals having various numbers of frequency components from one up to seven one-third octave bands by evaluating how readily each signal was detected in the presence of a broad range of measured ambients normalized to the 55 dB(A) level.

[123] Ambient data were collected in 2010 (Hastings, et al. 2011). Walkthroughs were conducted with different orientation and mobility instructors; data were collected on different days of the week and time of day.

[124] Each ambient sample had to be normalized to an overall SPL of 55dB(A) to ensure a comparable analysis was conducted for detectability utilizing different numbers of one-third octave bands. As discussed in the NPRM and this final rule, a standardized 55dB(A) ambient was used to derive the minimum one-third octave band specifications. The ambient used also had a standardized one-third octave band frequency composition. To analyze the robustness of various alerts, the multiple ambients collected had various overall SPLs, either less than or greater than 55dB, and various frequency compositions. For a proper evaluation of the various ambients, each ambient's overall SPL had to be normalized, that is adjusted to 55 dB, while maintaining each individual sample's unique frequency profile. To normalize each ambient sample, the sample was broken down into its one-third octave band levels and then each level was decreased or increased the same percentage until the overall level for that particular ambient sample equaled 55dB(A). For consistent comparisons of vehicle alert sounds in these different ambients, the key data was the frequency composition, or acoustic profile, across the one-third octave bands for each ambient collected.

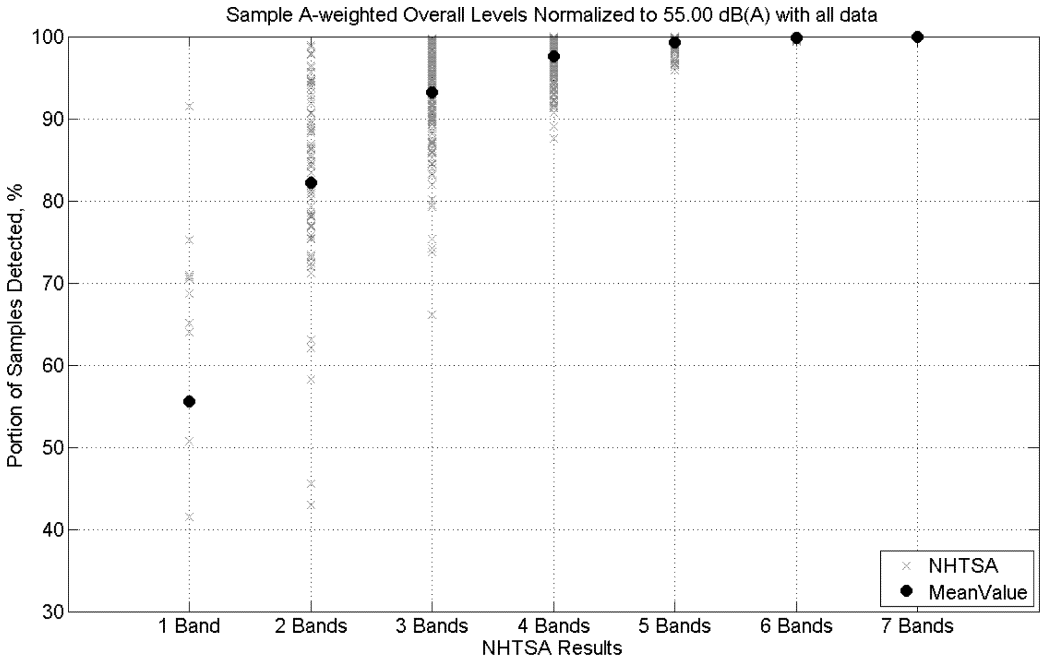

Figure 2. Robustness of Signals Having From 1 to 7 Bands That Meet Minimum NPRM Levels

Figure 2 shows the ''robustness'' [125] of single and multiple one-third octave band alert specifications, and includes up to seven bands because that is the maximum number that can be non-adjacent over the 315 to 5000 Hz range. This analysis shows that, on average, signals with minimum content in four one-third octave bands can be detected in 97 percent of ambient environments examined. This analysis also shows that sounds with content in only two one-third octave bands show strong resistance to masking if the minimum content is in certain bands. Additionally, this analysis shows that sounds with content in more than four one-third octave bands are only marginally more resistant to masking than sounds with four bands. Based on this analysis, NHTSA agrees with the commenters that the agency can accomplish the goals articulated in the NPRM of ensuring that sounds produced by EVs and HVs are detectable to pedestrians in a variety of ambients by requiring minimum content in fewer than eight one-third octave bands.

Given that the rationale for specifying minimum content in eight one-third octave bands in the NPRM was to ensure that sounds meeting the requirements of the NPRM were resistant to masking, NHTSA is reducing the number of bands in response to comments suggesting that requiring minimum content in eight one-third octave bands it not necessary for safety. As the latest NHTSA research demonstrated, reducing the number of bands with minimum requirements from eight to either four or two one-third octave bands would not impact the effectiveness of sounds meeting the minimum requirements of the final rule in providing alerts to pedestrians.

We believe that the four-band requirements and the two-band requirements have equivalent performance in terms of detectability by pedestrians and will be equally detectable in a variety of different ambients.

Under the four-band compliance option, the agency is requiring that the four bands used to meet the detectability requirements must be non-adjacent one-third octave bands in the frequency range from 315 Hz to 5000 Hz. This range includes the eight one-third octave bands for which we proposed requirements in the NPRM. In response to comments, NHTSA has decided that the final rule will also allow manufacturers to comply with the minimum acoustic requirements by placing acoustic content in the mid-range frequency bands excluded from the NPRM.

In order to comply, the alert signal must meet or exceed the given levels in at least four non-adjacent bands for each given vehicle operating condition. Also, the four bands must span a range of at least nine one-third octave bands. NHTSA believes that the four one-third octave band compliance option achieves the goals articulated in the NPRM of ensuring that sounds meeting this standard are detectable in a variety of ambients and responds to comments submitted to the NPRM claiming that the requirements in the NPRM were too restrictive and would require unpleasant sounds.

Because of the number of comments received on this issue, NHTSA also decided to explore allowing the two one-third octave band compliance option discussed in the NPRM. Under the two-band compliance option, minimum sound pressure levels are required in two non-adjacent one-third octave bands from 315 to 3150 Hz. One of the two bands must be below 1000 Hz and the second band must be at or above 1000 Hz. The two bands used must each meet the minimum requirements and together must also meet a specified overall SPL.

By including both a four-band specification and a two-band specification in this final rule, NHTSA is providing vehicle manufacturers with the flexibility to choose either compliance option in the new safety

[125] We use the term ''robustness'' to indicate how resistant a signal is to masking by background noise from a wide selection of different normalized ambient conditions covering a range of spectral content.

standard. We believe this approach adequately addresses a great majority of comments concerning the eight-band detectability specification proposed in the NPRM.

In addition, based on the foregoing, we have implemented slight changes to the minimum one-third octave band levels as a result of our human factors testing and acoustic model adjustments discussed above. As explained, these slight changes provide better agreement between the modeled levels and the levels indicated by the responses of the experiment participants when listening to various signals (see Figure 1) Table 13 provides the final rule minimum one-third octave band levels for each operating condition.[126]

TABLE 13—FINAL RULE MINIMUM SOUND LEVELS FOR DETECTION

One-third octave band center frequency, Hz	Stationary	Reverse	10km/h	20 km/h	30 km/h
315	39	42	45	52	56
400	39	41	44	51	55
500	40	43	46	52	57
630	40	43	46	53	57
800	41	44	47	53	58
1000	41	44	47	54	58
1250	42	45	48	54	59
1600	39	41	44	51	55
2000	39	42	45	51	55
2500	37	40	43	50	54
3150	34	37	40	47	51
4000	32	35	38	45	49
5000	31	33	36	43	47
Overall A-weighted SPL Range	43–47	46–50	49–53	55–59	60–64

The minimum one-third octave band requirements in the final rule for the eight one-third octave bands for which the agency proposed requirements in the NPRM are slightly lower than the values proposed in the NPRM for all test conditions. Alert signals just meeting these requirements are expected to have overall levels similar to sounds meeting the proposed requirements of the NPRM, ranging from 43 to 47 dB(A) for stationary; 46 to 50 dB(A) for reverse; 49 to 53 dB(A) for 10 km/h; 55 to 59 dB(A) for 20 km/h; and 60 to 64 dB(A) for 30 km/h.

As proposed, our detectability requirements were set so that EVs and HVs are detectable in an ambient with a 55 dB(A) overall sound pressure level. It has been our understanding that pedestrians who are blind use sound for navigation in environments for which the ambient is at or below 55dB(A), and they rely on more than just sound when the ambient increases above that level.[127] The NPRM explained that, in NHTSA's development of requirements for minimum vehicle sound levels, the agency chose to use a standardized ambient[128] at a level of 55 dB(A) as an alternative to recordings of actual traffic.[129] Based partly on research conducted by Pedersen et al. 2011,[130] NHTSA selected an ambient with a 55 dB(A) noise level and a specific spectral shape (see Figure 2, p. 2818 in the NPRM) that the Pedersen research had found to be representative of many common urban ambients. Because alert sounds that are detectable in the standardized 55 dB(A) ambient also would be detectable in ambients with similar spectral shapes and lower overall sound pressure levels, the 55 dB(A) standardized ambient was appropriate for detectability computations and was utilized throughout NHTSA's development of the minimum sound levels included in this final rule.

Our approach of using human subject responses to set detection thresholds indicates how quiet alert sounds can be before they can no longer be heard and ensures that the alert sound requirements in the final rule will have the least possible impact on overall environmental noise while still providing pedestrians with the vehicle sounds they need to navigate traffic situations.

In this final rule, for the reasons discussed above, the agency has decided to reduce the eight one-third octave band requirement as proposed in the NPRM to a four one-third octave band requirement. The agency is requiring that the four bands used to meet the detectability requirements must be non-adjacent one-third octave bands in the frequency range from 315 Hz to 5000 Hz because the results of the human factors study suggests that signals with non-adjacent bands are more detectable than signals with adjacent bands. Also, these bands must span a range of at least nine one-third octave bands. This is consistent with comments made by Alliance/Global. Signal components in adjacent one-third octave bands can mask each other more effectively than signal components in non-adjacent one-third octave bands. Masking reduces the effectiveness of the alert signal. Further,

[126] These levels are based on a single one-third octave band of noise producing a detectable signal assuming a threshold of 0.079 sones per ERB for the maximum of the partial specific loudness which is the threshold value that provides the best fit between modeled detection times and those of the experiment participants. The adjustments account for model biasing for specific operating conditions, repeatability/reproducibility as discussed in section III.K of this final rule, and calculation rounding. For details see: Hastings A.; and McInnis, C. ''Detectability of Alert Signals for Hybrid and Electric Vehicles: Acoustic Modeling and Human Subjects Experiment,'' (2015) Washington, DC: DOT/NHTSA.

[127] In the NPRM we stated that we chose an ambient with a 55 dB(A) overall sound pressure level because this represented a reasonable level below the 60 dB(A) ambient in which pedestrians would no longer be able to reasonably rely on hearing to detect approaching vehicles.

[128] The standardized ambient is a ''synthetic'' background noise consisting of white noise filtered to have the same spectrum as what a pedestrian would hear in real traffic but without the variations in amplitude over time. This synthetic noise is similar to actual traffic noise but is more consistent and repeatable and thus is better suited to the acoustic research that NHTSA conducted.

[129] The NPRM included a lengthy discussion of how masking of vehicle sounds by ambient noise (also called background noise) is a fundamental factor in developing minimum vehicle sound levels. For research purposes, background noise can come from recordings of actual traffic, but such recordings are likely to include random fluctuations or peaks from transient sources like the passage of nearby traffic, construction noise, or aircraft that introduce variability when conducting human factors testing or when applying detectability models.

[130] Pedersen, *et al.* (2011). White paper on external sounds for electric cars—Recommendations and guidelines.

four components that span nine bands will be more widely spaced than four components in adjacent bands. This will increase the probability that pedestrians will be able to detect at least one signal component. This is especially true for pedestrians with age-related hearing loss. Signals in the mid-range one-third octave bands from 630 Hz to 1600 Hz, which are most strongly masked by the typical ambient conditions encountered by pedestrians, were excluded in the NPRM in an effort to reduce the overall level since components in this frequency range would need to be set at higher sound pressure levels. However, our decision to require only four bands in the final rule and to include those mid-range frequencies provides manufacturers with more flexibility and addresses comments about the exclusion of those frequencies in the NPRM. In order to comply with the four one-third octave band compliance option, the alert signal must meet or exceed the given levels in at least four non-adjacent bands for a given operating condition. Figure 3 provides an example of a four-band signal.

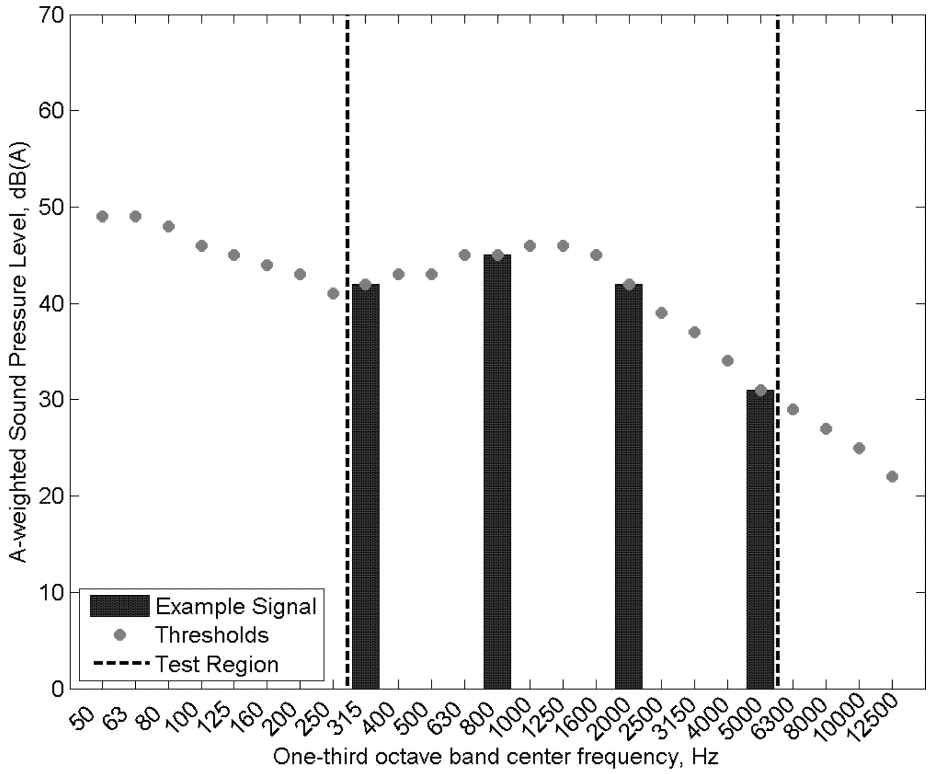

Figure 3. Example of a Four-Component Signal at Threshold at 0 km/h

In response to commenters who believe that sounds meeting the NPRM requirements will be too loud and will contribute to increases in environmental noise, we believe that our human factors testing has confirmed our analysis in the NPRM that sounds produced by EVs and HVs need to have content meeting the minimum thresholds we have specified to ensure detectability. At the same time, the agency has determined in its Environmental Assessment that the impact of alerts meeting the requirements of this final rule are expected to be negligible.

Several auto manufacturers also commented that sounds meeting the proposed requirements in the NPRM would intrude into vehicle interiors and be annoying to drivers. We believe that reducing the number of required bands and including frequencies from 630 Hz to 1600 Hz in the eligible range for compliance so that alert systems can utilize the entire range from 315 to 5000 Hz will provide manufacturers with the flexibility to design alert sounds that are non-intrusive and are acceptable to their customers.

Two One-Third Octave Band Compliance Option

Because of the number of commenters stating that the agency should adopt final rule with minimum content requirements in two one-third octave bands, NHTSA decided to explore a two one-third octave band compliance option in addition to the four-band compliance option discussed above. As shown in Figure 2 above, the average detectability of a vehicle sound in the presence of a range of ambients starts to decrease if there are fewer than four one-third octave bands with content at threshold levels. However, Figure 2 also shows that some of the signals with fewer than four bands at threshold levels perform well above the average and do achieve a high degree of detectability in the range of ambients. For this reason we have determined that alert sounds with content in fewer than four one-third octave bands can be acceptable choices but need additional specifications to ensure that they are as detectable as signals with content in four or more bands.

The two-band alternative that the agency is including in this rule closely matches the two-band approach suggested by commenters to the NPRM, but with a few important differences which are discussed below. By including both a four-band specification and a two-band specification in this final rule, NHTSA is providing vehicle manufacturers with the flexibility to choose either alternative for compliance with the new safety standard. In this section of today's preamble, we discuss how the agency concluded that a two-

band alternative is warranted and how we developed the two-band alternative using specifications suggested in NPRM comments.

In their NPRM comments, Alliance/Global suggested an acoustic specification for HVs and EVs that consisted of a minimum overall sound level along with a minimum level in two one-third octave bands.[131] The following were the particular levels they recommended:

TABLE 14—LEVELS SUGGESTED BY ALLIANCE/GLOBAL

	A-weighted dB	
	Minimum level in each of 2 Bands	Overall SPL level
0 km/h, Reverse	44	48
10 km/h	46	53
20 km/h	51	58

Two other criteria were part of Alliance/Global's suggested approach:

—That one of the two one-third octave bands should be in a frequency region below 1000 Hz and the other should be at or above 1000 Hz;

—That the two components of the signal should not be in adjacent one-third octave bands.

A number of other NPRM commenters, particularly vehicle manufacturers, endorsed the two-band approach as suggested by Alliance/Global.

In a follow-up letter submitted to the docket in February 2014 (treated as a late NPRM comment) a group of commenters (Alliance, Global, the National Federation of the Blind, and the American Council of the Blind) expressed their agreement on recommending a general approach of specifying two bands with an overall SPL level. In that comment letter, the suggested parameters were somewhat less specific compared to the original Alliance/Global suggestion or the compliance option discussed in the NPRM. The letter provided no minimum band levels for the two bands and left undecided the upper limit frequency (either 3150 Hz or 5000 Hz) as well as the breakpoint between the low and the high frequency (either 1000 Hz or 1600 Hz). The joint commenters indicated that further refinement of the two-band approach to finalize the levels and the frequency ranges may be needed and should be based on discussion among interested parties. They stated that those discussions should take place in the QRTV working group responsible for developing the GTR.

In developing the four-band approach that is included in today's final rule, NHTSA evaluated signals with different numbers of bands including signals with two bands. The details of that evaluation are discussed above and shown in Figure 2. As discussed, NHTSA's approach in evaluating various signals was to set the band levels for each component at the appropriate psychoacoustic thresholds according to Moore's model which was adjusted using the results of Volpe's human factors experiment. The adjusted acoustic model was used to analyze the performance of signals having various numbers of frequency components from one up to eight by predicting how readily each signal would be detected in the presence of the standardized 55 dB(A) ambient.

As discussed previously, Figure 2 demonstrates the robustness of single-band and multiple-band alerts when each band is set at the minimum threshold levels for detection based on the acoustic model the agency used. We used this same robustness methodology to evaluate the Alliance/Global two-band approach. Because their suggested approach did not specify different levels for different frequency bands, there are limitless possibilities for two-band signals that would meet the Alliance/Global method. However, the range of possible signals just meeting the requirement can be categorized according to the following four signal type scenarios:

(1) *Scenario A:* The level of the lower frequency band of the two bands is set at the suggested minimum, and the level of the higher frequency band is set such that the combination of the two bands meets the overall level (see Figure 4);

(2) *Scenario B:* The level of the higher frequency band of the two bands is set at the suggested minimum level and the level of the lower frequency band is set such that the combination meets the overall level (similar to Figure 4);

(3) *Scenario C:* The two bands both are set at the suggested minimum level, and there is low level content over many frequencies that on its own may not be audible but that, when combined with the two prominent bands, brings the signal up to the specified overall level (see Figure 5);

(4) *Scenario D:* The two bands are equal and their level is set such that the combination of the two bands meets the overall level (see Figure 6).

[131] See docket NHTSA–2011–0148–0251, Alliance/Global comment, p. 5.

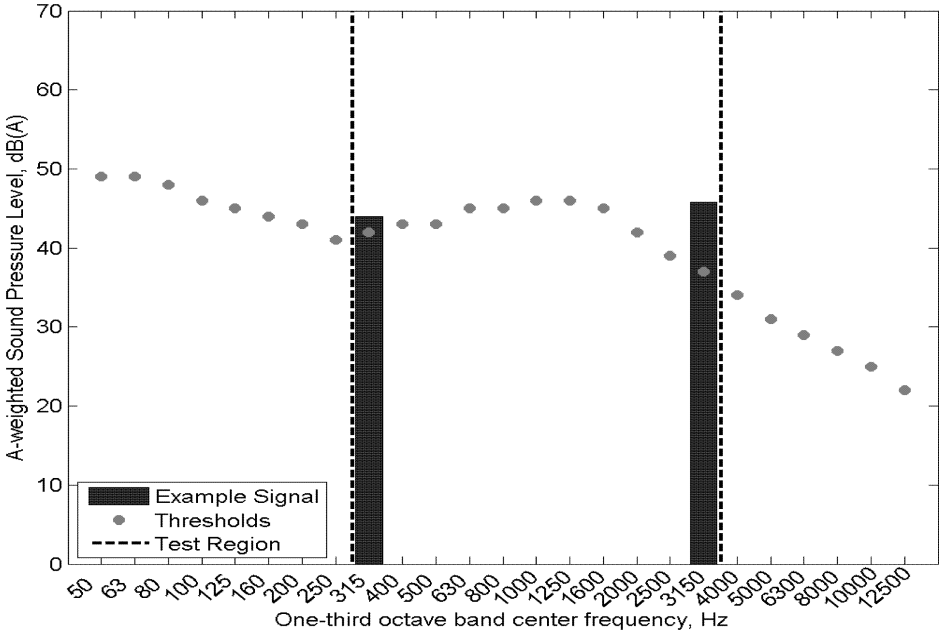

Figure 4. Scenario A
Two Components with the Lower Frequency at the Recommended Minimum Level and the Higher Frequency Increased to Meet the Overall SPL Requirement for 0 km/h

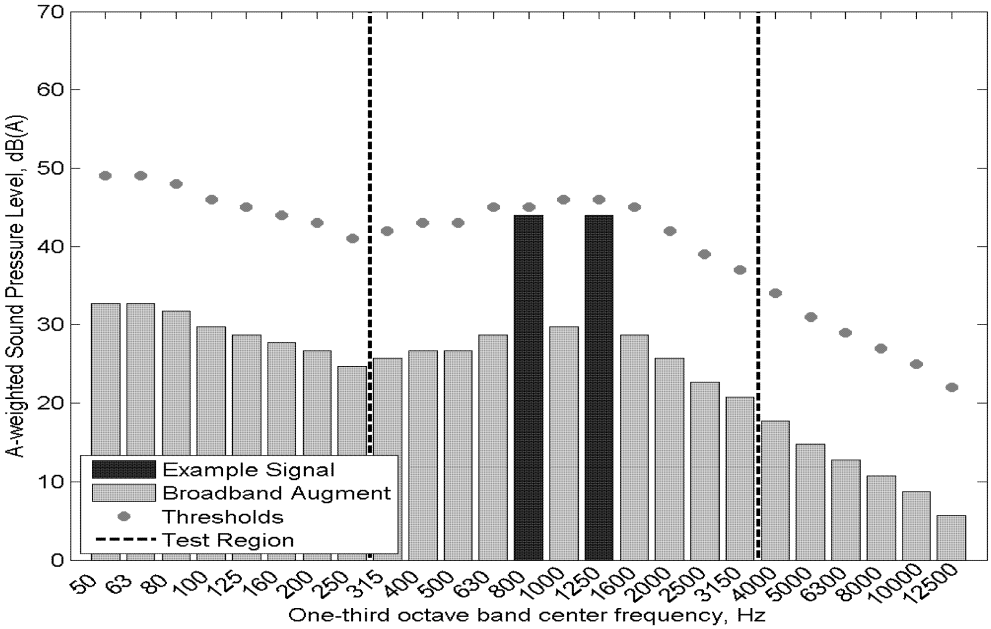

Figure 5. Scenario C
Two Components at Equal Levels Plus Additional Low Level Content Adjusted to Meet Overall SPL Requirement for 0 km/h

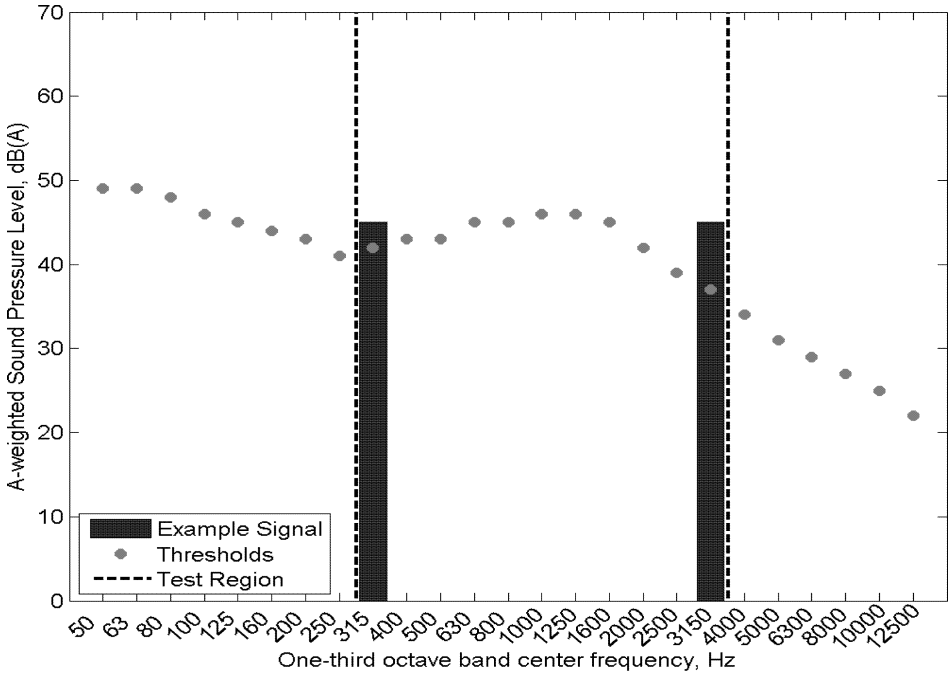

Figure 6. Scenario D
Two Components at Equal Levels Adjusted to Meet
Overall SPL Requirement for 0 km/h

The range of all possible signals meeting the criteria will fall somewhere within these four signal types. For simplicity, we have considered these four types in our analysis. It is expected that the robustness of other signals will be within the range observed for these four types.

The results of our robustness analysis of two-band signals meeting the Alliance/Global suggested method are shown in Figure 7. Two-band signals are plotted according to which of the four signal categories (Scenarios A, B, C, or D, above) they fall in, with averages indicated for each category. Again, this shows the percentage of times that each signal category would be detected in the normalized sampled ambient conditions. Note that three vehicle speeds plus stationary are indicated in Figure 7. In the suggested specifications provided in the Alliance/Global comment, the minimum band values increased with increasing speed but only enough to partially account for the increase in sound level needed to maintain adequate detection time over the whole speed range. Consequently, unlike in NHTSA's acoustic specifications, the performance of the Alliance/Global approach changes at higher speeds.

From Figure 7 it can be seen that, at idle, two-band signals meeting the Alliance/Global approach are robust regardless of which type of signal is considered. However, as vehicle speed increases, robustness decreases. Figure 7 indicates that the robustness performance of certain two-band signals, particularly those in the Scenario C category, declines significantly to the point that, on average, they would be detected only about 35 percent of the time at 20 km/h in the sampled ambient conditions.[132]

[132] Figure 7 includes values plotted at 30km/h. The data depicted at 30km/h is hypothetical data derived by VOLPE because Alliance/Global's suggested alert requirements went up to only 20km/h.

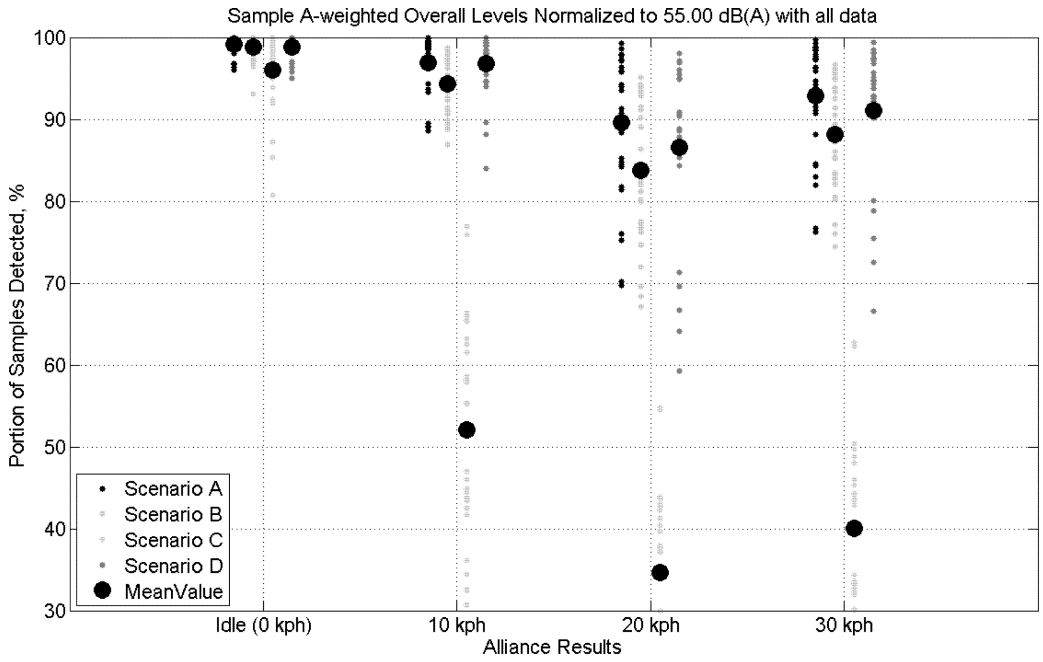

Figure 7. Robustness of Alliance/Global Suggested Two-Band Approach

This analysis led us to conclude that adopting the two-band Alliance/Global approach as it was suggested in their comments would allow some poor-performing alert signals to comply with the final rule. However, this analysis also led us to conclude that some two-band signals perform as well by our measures as the signals meeting the four-band requirements in this final rule, and that a two-band approach would be acceptable as long as it is specified in such a way as to exclude poor-performing two-band signals. Our analysis of two-band signals highlights two minor changes that we can make to modify the Alliance suggestion in order to increase robustness of two-band signals to that of the NHTSA four-band approach:

(1) Instead of expressing the required sound level in terms of overall SPL, we can use a *band sum* that accounts only for the sound energy in the two required bands; this criterion would negate the possibility ability to augment the two bands with acoustic energy that may not be audible, *i.e.,* that may not contribute to detectability and robustness.

(2) We can adjust the required minimum band sum to achieve robustness equal to that of the four-band specification. This provides a high degree of flexibility in signal design. For example, a system designer can make the two components equal, or can set one component at the minimum level and compensate by setting the second component high enough to reach the required minimum band sum level.

In order to optimize the Alliance/Global's suggested two-band approach using these modifications, the minimum band sum levels at each speed were iteratively determined. The results are shown in Table 15. We refer to this specification as an ''optimized'' two-band approach because it excludes two-band signals that have lower robustness (those signals that would be detectable in a lower number of ambients according to our analysis) while preserving the levels suggested by the Alliance/Global to the greatest extent possible.

TABLE 15—OPTIMIZED LEVELS FOR TWO-BAND SIGNALS

	A-weighted dB	
	Minimum level in each of 2 bands	Band sum of the 2 bands
0 km/h	44	48
10 km/h	46	55
20 km/h	51	61
30 km/h	56	66

Figure 8 shows the robustness performance of two-band signals that meet this optimized approach. Note that there now are three sound scenarios (A, B, and D) instead of the four discussed in Figure 7. Scenario C that used broadband content to enhance the two bands is no longer viable under the optimized approach. It can be seen that all two-band combinations meeting the optimized criteria will now be detectable in upwards of 97 percent of the normalized sampled ambient conditions and, on average, they reach

at least the level of robustness achieved by the four-band approach.

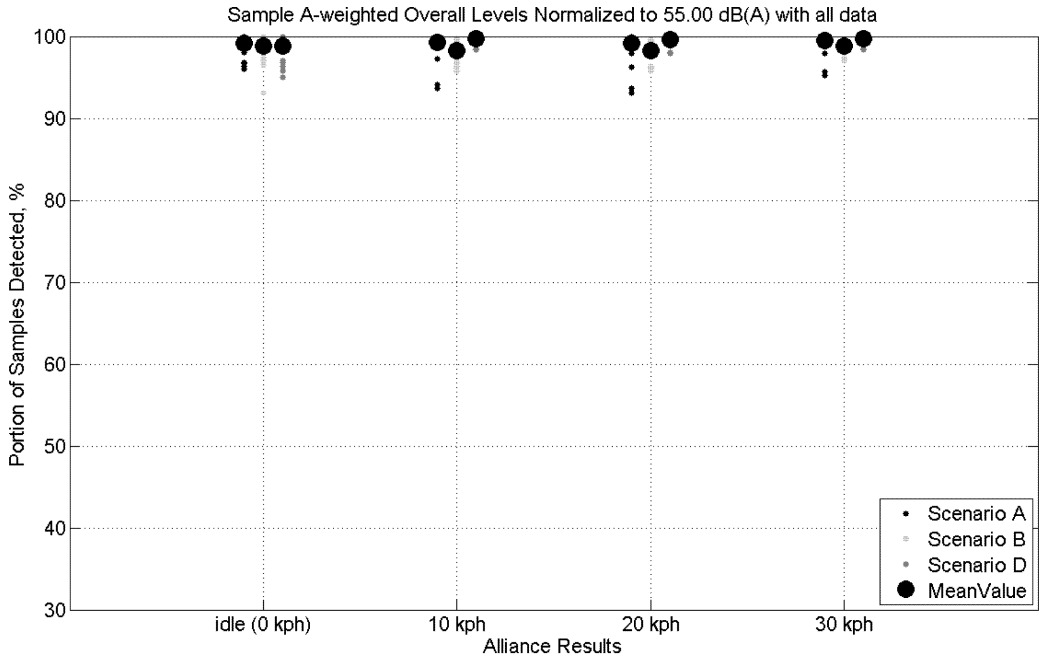

Figure 8. Robustness of Optimized Two-Band Approach

Also note that the optimized specification includes levels for 30 km/h because, as discussed in the crossover speed section of today's final rule (Section III.D), the agency has decided to include acoustic requirements for vehicle speeds up to 30 km/h.

The overall levels for both the optimized two-band specification and the four-band specification (''S4 Bands'') are summarized in Table 16. For comparison, Table 16 also shows the levels suggested in the Alliance/Global comment. It can be seen that for each overall SPL value given for the optimized two-band approach, the level is within the ranges for the four-band specification.

TABLE 16—OVERALL LEVELS OF THREE APPROACHES

	Minimum level, dB(A) *				
	Stationary	Reverse	10 km/h	20 km/h	30 km/h
S4 Bands **	47–50	49–53	52–56	59–62	63–67
Alliance/Global	48	48	53	58	NA
Optimized 2-band	48	*** 52	55	61	66

* Based on Partial Specific Loudness Threshold = 0.079 sones/ERB.
** Overall SPL depends on which four bands are selected.
*** SPL for 10 km/h with 3 dB subtracted.

For the Reverse specifications, the Alliance/Global comment set the band minimum levels and the overall level equal to the corresponding levels for the stationary operating condition. In the optimized two-band specification, to be consistent with the four-band approach and the method used in the NPRM, we are setting the band minimum and overall SPL by subtracting 3 dB from the level required at 10 km/h. That method is the same one NHTSA employed in the NPRM to set the levels for Reverse. For the band minimum, subtracting 3 dB from the 10 km/h level yields a value that is about the same as the band minimum the Alliance/Global suggested for Reverse, so the value we are adopting is the same as the one they suggested. For the overall level, subtracting 3 dB from the 10 km/h level yields a value for band sum that is somewhat higher than the overall SPL for Reverse suggested in Alliance/Global's comment, as shown in Table 16. To be consistent with the 4-band requirements and the method used in the NPRM to set Reverse requirements, we are using the higher value. This will account for the fact that sound level for Reverse operation needs to be higher than sound level in the Stationary condition, as explained in Section III.C of this preamble.

The modifications we have discussed to make two-band signals as robust as four-band signals will not make the two-band and four-band options the same in all respects. For example, the four-band option is somewhat less restrictive because the minimum levels for the one-third octave bands are lower than the

levels required with the two-band option. Also, the two-band approach is more likely to result in a signal that has an individual component that exceeds minimum detection thresholds in a particular band due to the need to meet the overall SPL requirement, which would make that component relatively prominent. We note that this does not mean that environmental noise will be increased because, as shown in Table 16, the band sum levels for the two-band approach are lower at all speeds than the overall sound pressure levels that can be reached by alerts meeting the four-band approach. As discussed in Section V.D of today's final rule, our environmental assessment indicates that neither the two-band nor four-band approach would have significant environmental noise impact.

In summary, we have decided that including both compliance options in this final rule allows manufacturers the flexibility to choose the approach that best suits their design goals, while accomplishing the agency's goals in the NPRM by providing a robustly detectable signal for pedestrians without significant environmental impact. The detection requirements for compliance of alert systems designed to meet the four-band and two-band specifications are given in the regulatory text of today's final rule.

Overall Sound Pressure Level

In the NPRM, the agency specified alert requirements at the one-third octave band level and not at the overall sound pressure level. NHTSA's position was that the overall sound level may be sufficient for ICEs, which intrinsically produce sound over a broad range of frequencies at all speeds and have acoustic characteristics such as modulation that enhance detectability, but not sufficient for inherently quiet vehicles operating solely on electric motors at low speeds. The agency continues to believe that one-third octave band requirements assure that a vehicle's total sound is detectable by a broad range of pedestrians over many ambient conditions.

ADB commented that, ''octave bands are not as great at predicting detection as overall sound levels'' based on research conducted by WMU. WMU stated that its research has shown that individual octave bands are not as useful in determining detection as is the overall sound level. WMU stated that while some regulatory specification in octave band make-up of alert sounds might be useful, there is limited justification for such a restrictive requirement. WMU also stated that a pedestrian with hearing loss would need to have available content at lower frequencies and that any potential sound should have a fairly broad frequency spectrum. WMU suggested that identifying two frequency bands that are most useful for detection, similar to Nissan's approach, may be appropriate.

The agency has reviewed the research cited by ADB and conducted by WMU on the correlation between overall sound pressure level and detectability. While this research does show that overall sound level had a good correlation with detectability, it does not appear that it addressed whether specifying levels in multiple octave bands influences the detectability outcome. The agency does not believe that the cited studies adequately support the proposition that overall sound pressure level is a better metric than one-third octave band sound pressure level. Furthermore, the WMU comments about specifying low frequencies to assist with hearing loss, and about requiring a broad frequency spectrum, and also that specifying two frequency bands may be appropriate, implies that they did not conclude that an overall specification by itself necessarily would be sufficient.

During the course of developing FMVSS No. 141, the agency has carefully considered overall sound pressure levels and corresponding individual one-third octave band sound pressure levels. The agency agrees that there can be a strong correlation between overall sound pressure level and detectability. However, we also believe that regulating only the overall sound pressure level leaves open the possibility of alert signals that may be undetectable in many common situations. Agency research indicates that alert sounds with the same overall sound pressure level often do not provide the same degree of detectability or robustness. This topic is discussed in sections that follow in this preamble where we identify how the agency derived the two compliance options specified in this final rule. Through our research, the agency has determined that for an alert signal to be as ''robust'' as possible, *i.e.* for a signal to be heard by the most diverse range of pedestrians across the widest range of ambient conditions, specific combinations of one-third octave bands in different frequencies must be included in the requirements of the final rule. The requirements for one-third octave bands at various frequencies contribute to the overall sound pressure level of the sound emitted by the vehicle. Conversely, the agency maintains that minimum one-third octave band sound levels are essential to establish minimum requirements for detection, and that specifying overall sound pressure level alone would not be an acceptable approach for this final rule.

Stopping Distance

Many of the commenters agreed with the agency's approach for using stopping distance for determining detectability requirements. Two of the commenters, however, ADB and WMU, questioned the distance calculated and used. ADB and WMU questioned whether the detection distances used are sufficient for pedestrians to detect, recognize, judge distance and trajectory, decide to initiate a crossing, and initiate a crossing, particularly at busy intersections. WMU explained that the detection distance formula used does not account for variability among pedestrians including those with hearing loss.

After considering the ADB and WMU comments, we have decided to continue to follow the approach used in the NPRM where we derived stopping distance using a driver reaction time of 1.5 seconds and a deceleration rate of 5.4 m/s^2. The agency's main premise for the calculation of the time that should be allowed for detection of approaching vehicles was the total vehicle stopping distance needed to avoid pedestrian collisions. While the pedestrian's reaction time is important, as is providing as much time as possible for pedestrians to make crossing decisions, the critical factor is that the pedestrian should hear the alert of an approaching vehicle no later than the time and distance the driver would need in order to react and stop the vehicle before colliding with the pedestrian.

Furthermore, the alert requirements specified in the final rule include a small safety margin that will extend the timing and distance for both the driver and the pedestrian. As discussed previously, the minimum one-third octave band levels derived for detectability were increased by 0.5 dB and rounded up to the closest whole decibel. Also, because our minimum requirements are based on the levels needed to detect a signal having content in a single one-third octave band, our requirement that signals must include multiple one-third octave bands provides an additional margin of safety. We believe that requiring EVs and HVs to produce sounds with content in multiple one-third octave bands will provide an additional safety margin of time and distance due to the increased overall sound pressure level resulting from the combination of one-third octave bands. In addition, the

specifications in this final rule are minimum levels for compliance. Vehicle manufacturers are likely to exceed the minimums by some amount in order to provide themselves with a margin of compliance. We believe these factors address concerns that the reaction time the agency used was insufficient.

F. Acoustic Parameters for Recognition of Motor Vehicles

In the NPRM, we stated that recognition includes two aspects: Recognition that the sound is emanating from a motor vehicle that may pose a safety risk to the pedestrian, and recognition of the vehicle's operating mode (acceleration, deceleration, constant speed, reverse or stationary but activated) so that the pedestrian can take appropriate measures to avoid a collision with the vehicle. The acoustic specification in the NPRM contained acoustic characteristics similar to the sounds that pedestrians associate with current ICE vehicles.

Based on our initial assessment of simulated sounds and engineering judgment, the agency determined in the NPRM that the sound emitted by the vehicle to meet the detection requirements must contain at least one tone. A component is defined as a tone if the total sound level in a critical band centered about the tone is 6 dB greater than the noise level in the band.[133] In the NPRM, we proposed requiring the sound emitted by the vehicle to have at least one tone at a frequency no higher than 400 Hz. The agency also proposed that the sound emitted by the vehicle must have content in each one-third octave band from 160 Hz to 5000 Hz.

Simulated sounds in the initial assessment were developed for the stationary but activated, constant speed pass-by, and accelerating pass-by conditions. Pass-by sounds included Doppler shifts (changes in frequency by a source moving relative to an observer) and simulated acceleration (a pitch or frequency shifting tied to a change in vehicle speed.) The sound pressure level changed as a function of speed and as a function of position relative to the microphone receiver during the pass-by simulations. During the original development of criteria for recognition, we stated that an alert signal should sound like an ICE in order to be recognizable. In order to identify qualities of the ICE vehicle, ICE sounds were evaluated in the quiet ambient conditions present during the recordings,[134] [135] which allowed low-frequency combustion related tones and wide range broadband content [136] to be audible.

The agency sought comments on the following topics related to the proposed recognition requirements:

- Suggestions for the minimum sound level of low frequency content that should be included in the agency's recognition requirements;
- Information as to whether speakers that manufacturers may wish to use to meet the requirements of the proposal are capable of producing any measurable content in the 160 Hz one-third octave band; and
- Information about the cost of a speaker system that is able to reproduce some measurable content at the 160 Hz one-third octave band versus the cost of a speaker system that is only capable of producing sound above 315 Hz.

The Agency received comments from Alliance/Global; SAE; OICA; Honda; Nissan; Porsche; Mercedes; Denso; National Federation for the Blind; Western Michigan University; Accessible Design for the Blind; The Seeing Eye, Inc.

According to Alliance/Global, bands below 500 Hz should not be required. They stated that these bands are not necessary for recognition and will add significant cost to the alert sound system. Alliance/Global also stated that isolating and measuring low frequency content under outdoor test conditions would be impracticable. Alliance/Global stated that prescribing an objective definition to recognizability using one-third octave bands is not possible because there are many ways to provide sounds that have similar acoustic characteristics. Finally, they do not recommend one-third octave band requirements in the 160 Hz band because existing speakers that are practical for alert systems cannot emit sound which contains frequencies as low as 160 Hz.

OICA stated that a tone that is pitched would simulate the sound of a machine and this in combination with the tire/road noise would be enough to recognize the sound as coming from a vehicle. They also stated that broadband band should not be required.

SAE indicated that the metric used to define 'tone' (ANSI S1.13—1995), in the proposed regulatory text, is not robust to all possible sound designs and would explicitly exclude sound characteristics identified as contributing to detection and recognition in the preamble.

Ford stated that it conducted a study to examine recognition of a given sound as the sound of a motor vehicle. The study consisted of a human factors test in which audio recordings of vehicle sounds were presented to participants using headphones. Participants were asked to assess how recognizable the sounds were in the presence of background noise. The study included 24 Ford employees and 4 blind individuals. Sounds tested included an ICE vehicle, a vehicle without an alert sound, and three alert sounds. Two tests were completed; recognition of a stationary sound and recognition of a 10 km/h pass-by. Additional tests were conducted to examine recognition of the sound as an object to avoid. Ford concluded that adding motion to the sound (pass-by vs. stationary) increased recognition as either a motor vehicle or an object to avoid. They also explained that it is not necessary to meet all proposed minimum levels in the 315 Hz, 400 Hz, and 500 Hz one-third octave bands for vehicles or alert sounds to be recognized as motor vehicles.

Honda indicated that the generation of low frequency sound is technically challenging, creates extra cost, and adds weight to the vehicle. Honda explained that the sound entering into the passenger compartment could be significant, which could cause annoyance. Honda suggested that this would require testing and an iterative design process to minimize negative effects.

Nissan stated that low frequency content alone will not ensure that a sound is recognized as a motor vehicle. Nissan suggested that requiring frequency content in this region means that either broadband or narrowband content (*e.g.* tones) could be used, which would sound quite different than an ICE.

Mercedes indicated that the proposed specification is restricting manufacturers flexibility to produce alert sounds for EVs and HVs that are effective yet pleasant to consumers and

[133] The agency explained that a component is considered to be a tone if the Tone-to-Noise ratio according to ANSI S1.13–1995[73] is greater than or equal to 6 dB.

[134] Garay-Vega, L; Hastings, A.; Pollard, J.K.; Zuschlag, M. & Stearns, M. (2010, April). Quieter Cars and the Safety of Blind. Pedestrians: Phase 1. DOT HS 811 304. Washington, DC: National Highway Traffic Safety Administration.

[135] Hastings, A., Pollard, J. K., Garay-Vega, L., Stearns, M. D., & Guthy, C. (October, 2011). Quieter Cars and the Safety of Blind Pedestrians, Phase 2: Development of Potential Specifications for Vehicle Countermeasure Sounds. DOT HS 811 496. Washington, DC: National Highway Traffic Safety Administration.

[136] Broadband content is content over a wide frequency range that could be spectrally continuous or periodic. Periodic content can be generated by engine combustion related harmonics or by periodic tire/pavement interactions, such as caused by transversely tined pavement. Continuous content can be generated by turbulence at the engine intake and exhaust ports, by non-periodically tined fan blades as well as by aerodynamic noise and random tire/pavement interactions.

expressed concerns about potential impacts to market penetration. Mercedes explained that low one-third octave frequency bands down to 315 Hz and broadband content down to 160 Hz are difficult to isolate inside the vehicle cabin and this may result in adding vehicle weight due to added insulation. Mercedes also mentioned that a speaker would need to increase in size in order to accommodate the proposed lower frequency requirements.

Porsche mentioned that pitch shifting is the most important factor to characterize motor vehicles. Porsche suggested that the number of frequencies and the frequency range be kept flexible. Porsche also indicated that broadband sound should not be required. Porsche stated that all sounds emitted by a vehicle are based on tones while broadband sound comes from tire noise. Porsche also explained that broadband sounds would require different devices and cannot be generated by the prototype control modules currently used by Porsche.

Denso requested clarification of the definition of the terms ''tone'' and ''critical band.'' Denso also mentioned that the agency did not identify sound pressure levels for the broadband requirement in the NPRM. Denso stated that the broadband requirement may not be as effective for recognition and localizability because the sound emitted by the vehicle speaker system may be masked by ambient sound if no sound level for the broadband content is specified.

NFB stated that recognition requirements were included in the PSEA to prevent excessive customization. They stated that the inclusion of pitch shifting will potentially be sufficient to insure recognition.

WMU indicated that the inclusion of tones is unlikely to enhance recognition because tones are readily masked by sounds in the environment, especially by sound from other vehicles. WMU also indicated that many blind pedestrians would not detect sound energy above 2000 Hz, especially those with hearing loss; therefore, this is not a reliable way to enhance recognition. WMU indicated that rhythmic, cyclic aspect of a sound would enhance recognition. In terms of speaker capabilities, they suggested that the cost of using speakers capable of producing sound energy in the 160 Hz range is not balanced by additional benefits. They explained that their studies have not found this low range to be useful for detection and noted that tones can be annoying.

Comments from the Accessible Design for the Blind (ADB) are consistent with WMU. ADB indicated that tones are masked by the ambient and that most people find tones to be annoying. ADB stated that added sound should be the same for all EVs and HVs. ADB explained that this would help with recognition and prompt interpretation of the sound as the sound of a vehicle. In response to the request for comments about the minimum levels of low frequency content that should be included for recognition, ADB stated that they are not aware of any research that supports the notion that adding low frequency content makes sounds more recognizable.

The Seeing Eye, Inc., stated that, for recognition purposes, it is important that all vehicles regardless of manufacturer, emit the same standardized sound.

Agency Response to Comments

After reviewing the comments and conducting additional research, we have decided to remove the requirements in paragraph S5.2 of the NPRM requiring EVs and HVs to produce sound that includes broadband content and low frequency tones. We believe these acoustic characteristics are not necessary for pedestrians to recognize artificial sounds produced by EVs and HVs as coming from a motor vehicle in operation.

During the agency's initial work to develop criteria for recognition, the agency assumed that an alert signal should sound like an ICE in order to be recognizable. In order to identify qualities of the ICE vehicle, ICE sounds were evaluated in the quiet ambient conditions present during the recordings [137] which allowed low-frequency combustion related tones to be audible. These low frequency tones make up part of the sound of a typical ICE vehicle at low speeds in quiet ambients. However, these low frequency tones are masked in many ambient conditions, and in particular the 55 dB(A) ambient used for determining the minimum sound requirements described in the NPRM.[138] In such cases pedestrians would need to use other cues to recognize a vehicle (ICE or otherwise), such as the location of the sound source (*e.g.* on the street at a stop light), the frequency and level changes caused by sound source motion (*e.g.* on the street approaching or passing the pedestrian), etc.

A recent study by NHTSA examined several alert signals in the presence of a 55 dB(A) ambient for a vehicle traveling at 10 km/h.[139] The signals included simulations based on recorded vehicles, tones, and noise components over a frequency range from 315 to 5000 Hz. Some signals had only a single component, *e.g.* a tone or a noise at 315, 630 or 2500 Hz, or multiple components, *e.g.* low frequencies (315 to 500 Hz), high frequencies (2000 to 5000 Hz), or components matching the NPRM frequencies. Participants were asked to indicate when they heard a sound that would influence their decision to cross a street. The study provides a practical indication of a pedestrians ability to recognize sounds emitted by HVs and EVs as motor vehicle sounds since recognition is required in order to respond to the detected signal in the form of making a decision regarding whether it is safe to cross a street.

All alert signals tested (with the exception of one signal that had levels below NPRM values) were detected and recognized on average by the minimum safe detection time of 2.0 seconds or greater. These results are consistent with comments by the Alliance/Global and with the study submitted by Ford. Based on these results, it appears that vehicle recognition cued by an alert signal in the presence of a ambient at 55 dB(A), which is the target ambient for detection, does not require that the alert signal contain low frequency tones. Because low frequency tones are not necessary for pedestrians to recognize sounds as vehicles sounds, could also add cost to the system, and may be annoying when not masked by the ambient, the agency is not including a requirement for low frequency tones in the final rule.

Similarly, the agency study showed that participants detected and recognized alert signals with a wide

[137] Garay-Vega, L; Hastings, A.; Pollard, J.K.; Zuschlag, M. & Stearns, M. (2010, April). Quieter Cars and the Safety of Blind. Pedestrians: Phase 1. DOT HS 811 304. Washington, DC: National Highway Traffic Safety Administration.; see also Hastings, A. et al. (2011). Quieter Cars and the Safety of Blind Pedestrians, Phase 2: Development of Potential Specifications for Vehicle Countermeasure Sounds. DOT HS 811 496. Washington, DC: National Highway Traffic Safety Administration.

[138] OICA measured stationary but activated levels are presented in Table 29 of the Phase III report. Comparing these data with the associated minimum threshold levels described in the NPRM, it can be seen that for most vehicles in Table 29 many of the measured vehicle one-third octave band levels are below the computed thresholds for the 55 dB(A) ambient used in the NPRM. Thus these components would not be reliably detectable in such an ambient.

[139] Hastings A.; and McInnis, Catherine. ''Detectability of Alert Signals for Hybrid and Electric Vehicles: Acoustic Modeling and Human Subjects Experiment'' (2015) Washington, DC: DOT/NHTSA.

range of sound characteristics including signals that do not include broadband content over the entire range from 160 Hz to 5000 Hz. For example, several signals in the study consisted of only a single pure tone or a single one-third octave band of noise and were detected and recognized at a safe distance provided the component met minimum levels as determined by the detection model. Based on these results, it appears that vehicle recognition cued by an alert signal in the presence of a 55 dB(A) ambient does not require broadband content in all one-third octave bands from 160 Hz to 5000 Hz. Given the potential costs associated with meeting the low frequency requirements of such broadband content and the fact that signals meeting the detection criteria are safely detectable, the agency is not including a broadband content requirement in the final rule specification.

Overall, the agency believes that pedestrians would use other cues to recognize a vehicle (ICE or otherwise), such as the location of the sound source (*e.g.* on the street at a stop light), and the frequency and level changes caused by sound source motion (*e.g.* on the street approaching or passing the pedestrian), etc. (See Section III.G on 'Frequency (Pitch) Shifting and Volume Change').

G. Frequency (Pitch) Shifting and Volume Change

The NPRM contained a requirement for frequency shifting which gives the pedestrian information about the acceleration or deceleration of an approaching vehicle. The PSEA required NHTSA to include sounds to alert pedestrians to acceleration and deceleration. As discussed in the NPRM, this information is important to the pedestrian in making a decision about whether or not to cross in front of a vehicle. The driver of an accelerating vehicle probably does not intend to stop and, according to the NPRM, ''the sound of accelerating vehicles in the parallel street indicates, for example, that the perpendicular traffic does not have the right of way and thus a crossing opportunity is available''. A decelerating vehicle on a path parallel to the pedestrian may be slowing to make a turn into the pedestrian's path if she or he were to cross the street.

The proposal required that the fundamental frequency of the sound emitted by the vehicle increase with speed by at least one percent per km/h between 0 and 30 km/h (18.6 mph). The NPRM did not include a test procedure associated with this requirement but stated that frequency shifting could be verified by comparing the fundamental frequency from the compliance tests at stationary, 10 km/h (6.2 mph), 20 km/h (12.4 mph), and 30 km/h (18.6 mph). The NPRM provided a definition for the fundamental frequency but did not specify how the fundamental frequencies at each vehicle speed should be compared.

As mentioned, the agency did not include a separate acoustic measurement procedure for frequency shifting in the NPRM, instead relying on other requirements specified and the increase in overall sound level as the vehicle increases speed (or the decrease in sound level as the vehicle decelerates) to provide enough information so that pedestrians will be able to determine when EVs and HVs are accelerating and decelerating. One reason why a separate acoustic measurement procedure was not included was due to the concerns about the feasibility of testing. The agency stated that it would be difficult for even an experienced test driver to repeatedly achieve and maintain a specific rate of acceleration or deceleration on a test track if such a test was required. Given the difficulty of ensuring a repeatable acoustic test for acceleration and the fact that information about changes in vehicle speed could be provided by varying sound pressure levels, NHTSA determined that the test procedure did not need to include a dynamic test for acceleration or deceleration.

The NPRM explained that manufacturers and their representatives, in meetings with NHTSA staff, expressed concerns that it is difficult to measure the change in frequency of a sound produced by a vehicle by measuring a complete vehicle during a pass-by test. Manufacturers requested that the agency measure frequency shifting using a component-level test, meaning that the alert system hardware is removed from the vehicle and tested as a separate unit.

In the NPRM, we said that we were hesitant to include a component-level test because we wanted the standard to be technology neutral and because we do not wish to limit technological innovation. As further explained, the agency was aware that manufacturers might use different technologies to comply with the standard, so defining the hardware components subject to the component-level test could prove difficult. The agency sought comment on including a component-level test to measure frequency shifting in the test procedure.

In the NPRM, the agency said that the proposed method for measuring frequency shifting depends on the presence of a strong tone in the sound. A tone is an acoustic component with well-defined features that make it relatively easy to recognize compared to noise. The pitch, or frequency, of an alert sound could be verified by tracking this tone as it increases in frequency for each pass-by test as the vehicle increases speed. In the proposal, we said it would be difficult to verify a sound's increase in frequency if the sound does not have any strong tones. We mentioned our concerns about identifying the tone of a sound and tracking this tone as the vehicle increases speed. The NPRM mentioned that we planned to conduct further research on this issue. We explained that if it was not possible to identify a tone to track in order to verify the increase in a sound's frequency, we may have to use a different method to verify the increase. The agency sought comments on this issue.

The agency received comments on frequency shifting from SAE, Alliance/Global, OICA, and Porsche. The agency also separately received a joint comment submitted by the Alliance, Global, the American Council of the Blind (ACB), and the National Federation of the Blind (NFB).

Several commenters stated that the NPRM did not include a test procedure to measure compliance with the proposed frequency shifting requirements. These commenters recommended that the agency use the frequency shift procedures specified in SAE J2889–1 to measure compliance with the frequency shifting requirements and that the agency allow indoor testing or component level testing to measure frequency shifting.

SAE commented that use of indoor facilities for the measurement of the frequency shift is necessary to obtain accurate results. SAE said that provisions for indoor measurement either at a component level or a simulated full-vehicle level are included in SAEJ2889–1 (May 2012). SAE also mentioned that in a December 2012 meeting with NHTSA, an alternative method of analysis was under investigation to eliminate the need for prior knowledge of the signal.

Alliance/Global mentioned that tonal tracking for frequency shifting becomes quite difficult at higher speeds (30 km/h) due the tire noise masking, particularly when testing outdoors. Alliance/Global stated they prefer an indoor component level test because they think that is the best way to ensure that the correct tones are being tracked and that noise from tires (at higher speeds), accessory equipment, or other sounds not intended for pedestrian safety, are not incorrectly counted

toward the sound measurement. Alliance/Global indicated that they are not aware of a procedure that can identify these tones during whole-vehicle testing.

OICA suggested that NHTSA change the definition of ''fundamental frequency'' in S4 to read, ''[Frequency] shift frequency means, for purposes of this regulation, any frequency or frequencies used to comply with S5.1.6.''

OICA suggested requiring that the frequency of the sound shift frequency within each individual gear ratio rather than over the entire range of speeds between 0 and 30 km/h. OICA stated that this will allow for the simulation of an ICE vehicle using different gear ratios within the tested speed range. Furthermore, OICA indicated that there might be various ways to determine the frequency tone and rate and suggested that NHTSA leave the way to measure it to the individual manufacturer. OICA indicated that there is no known method to identify the proper tone in all situations without specifying the tone in advance. OICA stated that information about the signal under evaluation will be necessary.

Porsche made reference to the signal processing requirements in SAE J2889–1 (7.2.3) and stated ''The fundamental frequency is dependent on the setup of the analysis system and is typically less than two Hertz.'' Porsche also suggested that NHTSA change the definition of fundamental frequency in S4 to read . . . ''S4 Fundamental frequency means, for purposes of this regulation, any prominent frequency of a valid measurement taken in S7.''

In the joint comment submitted by Alliance/Global/NFB/ACB, those commenters agreed that at least one frequency emitted by the vehicle must vary with speed by at least an average of one percent per mph over the range from 5 mph to the crossover speed. They indicated that this frequency may also contribute to meeting the spectral and overall sound pressure level requirements.

Agency Response to Comments

After reviewing the comments and conducting additional research on the topic of frequency shifting, we have decided not to include a requirement that a vehicle's emitted sound must change in frequency as the vehicle changes speed. Although this characteristic is still considered useful and we encourage its use on hybrid and electric vehicles for enhanced detectability and recognizability, a test procedure to determine compliance with requirements for frequency shift at this time has been deemed unfeasible.

As proposed in the NPRM and finalized here, the sound pressure level in each one-third octave band changes as speed increases, leading to an increasing overall sound pressure level that corresponds to the behavior of an ICE vehicle. Thus pedestrians will be able to tell if an EV or HV is accelerating or decelerating based on the increase or decrease in sound level emitted from the vehicle, just as they would be able to in the case of an ICE vehicle. In this final rule, the agency has chosen to use the increase and decrease in sound produced by the vehicle at different speeds as an alternative to frequency shifting.

We have decided to identify this alternative method by the term ''relative volume change.'' Basically, the method of ''relative volume change'' involves summing and comparing the normalized measured one-third octave band levels for each of the operating speeds for each test vehicle. For each operating speed, the normalized sum of the measured one-third octave bands should increase by a specified minimum amount at each successive speed interval. Further details about the ''relative volume change'' method and why the agency believes the original frequency shifting requirement is not feasible are discussed below.

The agency acknowledges comments regarding the lack of a test procedure to measure frequency shifting in the NPRM. Many of the commenters requested that, in lieu of a test procedure being included in the rule, the agency adopt the frequency shifting procedure set forth in SAE J2889–1 Section S7.2. In essence, this procedure calls for identification of a frequency that has changed as a function of vehicle speed, which can be measured and can be tracked during the operating conditions specified. However, the SAE procedure, as stated in appendix B–5 of the SAE standard, requires prior knowledge of the frequencies to be tracked (''The persons conducting the test know what frequencies should be produced by the device or vehicle under measurement''). NHTSA believes that the need for prior knowledge of the frequencies precludes a readily verifiable and practicable test procedure. Also, the procedure set forth in J2889–1, Section 7.2, requires an acoustics expert to determine both the starting frequency (and/or tone) as well as the shifted frequencies as speed increases, to verify compliance. The agency believes that this contributes to a lack of objectivity in the SAE test procedure for measuring frequency shifting. The agency believes that it would be difficult to reliably and repeatably verify compliance because the frequencies identified for frequency shifting by different technicians are unlikely to always be exactly the same.

Since issuing the NPRM, the agency has conducted additional research in an attempt to develop a cohesive methodology for analyzing and verifying frequency shifting. NHTSA considers frequency shifting measurement to consist of three main steps: (1) Measurement of the signal to be used in the analysis and its conversion to the corresponding frequency domain; (2) identification of the alert sound tonal components that meet the definition of tone and that are expected to shift at each of the measured operating conditions (stationary, 10 km/h, 20 km/h, and 30 km/h); and (3) calculation of the actual magnitude of frequency shifting that has occurred from the identified tonal components. Of these steps, step one, recording the measurements and converting them to the frequency domain, is relatively routine as this is a standard signal processing technique. Also, in step three, once the proper tones and base frequencies of the vehicle alert have been identified and have been determined to be a continuous result of frequency shifting, it is relatively easy to mathematically determine the amount of frequency shifting that has occurred. From both a process basis and a calculation basis, steps one and three appear consistent with the methodology specified in SAE J2889–1.

Unfortunately, in step two above, identification and validation of tonal components is exceptionally difficult. The procedure detailed in Section S7.2 of SAE J2889–1 specifically requires that the person conducting the test know in advance what frequencies are shifting to avoid having to subjectively identify and verify the critical tones produced by the vehicle alert system. To identify and validate tonal components, the test operator first must know precisely how a tone is defined. The NPRM defined a component as a tone if the total sound level in a critical band centered about the main tonal frequency is 6 dB greater than the noise level in the band; however, the terms ''noise level'' and ''critical band'' were left undefined, and this omission was cited by the commenters. As such, the language in the NPRM was insufficient to resolve a tone in a way that would allow frequency shifting determinations.

During further research into defining a tone, NHTSA found that there are four main ways of identifying and verifying tones: By using predetermined

information from manufacturers; visually, by plotting various sound data and determining an overall pattern; by utilizing a small amount of predetermined information (such as the base frequencies measured while the vehicle is in a stationary mode) and assuming a rate of frequency shifting to determine values for 10 km/h, 20 km/h, and 30 km/h; or lastly by utilizing a computer program to analyze sound data and search for tonal characteristics. Identification and verification of tones, regardless of method, is further complicated by the fact that vehicles do not generate a simple sound pattern and in general have a mixture of many tones, coupled with broadband noise as well, which is consistent with what commenters said. There are also pre-existing sound sources that have tonal and inherent frequency shifting qualities (for example, tires can produce a sound that has specific tonal qualities that will shift to a higher frequency that is proportional to the increasing speed of the wheel). These sound sources can work together to make searching for vehicle alert system tones very difficult and subjective.

NHTSA investigated using visual methods to identify tones: plotting the frequency levels versus sound levels as a function of both frequency and time as the vehicle is accelerated at a constant rate (a so-called ''run-up'' graph, presented as a spectrogram plot) where prominent frequency components can be tracked as they change due to frequency shifting; or by graphing sound levels as a function of frequency (referred to as the discrete method) for each speed condition (stationary, 10 km/h, 20 km/h, and 30 km/h) and identifying prominent frequency components which seem to be a function of frequency shifting. An example of these types of visual plots can be found in Figure B–1 of SAE J2889. Because the discrete method looks at individual test cases, there is no guarantee that the frequencies identified will be a result of continuous frequency shifting, and that the frequencies are not instead merely tonal artifacts present in the individual test case. It would be left up to the judgment of an acoustics expert to make this determination. Also, utilizing the run-up method would require the judgment of an acoustics engineer to determine the characteristics of a potential tone, identifying center frequencies, and determining if irregularities are present. Although it may be more objective than discrete visualization, this method can yield multiple interpretations of the same data, which makes it inherently subjective and unsuitable for the purposes of safety standard compliance.

The other methods for determining tones both require technical data from the manufacturer. Either the manufacturer would have to supply all of the data on frequency shifting, specifying all tones which will be used to calculate compliance, or the manufacturer would have to provide a smaller amount of information, such as the tonal components at stationary, and the agency then would have to assume a rate of frequency shifting as a function of speed and would estimate where the new tonal components should lie. Unfortunately, this process also is not objective, as the agency would be relying on information from the manufacturers and on acoustics experts to validate that information.

NHTSA also investigated the use of automated procedures utilizing ANSI S1.13: 2005, ISO 3745, and SAE J2889–1. However, NHTSA has been unable to produce a fully workable automated method. More research would be needed, but it is uncertain if the agency could ultimately develop repeatable, reliable, and objective procedures that do not require verification by an expert.

In light of the above discussion highlighting the impracticality of identifying and verifying tones without prior knowledge of the expected frequency shift, NHTSA agrees with the note 2 of Section S7.2.5.1.1 of SAE J2889 Rev DEC2014, ''. . . there is no known identification specification that can clearly identify frequencies which shift with vehicle operating conditions, primarily vehicle speed, when the frequency content of the desired signal and any background noise is unknown.'' Since no practicable test methodology consistent with the requirements of an FMVSS has been developed to date to objectively determine frequency shifting, the agency is not including a requirement for frequency shifting in the final rule.

Nevertheless, the agency encourages manufacturers to include frequency shifting in their development of alert sounds as this shifting does provide aural information to pedestrians about whether they are at risk or not and about the distance, speed, and acceleration of approaching vehicles. These are useful cues for pedestrian navigation.

In the future, should a practicable, objective method to quantify frequency shifting of vehicle alert sounds be developed, NHTSA may reconsider its decision to exclude a frequency shifting requirement from the safety standard.

Relative Volume Change

Because it is not feasible to include requirements for frequency shifting in the final rule for the reasons discussed above, the agency has decided to include in the final rule a requirement for vehicle-emitted sound level or ''volume'' rather than in frequency to increase as the vehicle increases speed. The agency has decided to include this volume change requirement as a means for pedestrians to utilize the sounds emitted by a vehicle to determine if a vehicle is accelerating or decelerating. The agency understands that the concept of ''relative volume change'' is not a direct replacement for frequency shifting, but we believe it is a reasonable alternative. While frequency shifting would be a more certain method for determining vehicle acceleration and deceleration, volume change will provide useful audible information to pedestrians about the operating state of nearby vehicles. We believe that the volume change specifications will partially compensate for the absence of pitch shifting requirements.

To better understand the concept, as a vehicle approaches a pedestrian at a constant speed, the pedestrian would hear the vehicle alert sound increase in volume, identifying that the vehicle is approaching but maybe not accelerating or decelerating. However, if the vehicle is approaching a pedestrian and accelerating (or decelerating), the alert sound will increase (or decrease) in volume more rapidly as the vehicle approaches while transitioning between 0 km/h and 10 km/h, between 10 km/h and 20 km/h, and between 20 km/h and 30 km/h. A rapid ramp up in volume as the vehicle approaches will be indicative of a vehicle accelerating, and a rapid reduction in volume as the vehicle approaches will be indicative of a vehicle decelerating.

The minimum detection thresholds which are contained in this final rule increase with speed. Consequently, vehicles that meet the minimum requirements, without exceeding them, will have an innate volume increase commensurate with the increase in speed. The minimum specifications incorporate a volume change of approximately 6 dB between stationary and 10 km/h, approximately 6 dB between 10 km/h and 20 km/h, and approximately 5 dB between 20 km/h and 30 km/h. However, manufacturers could design alert signals that have only a single sound level, such as one that meets the highest sound level requirements (those required at 30 km/h) across all speeds (thus exceeding the minimum levels at stationary, 10 km/h

and 20 km/h). In this case, the alert would have no built-in volume change with increasing or decreasing speed, and the potential pedestrian cue to increasing or decreasing vehicle speed would not exist. The ''relative volume change'' requirement specified in this final rule will ensure a minimum sound level increase and decrease as a vehicle reaches each successive higher or lower speed operating condition.

In discussing the minimum acoustic requirements for the eight one-third octave bands in the NPRM, NHTSA said the minimum requirements in each one-third octave band increased as the vehicle increased in speed to give pedestrians more time to detect faster moving vehicles and to allow the pedestrian to determine whether the vehicle was accelerating or decelerating. While the minimum acoustic requirements in the NPRM increased for each test speed, the NPRM did not include maximum sound requirements for each test speed. This meant that a vehicle could comply with the requirements of the NPRM by meeting the minimum acoustic requirements for the highest test speed for all test speeds without any variation in the sound produced by the vehicle. In other words, a vehicle alert system could be designed such that it would emit the loudest required sound level in all test conditions from stationary up to 30 km/h. Under this scenario, a pedestrian would have limited ability to detect changes in vehicle speed without pitch shifting because the sound produced by the vehicle would not change as the vehicle changed speed. To eliminate this possibility, NHTSA has included the volume change requirements in the final rule to ensure that the alert sound varies produced as vehicle changes speed.

Since an alert signal's acoustic components can change from one operating condition to the next, changes in the overall SPL level will not necessarily correspond to changes in the level of individual one-third octave bands. Also, the overall sound pressure level is influenced by bands that are outside of the range of one-third octaves covered by NHTSA's specifications (*i.e.,* those greater than 5000 Hz and less than 315 Hz). Therefore, in order to evaluate changes in perceived volume level, we will consider only the one-third octave bands that account for sound energy contained in the range from 315 Hz to 5000 Hz. Normalized one-third octave band values are derived by subtracting the minimum one-third octave values specified for the stationary operating condition from each of the one-third octave band alert measurements. This normalization process allows measurements of different one-third octave bands to be compared by accounting for the differences in the minimum levels specified for each band. The logarithmic sum of the thirteen normalized one-third octave band levels is then determined (*i.e.,* the ''band sum'').

$$BANDSUM = 10 * \log_{10}\left(\sum_{13}^{i=1} 10^{\frac{Normalized\ Band\ Level_i}{10}}\right)$$

Finally, the relative volume change is calculated as the difference in these band sum values between consecutive operating speed conditions.

Evaluating the increase in band sum values from one speed to the next then provides a metric for ''relative volume change.'' This approach allows for the tracking of volume as a function of speed, as the volume is characterized by the sound pressure levels above the minimum levels required at the baseline stationary operating condition. It also allows for the rejection of one-third octave bands outside of the range of interest (315 Hz to 5000 Hz). Another key characteristic of this approach is that frequency is not tracked, which provides design flexibility because different one-third octave bands can be prominent at different speeds.

The relative volume change procedure will utilize the same vehicle measurement data collected for the determination of compliance with the minimum detection standards. That is, the volume change determination uses the average values for the thirteen one-third octave bands of the first four valid, ambient-corrected runs, from the louder side of the vehicle (left or right), for each operating condition (Stationary, 10 km/h, 20 km/h, and 30 km/h). By comparing the calculated band sum at a given operating speed with the band sum value for the next lower speed condition, a relative volume change can be computed.

An example calculation is provided in Figure 9.

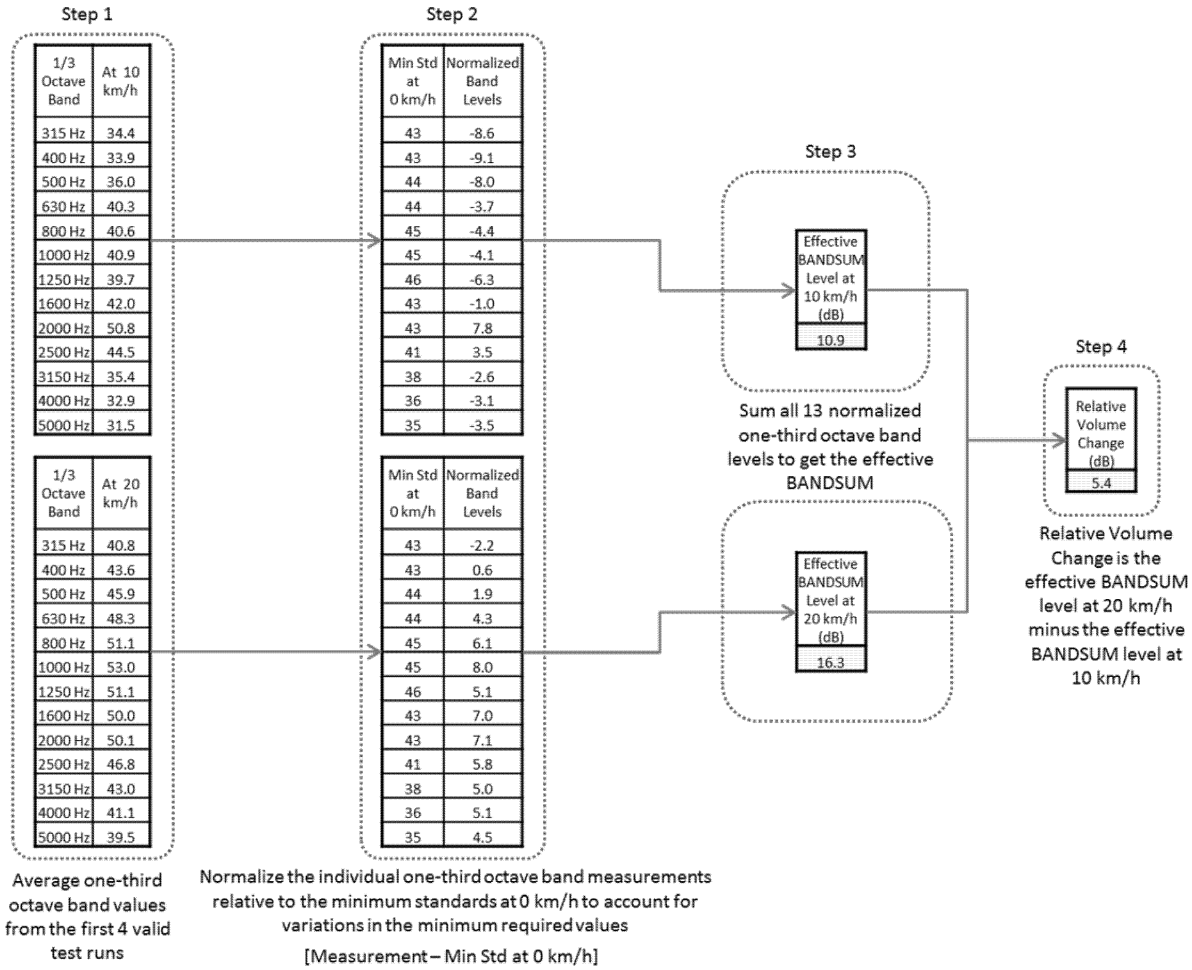

Figure 9. Example of Relative Volume Change from 10km/h to 20 km/h

Figure 9 illustrates the four-step procedure used to calculate the relative volume change for sample data for the 10 km/h to 20 km/h conditions as follows:

Step 1: Calculate the average measured one-third octave band level for each of the 13 one-third octave bands (315 Hz to 5000 Hz) using the four valid test runs identified for each of the test operating scenarios (stationary, 10 km/h (11+/− 1km/h), 20 km/h (21+/− 1km/h), and 30 km/h (31+/− 1km/h)).

Step 2: Calculate the normalized values for each of the 13 one-third octave bands for each of the operating scenarios, relative to the minimum SPL requirements specified for the stationary operating scenario. The normalized values are calculated by subtracting the minimum SPL values specified for the stationary operating condition from each of the one-third octave band averages calculated for each operating scenario (stationary, 10 km/h (11+/− 1km/h), 20 km/h (21+/− 1km/h), and 30 km/h (31+/− 1km/h)).

Step 3: Calculate the BAND SUM for each critical operating scenario (stationary, 10 km/h (11+/− 1km/h), 20 km/h (21+/− 1km/h), and 30 km/h (31+/− 1km/h)) as follows:

$$BANDSUM = 10 * \log_{10}\left(\sum_{13}^{i=1} 10^{\frac{Normalized\ Band\ Level_i}{10}}\right)$$

Where:

i represents each of the 13 one-third octave bands.

Normalized Band Level$_i$ is the calculated normalized value for each of the 13 one-third octave bands.

Step 4: Calculate the relative volume change between each operating scenario (stationary to 10 km/h; 10 km/h to 20 km/h; 20 km/h to 30 km/h) by subtracting the BAND SUM of the lower speed test case from the BAND SUM of the next higher speed test case.

The performance specifications for the relative volume change requirement were derived based upon the minimum detection standards for each operating condition. The minimum detection standards increase with speed such that, if a vehicle just meets the minimum standards at each operating condition, its relative volume change would be approximately 6 dB between stationary and 10 km/h, approximately 6 dB between 10 km/h and 20 km/h, and approximately 5 dB between 20 km/h and 30 km/h. It is the agency's desire to ensure that vehicles equipped with compliant alert sounds are only as loud as they need to be for detection by

pedestrians, and not excessively louder. To meet the relative volume change requirements, a manufacturer could simply increase the sound levels well beyond the minimum standards to achieve the required separation at each speed interval. However, we believe that manufacturers will also want to reduce alert sounds to the greatest extent possible while meeting the minimum standards in order to maximize customer satisfaction and minimize environmental noise. To accomplish the goal of minimizing excessive noise, the relative volume change values should not exceed the already established differences of 6 dB, 6 dB, and 5 dB built into the minimum operating condition specifications. The relative volume change specifications that NHTSA has decided to require are provided in Table 17.

TABLE 17—MINIMUM RELATIVE VOLUME CHANGE REQUIREMENTS

Critical operating scenarios	Minimum relative volume change, dB
Between:	
Stationary and 10 km/h	3
10 km/h and 20 km/h	3
20 km/h and 30 km/h	3

These performance levels were established using the following criteria. First, as explained above, to minimize alert sound levels, the maximum volume change between operating scenarios would be 6 dB, 6 dB, and 5 dB, respectively. So, as a starting point, the relative volume change requirements should not exceed these values. Second, a manufacturer might choose to design an alert signal that exceeds the minimum values at a given speed and just meets the minimum values at the next higher speed. Such a design would have a decreased relative volume change, *i.e.,* less than 5 dB or 6 dB, between operating conditions. Third, as discussed in the NPRM, the sound level change that can be discerned by an untrained observer is approximately 3 dB, so the relative volume change between each successive operating scenario should be at least 3 dB in order to be useful. Considering all these criteria, we want to target relative volume changes within the range of 3 dB to 6 dB. Within this range, we have decided to specify 3 dB as the minimum volume change requirement for the transitions between successive operating conditions. This means that the manufacturer can incorporate a 3 dB volume change or any level above 3 dB to meet the specified requirements. The minimum requirement of 3 dB between each operating condition ensures the volume change will be discernable while providing manufacturers with the greatest flexibility in the design of their alert systems.

It is NHTSA's expectation that the volume change requirement will provide pedestrians with the audible cues needed to discern vehicle acceleration and deceleration. However, we reiterate that frequency shifting still is a useful characteristic of a vehicle alert system, and we encourage system designers to incorporate frequency shifting even though this final rule does not include specific requirements for it.

Lastly, in regards to the commenters who requested that the proposed test procedure for frequency shifting be modified to allow for indoor testing and/or testing at the component level, those comments are no longer applicable since the agency has decided to exclude a frequency shifting test. In regard to comments about indoor and component testing in general, we have addressed that issue in Section III.K of today's final rule, where we have stated that NHTSA will conduct compliance testing on complete vehicles on outdoor test tracks.

H. Sameness

The NPRM criterion for sameness was that the alert sound of two example vehicles must have a sound pressure level within 3 dB(A) in every one-third octave band between 315 Hz and 5000 Hz. That requirement would limit the amount of variation in one-third octave bands over a range of frequencies when measured on a stationary vehicle. We proposed that requirement as an objective way to determine if the alert sounds produced by two different vehicles of the same make and model are the same.

In the NPRM, the agency interpreted the PSEA language on sameness as applying ''only to sound added to a vehicle for the purposes of complying with the NHTSA regulation'' [NPRM, p. 2804]. The proposed sameness criteria were not intended to apply to sounds generated by a vehicle's tires or body parts or by the mechanical operations of the vehicle.

In the NPRM, NHTSA stated that we interpret a vehicle ''model'' as a specific grouping of similar vehicles within a vehicle line. The *Federal Motor Vehicle Theft Prevention Standard,*[140] defines vehicle line as ''a name which a manufacturer applies to a group of vehicles of the same make that have the same body or chassis, or otherwise are similar in construction or design.'' If a manufacturer calls a group of vehicles by the same general name as it applies to another group, but adds a further description to that name (*e.g.,* Ford Fusion Hybrid, or Toyota Prius Three), the further description indicates a unique model within that line.

Also, the NPRM conveyed that the requirement for vehicles of the same make and model to have the same sound or set of sounds does not apply across model years. For example, a model year 2020 Prius Two could have a different sound than a 2019 Prius Two (same model but different model years). A 2019 Prius Two could have a different sound than a 2019 Prius Four (same model year but different models). All Prius Two's from the 2019 model year would be required to emit the same sound or set of sounds (same model and model year).

The PSEA includes language that requires ''the same sound or set of sounds for all vehicles of the same make and model.'' We interpreted this to mean that a manufacturer may choose to equip a vehicle to have different sounds for different operating modes such as forward, reverse, and stationary [NPRM, p. 2804]. Each sound would have to meet the corresponding performance requirements in each operating mode. We did not interpret this language in the PSEA to mean that a vehicle can have more than one alert sound for a given operating mode, such as a suite of sounds that a driver can select from according to personal preference.

In general, commenters from industry stated that speaker tolerances make it impossible to make all vehicles of the same year/make/model produce the same sound in accordance with the NPRM criterion, *i.e.,* to have the same sound level, within ±3.0 dB, in each of the thirteen specified one-third octave bands. Also, industry commenters favor an indoor, component-level test for sameness, rather than an outdoor test conducted on an ISO pad.

Advocacy groups that provided comments on the proposed sameness requirement generally supported it, or supported some performance-based assessment of sameness, but did not suggest specific technical criteria for such a performance test.

Alliance/Global stated on behalf of their member companies that the classification of sounds by an objective metric that would determine sameness first needs to have ''sameness'' defined. The NPRM proposal for a three decibel limit in each one-third octave band is not sufficient for the measurement uncertainty, let alone production variation, according to Alliance/Global.

[140] 49 CFR part 541.

Alliance/Global recommended that sameness be measured at a component level under indoor laboratory conditions. They stated that their only practical course of action to assure sameness between two vehicles is to compare the input signals to the speakers (the output from the signal generator or the programmed digital sound file). Alliance/Global stated that measuring sameness through microphone recordings of operating vehicles is not possible as a practical matter. Furthermore, due to the variation in production speakers, it also is not reasonable to require them to emit the same sound within the proposed three decibel specification. They acknowledged that the requirement cannot be deleted altogether because it is included in the PSEA. Alliance/Global also agreed with OICA that NHTSA should allow manufacturers the option of demonstrating compliance with the sameness requirement through comparisons of elements such as the software sound file, input to the speakers, etc.

OICA stated that the proposed sameness criterion needs revision, pointing out that industry has already shown that even 6 dB may not be a sufficient tolerance between vehicles of the same make and model. OICA stated that the measurement uncertainty is the most significant factor, and that the proposed allowance of 3 dB is not commensurate with the measurement uncertainty. OICA suggested that NHTSA should carefully consider how sameness is defined as that will drive the necessary measurement procedures. OICA noted that sound-generating devices that use the same software will inherently have the same sound, even when the sound is altered slightly through various factors such as installation into a vehicle. Using the same software also means that vehicles will produce the same sound even when the hardware is changed somewhat, according to OICA. OICA also noted that NHTSA could resolve issues with measurement of Sameness by specifying a requirement that applies to the software sound file. Citing the PSEA language, ''The Secretary shall allow manufacturers to provide each vehicle with one or more sounds that comply with the motor vehicle safety standard at the time of manufacture,'' OICA stated that vehicle manufacturers should be allowed to offer vehicles to customers with more than one alert sound and to equip vehicles with multiple alert sounds for the driver to select from during vehicle operation, as long as each of the sounds fulfils the minimum requirements defined in the safety standard. OICA suggested that the language of Section S5.3 should state that two vehicles of the same make, model, and model year must ''emit the same sound within a set of sounds,'' and that their overall sound level should be required to be within 6 dB(A).

Denso stated that this requirement is not feasible for a number of reasons. For one, there is inherent variability in vehicle sound characteristics and in speaker and amplifier characteristics and performance. When combining this variability, it is very difficult to limit the sound difference to within 3 dB(A) between two vehicles, even for vehicles having nominally identical sound systems, according to Denso. Denso stated that sound pressure levels will decrease by approximately one decibel when the ambient temperature increases from 0 to 40 degrees Celsius. Therefore, Denso suggested it is very difficult to measure the sound level within a tolerance of ±1.5 dB with good repeatability in outdoor conditions. In addition, since the perception of sound depends on ambient conditions (wind direction, wind speed, temperature, atmospheric pressure, etc.) and surrounding noise, Denso stated that ICE vehicles of the same model have up to a 3 dB and greater sound level difference. For these reasons, Denso requested that NHTSA not adopt a requirement for sameness.

The SAE stated that, although 3 dB may be an acceptable tolerance on overall SPL, it is not sufficient for one-third octave bands. SAE also stated that restricting one-third octave band variation does not guarantee sameness in any reasonable sense related to this regulation. Sounds can be filtered to meet the same one-third octave requirements, yet still could be perceived as substantially different by pedestrians. SAE provided an example of two sound files having the same overall SPL and very similar average spectral distribution, but different time signals. Despite their similarities, the two sound files were from recordings of completely different sounds. SAE stated that this demonstrates how sounds can appear to be similar based on a selected measurement criterion when in fact they might be very different in how they sound to listeners.

Honda stated the criterion for sameness in the NPRM is too stringent and cannot be complied with due to the variability of sound-producing devices. An attachment to Honda's comment graphically represented the variability in repeated testing of the same vehicles. [We note there was very little explanation of the data in Honda's comment; the graphic showed that one-third octave band measurements in repeated tests of the same vehicle appeared to vary by up to about 7 dB; but the results were quite different for the various one-third octaves and for the different test vehicles Honda tested, with variability in some instances being close to zero.] Honda suggested that NHTSA should specify an overall sound level and require that there be two peak frequencies that fall within specified frequency ranges.

Advocates for Highway and Auto Safety stated that, to ensure that different vehicles of the same make/model have the same sound, the agency must establish a test procedure for comparing different vehicles of the same make and model to ensure compliance and production uniformity along with meeting the FMVSS sound requirements.

Accessible Designs for the Blind stated that sameness should be tested at all speeds from idle up to the crossover point speed. ADB stated it does not believe that testing at idle only is appropriate for establishing the standard. ADB stated that changing a vehicle's tires or body design is likely to affect the vehicle's sound profile and therefore it is essential that the single sound specified be well documented as detectable and localizable under common traffic and ambient sound conditions by visually-impaired pedestrians who are at least 60 years of age. There will be differences in the perceived sound even if it is generated using the same wav file. The nature of the loudspeaker and where and how it is mounted will also result in differences. Perceived sound will, of course, also vary by road surface. ADB rejected the notion that a variety of sounds will be consistently and accurately recognized by pedestrians as coming from vehicles. Any added sound should be the same for all EVs and HVs in order to be maximally recognized and quickly interpreted as being a vehicular sound, according to ADB. ADB stated that having more than one sound is likely to decrease any safety benefit added sound might provide for visually-impaired pedestrians.

In a February 2014 letter to NHTSA co-signed by the Alliance, Global, the NFB, and the ACB, the co-signers jointly submitted their mutually agreed-upon position about aspects of the PSEA's sameness requirement. They stated that vehicles with the same overall sound pressure level, within a reasonable engineering and manufacturing tolerance, should be considered as having the same sound.

The joint letter said that vehicles of different model years should not be considered to be the same make and model. In other words, only vehicles of the same make, model, and model year should be required to emit the same sound.

The joint commenters also expressed their agreement about two other aspects of the PSEA Sameness requirement: First, OEMs should have flexibility to provide EV/HVs with some number of driver-selectable sounds instead of just a single sound; and second, OEMs should be allowed to install updated sounds once per model year to address any dissatisfaction that might arise on the part of vehicle owners with the alert sounds their HV/EVs are originally manufactured with. The latter would be separate from updates that OEMs might need to make to remedy a noncompliance or for conducting a recall, as provided for in the PSEA. The joint commenters believe the language of the PSEA, which uses the terms ''one or more sounds'' and also ''sound or set of sounds'' allows for driver-selectable sounds and voluntary updating of sounds.

We note that NHTSA did not receive comments specifically in response to our request for comment on the extent to which changing a vehicle's tires or body design would affect the vehicle's sound profile for the purposes of determining whether two example vehicles have the same sound.

Agency Response to Comments

In light of the comments the agency received on the NPRM sameness requirement, we have reconsidered the proposed requirement and have decided that it is not appropriate for the final rule. We agree with at least one shortcoming that was pointed out by several commenters: Even if two vehicles' alert sounds are within three dB(A) in each specified one-third octave band, the alerts would not necessarily sound the same because sounds that have identical one-third octave sound pressure levels can vary considerably in terms of how they are perceived by a listener. In fact, it is possible for completely different types of sounds to have similar one-third octave band levels, even across a wide range of frequency bands.

We now believe that the NPRM metric based on A-weighted one-third octave band sound pressure levels would be suitable only to identify ''defective'' sounds, *i.e.,* to identify when two sounds that are intended by design to sound the same are not the same, for example if a particular test vehicle had a damaged speaker. The main reason for this is that the NPRM method has relatively low resolution and would not distinguish between tonal signals and noise signals, which are different by definition but can have the same one-third octave band spectra. Consequently, even if two vehicles of the same make and model were to comply with the NPRM criterion, there would be little assurance that they in fact produce identical alert sounds.

We also acknowledge the concern expressed in comments that speakers used in alert systems have some inherent manufacturing variation. However, NHTSA has not conducted tests to verify the level of speaker variation claimed by commenters.

Regarding the Alliance/Global suggestion that overall sound pressure levels produced by two vehicles should be used to determine whether they are the same, we do not believe that method would provide a meaningful comparison. That approach would merely characterize how loudly two vehicles' alert sounds are perceived. That approach would not evaluate other acoustic characteristics that make sounds alike such as phase or spectral shape, and it normally would not distinguish between sounds that are obviously different to listeners. For example, music, construction noise, and thunder all can have the same overall A-weighted sound pressure level.

Other Sameness Metrics Considered by NHTSA

Subsequent to concluding that a requirement based on one-third octave levels is not appropriate for the final rule, the agency considered various alternatives for objectively determining that alert sounds among vehicles of the same make and model are the same.

To address issues with the NPRM approach, we considered two additional types of acoustic metrics to evaluate the similarity of the alert sounds on vehicles of the same make and model: Power Spectrum Analysis and Frequency Response Functions (FRF). These are both acoustic metrics that could be used to analyze the actual output of the alert system speaker to quantify the difference between two sound signals. Both of these metrics characterize amplitude and frequency. The FRF is sensitive to phase as well. Both metrics have higher resolution than one-third octave bands.

Power spectrum analysis generally has resolution sufficient for signals that do not change over time. However, temporal differences such as time reversal (*e.g.,* playing of a signal in reverse) and amplitude modulations which change the perceived character of a sound may not show up as significant differences in the power spectrum of two signals. For this metric to be useful for evaluating sameness, it probably would be necessary to evaluate the statistical correlation (R^2 value) of the power spectra of two sound signals and to specify a degree of correlation that must be achieved in order for the two sounds to be considered the same. For a variety of reasons including a lack of any established procedure using this method and also repeatability concerns, we do not know if it is feasible to develop a compliance requirement based on this method.

Frequency Response Functions would provide a better comparison. For some alert sounds, the FRF could be used to show that certain periodic variations are highly correlated between two signals. However, other signal variations may not be correlated. Additionally, an evaluation of the FRF would require a standardized method to synchronize the phase between the two signals, and the agency currently does not have any such method.

Overall, we have concluded that comparisons using Power Spectrum Analysis or Frequency Response Functions might provide a higher degree of confidence than the NPRM method that two unknown signals are the same, but developing a requirement and test procedure based on these metrics for a compliance test application may involve considerable additional agency research and testing.

Furthermore, in order for either of these metrics to be useful in a compliance test, the measurement variability of the data collected for a sameness evaluation would have to be extremely low, such that even small differences in measurements of two example vehicles could be attributed to actual differences in their alert sounds. As discussed in the Repeatability/Reproducibility section (Section III.K) of this preamble, we have determined that the variability of pedestrian alert sound measurements is on the order of several decibels when measured on a vehicle in operation (although stationary tests like those used for Sameness tend to be somewhat less variable.) Although the level of variability of the NHTSA measurement procedure promulgated in today's final rule is sufficiently low for stationary, reverse, and pass-by tests, we believe it is inadequate for a sameness evaluation using power spectra and FRFs. For these metrics to be useful for sameness, we would need to obtain a clean signal prior to its exposure to external influences like speaker tolerances and ambient noise fluctuations.

Another option would be to evaluate the alert signal at the point where it is transmitted to the alert system speaker, *i.e.,* at the speaker input. While speaker input would have very high repeatability, this approach would require that the speaker inputs must be physically accessible, which the agency has found is not always the case. For example, speakers might be integrated into a sealed module that incorporates the control electronics, making access difficult without destructive measures.

Another option is to evaluate the signal at the point where it is generated internally in the alert system. On typical alert systems, this would amount to evaluating the actual digital source of the alert sound, such as a wav file, or an equivalent digital element of the alert system from which the signal originates. NHTSA may not have the means to extract a digital file for a compliance evaluation of a test vehicle and would need the assistance of the vehicle manufacturer. At that point, a more practical option might be for NHTSA to simply request that information from the vehicle manufacturer. However, even if an OEM were to provide NHTSA with a digital source file from two vehicles of the same make and model, it is uncertain whether the agency could verify that they are identical.

Because alternative acoustic metrics have these issues, we believe they are not viable for a regulatory application, and we have decided not to adopt acoustic metrics for the sameness requirement in the final rule. Instead, as detailed later in this section, we have concluded that the final rule requirement for sameness should be based on certification by vehicle manufacturers that vehicles of the same make and model are designed to have identical alert sounds. That is, they must certify that vehicles of the same make, model, and model year are the same with respect to their alert system hardware and software components, the source of the alert sound (such as a digital file) and vehicle inputs used to vary the sound, as well as all other elements of the alert system.

Other Sameness Issues—Selectable Sounds and Mid-Year Updates

In the proposed regulatory text in the NPRM, paragraph S8 was included to prevent alert sound modifications, except in case of a vehicle recall. That section of the regulatory text also prohibited systems from being designed to allow access by anyone other than the OEM or a service provider, so that individuals would not be able to tamper with or replace the alert sound in their vehicles.

The joint comment of the Alliance, Global, the NFB, and the ACB addressed both the issue of ''selectable'' sounds and the issue of alert sounds being updated or improved after vehicles are delivered to customers. Regarding the first issue, the joint commenters stated that they believe the PSEA allows vehicles to be equipped with more than one sound for a given operating condition. This comment would mean, for example, that a particular vehicle make/model might have an alert sound X, an alert sound Y, and an alert sound Z for when the vehicle is in forward motion at a given speed, and the driver could select X, Y, or Z based on personal preference and could switch among those choices at any time. Regarding the second issue, the joint commenters stated the PSEA allows a manufacturer or dealer to provide vehicle owners with opportunities at any time during a model year to update the alert sound or sounds with which their vehicle came equipped from the factory. They contended that this allowance exists under the PSEA even in cases where the original sound is not defective or out of compliance with the safety standard, and that updates may be provided for aesthetic purposes rather than for remedy of a recalled alert system (the latter being expressly provided for in the PSEA.)

Given our understanding of the PSEA, we are not including provisions requested by these commenters that would allow for driver-selectable pedestrian alert sounds and mid-year updates of pedestrian alert sounds. As such, the provision in paragraph S8 of the NPRM regulatory text, which specifically prohibits alert sound modifications except for recall purposes and also prohibits systems designed so as to allow manipulation or modification of the alert sound by anyone other than the OEM or a service provider, is adopted in this final rule without modification. We believe that this approach is necessary to satisfy the requirements contained in the PSEA language and that allowing a means for owners to select or modify alert sounds, or to allow vehicle manufacturers, dealers, or other vehicle service entities to replace or update alert sounds outside the auspices of a recall action, would be in conflict with the language of the PSEA. Furthermore, by not allowing driver-selectable sounds, the final rule adheres more closely to the PSEA requirement that vehicles of a given make and model must have the same alert sound.

Compliance Evaluation of Sameness

After fully considering the NPRM comments on sameness and other acoustic metrics, we have concluded that the compliance requirement for sameness in this final rule should not be based on acoustic performance measurements, including the one proposed in the NPRM. The difficulties and unknowns with comparing direct measurements of acoustic metrics, as well as the potential need for more agency research in this area if we decided to use any of the metrics discussed above, leads us to conclude that, currently, the most effective and expedient way for NHTSA to evaluate sameness is to explicitly require that specific design aspects of vehicle alert systems must be the same, particularly the software and hardware that comprise the systems.

Although this approach would not be based on acoustic measurement, it would provide assurance that the design of alert systems on vehicles of a given make and model are consistent from one vehicle to the next because the vehicle manufacturer would be certifying not just that the sounds are the same but that the hardware and software components that are used to generate the alert sound are the same from vehicle to vehicle.

This approach is consistent with the comments NHTSA received in response to the NPRM. In response to NHTSA's request for comment in the NPRM regarding its proposed method of measuring whether the sound produced by two vehicles was the same, the Alliance/Global joint comment stated that the only way to verify sameness was to measure the digital signal output of the sound generator or to examine the digital sound file itself. Alliance/Global further referenced statements by OICA supporting a method of determining sameness based on the examination of the software and hardware making up the sound generation system. Alliance/Global stated in their comments that ''OICA notes that current sound generating devices that use the same software will inherently have the same sound, even when the sound is altered slightly through various factors, such as installation into a vehicle. The Alliance and Global agree with OICA that NHTSA should allow manufacturers the option of demonstrating compliance with the sameness requirement through comparisons such as: The software sound file, input to the speakers, etc.'' After reviewing the comments and its own data, NHTSA agrees that the best method for satisfying the requirement in the PSEA to require vehicles of the same

make and model to make the same sound is to examine the hardware and software of the subject vehicles and to require that hardware and software to be the same.

As stated previously, we believe that the Vehicle Safety Act and PSEA requirement can be satisfied by this methodology. Aside from being a requirement in the PSEA, requiring vehicles of the same make and model to emit the same sound limits the universe of sounds produced by EVs and HVs that pedestrians, both blind and sighted, must be able to identify as vehicle sounds. This is important because pedestrians must be able to recognize the sound produced by an EV or an HV as a vehicle-emitted sound for this rule to reduce crashes between pedestrians and EVs and HVs.

If we can establish that vehicles of the same make and model are alike with respect to the hardware and software they utilize for their alert systems, that information will be sufficient to establish their sameness because the sounds they generate would be effectively the same. That is, if two vehicles are designed the same in regard to having the same software and hardware to generate alert sounds, then any overall differences in the sound produced would not be perceptible in a meaningful way to pedestrians. Thus, this approach achieves the intent of the PSEA sameness requirement.

Consistent with the NPRM, we are applying the sameness criterion only to sounds added to vehicles for the purpose of complying with this final rule. In that way, tire noise, wind noise, and any other noise associated with vehicle motion and that is not generated by the pedestrian alert system is not subject to the sameness requirement.

We note that NHTSA has taken a similar approach in other FMVSS where we have relied on manufacturer's assurance and documentation that a system is designed to comply with the safety standard. For example, when NHTSA created the safety standard for Electronic Stability Control, FMVSS No. 126, S5.6 ''ESC System Technical Documentation,'' was included for compliance of ESC systems with an understeer requirement. In NHTSA's development of FMVSS No. 126, the agency was unable to devise an understeer test that was both accurate and repeatable. The agency instead took the approach of identifying certain system design characteristics and verifying them by requesting information from the OEM. Standard No. 126 lists items such as a system diagram, a written explanation of the system operational characteristics, a logic diagram, and a discussion of processor inputs and calculations relating to vehicle understeer as examples of evidence that may be used to validate the manufacturer's certification.

In the case of pedestrian alert systems, we are taking that approach. In our development of today's final rule on FMVSS No. 141, we have not successfully devised a meaningful, accurate and repeatable test for sameness. The reasons for this are discussed previously in this section. Instead, we are including a requirement that critical aspects of the alert system design must be the same from vehicle to vehicle.

We also believe that this approach is consistent with the Vehicle Safety Act. While Congress intended that NHTSA issue performance standards when it passed the Vehicle Safety Act, courts interpreting the Vehicle Safety Act have recognized that in some instances it is necessary for NHTSA to issue a design restrictive standard in order to achieve a desired performance or to ensure safety.[141] In *Chrysler* v. *Department of Transportation,* the Sixth Circuit upheld a FMVSS issued pursuant to the Vehicle Safety Act restricting the design of headlamps. The court held that the design restriction on headlamps in the standard was consistent with the Vehicle Safety Act because it fulfilled the important safety purpose of ensuring that replacement headlamps were readily available to consumers. We believe that the provisions in this final rule requiring that certain aspects of the vehicle alert sound system be the same in all vehicles of the same make and model, in addition to fulfilling a requirement in the PSEA, fulfils the safety purpose of helping pedestrians to recognize sounds produced by EVs and HVs as vehicle emitted sounds.

To implement this approach for the sameness requirement, we are modifying the proposed regulatory text in paragraph S5.5 (was NPRM paragraph S5.3) to state that any two vehicles of the same make, model, and model year shall generate their pedestrian alert sound using the same external sound generation system including the software and hardware that are part of the system. Furthermore, we are adding a definition of Pedestrian Alert System within the regulatory text of S5.5 which lists the common components of pedestrian alert systems. In this way, by certifying that a pedestrian alert system meets S5.5, the manufacturer is explicitly certifying that the following specific hardware and software components of the system are the same from vehicle to vehicle: The alert system hardware components including speakers, speaker modules, and control modules, as evidenced by specific details such as part numbers and technical illustrations; the location, orientation, and mounting of the hardware components within the vehicle; the digital sound file or other digitally encoded source; the software and/or firmware and algorithms which generate the pedestrian alert sound and/or which process the digital source file to generate a pedestrian alert sound; vehicle inputs including vehicle speed and gear selector position utilized by the alert system; any other design features necessary for vehicles of the same make, model, and model year to have the same pedestrian alert sound at each given operating condition specified in this safety standard.

To verify the OEM's certification of an alert system in the agency's annual compliance evaluations, NHTSA's Office of Vehicle Safety Compliance may request that the manufacturer make available to the agency specific design documentation relating to the alert system used on same make, model, and model year vehicles. The documentation that a manufacturer could provide to demonstrate that the sound produced by two vehicles of the same make and model is the same may include documents such as: A description of the source of the alert sound, such as the digital sound file; a copy of the digital file (if applicable); any algorithms for processing/manipulating the digital file to generate an alert sound; vehicle inputs such as speed signal that are needed to process and generate the alert sound; and details such as part numbers showing that vehicles of the same make, model, and model year are consistently equipped with identical alert system components.

I. Customer Acceptance

In the NPRM we discussed presentations provided by vehicle manufacturers regarding consumer acceptance of adding sound to vehicles to provide pedestrian detection. Nissan submitted a presentation stating that over 60 percent of Nissan Leaf owners surveyed found that added noise was acceptable if the overall sound pressure level of the sound was 55 dB–A or quieter for the forward moving condition.

The NPRM also discussed the ways in which NHTSA crafted the proposal to account for concerns about the community noise impacts of the

[141] *See Washington* v. *Dep't of Transp.,* 84 F.3d 1222, (10th Cir. 1996); *Chrysler Corp.* v. *Dep't of Transp.,* 515 F.2d 1052, 1058 (6th Cir. 1975).

proposal so that sounds complying with the requirements of the final rule would not unnecessarily contribute to noise pollution. In consideration of community noise impacts the NPRM omitted the mid-range frequencies from the proposed acoustic requirements as these are the frequencies that contribute the most to increasing the overall sound pressure level of sound.

NHTSA also conducted a draft Environmental Assessment (EA) to analyze the environmental effects of the proposed rule. The analysis in the EA most relevant to analyzing the impact of the rule on consumer acceptance is the single car pass-by analysis. This analysis is designed to show what a person standing near the road way would hear when a EV or HV emitting sound complying with the NPRM passed by. In an urban ambient with an overall sound pressure level of 55 dB(A) a listener standing near the roadway would not be able to perceive the difference between a EV/HV that did not produce added sound and an EV/HV that complied with the requirements of the NPRM.[142] In a non-urban ambient with an overall sound pressure level of 35 dB(A) the difference between the single-vehicle pass-by for EVs/HVs meeting the minimum sound requirements in the NPRM and those without the added sound would be 3.1 to 6.3 dB, depending on speed, and 10.1 dB at stationary. In the non-urban ambient a single vehicle pass by of an EV/HV meeting the minimum sound requirements of the NPRM would produce less sound than an average ICE vehicle although this difference would only be noticeable at stationary.

We received several comments in response to the NPRM that certain aspects of the proposal would be annoying to passengers or drivers or would not be accepted by consumers. We also received several comments from members of the general public stating that the whole concept of adding any sound to hybrid and electric vehicles would be annoying and would lead to decreased sales of EVs and HVs.

Alliance/Global stated in their joint comment that the loudness and frequency composition of sounds meeting the proposed requirements would be unpleasant to vehicle occupants. Specifically sounds with minimum content in eight one-third octave bands would be too loud to be accepted by consumers.

Alliance/Global further stated that because the proposed requirements did not contain requirements for mid-range one-third octave bands from 500 Hz to 2000 Hz, resulting sound would have a shrill unpleasant character. Alliance/Global stated that, based on past experience with shrill sounds, their members fear that costumers may be unwilling to purchase EVs and HVs if they are equipped with sounds meeting the proposed requirements.

GM stated that the proposed sound levels and operating conditions are in excess of the safety needs of pedestrians and further explained that this would likely result in customer annoyance leading to customers disabling the alert sound and also affecting vehicle purchases. Chrysler and Honda also expressed concerns about marketability and customer acceptance.

Toyota also stated that sounds meeting the requirements of the NPRM would be too loud and would discourage consumers from purchasing EVs and HVs. Toyota commented that it had examined customer acceptance of sounds meeting the NPRM specifications. Toyota used a prototype speaker and included 56 Prius owners (ages 20 to 55 years old). Participants were asked to drive an alert-equipped vehicle on a specific route and then rate the sound. The operating conditions experienced during the study included slow acceleration; 40 km/h pass-by; slow deceleration; and 16 km/h pass-by. Toyota reported that 68 percent of the drivers were somewhat dissatisfied or very dissatisfied with their overall experience with the sound emitted by the test vehicle. Toyota asked the participants how the sound might affect their future vehicle purchases, and 54 percent of the drivers indicated a somewhat negative or very negative impact, while 46 percent indicated no impact or a somewhat positive impact. Toyota also mentioned that a sound meeting the proposed requirements in the NPRM resulted in an increase in the interior noise relative to the same vehicle with the alert system turned off.

WBU commented that allowing the sound to be emitted over fewer one-third octave bands may alleviate manufacturers concerns about consumer acceptance of alert systems.

Several commenters also stated that requiring a sound while the vehicle is stationary would lead to lower consumer acceptance of EVs and HVs. Nissan submitted with its comment the result of a customer survey that indicated that over 60 percent of costumers would accept an idle sound with an overall sound pressure level of 49 dB–A or less.

NHTSA also received comments from OICA stating that the requirements in the NPRM requiring that the sound produced by EVs and HVs contain tones would make sounds complying with the NPRM annoying to vehicle occupants. Mercedes expressed concern that including requirements for low one-third octave frequency bands down to 315 Hz and broadband content down to 160 Hz may affect consumer acceptance of sounds meeting the requirements of the NPRM because sounds with content in this area of the spectrum are difficult to isolate from the vehicle cabin.

Agency Response to Comments

As discussed in Section III.E of this notice, the agency made several changes to the acoustic requirements of the NPRM in this final rule. In response to comments from manufacturers, the final rule allows compliance with its acoustic requirements by placing minimum content in the mid-range one-third octave bands from 500 Hz to 2000 Hz. We believe that this change will increase manufacturer's flexibility to create sounds that are pleasing to motorists and pedestrians. NHTSA does not believe that the overall sound pressure level of sounds meeting the requirements of this final rule will discourage consumers from purchasing EVs or HVs or effect consumers acceptance of the requirements in the final rule. The overall sound pressure level of sounds meeting the requirements of the final rule for the 10 km/h pass by are between 53–56 dB(A). According to Nissan's presentation, 60 percent of consumers would accept added sound to their vehicle if the overall sound pressure level of the sound was 55 dB(A) or quieter for the forward moving condition. NHTSA believes that the Nissan study indicates that consumers will accept sounds meeting the requirements of the final rule.

While the minimum sound requirements in the final rule increase above 55 dB(a) for the 20 km/h and 30 km/h pass-by tests, sound emitted from other sources on the vehicle, such as the tires, increases as the vehicle increases speed as well. NHTSA believes that the increased sound from these other sources will limit the extent to which drivers notice, and are negatively affected by, the sound produced in compliance with this final rule at 20 km/h and 30 km/h.

NHTSA finds that it is difficult to draw conclusions about consumer acceptance of sounds meeting requirements of the final rule from the survey submitted by Toyota. The Toyota survey does not breakout the views of the participants in the survey by operating speed like the survey

[142] NHTSA, Minimum Sound Requirements for Hybrid and Electric Vehicles; Draft Environmental Assessment (2013), at 39–40.

conducted by Nissan. One of the conditions included by Toyota was a 40 km/h pass-by for which the agency did not propose requirements in NPRM. Furthermore, the Toyota study did not state the overall sound pressure level of the sound to which the participants were exposed during the test. We believe that reducing the number of required one-third octave bands to either four or two and allowing manufacturers to comply with the requirements of the final rule by placing minimum content in the mid-range one-third octave bands from 500 Hz to 2000 Hz will allow manufacturers more flexibility to create pleasing sounds.

The final EA replicates the findings of the draft EA indicating that sounds emitted by EVs/HVs in compliance with this final rule will be noticeably louder than EVs/HVs without added noise but will produce less sound than the average ICE vehicle. For this reason we do not believe that the requirements in the final rule will lead to sounds that will be so loud as to be annoying to drivers and pedestrians or to effect consumers' desire to buy these vehicles. Furthermore, according to the analysis of national annual noise caused by this final rule in the Final EA, EVs and HVs subject to the final rule would only be required to emit sound in compliance with this rule during 2.3 percent of all travel hours in urban areas.[143] Therefore, the amount of time during which drivers and pedestrians would be exposed to sounds produced in compliance with the final rule is limited which also limits the possibility for annoyance to drivers and pedestrians.

This is not the case for LSVs, however. These vehicles have top speeds of greater than 20 mph and less than 25 mph and, because final rule would require sound at speeds of up to 18.6 mph, sound is likely to be nearly constant for these vehicles. In addition, these vehicles are often open, lacking windows and, sometimes doors. For this reason, occupants of these vehicles are likely to hear the required sounds more so than occupants of other vehicles. However, we did not receive any comments indicating that consumer acceptance of sounds required by this final rule would be a greater issue for owners of LSVs than other vehicles to which this rule applies.[144]

The agency addressed comments regarding consumer acceptance of a sound at stationary in Section III.I of this notice. We note briefly here that we do not believe that the requirements in the final rule for EVs and HVs to emit a sound at stationary will substantially affect consumer acceptance of the requirements in the final rule. As indicated by the survey conducted by Nissan, 60 percent of consumers accepted a sound at stationary with an overall sound pressure level similar to the levels required by the final rule.

We note that the final rule does not contain the requirements for broadband sound, low frequency content, and tones proposed in the NPRM. In satisfying the mandate in the PSEA to establish minimum sound requirements for EVs and HVs, NHTSA has taken several steps to minimize the impacts of the requirements on drivers and pedestrians while also ensuring that these vehicles are detectable to pedestrians when operating at low speed. This includes reducing the number of required bands and removing requirements for tones and low frequency content. Given these changes from the NPRM to the final rule, NHTSA believes manufacturers will be able to design pedestrian alert sounds that will be accepted by drivers and pedestrians.

J. Test Conditions

Ambient Temperature Range for Testing

In the NPRM, we proposed that, for sound measurement testing, the ambient temperature be in the range 5 to 40 °C. This proposal is consistent with SAE J2889–1. However, SAE J 2889–1 contains a note stating that testing of some vehicles may not be possible in warmer weather conditions (above 20 °C) since such things as battery cooling fans (if there is one) will always be running. Since the NPRM proposed that measurements that contain sounds emitted by any component of a vehicle's battery thermal management system be considered not valid, the NPRM stated that SAE J2889–1 note will also apply to FMVSS No. 141 sound measurement testing. Therefore, in the NPRM preamble, NHTSA requested comments on narrowing the permitted temperature range to 5 to 20 °C to improve test repeatability and to remove issues with battery cooling fans running.

We received comments from Alliance/Global and Honda regarding the ambient temperature during testing. Both commenters were opposed to narrowing the permitted temperature range to 5 to 20 °C to improve test repeatability and to remove issues with battery cooling fans running. Honda also recommended that the ambient weather conditions be measured at the specified microphone height in FMVSS No. 141 S6.4 with a tolerance of ±0.02 meters instead of the specified microphone height with a tolerance of ±0.0254 meters that was proposed in the NPRM.

Agency Response to Comments

After the NPRM was issued, NHTSA analyzed the sound measurement repeatability data that it collected in 2012 for a Ford Fusion to determine if there were systematic effects of the atmospheric conditions, particularly temperature, on measured sound pressure level for the vehicle's 10 km/h pass-by. This data consisted of 96 individual measurements taken over a six-month period from April to September of 2012. For each individual measurement the following data was recorded:

- Overall Sound Pressure Level (dBA)
- Temperature (°C)
- Wind Speed (m/s)
- Wind Direction (degrees from North)
- Atmospheric Pressure (Pa)
- Relative Humidity (%)

Analysis of variance for each variable's effect on overall sound pressure level showed no statistically significant variation (at the $\alpha = 0.05$ level) for any variable over the range of the data. Linear modeling of all terms also showed no statistically significant effect on overall sound pressure level for any variable.[145]

Since ambient temperature has no statistically significant effect on measured sound data, NHTSA agrees with the commenters that we should not restrict ambient temperatures to between 5 °C and 20 °C (however, we note that the tendency of thermal management system cooling fans to activate at higher temperatures may effectively limit testing to this temperature range). Doing so could limit compliance testing opportunities while not providing any test accuracy or repeatability benefit. We would expect a vehicle's thermal management system to operate more frequently in tests during warmer ambient conditions. As discussed in Section III.K, the agency has clarified when a test can be deemed invalid, including instances when cooling fans engage intermittently

[143] NHTSA, Minimum Sound Requirements for Hybrid and Electric Vehicles; Final Environmental Assessment (2016), at p. 56. (docket NHTSA–2011–0100).

[144] Note that the category of Low Speed Vehicles is defined in NHTSA regulations as vehicles whose top speed is more than 20 mph and not more than 25 mph. Electric vehicles with top speed of 20 mph or less, like many electric golf carts for example, are not considered LSVs and, in fact, are not regulated as motor vehicles, and thus are not subject to this final rule.

[145] For a complete analysis *see,* Garrott, W.R., Hoover, R.L., Evans, L.R., Gerdus, E., and Harris, J.R., ''2012 Quieter Vehicle Testing Report: Measured Sound Levels for Electric, Hybrid Electric, and Low Speed Vehicles'' Washington, DC, DOT/NHTSA, November 2016.

during testing. Therefore, the final rule will permit sound measurements to be made when the ambient temperature is in the range from 5 °C and 40 °C.

Honda's other recommendation was that the ambient weather conditions be measured at the specified microphone height in FMVSS No. 141, paragraph S6.1, with a tolerance of ±0.02 meters. NHTSA agrees that the ±0.02 meters tolerance instead of the proposed height tolerance of ±0.0254 meters that was proposed in the NPRM is more consistent with SAE J2889–1.

The NPRM used the microphone positions of S7.1 of SAE J2889–1 and also used the microphone height tolerance of ±0.02 meters. It seems logically consistent to use the same height tolerance of ±0.02 meters for the meteorological instrumentation. Making this change is not expected to have any impact on the stringency of the compliance test. It will merely make testing slightly easier to perform. Therefore, the final rule will have a meteorological measurement height tolerance of ±0.02 meters (±2.0 centimeters).

Tire Inflation Pressure

In the NPRM, NHTSA proposed that, prior to sound measurement testing, the vehicle's tires be inflated to the recommended tire inflation pressure listed on the vehicle's tire placard.

EMA recommended that NHTSA adopt the tire inflation pressure requirements for medium and heavy trucks in FMVSS No. 121, *Air Brake Systems.* NHTSA's proposal deviates from the test procedure in FMVSS No. 121 which states that tires will be inflated as specified by the vehicle manufacturer for its GVWR.

EMA cited two factors in support of its suggestion to harmonize the test procedures in this final rule with those contained in FMVSS No. 121 for tire fitment and inflation pressure. First, EMA pointed out that a conflict between FMVSS No. 121 and FMVSS No. 141 would add a burden to manufacturers without any safety benefit by imposing a unique tire inflation pressure specification for the new FMVSS. Second, EMA stated that ''the tire inflation pressures on a heavy-duty vehicle's certification label or tire information label may lead to inaccurate tire inflations.'' EMA stated that a heavy-duty vehicle's certification label or tire inflation pressure label contain the recommended cold inflation pressures for the tires identified on those labels; however, it is possible that the vehicle may be equipped with a tire not listed on those two labels.

Agency Response to Comments

The agency has considered EMA's comments and agrees that the correct inflation pressure should be used for all applicable vehicles. For passenger cars, multipurpose passenger vehicles, light trucks, and buses (with GVWR of 4,536 kg or less) the requirement as proposed in the NPRM is appropriate. For low-speed vehicles, the required certification label generally includes tire size and inflation pressure information. All low-speed vehicles tested to date by the agency's Compliance division have shown the requisite tire inflation pressure information on the certification label.

To address EMA's comments and ensure that all vehicles subject to the new safety standard are addressed in the language relating to recommended inflation pressure, paragraph S6.6(e) of the regulatory text has been revised.

Tire Conditioning

In the NPRM, NHTSA proposed that, prior to sound measurement testing, the vehicle's tires be conditioned by driving it around a circle 30 meters (100 feet) in diameter at a speed that produces a lateral acceleration of approximately 0.5 to 0.6 g for three clockwise laps, followed by three counterclockwise laps. This tire conditioning procedure was derived from ISO 362, ''Road Noise for Passenger Vehicle Tires.''

Honda and OICA recommended that NHTSA not require tire conditioning prior to testing unless NHTSA can show differences in measured acoustic data attributable to conditioning. OICA recommended changing the tire conditioning language to state that before sound measurements are started, the tires shall be brought to their normal operating conditions.

Agency Response to Comments

NHTSA does not have measured acoustic data showing differences that are attributable to tire conditioning. However, NHTSA's goal for tire conditioning matches the OICA recommendation that, before sound measurements are started, the tires be brought to their normal operating conditions. NHTSA also thinks that sound measurement testing with brand new tires may produce non-representative sounds due to mold vents and mold lubricant. The goal of tire conditioning is to remove sound anomalies caused by these effects. We believe that achieving this goal will require minimal effort during testing. Therefore, NHTSA will retain tire conditioning in the final rule for passenger cars, multipurpose passenger vehicles, light trucks, and buses with a GVWR of 4,536 kilograms or less, and low-speed vehicles. The final rule only specifies how NHTSA (not manufacturers) will perform compliance testing and, as with other NHTSA safety standards, manufacturers may elect not to adopt specific portions of a test procedure if they are convinced that doing so will not affect how their test results compare to the results from NHTSA compliance testing.

Self-Locking Doors

In the NPRM, NHTSA proposed that the test vehicle's doors are shut and locked for all measurements of vehicle pedestrian alert sounds.

NHTSA received comments on this topic from OICA and Alliance/Global. Commenters requested that NHTSA clarify the vehicle condition section of the final rule test procedure for self-locking doors by adding a sentence saying that in the case of self-lockable vehicles, the doors shall be locked before starting measurement.

Agency Response to Comments

NHTSA does not think that it is necessary to add clarification about vehicles with self-locking doors to the regulatory text. The applicable proposed regulatory text, as contained in the NPRM, is S6.6(b): ''The vehicle's doors are shut and locked and windows are shut.'' This seems quite clear. This text requires that all doors, whether self-locking or not, be locked prior to testing. This text is used in this final rule in re-numbered paragraph S6.6(a).

Accessory Equipment

In the NPRM, NHTSA proposed that, for sound measurement testing, all accessory equipment (air conditioner, wipers, heat, HVAC fan, audio/video systems, etc.) be turned off. We also stated that propulsion battery cooling fans and pumps and other components of the vehicle's propulsion battery thermal management system are not considered accessory equipment.

NHTSA received comments on this topic from OICA and Alliance/Global. Commenters requested that NHTSA state that accessory equipment that cannot be shut off need not be shut off. The commenters suggested that the compliance test procedure prohibit the use of any results which include sound from any vehicle systems other than those which would be constantly engaged under the specified performance conditions.

Agency Response to Comments

NHTSA's goal during compliance testing is to measure the sound

produced by the vehicle when it is in its quietest state after sale to the general public. It is not to test the vehicle in some artificially quiet state that will never be attained by the driving public. These comments are in accord with NHTSA's goal for compliance testing. The point made by commenters, that accessory equipment that cannot be shut off need not be shut off, is sensible, is in the spirit of what NHTSA is trying to accomplish, and clarifies a point not addressed previously. Therefore, in the final rule we are adding the phrase ''that can be shut down'' to the proposed regulatory text of section S6.6(c) in the NPRM that dealt with accessory equipment. The re-worded requirement is in Section S6.6(b) of the final rule regulatory text.

Vehicle Test Weight

In the NPRM, we proposed that, for sound measurement testing, the vehicle test weight will be the curb weight (as defined in 571.3) plus 125 kilograms. Equipment, driver, and ballast should be evenly distributed between the left and right side of the vehicle. The vehicle test weight should not exceed the GVWR or Gross Axle Weight Ratings (GAWRs) of the vehicle.

Commenters addressed three issues related to vehicle test weight: the need for the final rule to specify vehicle test weight, the need for a vehicle test weight tolerance, and what the specified vehicle test weight should be.

Both Alliance/Global and OICA commented that vehicle test weight has no effect on measured vehicle sounds. Honda commented that, since FMVSS No. 141 testing is being conducted at relatively low vehicle speeds (a maximum of 30 km/h), small changes in vehicle test weight would have a minimal effect on measured vehicle sounds. Alliance/Global and OICA both commented that, if the final rule does specify vehicle test weight, then, for practical reasons, a vehicle test weight tolerance should be specified. Alliance/Global and Honda both recommended using the vehicle test weight specified in SAE J2889–1 (manufacturer-defined unloaded weight + one person + measurement instruments).

Agency Response to Comments

NHTSA believes that a vehicle test weight specification is necessary. While we have not conducted research in this area, we believe it is reasonable to anticipate that if a large load (relative to the curb weight of the vehicle) is placed in a vehicle (say 1,000 pounds in a passenger car's trunk or 30,000 pounds on a heavy truck), there would likely be some change in the sound produced by the vehicle during testing. Therefore, we believe it is necessary to specify vehicle test weight in the final rule.

In specifying vehicle test weight in other rules, NHTSA has not provided a weight tolerance. Organizations performing a test should make reasonable efforts to comply with the test specifications exactly as written. Therefore, we are choosing not to do so here and FMVSS No. 141 will not contain a vehicle test weight tolerance.

Since NHTSA agrees with the commenters that the sound produced by a vehicle at the relatively low test speeds being used for FMVSS No. 141 testing is not sensitive to minor changes in vehicle loading, minor deviations in vehicle test weight from the exact values specified in the rule should not have any effect.

As to what the vehicle test weight specified in final rule should be, NHTSA wants to measure sounds produced by lightly loaded vehicles. We believe that, all else being equal, the tires of a heavily loaded vehicle will produce a louder sound than will the tires of that same vehicle when it is lightly loaded.

NHTSA has identified three possible alternatives for vehicle test weight in FMVSS No. 141. These are:

1. Retain the NPRM vehicle test weight specification. This does not seem to have any particular advantages and has multiple disadvantages. Some of the disadvantages are that this test vehicle weight specification does not match that contained in SAE J2889–1; this vehicle test weight specification is not used by other FMVSS; and this vehicle test weight specification imposes weight limits on NHTSA test drivers. To elaborate on the last point, since the proposed NPRM regulatory text would require the weight above vehicle curb weight to be evenly balanced from side-to-side, the test driver for NPRM-based compliance tests cannot weigh more than 62.5 kg (138 pounds). Since a 50th-percentile adult male weighs 76 kg (168 pounds), the use of this vehicle test weight specification could create difficulties in finding drivers to perform compliance testing.

2. Specify the SAE J2889–1 vehicle test weight specification for NHTSA tests. This was the method recommended by commenters. It would harmonize with SAE J2889–1, and it has the advantage that NHTSA could use any test drivers. It has two disadvantages. First, it would mean that the weight of the test vehicle will vary with the weight of the test driver (*i.e.,* the test weight is not a precisely specified number of pounds above the manufacturer-defined unloaded weight). This may not matter since we believe that the external sounds generated by a vehicle are relatively insensitive to vehicle weight. Second, this vehicle test weight specification is inconsistent with any other FMVSS. A given NHTSA test vehicle often is tested by NHTSA and by manufacturers to determine compliance with multiple 100-series FMVSS at one time, with compliance testing for one standard being performed right after that for another. Adopting the SAE J2889–1 vehicle test weight specification would require a test vehicle undergoing such a sequence of compliance tests to be reloaded before and after FMVSS No. 141 testing slightly increasing the costs of performing such testing.

3. Specify a vehicle test weight that is specified by other NHTSA FMVSS. These test weights are different depending on vehicle class and brake system type. For pedestrian alert sound testing, a fairly lightly loaded weight would be used, not the heavier loading specified in some FMVSS. The vehicle test weight specifications used by other FMVSS are as follows:

- FMVSS No. 105 is applicable to vehicles with hydraulic or electric service brake systems and a GVWR greater than 3,500 kg (7,716 pounds). FMVSS No. 105 defines Lightly Loaded Vehicle Weight (LLVW), for vehicles with a GVWR of 10,000 pounds or less, as equal to unloaded vehicle weight plus 400 pounds including driver and instrumentation. FMVSS No. 121 is applicable to vehicles with air brake systems. FMVSS No. 121 tests at a weight equal to unloaded vehicle weight plus 500 pounds including driver and instrumentation plus not more than an additional 1,000 pounds for a roll bar structure on the vehicle (if needed).
- FMVSS No. 135 is applicable to vehicles with a GVWR of 3,500 kg (7,716 pounds) or less. FMVSS No. 135 defines Lightly Loaded Vehicle Weight (LLVW) as equal to unloaded vehicle weight plus 180 kg (396 pounds) including driver and instrumentation.
- FMVSS No. 500 is applicable to low speed vehicles. FMVSS No. 500 defines the test weight as equal to unloaded vehicle weight plus 78 kg (170 pounds) including driver and instrumentation.

NHTSA does not believe that any one of these alternatives is better for safety than any other. As was previously stated, NHTSA thinks that the sound produced by a vehicle at the relatively low test speeds being used for FMVSS No. 141 testing is not sensitive to minor changes in vehicle loading. Therefore, NHTSA's goal in selecting a test vehicle weight specification is to choose one that will minimize the economic burden of performing compliance testing. We

think that this alternative is best achieved through the selection of the third alternative listed above changing to the vehicle test weights specified by other NHTSA FMVSS. Vehicle test weights will therefore be specified by vehicle type and GVWR in the final rule.

Battery Charge During Testing

In the NPRM, NHTSA proposed that, for sound measurement testing, the vehicle's electric propulsion batteries, if any, be fully charged.

NHTSA received comments on this topic from Advocates, Alliance/Global, Honda, Navistar, and OICA. Advocates requested that NHTSA either establish a battery charging procedure or require that the vehicle be charged in accordance with the manufacturer's stated charging procedure as outlined in vehicle documentation to ensure that the ICE or other vehicle non-essential systems do not start during sound testing procedures. Alliance/Global and OICA recommended using the language from the charging procedure in SAE J2889–1. OICA stated that many hybrids cannot be charged by external charge devices and that by driving the vehicle a 100-percent charge level will nearly never be reached. Honda pointed out that controlling the battery condition of a hybrid vehicle to attain a specific level of charge can be difficult. Honda recommended testing with the propulsion battery at a normal (as is) condition and deleting this requirement as being unnecessary. Navistar recommended that batteries be charged to the manufacturer's recommended full state of charge.

Agency Response to Comments

NHTSA agrees with Advocates that the battery needs to be sufficiently charged during sound measurement testing so that the ICE or other vehicle non-essential systems do not automatically activate. Provided that this condition is met, the battery's state of charge during sound measurement testing should have no impact on the safety of the vehicle. NHTSA also agrees with commenters that precisely controlling the battery condition of a hybrid vehicle to attain a specific level of charge can be difficult. However, getting the battery's state of charge during testing high enough that the ICE or other vehicle non-essential systems do not automatically activate should be feasible.

Following review of the comments, NHTSA has decided to accept the OICA and Alliance/Global recommendations and use the SAE J2889–1 language for the battery charge specifications in paragraph 7.1.2.2. This will accomplish our two objectives of (1) having a battery's state of charge during testing be high enough that the ICE or other vehicle non-essential systems do not automatically activate, and (2) specifying a practicable, achievable, battery state of charge for testing.

Battery Thermal Management Systems

In the NPRM, NHTSA proposed that measurements that included sounds emitted by any component of a vehicle's propulsion battery thermal management system are not considered valid. In addition, when testing a hybrid vehicle with an ICE that runs intermittently, measurements that contain sounds emitted by the ICE would not be considered valid measurements.

NHTSA received comments on this topic from OICA and Alliance/Global. Commenters pointed out that the battery's thermal management system might always be running when the vehicle is performing the test scenarios. Therefore, they requested that NHTSA state that a battery thermal management system that would normally be operating during the specified test conditions need not be shut down. The commenters suggested that the compliance test procedure prohibit the use of any results which include sound from any vehicle systems other than those which would be constantly engaged under the specified performance conditions.

Agency Response to Comments

NHTSA's goal during compliance testing is to measure the sound produced by the vehicle when it is in its quietest state after sale to the general public. It is not to test the vehicle in some artificially quiet state that will never be attained by members of the driving public. These comments are in accord with NHTSA's goal for compliance testing. The commenters' statement, that a battery thermal management system that would normally be operating during the specified test conditions need not be shut down, is sensible and is consistent with what NHTSA is trying to accomplish. Clarifying this will address an important test factor that was not covered in the proposed version of the regulatory text. This factor is addressed in S7.1.2 and S7.3.2 of the regulatory text in this final rule. We have modified both of these subsections by adding appropriate wording to include systems which would be constantly engaged under the specified test performance conditions (backing, stationary, forward motion at specified speeds).

K. Test Procedure

Indoor Testing

In the NPRM, the agency tentatively concluded that outdoor acoustics testing was preferable to indoor testing in hemi-anechoic chambers. The agency explained that outdoor testing was more representative of real-world vehicle-to-pedestrian interactions, and that outdoor tests, especially pass-by tests, transmit to the pedestrian not just vehicle-generated sounds (*e.g.,* engine-powertrain and pedestrian alert system), but also sounds from the vehicle body's interaction with the atmosphere (wind noise) and road test surface (tire noise). These complete sound profiles are transmitted to the pedestrian over the ''outdoor ambient'' noise. Outdoor sounds also contain a Doppler shift when the vehicle is moving relative to the pedestrian.

Conversely, the NPRM also explained, when a vehicle is tested on an indoor dynamometer in a hemi-anechoic chamber, the body of the vehicle is static and does not produce aerodynamic noise. The agency said that it was unclear how representative the tire noise generated during rotation on the curved dynamometer test rollers is of actual tire-road noise. As explained, the vehicle approach and passing of the microphones could be simulated by phasing a row of microphones next to the vehicle, and interior tire noise could be digitally replaced with exterior tire noise recordings, however, the agency has not determined the fidelity of such methods.[146] The agency voiced its concern about both the availability of repeatable specifications for all aspects of indoor testing and the availability of hemi-anechoic chambers in which to conduct compliance testing.

The NPRM mentioned the agency's belief that specifications for outdoor testing have a more detailed history of objective and repeatable performance than specifications for indoor testing. The agency noted that a substantial amount of development and refinement has gone into the test procedures and facilities used for outdoor vehicle noise testing.

The NPRM explained that SAE J2889–1 contains specifications on the cut-off frequency of the indoor hemi-anechoic test facility and requirements. However, the agency stated that it was not aware of specifications for dynamometer drum surface textures, materials, diameters, road loads coefficients (*i.e.,* to produce

[146] *see https://www.bksv.com/en/products/PULSE-analysis-software/acoustic-application-software/pass-by-noise-testing/indoor-testing-7793* (weblink last accessed 2November2016).

appropriate engine RPMs), etc. to allow comparable results between different indoor dynamometers.

Lastly, the NPRM explained that there are some advantages to testing indoors. Testing in an indoor hemi-anechoic chamber would not be influenced by weather conditions or high ambient noise levels that can affect outdoor testing. Indoor testing could be more predictable and time efficient than outdoor pass-by testing because testing time would not be limited by weather and noise conditions at the test site. The agency sought comment on the availability of hemi-anechoic facilities that could accommodate indoor pass-by testing and the desirability of including a test procedure for indoor pass-by testing in this standard.

Auto manufacturers and groups that represent them, along with SAE, stated in their comments that the agency should allow indoor testing in the compliance test procedure. According to Alliance/Global, OEMs would prefer and support the use of indoor measurement facilities meeting specifications contained in SAE J2889–1and ISO 16254. Alliance/Global [147] explained that in consideration of the practicability and repeatability of the required tests, they believe that the test conditions specified in the final rule should allow both the outdoor testing and indoor hemi-anechoic testing which are specified in SAE J2889–1. The Alliance/Global mentioned that some of its members have indoor hemi-anechoic chambers for pass-by testing and some do not, but all can gain access to them.

Honda stated it is necessary to include indoor test procedures in the final rule and requested the agency allow use of an anechoic chamber as an option for system testing. Honda stated that this option will be more practical for automakers and can yield more consistent and repeatable results without compromising the quality of the sound measurements. Honda explained that indoor chamber tests are necessary not only for pass-by tests, but for stationary vehicle tests using an artificial speed signal and component-based pitch shifting tests.

OICA stated that indoor test facilities meeting the specifications in SAE J–2889–1 are an acceptable alternative to outdoor testing. According to OICA, hemi-anechoic test facilities are widely available for testing and should be allowed but not required. OICA mentioned that some specifications for the facilities will be needed but did not elaborate further.

SAE explained that to achieve the goals of practical, repeatable, and reproducible test results, the use of indoor and component level test facilities are necessary. Furthermore, SAE stated that for measuring the acoustic one-third octaves at any speed greater than zero, the use of indoor facilities will be necessary to reduce measurement uncertainty.

Agency Response to Comments

In this final rule, the agency is specifying performance requirements for vehicle-emitted sounds that are detectable and recognizable to a pedestrian as a motor vehicle in operation. All components of the vehicles' sound profile that convey the signature of a motor vehicle in operation (including aerodynamic and tire noise) up to the crossover speed are important facets of the vehicle's sound performance. Upon consideration of the above comments, and as explained further below, the agency has decided to only specify requirements for outdoor testing as proposed in the NPRM. Vehicle manufacturers may choose to test their vehicles indoors but the final rule has not added that option to the regulatory text.

As previously mentioned, the agency believes that outdoor testing is more representative of real-world vehicle-to-pedestrian interactions, and that outdoor tests, especially pass-by tests, reproduce not just vehicle sounds that are internally generated (*e.g.,* engine-powertrain and pedestrian alert system), but also sounds from the vehicle body's interaction with the atmosphere (wind noise) and road test surface (tire noise). When a vehicle is tested on an indoor dynamometer in a hemi-anechoic chamber, the body of the vehicle is static and does not produce aerodynamic noise. Additionally, the agency does not know how representative the tire noise generated during rotation on the curved dynamometer test rollers is of actual tire-road noise.

To date, the agency has had limited experience and access to testing for and measuring acoustic sound levels on dynamometers in hemi-anechoic test chambers. As we stated in the NPRM, the test setup and test execution procedures for outdoor testing have long been established.[148] As mentioned previously, a substantial amount of development and refinement has gone into the test procedures and facilities used for outdoor vehicle noise testing. Establishment of corresponding indoor procedures to be used in hemi-anechoic chambers on dynamometers requires further development and validation. SAE J2889–1 contains specifications for indoor testing but does not appear to provide the specifications for dynamometer drum surface textures, materials, diameters, road loads coefficients (*i.e.,* to produce appropriate engine RPMs), etc. to allow comparable results between different indoor dynamometers and outdoor ISO 10844 noise pads.

The agency continues to be concerned that hemi-anechoic chambers that have four-wheel dynamometer drive capabilities are not widely available for commercial testing. The agency was able to locate a large number of outdoor 10844 noise pads in the United States, most of which were available for paid use by outside parties. As mentioned in the NPRM, one vehicle manufacturer stated that it has nine noise pads throughout its global operations and we believe the standardized outdoor noise pads have widespread commercial availability.

While indoor testing is appealing because it eliminates inclement weather and seasonal downtimes, which may provide more flexibility for manufacturers, we believe this is outweighed by the fact that outdoor testing will provide a more representative real-world condition including realistic interaction of the vehicle and vehicle alert system with the outdoor environment. The NHTSA acoustic measurement procedures incorporate strategies such as the rejection of test runs having extraneous background noise to ensure that interaction with the outdoor environment does not affect test results.

Several of the commenters explained that we should allow indoor testing as specified in SAE J2889–1. In addition to conducting indoor testing in a hemi-anechoic chamber using a dynamometer to simulate vehicle motion, it is possible to conduct pass-by testing in an indoor hemi-anechoic chamber, provided sufficient space is available to allow testing of all test conditions. SAE J2889–1 seems to allow for both methods of indoor testing. Full vehicle indoor pass-by testing in a hemi-anechoic chamber without a dynamometer (*i.e.,* an indoor track) would capture elements of the vehicle sound profile (including aerodynamic and tire noise) that contribute to the detectability of the vehicle's sound signature until the vehicle reaches the crossover speed. Therefore, indoor pass-by testing in a hemi-anechoic chamber is able to record all aspects of the vehicle's sound profile while still achieving the convenience and efficiency advantages of indoor

[147] NHTSA–2011–0148–0251.

[148] 78 FR 2836 (Jan. 14, 2013).

testing. In this case, an indoor pass-by procedure, without a dynamometer, would be the same as the outdoor pass-by procedure contained in Section 7.1.5.4 of SAE J2889–1 DEC 2014 except that the 50-meter radius free of reflecting objects around the test track would not apply. The provision in SAE J2889–1 DEC 2014 that the hemi-anechoic chamber used for indoor pass-by testing comply with ISO 3745 or ISO 26101 would ensure that reflection from the test enclosure would not interfere with the vehicle's sound measurement.

The Alliance/Global [149] mentioned that some OEMs have indoor facilities large enough to execute full vehicle pass-by tests at required test speeds but did not provide corresponding details. The agency is not aware of the availability of hemi-anechoic chambers that are large enough to accommodate indoor pass-by tests and continues to believe that the existence of such facilities is limited, which would be an issue if NHTSA favored this approach as an option and wanted to conduct its own compliance testing in such an environment.

SAE stated that when measuring the acoustic one-third octaves at any speed in excess of zero, the use of indoor facilities is necessary to reduce measurement uncertainty. SAE also explained that to achieve the goals of practical, repeatable, and reproducible test results, the use of indoor and component level test facilities are necessary. NHTSA has issued a technical report presenting an analysis of its indoor test data for hybrid and electric vehicles.[150] This report includes the analysis of acoustic measurements in hemi-anechoic chambers equipped with chassis dynamometers. The analysis includes data for electric, hybrid, and internal combustion engine vehicles and examines ambient noise, repeatability and reproducibility of vehicle acoustic signals (measurements). The analysis includes a limited comparison of indoor and outdoor test data provided by Transport Canada and NHTSA in conjunction with Transportation Research Center (TRC).

Test results between two indoor test sites (General Motors Milford Proving Grounds (MPG) and International Automotive Components (IAC)) and one outdoor test site (TRC) were compared. Repeatability, as measured by standard errors for each indoor site was good. The estimated mean value was found to be within 0.5 to 0.75 dB of the true mean with 95% confidence depending on the one-third octave band being analyzed. Reproducibility of estimated means between the two indoor tests sites was about 2 dB on average; however, individual measurements had significant variation resulting in a 95% confidence interval range of +/−2.5 dB to +/−6.7 dB depending on the one-third octave band.

In addition to comparing the two indoor test facilities to one another, both facilities were also compared with outdoor measurements made at TRC. Measurement reproducibility between each indoor test facility and TRC was evaluated by comparing the average values of each vehicle at each one-third octave band for each speed at the respective sites. Results indicate that the indoor facilities tend to have higher acoustic sound levels, especially at 20 and 30 km/h. Because the differences are smaller at 10 km/h, it is not likely that the differences in acoustic reflections from the indoor floor and the outdoor pavement are causing the difference. Rather, it is likely that the tire/dynamometer interaction is producing the higher sound pressure levels. We believe that these results show that it may be necessary to conduct further studies about the tire/dynamometer interaction before any level of confidence can be established with the procedures utilizing a dynamometer. Because our research shows that the tire/dynamometer interaction could influence the repeatability of the test and because there are no specifications for dynamometer drums or other aspects of indoor testing that would increase repeatability, we believe that the procedures for indoor testing are not currently sufficient to be used by the agency for compliance testing.

Considering confidence intervals of estimated mean values for individual vehicle/speed/frequency pairs, the standard deviation between TRC and MPG was as high as 5 dB and the standard deviation between TRC and IAC was as high as 4.7 dB. Thus 95% confidence intervals would be as large as +/−9.8 and +/−9.2 dB respectively. It is important to keep in mind that these confidence intervals included not only site-to-site differences, tire/dynamometer differences, and differences as a result of using different vehicles and in some cases different model years, therefore, these confidence intervals can be considered a worst case. It is expected that confidence intervals for the same vehicles would be smaller.

In response to the SAE comment, we note the limited data available seem to demonstrate that there is measurement variability inherent in the procedures utilized indoors and outdoors. For the one-third octave bands, higher levels of variability were noted between several indoor facilities and between indoor and outdoor facilities. The variability noted may be associated with different dynamometers used and the fact that the comparison vehicles were not in all cases the exact same vehicles. The agency believes that further research and specification refinements are required to establish and properly validate indoor testing utilizing dynamometers. Further discussion on test repeatability and reproducibility is provided in Section III.K of this document.

In conclusion, after considering recent agency research and the comments received on the NPRM, the agency continues to believe outdoor testing on an ISO test pad is preferable to indoor testing in hemi-anechoic chambers with dynamometers. Section S7 of the final rule specifies the test procedures for outdoor testing.

We again note that vehicle manufacturers' testing can deviate from the procedures in an FMVSS, which communicate the method the agency will use to determine whether a vehicle complies with the requirements of that standard. Vehicle manufacturers may choose to test their vehicles indoors for the purpose of demonstrating compliance with the standard, but the final rule has not added that option to the regulatory text. The agency believes that further developments, refinements and validation are required before the indoor hemi-anechoic chambers equipped with chassis dynamometers can be specified by the agency. If further developments, data and information become available in the future the agency may decide at that time to revisit the possibility of adding the indoor testing option.

Test Surface for Compliance Testing

In the NPRM, NHTSA proposed that the test surface used during compliance testing meet the requirements of ISO 10844:2011.

NHTSA received comments on this topic from OICA, Alliance/Global, and EMA. OICA and Alliance/Global recommended that NHTSA allow compliance testing on a test surface meeting the requirements of either ISO 10844:2011 or ISO 10844:1994. They supported this recommendation by stating that they believe that surfaces meeting the requirements of ISO 10844:1994 and ISO 10844:2011 are technically equivalent.

[149] NHTSA–2011–0148–0251.

[150] See Hastings et al. ''Analysis of Indoor Test Data for Hybrid and Electric Vehicles.'' (2015) U.S. Dept. of Transportation, Washington, DC.

Agency Response to Comments

NHTSA agrees with OICA and Alliance/Global that surfaces meeting the requirements of ISO 10844:1994 and ISO 10844:2011 seem to be technically equivalent. Our understanding is that the major impetus for the 2011 update of the ISO 10844 standard was to incorporate laser profilometry technology that has recently become available which allows more precise measurements of the porosity of the surface. NHTSA's understanding is that the majority of surfaces that are within the 1994 standard should pass the 2011 standard without change. We know that this was the case for the Transportation Research Center, Inc.'s (TRC's) ISO sound pad that has been used for much of NHTSA's testing. Prior to NHTSA's testing, TRC's ISO sound pad was certified under ISO 10844:1994. At NHTSA's request, TRC recertified their sound pad under ISO 10844:2011; this required certification testing but no structural changes to the sound pad.

Thus a 1994 certified sound pad is likely to generate a sound profile equivalent to that generated on a 2011 certified surface. During the NHTSA's 2011 testing, a Ford Fusion vehicle was tested on both ISO 10844–1994 and ISO 10844–2011 surfaces and no significant difference in sound profile levels were found.

For light vehicle sound measurement, NHTSA has had no difficulties in finding sound pads certified to ISO 10844–2011 for its testing.

NHTSA prefers to harmonize FMVSS No. 141 with SAE J2889–1 absent rationale for departing from that standard. The updated version of SAE J2889–1 that was released in December 2014 specifies performing outdoor sound testing on a surface that meets the requirements of ISO 10844:1994, ISO 10844:2011, or ISO 10844:2014. Since NHTSA believes these three surfaces to be technically equivalent, we are expanding the list of test surfaces specified for FMVSS No. 141 compliance testing to include those certified to any of the above three versions of ISO 10844.

Based on the preceding discussion, all types of vehicles to which this rule applies will be tested on surfaces that meet either ISO 10844:1994, ISO 10844:2011, or ISO 10844:2014 specifications.

Vehicle Start-Up/Activation

The NPRM proposed in Section S5.1.1 that a vehicle must emit sound meeting the specifications for the stationary-but-active operating condition ''within 500 milliseconds of activation of the vehicle's starting system.'' The NPRM test procedure to measure compliance with the proposed stationary-but-active condition included a separate microphone two meters in front of the vehicle on the vehicle centerline.[151] We stated in the NPRM that this other microphone is needed in addition to the two specified in SAE J2889–1 to measure the sound that a pedestrian standing directly in front of a vehicle would hear. We wanted to ensure that there was no drop off in sound level from the side of the vehicle where the measurement is taken to the front of the vehicle, where the sound would be beneficial in warning pedestrians standing in front of the vehicle of its presence.

There were a number of comments on the proposed stationary-but-active requirement, focusing on two aspects of the regulatory language: (1) The start-up delay of 500 milliseconds for the alert to begin, and (2) the meaning of ''activation of the vehicle's starting system'' for HVs and EVs.

We note here that these two issues are directly related to the sound-at-stationary requirement which is discussed in Section III.C, ''Critical Operating Scenarios,'' in today's final rule. Many of the NPRM comments addressed start-up delay and definition of 'activation' to the extent that they opposed any requirement for an alert sound in the ''Stationary-but-Active'' operating condition. Because comments on the ''Stationary-but-Active'' operating condition were summarized in that previous section of this final rule, and we wish to avoid duplication, we are not repeating all of those comments here. Rather, we focus here on aspects of the Stationary-but-Active comments that directly relate to Start-up, the definition of Activation, and the associated measurement procedure.

Commenters, mainly OEMs, said that 500 milliseconds is too rapid to emit sound in a controlled fashion, and that it is technically unfeasible to achieve the one-third octave band levels in that short an interval.

Advocates stated that NHTSA should provide data to support the requirement that the alert sound must initiate and meet the acoustic specifications within 500 milliseconds of activation to justify that this is an appropriate amount of time to warn pedestrians. Advocates also suggested the agency should investigate the delay times of typical vehicles, *i.e.,* the delay between when a vehicle is started and when it is able to begin moving. NHTSA's analysis to support the 500 milliseconds requirement also should consider whether a lower sound level is appropriate for the parked condition.

Honda stated that NHTSA should clarify the definition and the measurement procedure of ''after the vehicle's starting system is engaged'' in the NPRM. If the definition of ''activation is the instant when the driver operates the vehicle's starting system, then it may be possible to engage the alert sound within 500 milliseconds. However, it may be difficult to consistently achieve the specified one-third octave levels in each of the eight bands as specified by NHTSA in the proposed rule.

Mitsubishi stated that the alert sound should start when a vehicle is shifted out of Park, and the 500 milliseconds interval should start at that point. Mitsubishi stated that it would be technically impracticable to meet the 500 milliseconds requirement from the moment a driver first activates the propulsion system. Mitsubishi also pointed out the need for NHTSA to define ''activation of the vehicle's starting system.''

Denso commented that 500 milliseconds is not enough time to initiate the alert sound, and that only individual vehicle manufacturers can determine how much of a delay is necessary for a given vehicle. Denso also said that the safety risk to pedestrians can be avoided if the alert sound is emitted beginning at the moment that a vehicle commences motion. In that regard, Denso suggested introducing minimum SPL requirements for a vehicle commencing-motion sound in place of the minimum SPL requirements for a vehicle at ''start-up and stationary but activated.''

WMU stated that 500 milliseconds should provide enough time from a safety standpoint because, in most cases, a driver does not initiate movement for several seconds after first starting up a vehicle. This would give any nearby pedestrian several seconds of acoustic warning.

We also received comments from Alliance/Global stating that, for testing in the stationary condition, we should amend the test procedure to eliminate the additional measurement at a point two meters in front of the vehicle on the vehicle centerline since that would have applied only to the stationary test which they were in favor of excluding from the final rule.

A number of commenters challenged the proposed requirement on the basis that 500 milliseconds is too short an interval for an alert system to become active upon vehicle start-up because

[151] The vehicle centerline is referred to as the CC' line in the test setup diagram in J2889–1.

vehicle manufacturers cannot ensure that an alert system is fully engaged and operating at the required sound level in such a short amount of time. Commenters stated that one reason for this is speaker transients, *i.e.,* once sound production begins it takes a while for it to stabilize. Therefore, while a vehicle's alert system may be capable of emitting some level of sound within 500 milliseconds, it may not achieve the specified sound pressure levels in each one-third octave band until a considerably longer time has elapsed after start-up.

Commenters also questioned how NHTSA intends to measure the lag time between starting system activation and the initiation of the alert sound. OEMs and industry groups commented that the NPRM did not define what ''activation of a vehicle's starting system'' means exactly. Without an exact definition, any attempt to measure the lag time would be subject to arbitrary selection of a starting point which could result in inconsistent measurements.

Agency Response to Comments

As a consequence of our decision discussed in Section III.C of this final rule to require sound at stationary only when a vehicle's gear selector is not in ''Park,'' and also due to the fact that vehicles are designed so that they must be in ''Park'' in order to be started, the proposed requirement for an alert to initiate within 500 milliseconds of vehicle activation is no longer applicable. Therefore, that proposed requirement is not included in this final rule.

In addition, our decision on sound-at-stationary obviates the need for NHTSA to define the term ''activation of the vehicle's starting system'' as it appeared in the proposed S5.1.1 regulatory text. Because alert system engagement will not depend on when a vehicle is started, no definition of ''activation'' is necessary.

We note that this decision does not mean that vehicles would have to be in motion before they are required to emit an alert sound. Vehicles that are not moving must emit an alert sound unless they are in a condition typical of a vehicle that may remain parked for some time. Vehicles that are stationary still would have to emit sound if they are, for example, waiting at a red traffic light (assuming the drivers do not shift to Park, in the case of automatic transmission vehicle, or apply the parking brake in the case of manual transmission vehicles). This means that vehicles that are in Park with an activated ignition and which are not in traffic, and which therefore are unable to drive off until they are put into gear, would not have to emit sound. For example, vehicles that are parked but idling so that occupants can use the heat or air-conditioning would not have to emit sound. We recognize that this will distinguish EVs/HVs from ICE vehicles since the latter emit sound whenever their engines are running, even in Park (although this may not be the case for ICE vehicles with stop-start capability.) On the other hand, an ICE vehicle could be parked with its ignition in the 'ON' position but with its engine not running.

We have decided to maintain the use of the additional front-center microphone for determining compliance with the stationary-but-active requirement. We believe this is important to ensure that pedestrians standing or passing in front of EVs and HVs are able to detect them. If the agency did not ensure that sounds produced by EVs and HVs met the minimum sound requirements in today's final rule two meters in front of the vehicle it would be possible that a pedestrian standing in front of an EV or HV would not be able to hear it within the vehicle's safe detection distance.

Vehicle Speed During Compliance Testing

In the NPRM, NHTSA proposed that the instrumentation used to measure vehicle speed during compliance testing be capable of continuous speed measurement over the entire zone from the 'AA' Line to the 'BB' Line with an accuracy of ±1.0 km/h.

NHTSA's proposal also set a speed tolerance for valid test runs. For a test run to be valid, the vehicle speed must be within ±1.0 km/h of the target speed for that run as the vehicle travels through the measurement zone from the AA' Line to the PP' Line.

NHTSA received comments on the instrumentation used to measure vehicle speed during compliance testing from Honda and Alliance/Global. Commenters requested that NHTSA allow independent,[152] as well as continuous, speed measurement during compliance testing. Honda requested that the accuracy specification for speed measurement equipment match that contained in SAE J2889–1 (± 0.5 km/h for continuous speed measurement devices or ± 0.2 km/h for independent speed measurement instrumentation). Alliance/Global also requested that the accuracy specification for independent speed measurement equipment match that contained in SAE J2889–1.

NHTSA received comments on the speed tolerance for valid test runs while the vehicle is traveling forward from Alliance/Global. They recommended changing the speed tolerance to −0.0/+2.0 km/h. Their justification for recommending this is to correct the inconsistency between the standard's performance requirement and compliance test procedure while still maintaining an overall tolerance of 2.0 km/h.

Agency Response to Comments

NHTSA wants to harmonize FMVSS No. 141 with SAE J2889–1 when feasible and consistent with the agency's focus on safety. For the instrumentation used to measure vehicle speed during compliance testing, we see no reason not to harmonize with SAE J2889–1.

Allowing independent speed measurement will not affect compliance test severity (or the safety benefits provided by this standard) because the 10 meters between the AA' Line and the PP' Line is not enough distance to permit the vehicle to vary more than minimally from the target speed.

In the most recent versions of SAE J2889–1, the accuracy specification for the continuous speed measurement instrumentation (±0.5 km/h) is tighter than the earlier SAE J2889 (Sept 2011) version and the NHTSA's proposal of ±1.0 km/h. The SAE J2889–1 continuous speed measurement accuracy specification is known to be both feasible and practical since NHTSA's commercially-purchased sound measurement equipment package includes speed measurement instrumentation with an accuracy specification of ±0.1 km/h. The SAE J2889–1 independent speed measurement accuracy specification (±0.2 km/h) is tighter than the SAE J2889–1 continuous speed measurement accuracy specification. While NHTSA does not have first-hand knowledge of independent speed measurement, we believe that the SAE J2889–1 accuracy specification should be both feasible and practical. Therefore, NHTSA accepts Honda's recommendation and will make the FMVSS No. 141 speed measurement instrumentation accuracy specification identical to that contained in the most recent version of SAE J2889–1.

Alliance/Global made a good point regarding the speed tolerance for valid test runs while the vehicle is traveling

[152] SAE J2889–1 defines independent speed measurement as being when two or more separate devices are used to measure the vehicle's speed as it crosses the AA', BB', and PP' Lines. In comparison, continuous speed measurement uses one device to measure the vehicle's speed as it travels through the entire zone from the AA'' Line to the BB' Line.

forward. NHTSA's proposal required the vehicle to emit sounds having a specified level that varied with the speed of the vehicle. The required level varied in a stepwise manner with the steps occurring at multiples of 10 km/h, *i.e.,* at 10, 20, and 30 km/h. In other words, NHTSA proposed that the vehicle emit sound with one sound pressure level at, for example, 9.9 km/h and with a different sound pressure level at 10.0 km/h. NHTSA also proposed that compliance testing be performed at multiples of 10 km/h, *i.e.,* at 10, 20, and 30 km/h. The problem is that, when testing at, for example, 10 km/h, due to the ±1.0 km/h speed tolerance, valid tests could be performed at any speed from 9.0 through 11.0 km/h, inclusive. Therefore, a test performed at 9.9 km/h would be a valid test as would a test performed at 10 km/h. However, as previously discussed, these two tests would have different required sound pressure levels.

The Alliance/Global suggestion would avoid this problem by changing the speed tolerance to −0/+2 km/h. This would mean that a valid 10 km/h test would have to have a speed in the range from 10.0 to 12.0 km/h, inclusive. Alternatively, the proposed 10 km/h pass-by compliance test would become an 11 km/h pass-by test with a ±1.0 km/h speed tolerance.

The Alliance/Global suggestion is a departure from SAE J2889–1 (which has a 10 km/h pass-by test with a ±1.0 km/h speed tolerance). However, this idea allows NHTSA to vary the required level of the sounds emitted by the vehicle in a stepwise manner with the steps occurring at multiples of 10 km/h, *i.e.,* at 10, 20, and 30 km/h. Adopting this suggestion will have only a very minor effect on the severity of FMVSS No. 141 compliance tests making them a little easier to pass since each test will now, on the average, be performed at a 1.0 km/h faster speed. Therefore, tires, aerodynamics, etc., will contribute slightly more sound thereby reducing the sound that needs to be generated by the vehicle's external sound generation system. However, the differences in sounds due to this 1.0 km/h speed up are expected to be minor.

Considering all of the preceding discussion, NHTSA has decided to adopt the Alliance/Global suggestion and change the compliance test speed tolerance to −0/+2 km/h. NHTSA will make this revised tolerance applicable to all three moving vehicle compliance tests, including the 10, 20, and 30km/h pass-by tests.

Repeatability/Reproducibility

NHTSA is addressing measurement variability in the final rule as a result of comments that were received on the NPRM, coupled with additional testing and analysis conducted by the agency which indicate that measurement repeatability and reproducibility (the latter across test facilities), may impact compliance testing results if not properly accounted for. The NPRM discussed how the agency would attempt to minimize test variability. However, adequate treatment was not given to the potential effect measurement tolerance may have on compliance testing.

A critical component of every Federal motor vehicle safety standard is a compliance test procedure that is objective, repeatable and reproducible. The test procedure must be objective such that differing parties, including OEMs and test laboratories will interpret and execute the procedures the same way. The test procedure must be repeatable and reproducible such that the results obtained are the same results from test-to-test at the same test facility and across different test facilities.

In the NPRM, the agency discussed its approach for minimizing test variability. The test procedure specified in the NPRM requires that all tests be conducted on a track with a surface that meets the requirements of ISO 10844:2011 which specifies, among other things, a very particular type of pavement to be used so as to minimize the contribution of tire noise to the sound measured. As mentioned in the NPRM, using a specified test track surface would minimize test variability.

The NPRM also contained provisions for specific environmental conditions (temperature and wind specifications), vehicle conditions (tire set-up and conditioning, door and window opening adjustments, vehicle accessory settings and vehicle loading), and track/instrumentation layout restrictions. These provisions are also important for minimizing test variability. The NPRM explained that the instruments used to make the acoustical measurements required under our proposal must meet the requirements of paragraph 5.1 of SAE J2889–1. This SAE paragraph describes procedures for calibration of the acoustical equipment. Use of such instruments and calibration procedures will ensure that test measurements can be duplicated repeatedly on the same vehicle at one facility, or at different test facilities.

In the NPRM, the agency addressed the issue of intermittent vehicle sound caused by the vehicle's battery cooling fan by requiring that any vehicle sound measurements taken while the cooling fan is operating be discarded. At the time, the agency believed that this helped address repeatability issues caused by battery cooling fans. The NPRM required that for all operating conditions, four consecutive valid measurements be within 2 dB(A). As explained, this repetition and decibel level restriction would ensure repeatability of vehicle sounds without the presence of unwanted ambient spikes, other non-vehicle sounds, or intermittent sounds the vehicle may happen to make that are not associated with its normal operating sound.

The agency received individual comments from Honda, Alliance/Global, Toyota, SAE, Nissan, and Denso. These comments generally fell into two categories: The expected variance in recorded measurements in terms of size and sources of variability; and the consequences of manufacturers taking steps to address repeatability in compliance testing.

Honda offered two comments regarding measurement variability. The first dealt with outdoor testing stating ''The Notice of Proposed Rulemaking (NPRM) requires testing of the one-third octave requirement at an outdoor site, but we are concerned that this poses practical concerns due to the low repeatability of test results which will be influenced by the presence of background noise.'' Honda also explained that it believes the ''like vehicle requirements'' are too stringent, and practically cannot be met due to the variability of sound producing devices. Honda provided an attachment with plots that indicate the differences in four tests by the same vehicle is more than 3dB.

Alliance/Global stated, ''The loudness in NHTSA's proposal is created by summing required broadband content in eight one-third octave bands when the sound in each band is already loud enough for detection purposes. The resultant sum is a sound that is, at a minimum, 6 dB louder than necessary. When a compliance margin (for repeatability and reproducibility) and production variation is added on, this proposed alert sound becomes 9–12 dB louder than necessary. The decibel sound scale is logarithmic, so this represents a doubling in the perceived sound levels.''

Alliance/Global further said that they were concerned that the run-to-run variability is greater than the levels proposed in the NPRM. They stated, ''Given the uncertainties noted by SAE for the measurement of one-third octaves proposed in the NPRM, we

suggest that the tolerance should be increased to 9 dB. This applies to all measures of performance for compliance purposes.''

SAE discussed measurement uncertainties in its comments. SAE said that for the measurements of overall Sound Pressure Levels (SPL) the identified site-to-site variation at 80% confidence interval is ±1.4 dB. SAE said that the uncertainty for the measurements of one-third octave results ''has not yet been determined,'' but will be larger than the uncertainty for the overall SPL. According to SAE, for indoor measurements, the site-to-site variation of one-third octave levels at 95% confidence interval is expected to be in excess of ±2 dB. For outdoor measurements, the site-to-site variation at 95% confidence interval is expected to be in excess of ±6.0 dB. According to SAE, these estimated uncertainties should be considered when specifying tolerances for regulatory compliance. SAE also mentioned that any variation in sound output due to vehicle component production variability will be in addition to the measurements variation noted.

Denso commented on the variability of the speaker unit itself, stating ''There is inherent variability in vehicle sound characteristics and in speaker and amplifier characteristics and performance. When combining this variability, it is very difficult to limit the sound difference within 3 dB(A) between the two vehicles, even for vehicles having nominally identical sound systems.'' Denso also went on to comment that for a 40 degree rise in temperature (0 °C to 40 °C) the overall sound level would decrease by 1 dB. Nissan, similar to Denso, suggested in its comments that sound levels must be increased by the variation of speakers.

In general, comments received stated that the variability present in the vehicles sound measurement is higher than the agency accounted for in the NPRM, and that variability could be substantial even when using the measurement procedures set forth in SAE J2889–1. There was also concern expressed by the commenters that if manufacturers increase vehicle alert sound pressure levels above the minimum standards to ensure a reasonable compliance margin, the vehicle alert sound may become excessively loud.

Agency Response to Comments

Upon review and further consideration of the comments received it appears that the provisions for addressing variability included in the NPRM and discussed above are not sufficient to properly address all the test variability inherent in measuring vehicle acoustic alert sounds. To further address the issue of variability, the agency has decided to reduce the minimum standards required in this final rule by 4 dB in each one-third octave band as further discussed below. We expect sounds produced by EVs and HVs will exceed the minimum one-third octave band values in the final rule because manufacturers will design alert systems in order to ensure a margin of compliance. For this reason, we believe that vehicles complying with the final rule, the requirements of which have been reduced by 4 dB in each one-third octave band from the values provided by our revised detection model, will still emit alert sounds that are loud enough for pedestrians to safely detect EVs and HVs.

During its research, NHTSA conducted a series of tests to determine the actual level of variability in the one-third octave band measurements.[153] To do this, NHTSA analyzed data from a 2010 Ford Focus, combining over 100 individual test runs recorded at the 10 km/h test condition, including right and left side microphone recordings, that were measured at three facilities (71 test runs at Transportation Research Center in Marysville Ohio, 17 test runs at the Ford Motor Company Proving Ground in Romeo, Michigan, and 16 test runs at the Navistar test track in Fort Wayne, Indiana) over a period of 6 months. Test data were considered valid if there were no anomalies apparent in the sound recordings. The recorded files were analyzed using NHTSA's sound analysis code.

The data from the test runs were further processed using a bootstrap method[154] into three datasets, consisting of 10,000[155] samples of eight randomly selected individual test runs, for each facility. These samples were then processed into the one-third octave bands utilizing the compliance procedure (the average of the first four valid test runs within 2 dB), generating 10,000 sets of the 13 one-third octave bands between 315 Hz and 5000 Hz. Analyzing the datasets for the individual test sites, the maximum 95% confidence interval for the individual one-third octave bands recorded on the TRC ISO sound pad was ±1.6 dB at 800 Hz and 1000 Hz. For the Ford MPG ISO test pad, the maximum value for the 95% CI of the individual one-third octave bands was ±2.0 dB at 315 Hz, and at the Navistar ISO pad it was ±1.2 dB at 400 Hz. Looking at all three sites, the overall effective maximum variation occurs in the 315 Hz one-third octave band with a 95% CI of ±2.5 dB. A summary of the results is in Table 18.

TABLE 18—COMPARISON OF MEAN AND 95% CONFIDENCE LIMIT FOR THE ONE-THIRD OCTAVE FREQUENCIES FOR THE THREE TEST SITES

Frequency	TRC		Ford MPG		Navistar		Overall effective 95% confidence limit
	Mean level recorded dB(A)	95% Confidence limit	Mean level recorded dB(A)	95% Confidence limit	Mean level recorded dB(A)	95% Confidence limit	
315	41.6	1.3	40.4	2.0	41.8	0.6	2.5
400	42.5	1.1	41.1	1.1	42.7	1.2	2.0
500	44.1	1.0	44.3	0.9	44.4	1.0	1.7

[153] NHTSA Technical Report '' Repeatability, Reproducibility, and Sameness of Quiet Vehicle Test Data'' (2016) Gerdus, E., Hoover, R.L., and Garrott, W.R.

[154] ''Bootstrap method'' is a statistical procedure wherein a data set consisting of a relatively small set of measurements is resampled many times over to obtain a much larger data set. This can improve statistical estimates and confidence intervals. For example, for the Ford Fusion tests on the TRC ISO sound pad at 10 km/h, NHTSA ran twelve test series, each consisting of eight runs, for a total of 96 runs. To improve our estimate of the variability in these 96 tests, we used a bootstrap method in which all of the 96 runs were consolidated into one set. Single runs then were drawn randomly from this set and the measurement values including one-third octave band levels were recorded. The run drawn was then returned to the set. This process was repeated thousands of times using the computational capability of a computer. For the Fusion data, 80,000 runs comprising 10,000 test series were drawn in this manner which made it easy to directly determine the 95% confidence interval for these vehicle tests. We used a similar procedure to evaluate vehicle measurements from the Navistar and Ford MPG test facilities, to make up three data sets (one from each of the three test facilities).

[155] The dataset size of 10,000 was selected to maximize the overall accuracy of the analysis while maintaining a reasonable total computation time.

TABLE 18—COMPARISON OF MEAN AND 95% CONFIDENCE LIMIT FOR THE ONE-THIRD OCTAVE FREQUENCIES FOR THE THREE TEST SITES—Continued

Frequency	TRC		Ford MPG		Navistar		Overall effective 95% confidence limit
	Mean level recorded dB(A)	95% Confidence limit	Mean level recorded dB(A)	95% Confidence limit	Mean level recorded dB(A)	95% Confidence limit	
630	46.1	1.2	45.6	1.6	46.5	0.8	2.2
800	48.4	1.6	50.4	1.3	48.3	1.1	2.3
1000	49.0	1.6	50.7	1.0	49.1	0.7	2.0
1250	48.8	1.4	50.1	1.1	48.9	0.6	1.9
1600	49.7	1.5	51.0	1.1	49.3	0.9	2.1
2000	48.6	1.5	48.7	1.0	48.0	0.5	1.9
2500	46.6	1.2	46.7	1.1	46.2	0.7	1.8
3150	45.2	1.2	45.1	1.0	44.9	0.9	1.8
4000	44.0	0.9	43.9	0.8	43.4	0.9	1.5
5000	41.9	0.8	42.0	1.2	41.5	0.8	1.6

Furthermore, NHTSA conducted research into the effects of speaker variability on one-third octave band repeatability using a limited sample of vehicles. Testing was performed on a group of four model-year 2014 Toyota Prius V vehicles under stationary conditions, in a hemi-anechoic chamber, with only the alert sound generator active to minimize potential variability from other sources. This testing found that when a single vehicle was tested in the chamber, run-to-run variability had a 95 CI of ±0.2 dB, operating with only the speaker active. Overall speaker variability consists of more than just the repeatability of any one individual speaker, as manufacturing tolerances will add variability when multiple speakers are tested. To estimate overall speaker variability, the agency analyzed the data across all four Prius vehicles tested. When all four vehicles were tested in the chamber, run-to-run variability increased to ±0.8 dB.[156]

Based upon the limited test data from this analysis, NHTSA estimates an overall test variability of ±3.3 dB, including both the effective test procedure variability (±2.5 dB) and the measured speaker variability (±0.8 dB). The commenters indicated that the true variability is unknown and recommended that a 3 to 9 dB increase is appropriate. To account for other, unknown sources of variability, the agency has decided to add an additional small tolerance to the variability identified during its research. Considering both the measured and the unknown variability, we have concluded that a tolerance of 4 dB adequately accounts for actual test variability.

[156] *See* NHTSA Technical Report '' Repeatability, Reproducibility, and Sameness of Quiet Vehicle Test Data'' (2016) Gerdus, E., Hoover, R.L., and Garrott, W.R.

NHTSA agrees with Alliance/Global, as well as the other commenters that manufacturers will take into account measurement variability when designing alert systems to ensure compliance with the specified performance requirements. It is possible that with this margin added, the alert sound would significantly exceed the minimum sound requirements. As such, NHTSA has decided in this final rule to reduce the minimum levels that were indicated by our detectability modeling effort. We are implementing a reduction of 4 dB in each one-third octave band for all test conditions to offset the margin of compliance that we acknowledge is needed to address test variability and that we believe OEMs will build into their alert systems. As discussed above, our repeatability analysis has shown that a 4 dB adjustment will be adequate for this purpose.

It must be made clear that the reduced minimum levels specified in this final rule, which include the 4-dB adjustment described above, are the absolute minimums allowed for safety purposes. Testing variability is not a justification for failing to meet these minimums which have been adjusted specifically to address concerns about test repeatability. The agency intends to pursue potential enforcement actions on measured levels below these minimum standards. The agency believes that by virtue of this 4-dB reduction in the level specified in each one-third octave band, manufacturers can build a reasonable margin of compliance into their alert systems while maintaining acceptable overall sound levels. We also believe this reduction, along with other changes in the final rule compared to the NPRM such as the reduction in the number of required one-third octave bands, further addresses concerns about customer acceptance, noise intrusion, and other concerns about the safety standard requiring alert sounds that are excessively loud.

Ambient Noise Correction

In the NPRM, NHTSA proposed that the ambient noise be measured for at least 30 seconds before and after a series of vehicle tests. A 10-second sample was then to be taken from these measurements and used to determine both the overall ambient noise SPL and the ambient noise level for each one-third octave band. The 10-second sample selected was to include ambient levels that were representative of the ambient levels that occurred during the actual vehicle measurement. As explained in the NPRM, it is important to know the background noise level during the test to get an accurate measurement of the sound made by the vehicle alone. Because NHTSA's proposed requirements were established using a one-third octave band basis, we stated that ambient corrections should also be calculated on a one-third octave band basis.

The NPRM explained that SAE J2889–1 contains a procedure for correcting vehicle measurements at the overall sound pressure level to account for ambient influence. In the NPRM, we also acknowledged that the variance of a signal is greater on a one-third octave band basis than at the overall level, and thus it may be difficult to apply the ambient correction procedure in SAE J2889–1 to one-third octave bands. The NPRM further stated that SAE J2889–1 requires a peak-to-peak variation of less than 2 dB in order to do a valid correction. We also pointed out that, even if the fluctuation of the overall sound pressure level of the ambient is less than 2 dB, the fluctuation in some individual one-third octave bands would likely be higher. To address this concern, we proposed a procedure that

allowed one-third octave band correction within certain limits on both the peak-to-peak ambient fluctuation and the level difference between the vehicle measurement and the ambient. These criteria were provided in Table 6 in the regulatory text contained in the NPRM. They were chosen in order to provide a high degree of confidence that contamination due to an unobserved, random fluctuation would not impact the final reported level by more than about one half of one decibel. In the NPRM, we explained that increasing the acceptable peak-to-peak variability in the ambient correction procedure will allow for testing to be conducted in ambient sound environments in which the agency would expect to be able to make accurate measurements. NHTSA conveyed its position that this approach would increase flexibility in the locations and times when outdoor testing can be conducted without significantly compromising the accuracy of measurements. We sought comment on this topic.

NHTSA received comments on ambient noise correction from Alliance/Global, Honda, OICA and SAE. The comments from these organizations on this topic have been divided into three issues: Validity of applying ambient correction to one-third octave bands; a conflict in the correction procedure; and ambient measurement time interval.

All commenters stated that measured one-third octave band sound levels generated by the vehicle could not be corrected for ambient noise while maintaining adequate repeatability. As stated by Honda ''[t]he time-to-time variance of the one-third octave level of ambient noise is large and the ambient noise measurement and vehicle noise measurement are not simultaneous so that compensating by one-third octave level is not realistic for achieving repeatability.'' All four organizations therefore recommended only performing ambient noise correction for the measured overall SPL generated by the vehicle using the procedures contained in SAE J2889–1.

OICA questioned the proposed procedure to correct the measured one-third octave band sound levels generated by the vehicle for ambient noise. They pointed out that the proposed procedure contains a contradiction. It requires measurement of both the sounds generated by the test vehicle during a test and of the ambient noise at the same time and using the same equipment. The problem is that sound measurement during testing records both sounds generated by the vehicle (signal) and ambient noise. There is no objective method to disentangle the signal from the ambient noise in the recorded signal.

Finally, OICA questioned which 10 seconds should be analyzed out of each 30-second-long ambient noise measurement since NHTSA did not specify which 10 seconds.

Agency Response to Comments

NHTSA believes, based upon data collected and testing experience gained over the past several years, that measured one-third octave band sound levels generated by a vehicle can be corrected for ambient noise while maintaining adequate repeatability.

NHTSA conducted a substantial amount of vehicle sound measurement repeatability testing using a 2010 Ford Fusion (with an internal combustion engine) to develop this rule.[157] That testing included a large number of ambient noise measurements. Testing was performed on the ISO sound pad of the Transportation Research Center, Inc. in East Liberty, Ohio, and was analyzed to examine ambient noise variability. All of this testing was performed at night to minimize the ambient noise.

Analyses of NHTSA's measured ambient sound data found substantial variability. The overall ambient SPL varied over a 15.9 dB range from a low of 29.5 dB to a high of 45.4 dB. The ambient one-third octave band levels varied over a 24.4 dB range with a low of 13.6 dB and a high of 38.0 dB.[158] This ambient sound data was measured over a six month period from April to September of 2012.

NHTSA's calculations indicate that these large variations in ambient noise levels had only a minimal effect on the measured one-third octave band sound levels generated by the vehicle following ambient noise correction.

As per the procedure proposed in the NPRM, any sound generated by the vehicle at the one-third octave band level (and per SAE J2889–1 for the overall SPL) will not be corrected at all if it is more than 10 dB above the ambient noise level. NHTSA examined its vehicle sound measurement repeatability testing to see how frequently this situation occurred.

NHTSA analyzed MY2010 Ford Fusion sound data measurement repeatability for five scenarios: Stationary, reverse, 10 km/h pass-by test, 20 km/h pass-by test, and 30 km/h pass-by test. The vehicle was quietest during the stationary and reverse scenarios.

None of the Ford Fusion sound data collected during the 10 km/h pass-by test, 20 km/h pass-by test, or 30 km/h pass-by test were within 10 dB of ambient levels. Therefore, no ambient noise correction was performed for any of these tests at the overall SPL and one-third octave band level.

For the stationary scenario, 82.3 percent of tests were more than 10 dB above ambient noise levels and did not require correction. The remaining 17.7 percent of tests needed to have either the overall SPL or one or more measured one-third octave band levels corrected. However, none of these tests had measured signal levels that were less than 3 dB above ambient noise levels (the differential below which tests are considered invalid).

Electric or hybrid vehicles with an alert meeting the requirements of this rule may be quieter than is the 2010 Ford Fusion. This may result in more electric and hybrid vehicle sound tests not giving results that are 10 dB or more above ambient. Nevertheless, NHTSA believes that the effects of ambient level variability on vehicle sound measurement repeatability will be limited.

The purpose of ambient noise correction is to reduce variability in vehicle sound measurements due to variations in the ambient noise level. NHTSA uses the minimum ambient noise levels, collected before and after a test series, for ambient correction. By doing so, the ambient noise levels are expected to vary little with time during a test session. Distinct, transient loud sounds such as chirping birds, overhead planes, car doors being slammed, etc., will affect the maximum ambient noise levels but not the minimum ambient noise levels. The minimum ambient noise levels are expected to be primarily the result of more slowly varying environmental factors such as steady state wind speed, the test site geometry, and the foliage on nearby vegetation. Therefore, NHTSA believes that the minimum ambient noise levels used for correction will typically be similar before, during, and after a test series. The ambient noise correction is expected to eliminate the effects of this slowly varying ambient noise from the measured sound levels for a vehicle.

NHTSA also recognizes that distinct, louder events such as passing vehicles or wind gusts could, if they were to occur at certain times during a vehicle's operational sound measurement, increase both the measured vehicle sound and sound measurement variability. Therefore, NHTSA has

[157] Garrott, W.R., Hoover, R.L., Evans, L.R., Gerdus, E., and Harris, J.R., ''2012 Quieter Vehicle Testing Report: Measured Sound Levels for Electric, Hybrid Electric, and Low Speed Vehicles'' Washington DC, DOT/NHTSA, November 2016.

[158] Ibid.

added regulatory text in the final rule stating that measurements containing any distinct, transient, loud sounds (*e.g.,* chirping birds, overhead planes, passing trains, car doors being slammed, etc.) are considered invalid. Further discussion about determining the validity of vehicle measurements can be found in Section III.K.

In September 2014, the agency received a copy of the latest draft of ISO 16254, *Acoustics—Measurement of sound emitted by road vehicles,*[159] and in December 2014 SAE issued a revised version of SAE J2889–1.[160] Both standards are of interest to the agency because, unlike the May 2012 version of SAE J2889–1, they both attempt to address measurements at the one-third octave band level as well as overall SPL level. These standards appear to agree with the various comments, including the comments received from SAE, advising against ambient corrections at the one-third octave band level. Both standards specifically state, ''Background compensation is not permitted for one-third octave band measurements.'' Both standards also specify that when analyzing the one-third octave band measurements the level of background noise in each one-third octave band of interest shall be at least 6dB below the measurement of the vehicle under test in each respective one-third octave band. In effect, both standards state that the one-third octave bands cannot be corrected for ambient noise and that the only one-third octave bands useful for evaluation are those bands found to have at least a 6 dB difference between the vehicle measured value and the ambient measured value.

The NPRM proposed that no corrections are needed at the one-third octave band level when there is at least a 10 dB difference between the vehicle measured value and the ambient measured value. The ISO and SAE standards reduce this cut-off point for one-third octave band levels to a 6 dB difference. Based upon the earlier discussion of test data, our experience has been that very few ambient corrections are required at the 10 dB difference level. Even fewer would be required at the 6dB difference level, which has the potential to reduce the number of test runs needed for a vehicle compliance evaluation. We agree with the commenters that one-third octave bands are not viable if they are within 3 dB of the ambient, and thus it is not necessary to consider whether bands at that difference level should be corrected or not.

Accordingly, we have decided to revise the required difference between the vehicle and ambient at the one-third octave band level from 10dB as proposed in the NPRM to 6 dB, the same as in the draft ISO and revised SAE standards, as the threshold difference between when one-third octave bands should or should not be corrected for ambient conditions. Additionally, for the one-third octave bands having 3 dB to 6 dB separation between the vehicle and ambient measurements, the agency has decided to continue to correct as proposed in the NPRM. The draft ISO and SAE standards reject all the one-third octave bands with separation less than 6dB whereas now the agency's procedure considers them usable in an attempt to reduce possible test burden by rejecting fewer sound measurements. Finally, as proposed in the NPRM, any bands found to have a separation of less than 3 dB would be considered unusable. These revisions have been incorporated into the respective tables in the final rule.

Finally, based upon further consideration of the comments received, evaluation of the ambient data collected, and review of the latest ISO and SAE documents received, we have decided to make a few additional revisions to the ambient correction paragraph S6.7 in the final rule. These additional revisions to S6.7 are as follows:

- Ambient corrections may be required at the overall sound pressure level when considering which four valid test runs can be used for performance evaulation during each operating scenario. Ambient corrections at the one-third octave band level may also be required during the one-third octave band evaluations for each operating scenario. For clarification purposes Table 6 as proposed in the NPRM will be replaced with two new tables, Tables 6 and 7, one for overall SPL corrections and one for one-third octave band corrections when required. As in the NPRM, both of these tables are derived from Table 2 in SAE J2889–1.
- The first column in Table 2 of SAE J2889–1 and Table 6 in the NPRM differentiate between ambient noise levels greater than or less than 25 dB. We do not believe this differentiation is required. Table 2 in SAE J2889–1 applies to overall SPL correction. NHTSA understands that SAE J2889–1 included the 25 dB breakpoint to separate overall SPL correction because an ambient noise of less than 25 dB in an outdoor setting is extremely quiet and unlikely to occur. If such a low ambient did occur, then the overall vehicle SPL would require correction only if it was within 10 dB of the ambient noise, *i.e.,* if the overall SPL of the vehicle test was quieter than 35 dB. However, any vehicle that produces an overall SPL of less than 35 dB is very quiet and most likely would not comply with the requirements of this final rule or be heard by pedestrians. SAE J2889–1 states that in this situation, no overall SPL correction should be made. Instead, the technician conducting the test should report that the corrected overall SPL will be less than the measured signal overall SPL. NHTSA desires to correct both overall SPL and one-third octave band levels when necessary. Since overall SPL is the antilog of the logarithmic sum of all one-third octave band levels, the one-third octave band levels will, for any wide-band sound, be substantially lower than overall SPL. During NHTSA's outdoor testing, we have never seen an ambient overall SPL that is below 25 dB. However, we routinely have seen ambient one-third octave band levels below 25 dB, with some being as low as 14 dB. Furthermore, for some scenarios and one-third octave bands, NHTSA's minimum safety standard criteria are set at a level below 35 dB. NHTSA needs a robust correction procedure that is applicable when one-third octave band ambient levels are below 35 dB. If ambient is less than 25 dB in one or more one-third octave bands and the difference between ambient and vehicle measurements in those bands is less than 6 dB, we still need a way to make corrections. Therefore, NHTSA has decided to use the ambient noise correction procedure regardless of the level of ambient noise present. To accomplish this, we have removed the 25 dB limitation by deleting the first column and the last two rows from both tables.
- The second column in Table 6 of the NPRM and Table 2 of SAE J2889–1 sets peak-to-peak limits on the variability of measured ambient conditions relative to the corresponding differences measured between the vehicle alert sound profile and the measured ambient sound levels. According to the tables, the larger that difference, the larger the acceptable ambient peak-to-peak variation. OICA mentioned that the proposed procedure for ambient noise correction was confusing and contained a contradiction. According to OICA, the notes to NPRM Table 6 indicated that in some test scenarios the ambient noise levels must be measured at the same

[159] NHTSA–2011–0148–0334.

[160] In December 2014, SAE issued a revised SAE J2889–1. That version of J2889–1 contains the same proscription on background correction at the one-third octave band level as does ISO 16254.

time as the actual vehicle, *i.e.,* during the vehicle pass-by run, and using the same microphones. The NPRM did not state how this should be done. We have considered OICA's comment and agree that the notes in conjunction with the proposed Table 6 are confusing and contradictory. Ambient measurements during actual vehicle tests are not possible without subjective determination as to what sounds are ambient noise versus what are generated by the test vehicle. NHTSA does not intend to measure ambient and vehicle sounds at the same time through the same microphones. The purpose of column 2 is to ensure the validity and minimum variability of ambient sound files collected just prior to and after vehicle tests. The objective is to avoid ambient sound measurements that contain any distinct, transient, sounds (*e.g.,* chirping birds, overhead planes, car doors being slammed, etc.) for correcting vehicle sound files. We understand that column 2 is intended to provide a quantitative method for determining when distinct, transient, sounds are too loud and risk causing excessive variability in ambient sound measurements. Clearly, a high variability in ambient sound can have a compounding effect on vehicle sound pressure variability. Such variability could have a major impact on measurement repeatability. Due to ambient differences, test results from one day to another for the same vehicle might not be the same. To minimize the likelihood of ambient variability, the agency has decided, as originally proposed in the NPRM, to use the minimum ambient level instead of the maximum ambient level. Use of the minimum ambient was discussed in more detail previously in this section. Furthermore, variability of the ambient sounds measured during any vehicle test may also cause difficulties in capturing the true vehicle alert profile. To address OICA's issue we have deleted the entire second column and the associated notes from NPRM Table 6. We have also added regulatory text stating that measurements containing any distinct, transient, loud sounds (*e.g.,* chirping birds, overhead planes, car doors being slammed, etc.) are considered invalid.

• The entries in some cells in Column 4 of NPRM Table 6 and Table 2 of SAE J2889–1 are confusing. It is not clear what an entry of ''Do not correct, but report $OBL_{testcorr,j} < OBL_{test,j}$'' means in the context of a NHTSA compliance test. Since, as previously discussed, the last two rows of NPRM Table 6 have been deleted, the entry of ''Do not correct, but report $OBL_{testcorr,j} < OBL_{test,j}$'' appears in only one cell of the table. The row containing this cell will only be used when the separation between the measured vehicle sound (signal) and the ambient (either overall SPL or one-third octave band level as appropriate) is less than or equal to 3 dB. NHTSA believes that a signal- to-ambient difference of 3 dB or less is too small to ensure the ambient is not influencing the measurement. Therefore, test runs performed for which the overall measured SPL does not exceed the ambient measured SPL by more than 3.0 dB should be considered not valid and should not be used. For test runs for which the overall measured SPL exceeds the ambient measured SPL by more than 3.0 dB, it is possible that the measured sound level may not exceed the ambient sound level in one or more one-third octaves. When this happens, it is acceptable to use the data from the one-third octave bands for which the measured sound levels exceeded the ambient sound levels by more than 3.0 dB. However, the data for those particular one-third octave bands for which the measured sound level was too close to the ambient sound are considered not valid and cannot be used.

Appropriate modifications also have been made to paragraph S6.7 of the regulatory text, describing how to perform ambient noise corrections.

These decisions are clarifications and refinements that are needed for consistent compliance testing. Because they address practical issues that arise from application of the ambient correction procedures of the NPRM, which in turn are based as closely as possible on SAE J2889–1, we believe these changes are within the scope of the NPRM. In one case, we deleted a specification that doesn't apply to NHTSA testing and thus is not relevant for this final rule. Another change clears up confusion arising from a contradiction in the ambient correction table as it appeared in the NPRM. Another arises from the agency's decision to do ambient corrections at the one-third octave band level which the agency explicitly proposed in the NPRM (some commenters disagreed with that approach, and we have addressed those comments in this preamble.)

Overall, these technical changes are consistent with the SEA/ISO standard which the agency has referenced in the NPRM and which commenters urged NHTSA to adhere to. Furthermore, as we've noted, these refinements in the ambient correction procedure will have a very minimal impact on the outcomes of a small minority of tests, and they do not constitute any greater test stringency or an increase in the required sound levels over those proposed in the NPRM.

In response to OICA's question as to which 10 seconds should be analyzed out of each 30 seconds (or more), NHTSA has decided that the entire ambient noise measurement (including an interval of 30 seconds or more taken before a test series and another interval of 30 seconds or more taken after a test series) should be analyzed. Since ambient noise correction is based upon the minimum ambient noise collected before and after a test series, analyzing the entire period collected instead of two 10-second periods may result in a lower minimum ambient noise. Having a lower minimum ambient noise makes it less likely that ambient noise correction of the measured vehicle sound will be necessary. In the event that ambient noise correction is necessary, having a lower minimum ambient noise reduces the magnitude of the resulting correction resulting in a slightly easier compliance pass/fail criterion.

It is NHTSA's belief that making this change to the ambient noise correction procedures will have no effect on safety because NHTSA intends to perform compliance testing on ISO sound pads during times with as low an ambient noise as is reasonably achievable. This will minimize the need for ambient noise corrections during NHTSA compliance testing.

Conditions for Discarding Results

The NPRM discussed the agency's approach for measuring the sound produced by hybrid vehicles (HVs) without their associated internal combustion engines (ICEs) operating because of the need to measure the sound of those vehicles' in their quietest state. As explained, the proposal was designed to ensure that HVs and EVs emit a minimum level of sound in situations in which the vehicle is operating in electric mode because in that mode these vehicles do not provide sufficient sound cues for pedestrians. Therefore, we proposed to control the situation in which an ICE engine does start operating during a test by invalidating test measurements that are taken when a vehicle's ICE is operating. The proposed test procedure stated that when testing an HV with an ICE that runs intermittently, measurements that contain sounds emitted by the ICE are not considered valid.

The NPRM also discussed that tests occurring within the temperature range specified in SAE J2889–1 can produce

divergent results when a vehicle is tested at different temperatures. In high ambient temperatures, the battery cooling fan, part of the thermal management system on electric vehicles, can activate intermittently while the vehicle is operating. As discussed, the agency decided to address the issue of intermittent vehicle sound caused by the vehicle's battery cooling fan by requiring that any vehicle sound measurements taken while the cooling fan is operating be discarded. While the agency believed that this would address repeatability issues caused by battery cooling fans, we noted that there may be other vehicle functions that produce inconsistent sound levels as a result of the ambient temperature. The agency tentatively concluded that we had sufficiently controlled this situation in the test procedure by invalidating measurements in which any component of the vehicle's thermal management system (*i.e.* a cooling pump or fan) is engaged. We solicited comments on other vehicle functions that produce varying noise levels at different ambient temperatures.

Furthermore, to ensure the goal of testing the vehicle in its quietest state, the NPRM specified the vehicle test condition that all accessory equipment on the vehicle should be turned off. This step was included because the vehicle's air conditioning system, heating system, and windshield wipers, for example, can all produce sound when activated which can introduce inconsistency into the acoustic measurements.

The NPRM went on to explain that for all operating conditions, the proposed test procedure (and that of SAE J2889–1) specified that four consecutive valid measurements be within 2 dB(A). This repetition and decibel level restriction are to ensure repeatability of vehicle sounds without the presence of unwanted ambient spikes, other non-vehicle sounds, or intermittent sounds the vehicle may happen to make that are not associated with its quiet operating state.

As explained in the NPRM, the agency has no preference in how manufacturers choose to comply with the minimum sound level requirements in this standard. If the agency could rely on battery cooling fans on electric vehicles or the ICEs on hybrid vehicles to be activated whenever the vehicle is turned on or is moving, this may be a satisfactory manner for a manufacturer to comply with the minimum sound level requirements. However, if the battery cooling fans and the ICEs on hybrid-electrics are only running intermittently, then sounds produced by these vehicle systems cannot be relied upon to provide sound to pedestrians for safety purposes under all conditions. While the proposed specifications requiring four valid measurements within 2 dB(A) would to some extent address repeatability issues caused by intermittent vehicle noise, the agency explained that it wanted to guard against a situation in which measurements are accepted with the battery cooling fans active on an EV or the ICE engaged on a hybrid-electric if those noise sources are intermittently engaged.

The agency also acknowledged, as discussed in the NPRM, that it may be possible that not all the HVs to which this proposal would apply are designed to be operated in EV-only mode for every operating condition for which the safety standard would specify requirements. Because the agency would be testing HVs in their quietest state, the test procedure and requirements as proposed were not designed to test a vehicle that produces added sound while its ICE is operating. Therefore, the agency stated it would not require that HVs meet the requirements of the proposal for a given operating condition if they are not capable of operating in electric-only mode in that operating condition. For example, if a vehicle is not designed to operate in electric-only mode above 25 km/h, it would not be required to meet the requirements in the proposal at any speed above that (*e.g.* at 30 km/h). The NPRM also included a provision to exclude an HV from meeting the minimum sound requirement for a given operating condition after ten consecutive tests during which the vehicle's ICE is operating during the entire test.

In response to the NPRM and the issue of invalid test results, OICA, Alliance/Global, Nissan, SAE and Advocates provided comments.

OICA recommended discarding any measurements that are influenced by the presence of vehicle functions that produce intermittent sounds. According to OICA, intermittent sound sources include cooling fans and pumps, and air conditioning components. OICA said that turning off the A/C and minimizing powertrain operation before executing a test will reduce the incursion of these sounds. OICA explained that ''experienced engineers must know what is truly an intermittent sound for a specific vehicle, and what is part of the normal vehicle emitted sound.'' OICA also asked the question about how the regulation will handle a vehicle whose thermal management system is always operational.

The comments received from Alliance/Global were similar to those provided by OICA. These commenters recommended that the agency clarify for testing purposes that all auxiliary equipment capable of being shut off actually is shut off as part of the test procedure. Alliance/Global along with OICA provided several suggested regulatory text edits to address their related concerns.

Nissan stated that given the complexity of EV and HEV technology and the expectation for future system innovation, it believes that OEMs would need to identify potential vehicle systems and components which could contribute to the overall noise measurement on a model-by-model basis.

SAE explained that the 2dB criteria was included in the SAE and ISO standards as a data quality check and was designed to provide some objective criteria to assist the user of the standard to know when unrelated transient sounds are likely to have occurred. SAE said that engineering judgment by an experienced test engineer is still required to determine when other unrelated sounds have occurred, and a decision to invalidate a measurement must be made. SAE noted that there may be certain accessories that cannot be turned off. When tested, those accessories should be in the lowest noise emission mode. SAE referred to paragraphs 7.1.2.3 and 7.1.2.4 in SAE J2889–1 May 2012 which further defines accessory loads and multi-mode operation.

Advocates for Highway Safety commented that the requirements should prohibit use of any test results which include sounds from any vehicle systems other than those which would be constantly engaged under the specified test conditions (backing, active but stationary, forward motion).

Agency Response to Comments

The agency has considered the comments received and the suggested changes to the regulatory text. Based on review of the comments, NHTSA finds general agreement with the agency's overall approach for identification of valid and invalid test runs. The goal is to identify and utilize those test runs that exhibit a vehicle's quietest operating mode. In consideration of Nissan's comments about the complexity of EV/HV technology, the agency anticipates that there will be a need to inquire about specific noise-generating technologies and systems utilized on test vehicles prior to

conducting FMVSS No. 141compliance testing. We note that NHTSA uses this approach to enforce other safety standards. For example, in FMVSS No. 126; *Electronic Stability Control Systems,* there is a requirement for the vehicle manufacturer to make available technical documentation about the ESC understeer countermeasures. Similarly, in FMVSS No. 226, *Ejection Mitigation,* there is a requirement for the vehicle manufacturer to make technical information about rollover sensing systems available to NHTSA. With this information, the agency can identify which systems produce noise continuously rather than intermittently. Once this is established, test runs that include sounds from intermittent ICE operations and/or intermittent thermal management system activations can and will be deemed invalid.

Advocates recommended modifying the language to ''prohibit use of any test results which include sounds from any vehicle systems other than those which would be constantly engaged under the specified performance conditions (backing, active but stationary, forward motion up to 18 mph).'' During testing, all accessory equipment that can be physically turned off will be turned off. OICA asked about a thermal management system that is operational at all times. To address that, systems and accessories that cannot be turned off will be operated in their quietest mode. As mentioned by SAE, the agency agrees that engineering judgment by an experienced test engineer will be required to determine when other unrelated sounds have occurred, and a decision to invalidate a measurement must be made.

In consideration of the comments received and associated changes to the regulatory text that were suggested, the agency has decided to revise the regulatory text in the final rule accordingly.

The NPRM regulatory text addressed situations where the ICE ''remains active for the entire duration of the test,'' but we also need to be concerned with an ICE or thermal management system that operates intermittently. If any of these three conditions occur during ten consecutive tests the vehicle is not required to meet the applicable requirements. The agency has considered the total number of tests that may have to be executed to acquire the necessary four valid tests and has decided to include an absolute number of tests that must be attempted before the test sequence can be terminated.

The NPRM regulatory text did not specifically state that all accessories that can be physically shut off should be shut off during testing. That text has been added to the final rule.

Calculation of Results

The NPRM explained that the proposed compliance test procedure was consistent with the Society of Automotive Engineers Surface Vehicle Standard J2889–1, ''*Measurement of Minimum Noise Emitted by Road Vehicles,*'' September 2011,[161] and that several sections of the SAE standard were incorporated by reference into the proposed FMVSS regulatory text. The agency further discussed that for all pass-by operating conditions, the proposed test procedure (and that of SAE J2889–1) specified that at least four valid test trials must be completed while recording corresponding acoustic sound measurements for each operating condition, and upon completion of testing the first four valid trials with an overall SPL within 2 dB(A) of each other would be chosen for analysis. We explained that this repetition and decibel level restriction were to ensure repeatability of vehicle sound measurements without unwanted ambient disturbances, other non-vehicle sounds, or intermittent sounds the vehicle may happen to make that are not associated with its operating mode.

The proposed rule required that for each pass-by test, the sound emitted by the vehicle at the specified speed be recorded throughout the measurement zone specified in S6.4. The regulatory text specifically stated in S7.3(a), ''The test result shall be the lowest value (average of the two microphones) of the four valid pass-bys. The test result shall be reported to the first significant digit after the decimal place.'' The proposed regulatory text also stated in S7.3(b), ''The test result shall be corrected for the ambient sound level in each one-third octave band according to the procedure in S6.7 and the correction criteria given in Table 6 and reported to the first significant digit after the decimal place.''

The NPRM also explained that to ensure measurements can be duplicated repeatably on the same vehicle at one facility or at different facilities, the instruments used to make the acoustical measurements should meet the requirements of paragraph 5.1 of SAE J2889–1. Since the filter roll-off rates used affect the results of the acoustic measurements at the one-third octave band level, the NPRM explained that SAE J2889–1 requires conformance with ANSI S1.11. ANSI S1.11 specifies a wide range for filter roll-off rates, and these rates, if selected at the upper and lower extremes of the range, could produce different results. The agency sought comment on whether the test procedure should specify a maximum roll-off rate that is finite.

The agency also considered in the NPRM whether the procedures for analyzing the frequency spectrum in SAE J2889–1 were sufficient to ensure that the results of the acoustic measurements were recorded in a consistent manner. The agency asked additional questions about which filter roll-off rates have been used, if the one-third octave band analysis should be done in the frequency domain or in the time domain, and if an exponential window should be used when conducting the frequency analysis.

Several organizations including Alliance/Global (combined comment), SAE, OICA, NFB, Honda, and Toyota submitted comments regarding the need to clarify the procedures for processing the acoustic measurements used to determine vehicle compliance.

Alliance/Global stated that the NPRM was ambiguous as to what SPLs should be reported when four sets of measurements are made with two microphones. They suggested that the agency proposal was not clear if side-to-side measurements are to be averaged with the lower of the four measurements reported or if each side's four measurements are to be averaged and the lower measurement reported. Alliance/Global also stated that they do not agree with the use of the SAE J2889–1 ambient background correction procedures when applied to one-third octave band measurements as proposed because it differs from the ISO/SAE procedures which recommends correcting for ambient background only at the overall SPL level, not at the one-third octave band level. According to the Alliance/Global, its members said that they support the test procedures as specified in SAE J2889–1.

SAE commented that, ''Section S7.3(a) proposed text is unclear.'' SAE explained that the four measurement runs are to be averaged independently per side, and then the lower of the two sides is chosen to be the intermediate or final result, as applicable, in accordance with SAE J2889–1. The NFB supported the SAE comments on the proper measurement procedure. OICA said that the overall SPL values should be averaged per side and that the reported final result is from the vehicle side with the lower average overall SPL level.

Toyota stated, as mentioned in the Alliance/Global joint comment, that the

[161] The agency recognized that SAE had published an updated version of J2889–1 in May 2012. At that time we had not yet evaluated the new version, but said we intended to do so before publishing a final rule.

measurement procedure in the NPRM introduces significant variability within the results and that a more appropriate measurement procedure would be that which is specified by SAE J2889–1. Honda stated that it supports the principle of taking four measurements, averaging the lower values from each side, and reporting the calculated value, per SAE J2889–1.

In regards to roll-off filter selection for post processing acoustic files, Alliance/Global supported the use of ANSI S1.11–2004 Class 1 one-third octave filters as specified in SAE J2889–1. While they acknowledged the agency's concern regarding filter roll-off rates, they stated that the roll-off rate has a very small impact on the one-third octave results (approximately 0.15 dB). Honda also voiced concerns regarding filter roll-off rates, in that specifying a maximum and sub-infinite roll-off rate in this test procedure would represent a change to the general standard of one-third octave analysis already commonly used by automakers. Honda stated that this change would create an extra testing burden and would require additional time for development of the appropriate test instruments and test procedures.

Agency Response to Comments

It has been the agency's intention to follow the SAE J2889–1 [162] test procedures, when feasible and consistent with the agency's focus on safety. As discussed in the NPRM and in this final rule, the agency has decided to evaluate HVs and EVs for detectability and recognition at the one-third octave band level rather than at the overall sound pressure level. To do this, the agency will follow the procedures specified in SAE J2889–1 for: (1) Obtaining the ambient sound files both before and after execution of a series of test trials; (2) measuring the sound profiles for each of the first four valid test trials as appropriate for each test condition; and (3) determining which recorded sound files to use for the one-third octave band evaluation. It should be noted that the agency's final rule test procedure augments SAE J2889–1 by specifying how exactly the selected acoustic measurements will be corrected for ambient conditions and evaluated at the one-third octave band level, which is a critical step in the compliance test procedure and one that is not fully detailed in SAE J2889–1.

All of the commenters indicated that the agency's proposed ambient correction and test procedure, S6.7 and S7, do not exactly follow the procedures in SAE J2889–1. SAE specifically said that our proposed regulatory text was unclear, and the Alliance/Global stated our proposed text was ambiguous. More specifically, the commenters noted that the proposed regulatory text specified that, for each of the four consecutive valid test runs collected during the pass-by tests, the left and right microphone files are averaged together and then the one run with the lowest overall SPL value was used to evaluate the one-third octaves to determine compliance. On the other hand, the commenters noted that SAE J2889–1 clearly requires that the four data files recorded on the left side of the test vehicle are averaged, and the four data files recorded on the right side of the vehicle are averaged, and then the side of the vehicle with the lowest average overall SPL value should be selected to evaluate the one-third octave bands for compliance.

The agency has evaluated these comments and has further scrutinized the proposed text and the procedure specified in SAE J2889–1. We have decided that the regulatory text as proposed did not match that in SAE J2889–1 and agree that the text should be unambiguous. We note that the agency's intent has been to follow SAE J2889–1 as closely as possible but to expand and add the necessary details not currently specified in SAE J2889–1 for the final evaluation of the one-third octave bands.

We further considered how the recorded acoustic data files should be evaluated, and we have concluded that averaging the data files on each side of the test vehicle separately as required in J2889–1 provides the most realistic results. During a pass-by scenario, a pedestrian listening to a vehicle driving by will be positioned on either the left or right side of the vehicle. Since the pedestrian will be on one side of the vehicle or the other as it passes, the SAE J2889–1 procedures appropriately select the side of the vehicle that is found to be the quietest during the test runs. Taking an average that includes sound from both the left and right microphones as specified in the NPRM would not provide an accurate representation of what any pedestrian would hear. Therefore, the regulatory text has been revised to agree with the SAE standard.

As mentioned previously, Alliance/Global suggested that the proposed regulatory text was ambiguous in regards to the steps involved in analyzing vehicle acoustic measurements. Upon closer examination of our proposed text, we believe the text should be revised to add some clarification and additional detail. To that end, we are providing here a detailed, step-by-step explanation in conjunction with several figures to further illustrate the process. The corresponding regulatory text in this final rule has been revised accordingly to make the procedures as unambiguous as possible.

The process of executing vehicle measurements in each test condition (stationary, reverse, pass-bys), collecting necessary sound files, determining test run validity, and processing sound files to verify vehicle compliance can be broken down into five main steps, which are discussed in detail later in this section, and which can be briefly summarized as follows:

1. For a given test condition, execute test runs and collect acoustic sound files;
2. Eliminate invalid test runs and discard the corresponding sound files;
3. Identify the first four valid vehicle test runs that have overall SPLs within 2dBA of each other;
4. Take an average of the four overall SPLs from the left side of the test vehicle; separately, take an average of the four overall SPLs from the right side of the test vehicle; the lesser of these two averages will determine whether the left side or right side sound data are to be used for one-third octave band analysis.
5. Evaluate either the left side or right side sound data (whichever had the lower average in Step 4) at the one-third octave band level to determine compliance.

Each of these five steps is discussed in more detail below.

For a given test condition, execute test runs and collect acoustic sound files: To begin the process, multiple test runs (at

[162] In the NPRM the agency officially referenced SAE Standard J2889–1, dated September 2011, and noted that SAE had published an updated version of J2889–1 in May 2012 but that we had not evaluated that later version and intended to do so before publishing the final rule. In the May 2012 version, SAE added testing protocols for vehicle commencing motion sound and for frequency shift measurements, neither of which the agency has decided to utilize as discussed in this final rule. The May 2012 version also included paragraph updates and re-numbering. In December 2014, SAE issued another revision to J2889–1. In the final rule we have decided to update the official reference for the SAE J2889–1 standard from the September 2011 version to the December 2014 version and have updated references throughout the FMVSS No. 141 standard accordingly. A number of OEMs, including some of those that commented on the FMVSS No. 141 NPRM, are parties to the SAE committee that created J2889–1, and they presumably had a hand in subsequent updates. The agency has decided to use the Dec. 2014 version since that is the most up-to-date and since the older versions seemed to leave open some important technical details that are addressed to some extent in the latest version. Safety groups and other non-industry commenters did not address SAE recommended practices, so we assume they are indifferent about which version of the SAE standard is referenced in this final rule.

least four, but generally five to seven based on NHTSA's experience) must be completed for each test condition (stationary, reverse, pass-by) as specified in the regulatory test procedures. Immediately before and after each test condition, at least 30 seconds of ambient noise must be recorded. During each test run, a left (driver's side) and right (passenger side) acoustic sound data file must be recorded. For the stationary tests, data from a third microphone located directly ahead of the test vehicle is also recorded.

Eliminate invalid test run acoustic sound files: The sound files collected from each microphone during each test run are evaluated for validity. The specifics for determining validity of each test run sound file are discussed in Section III.K, *Conditions for discarding measurements.* Each test run deemed valid must be numbered sequentially based upon the chronological order in which it was executed on the test track, and each must include a left (driver's side), right (passenger side), and for the stationary test condition a front center acoustic sound file. Sound files shall be identified with, and shall retain, their test run sequence number and their association with left side and right side microphone locations.

Identify first four valid test run sound files within 2dBA: After a group of test run sound files have been determined as valid, further evaluation is required to identify the ''first four valid test run sound files with overall SPLs within 2dBA.'' Figure 10 identifies a flow diagram that depicts this process which is derived directly from SAE J2889–1.

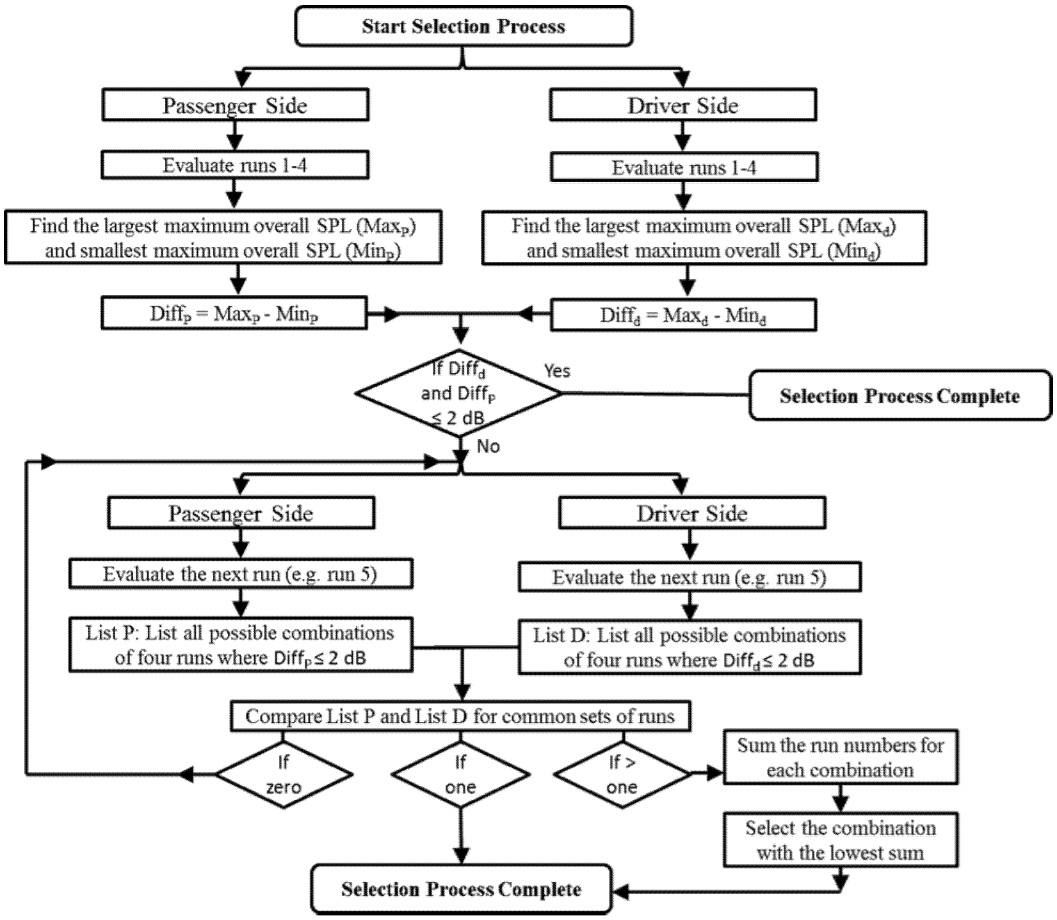

Figure 10. Selection process to determine "first four valid test run sound files within 2dBA"

For each test run, a valid left (driver's side) and a valid right (passenger side) sound file must exist. For each sound file the maximum overall SPL must be determined. Ultimately, the four test runs to be used for the compliance evaluation must be sequentially the first four valid test runs that have four left side files within 2.0dB(A) overall SPL and four right side files within 2.0 dB(A) overall SPL. The left and right side files must come from the same set of four test runs. This test run selection process as depicted in Figure 10 is as follows:

Step 1: Number each valid sound measurement test run sequentially in the chronological order it was completed on the test track– *e.g.,* Run 1, Run 2, Run 3, . . . Run N. Each test run must have a corresponding left (driver's side) and right (passenger side) acoustic sound file.

Step 2: Determine the maximum overall SPL value for the left and right side sound files from each of the first 4 test runs.

Step 3: Compare the four left side (driver's side) maximum overall SPL values. Calculate the difference between the largest and smallest of the four values. Use the same process to determine the difference between the largest and smallest of the four right side (passenger side) maximum overall

SPL values. If the difference is less than or equal to 2.0 dB(A) on both the left and right sides, then these four test runs will be used for the compliance evaluation, and the test run selection process for the given operating condition is complete. The selected runs will be considered the ''first four valid test runs within 2dBA.'' Otherwise, continue to Step 4.

Step 4: Add data from a fifth test run to the analysis.

Step 5: For the driver's side microphone, list all possible combinations of four runs for which the largest overall SPL from any of the four runs minus the smallest overall SPL from any of the four runs is less than or equal to 2.0 dB(A).

Step 6: For the passenger side microphone, list all possible combinations of four runs for which the largest overall SPL from any of the four runs minus the smallest overall SPL from any of the four runs is less than or equal to 2.0 dB(A).

Step 7: Examine the list of run combinations developed in both Step 5 and Step 6. If a set of four runs (*e.g.,* Run 1, Run 2, Run 4, and Run 5) appears in both the Step 5 and Step 6 lists, enter it into a new list (the Step 7 list).

Step 8: The Step 7 list can possibly contain zero, one, or more entries. If the Step 7 list has zero entries, skip to Step 10. If the Step 7 list contains exactly one entry, then that entry is the set of runs for which final data will be analyzed. For this case, terminate the run selection procedure. This set of runs will be considered the ''first four valid test run sound files within 2.0dBA.'' If the Step 7 list contains more than one entry, go to Step 9.

Step 9: Case for which the Step 7 list contains more than one entry. Sum the run numbers for each set of runs in the Step 7 list. For example, if an entry contains Run 1, Run 2, Run 4, and Run 5, then the sum of its run numbers would be 12 (1+2+4+5). Select the entry which has the lowest sum of run numbers. This set of runs is the set for which final data will be analyzed for compliance. At this point, terminate the run selection procedure. This set of runs will be considered the ''first four valid test run sound files within 2.0dBA.'' [Note: When there are five runs being considered, it is mathematically impossible for the sums of the run numbers for the two entries in the Step 7 list to be exactly the same. One entry will always have a lower value. However, in NHTSA's experience there have been cases in which six or seven test runs are needed to find a set of four shared by the driver's and passenger's sides that have Overall SPLs within 2.0 dB(A). It might be possible (although the agency has not yet had it happen) in these situations for the sums of the run numbers for the two entries in the Step 7 list to be exactly the same. If this occurs, our procedure will be to eliminate the combination of four runs containing the highest run number. If the highest run number is the same in both four-run combinations, we then will eliminate the combination of four runs containing the second highest run number, and so on.]

Step 10: Case for which the Step 7 list contains zero entries. In this situation, add data from another test run to the analysis and return to Step 5. [Note: In NHTSA's experience, there have been instances in which it was necessary to examine data from as many as seven runs to find a set of four that are shared by the driver's and passenger's sides that have Overall SPLs within 2.0 dB(A).]

Note that, although data recorded by the front microphone are not considered when determining the ''first four valid test runs within 2dB(A),'' those data are used when evaluating compliance with the directivity requirement. The front microphone data to be used for directivity are the data recorded during the ''first four valid test runs within 2dB(A)'' determined according to the procedure above.

Average sound files on test vehicle left and right sides to determine final files for one-third octave band processing: After the ''first four valid test runs within 2.0dBA'' have been identified, the four acoustic sound files from each side of the vehicle recorded during those four runs are analyzed to determine which side of the vehicle was the quietest during test execution. Figure 11 is a flow diagram that depicts the process used to further identify the acoustic data files on a particular side of the test vehicle that will be used to evaluate vehicle compliance at the one-third octave band level. For each of the eight acoustic sound data files (four left side files and four right side files) the maximum overall SPL value must be identified. Each of the eight acoustic data file maximum overall SPL values are then corrected for the recorded ambient conditions as specified in the final rule. Finally, the four ambient-corrected maximum overall SPL values on each side of the vehicle are averaged together for one comprehensive ambient-corrected value for each side of the vehicle. The side of the vehicle with the lowest average ambient-corrected maximum overall SPL value is the side of the vehicle that is further evaluated for compliance at the one-third octave band level. Each of the four acoustic data files on the side of the vehicle with the lowest average ambient-corrected maximum overall SPL value are then used for the one-third octave band evaluation as depicted in the flow diagram in Figure 12.

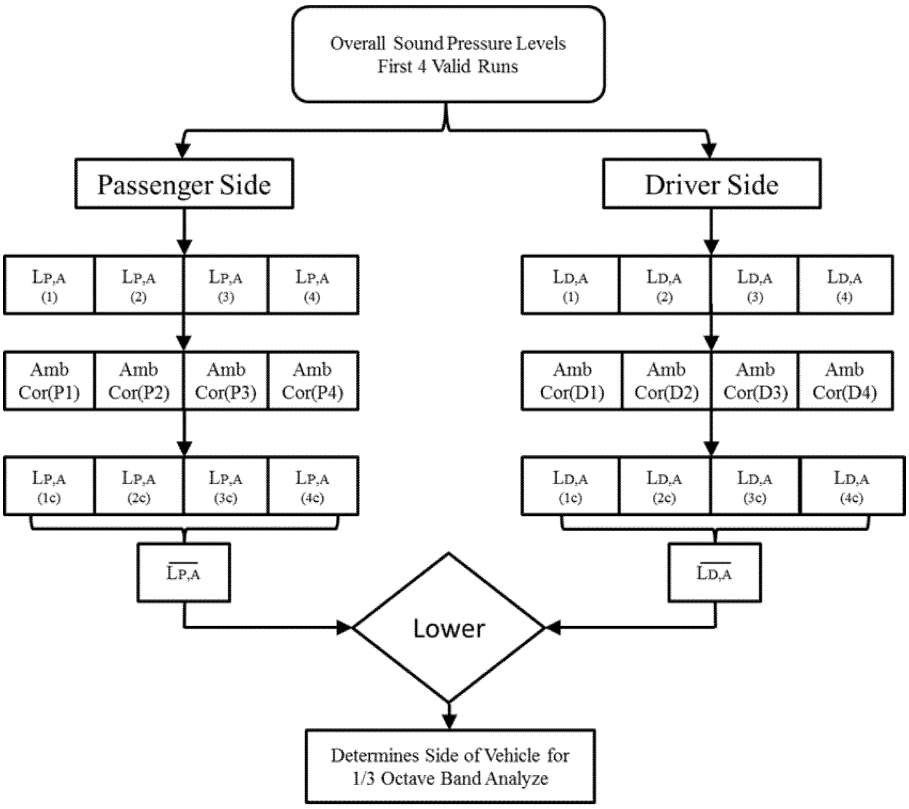

Figure 11. Flow diagram for identification of quietest side of test vehicle to be used for one-third octave analysis

In the event that the average corrected maximum overall SPL values for the driver's and passenger's sides are exactly equal, then the sound from the passenger's side will be analyzed.

Evaluate final sound files at one-third octave band level for compliance verification: Figure 12 indicates the flow process for analyzing the selected four acoustic data files for the one-third octave band analysis. As shown in Figure 11, the side of the vehicle found to have the lowest overall average and corrected SPL value is the side of the vehicle that is further evaluated for compliance verification. The side selected has four individual acoustic data files. Each file is broken down into its one-third octave band levels. The identified one-third octave band levels in each of the four files are then corrected for the measured ambient levels as specified in the final rule. The four corrected values in each one-third octave band are then averaged together to get the average corrected sound pressure level in each one-third octave band. The averaged corrected values in each one-third octave band are then compared directly to the minimum standards specified in this final rule to determine compliance.

The stationary test condition, ''first four valid test runs within 2dB(A)'' also has front microphone acoustic data. Each sound file for the front microphone is broken down into its one-third octave band levels. The identified one-third octave band levels in each of the four files are then corrected for the measured ambient levels as specified in the final rule. The four values calculated in each one-third octave band are then averaged together to get the average ambient-corrected sound pressure level in each one-third octave band. The averaged, corrected values in each one-third octave band are then compared directly to the minimum standards specified in this final rule to determine compliance.

As explained previously, the process established in this final rule augments the process specified in the SAE standard by clarifying the steps depicted in Figure 12 for processing the selected sound files for the one-third octave band analysis. The current version of SAE J2889–1 does not correct one-third octave band data, as required in this final rule.

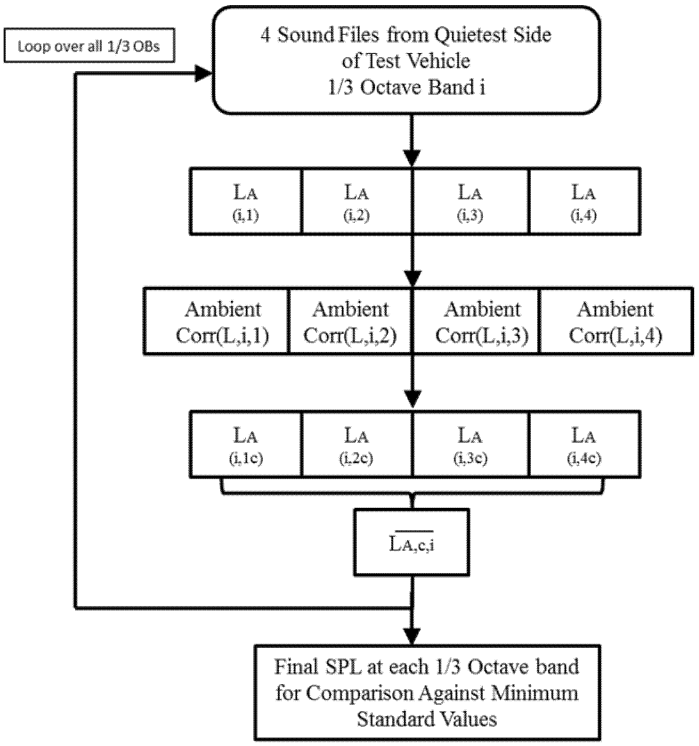

Figure 12. Flow diagram for processing sound files at one-third octave band levels

To address commenter issues discussed above and to add clarification, the final rule test procedure (paragraph S7) replaces in its entirety the proposed regulatory text of the corresponding section of the NPRM.

Data Post-Processing

In the NPRM, the agency sought comment on data post-processing topics including filter roll-off rates, measurement domains and type windows used for frequency analyses. Few comments were received, but the one topic that was commented on was filter roll-off rates. The commenters strongly supported using the ANSI S1.11–2004 Class 1 one-third octave filters as specified in SAE J2889–1.

We agree that the ANSI S1.11 filters should be used for processing the acoustic sound files. However, as mentioned in the NPRM, the selected filter roll-off rates could affect the results of the acoustic measurements at the one-third octave band level. Furthermore, there are other attributes (*i.e.,* sound analysis code window size, time used for exponential averaging, and the precise details of the implementation of the sound analysis code) that should also be considered for use in the data post-processing routines that can impact the final results. All of these critical attributes must be evaluated and defined to ensure an objective test procedure is specified that provides reproducible and repeatable test results.

Over the past few years, the agency has used two different sound analysis codes for processing acoustic sound files. The first code, which NHTSA licensed from Bruel and Kjaer, is the B&K Pulse Reflex™ Code (the B&K Code), and is an integral part of a commercial off-the-shelf acoustic sound measurement system. NHTSA has utilized this system and software code for much of its early research testing. The B&K Code is a data analysis software that uses preprogrammed building blocks, known as elements, to form processing chains. For the purpose of processing sound recordings two processing chains were used, one for determining the overall sound pressure levels and one for determining the 13 one-third octave sound levels.

The second analysis code that has been used by the agency is one developed by the Volpe National Transportation Systems Center (the Volpe Code). This sound analysis code was written using Matlab™. While Matlab is a proprietary engineering based technical programming language, the source code developed for acoustic data processing is the property of the United States Department of Transportation and can be made publically available. This code uses a more traditional, language based, programing structure.

The agency is aware of other acoustic measurement instrumentation and associated codes that can also be used to collect and process acoustic sound files but none of these other systems/codes have been evaluated. It is our understanding that among these codes, the two used by NHTSA and some of the other available codes function similarly. Figure 13 depicts the general process used by these various codes to derive the overall and one-third octave band sound values.

The general process involves loading the sound data file, applying the defined acoustic sound weighting, and then performing the necessary respective processing to arrive at both the overall sound pressure level and one-third octave band values. The respective processing routines will be further outlined in the following sections.

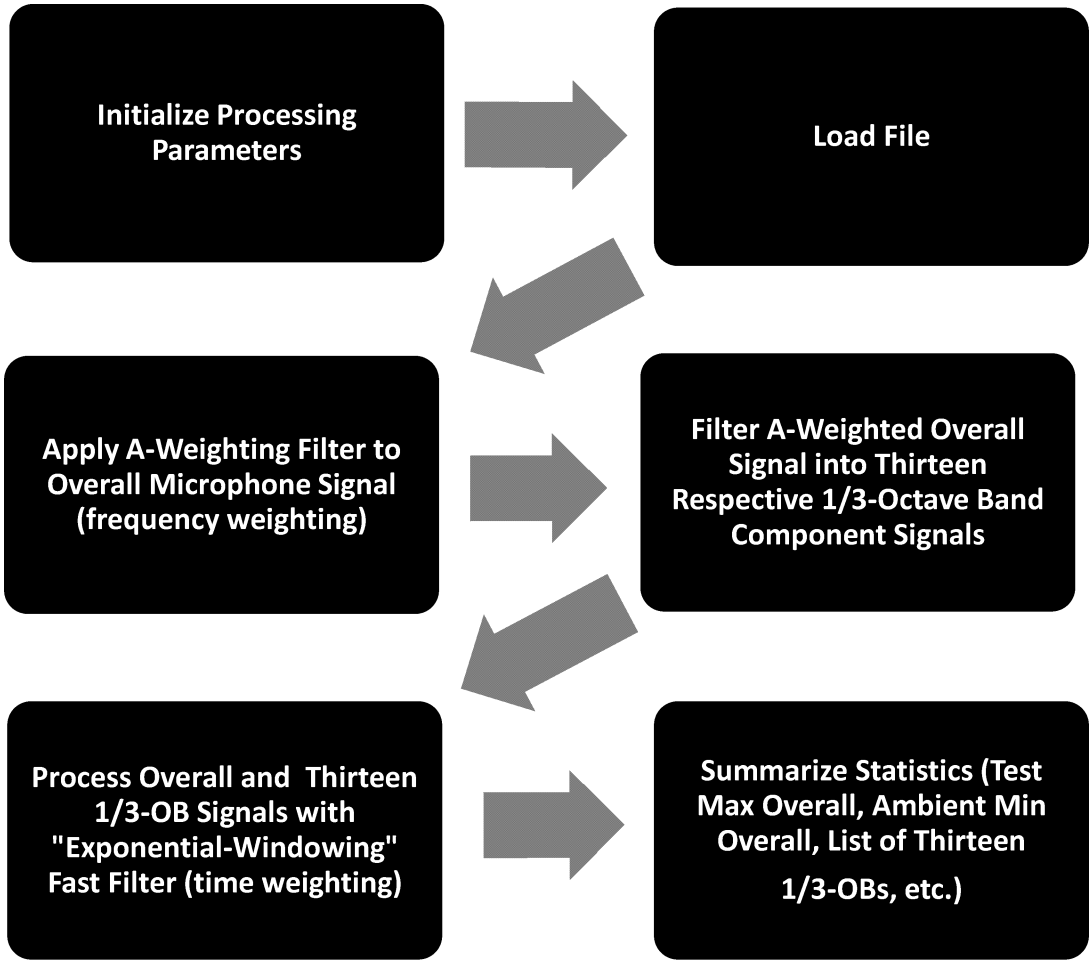

Figure 13. General Flow Diagram for Data Processing Code

For evaluation purposes, the sound data recorded during some test runs were analyzed using both the B&K Pulse code and the Volpe code. Some test runs were also analyzed using two different sets of user-specified parameters. Analysts looking at the results from these runs noted that there were slightly different overall sound pressure levels and one-third octave band levels for the exact same sound data depending upon the sound analysis code and the user-selectable parameters used. While the differences that were seen were not large (less than 2.0 dBA), NHTSA believed that it needed to understand the source of the differences before either code could be used in a compliance test. Therefore, NHTSA undertook further research work after publication of the NPRM to evaluate and resolve this issue.

The objective of this research was to select one sound analysis code and one set of user-selectable parameters for use in compliance testing of measured vehicle sound data. Our criteria for choosing an appropriate sound analysis code were:

- The code must generate correct results for mathematically-generated test cases for which the correct result is known.
- The code must meet all of the filter requirements for one-third octave band filters that are contained in the ANSI S1.11–2004 Class 1 standard.
- The code can be made publically available so all individuals and organizations know the exact methods, specified parameters, and filtering being used by NHTSA.

Table 19 shows the standard settings for the user definable parameters that can be set in each of the code packages that were evaluated.

TABLE 19—ANALYSIS CODE USER-SELECTABLE PARAMETERS

Acoustic test data analysis settings		
Parameter	B&K Pulse	Volpe Matlab
General Settings:		
Sampling Frequency	65536 Hz	65536 Hz.
Processing Window	Test Scenario Dependent	Test Scenario Dependent.
Acoustic Weighting	A or Linear Weighting	A or Z Weighting.
Overall Sound Pressure Level Settings:		

TABLE 19—ANALYSIS CODE USER-SELECTABLE PARAMETERS—Continued

Acoustic test data analysis settings		
Parameter	B&K Pulse	Volpe Matlab
Frequency span	25600 Hz	24000 Hz.
Overall Averaging	Linear	None.
Averaging time	0.05	None.
One-Third Octave Band Analysis Settings:		
Bandwidth (Fractional Octave)	⅓—Base 10 Exact	⅓—Base 10 Exact.
Upper Nominal Center Frequency	5000 Hz	5000 Hz.
Lower Nominal Center Frequency	315 Hz	315 Hz.
Type of Octave Band Averaging	Exponential	Exponential.
Type of Time Weighting	Fast	Fast.
Averaging Time	¼ seconds	¼ seconds.
Tau (Time Constant)	⅛ seconds (Fast)	⅛ seconds (Fast).

NHTSA began evaluating both codes by running the same vehicle sound data file through both code packages, looking to see how consistent the codes were relative to each other. The outcome was that each code gave slightly different results, even while using consistent parameter settings.

To systematically determine the differences between the two packages, both the B&K and the Volpe sound analysis codes were checked to ensure that they provided known output results for known input values. This was done through the development of test cases that were processed using each of the sound analysis codes. The test cases consist of simple pure tones which are computer-generated rather than taken from actual sound recordings, and thus they have none of the complexity of actual acoustic measurements. The test cases provide elemental inputs for which the correct outputs are known in advance. The test cases were used to evaluate the accuracy of a given code's analysis routine and to compare the outputs of the two different analysis methods.

Test Case 1 was a series of pure tones. The sound pressure of each tone as a function of time is given by a constant-amplitude, constant-frequency, single sine wave. Multiple pure tones were generated, each at a different constant-frequency. For this research, two constant-amplitudes corresponding to 40 and 60 dB sounds were used. To be certain of capturing all important effects for each of the 13 one-third octave bands of interest to NHTSA (which have nominal center frequencies ranging from 315 Hz to 5,000 Hz), the pure tones for Test Case 1, developed using Matlab™, were generated at 201 individual frequencies each corresponding to ⅛th of a one-third octave band (1/24th of a full octave). The frequency range over which they span is, nominally, 70Hz–22,300Hz. This range encompasses six full one-third octave bands both above, and six full one-third octave bands below, the 13 one-third octave bands of interest to NHTSA. This range was chosen to ensure a full profile of how each code responds to known inputs was generated and understood.

The following aspects of sound analysis code were checked using Test Case 1 data files:

- The correctness of the calculated amplitude, when no frequency weighting (Z-weighting) was applied, for a pure tone at a frequency corresponding to the center of each of the one-third octave bands of interest.
- The correctness of the calculated amplitude, when A-weighting was applied, for a pure tone at a frequency corresponding to the center of each of the one-third octave bands of interest.
- The correctness of the band-pass filters that split frequency-weighted sound pressure level data into 13 one-third octave bands. NHTSA and commenters want these band-pass filters to meet all of the Type 1 filter requirements for one-third octave band filters that are contained in the standard ''ANSI S1.11–2004''. The Test Case 1 frequencies include all of the frequencies listed in Table B1,'' of ANSI S1.11–2004 for the 13 one-third octave bands of interest to NHTSA.

For the second test case, Test Case 2, thirteen pure tones were superimposed to form one sound-pressure signal. These thirteen pure tones were at the frequencies corresponding to the center of each of the one-third octave bands of interest. No frequency weighting (*i.e.,* Z-weighting) was applied.

Two test runs were made using Test Case 2. The first had a 40 dB pure tone centered at each of the one-third octave bands of interest (giving an Overall SPL for this test run of 51.1394 dB). The second used thirteen pure tones at 60 dB (giving an Overall SPL for this test run of 71.1394 dB). This test case was used to check the correctness of the calculated amplitudes when no frequency weighting (Z-weighting) was applied to a complex sound data waveform.

In general, in comparing the two analysis codes using Test Case 2, NHTSA found very little or no difference between the calculated amplitudes regardless of weighting type (A- or Z-weighting) for the individual pure tones located at the center frequencies of each of the 13 one-third octave bands. Each code set gave either 40 or 60 dB at each center frequency, as expected. The results from the two analysis codes were also consistent when the overall SPL for the 13 center frequencies were combined, and both the Volpe Matlab code and the B&K Pulse code produced the correct results of 51.1 dB and 71.1 dB for the 40 dB and 60 dB inputs, respectively.

However, in looking at the test results from Test Case 1, the two analysis codes were not consistent regarding their band-pass filter function that splits frequency-weighted sound pressure data into the 13 one-third octave bands. When comparing the output of each of the 201 frequencies described in Test Case 1 to the requirements specified in ANSI S1.11–2004, NHTSA found that the B&K software tended to insufficiently attenuate the frequency bands away from the nominal one-third octave band. An example of this is shown below in Figure 14 which plots the minimum and maximum ANSI filter requirements, the output of the B&K Pulse code, and the output of the Volpe Matlab code, for the one-third octave band centered at 1000 Hz.

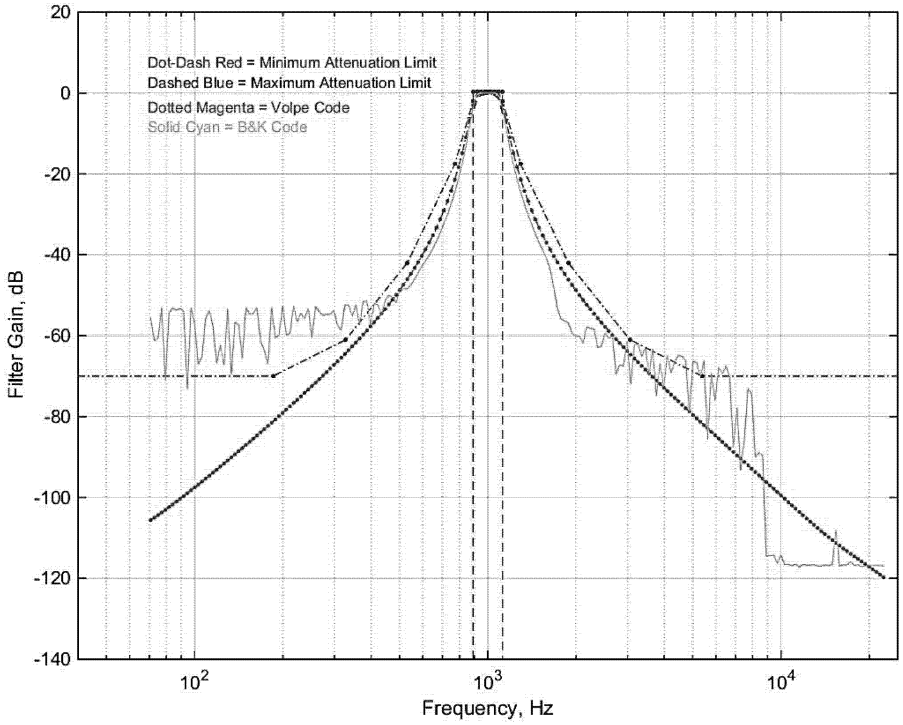

Figure 14. One-Third Octave Band Filter Response for the 1000 Hz Band

While some bands displayed better adherence to the ANSI S1.11 specifications, all of the 13 one-third octave bands displayed similar results as the 1000 Hz band shown above for the B&K software. On the other hand, the Volpe Matlab code processed data fell well within the filter attenuation limits specified in ANSI S1.11–2004 Class 1 across all bands. Complete results for all the individual one-third octave bands can be found in the corresponding NHTSA research report.[163]

The results of our research indicate that the two codes analyzed have different filter algorithms. This results in the two codes calculating slightly different one-third octave band levels. The exact filtering algorithm used in the B&K code is unknown because the code is proprietary. The filtering algorithm used in the Volpe code is known and can be made public. Given the results of our examination of the two post-processing methods, NHTSA has decided to use the Volpe Matlab code for the agency's future compliance testing programs. As explained above, one reason for this is that the Matlab code appears to be in full agreement with ANSI S1.11–2004 specifications and requirements. Also, the source code is not proprietary, and it can be made publically available. To resolve any potential problems with post-processing code conflicts, the agency will make the Matlab code to be used publically available, either as part of the agency's compliance test procedure, or posted on the agency's Web site. This approach will help the agency with its recent efforts to increase public communications and transparency. In reference to the other parameters that the agency inquired about in the NPRM, measurement domains and type windows used for frequency analyses, no direct comments were received so the agency has made decisions according to what it believes are technically correct. All the parameters that will be used for post processing the acoustic files will be specified in the publically available Matlab code.

L. Phase-In of Requirements

The PSEA directed NHTSA to establish a phase-in period to set forth the dates by which production vehicles must comply with the new FMVSS No. 141. The PSEA also stated that NHTSA must require full compliance ''on or after September 1st of the calendar year that begins three years after the date on which the final rule is issued.''

To address these requirements in the PSEA, the NPRM proposed a phase-in over three model years for new hybrid and electric vehicles produced for sale in the U.S., and full compliance of all new hybrid and electric vehicles by September 1, 2018. The three-year phase-in was based on a '30/60/90' phase-in schedule. Given that the NPRM assumed publication of a final rule in calendar year 2014, the phase-in requirements proposed in the NPRM were: 30 percent of each OEM's HV and EV production in compliance by September 1, 2015; 60 percent by September 1, 2016; 90 percent by September 1, 2017; and 100 percent by September 1, 2018. The proposed phase-in schedule was intended to be applicable to all manufacturers of HVs and EVs, except small volume and final stage manufacturers. The latter were allowed to postpone compliance until the date on which other manufacturers were required to have all their vehicles brought into compliance, *i.e.,* September 1, 2018.

The NPRM also included amendments to Part 585 Reporting Requirements to allow for OVSC verification of each manufacturer's phase-in of pedestrian alert systems.

With the exception of two advocacy groups, all commenters opposed the phase-in requirements as proposed in

[163] Dr. W. Riley Garrott, Richard, L. Hoover, Eric Gerdus, and Sughosh J. Rao, ''Selecting a Sound Analysis Code for Use With NHTSA Test Procedure to Characterize Vehicle Sound'' NHTSA Technical Report.DOT HS 812 284.

the NPRM. The NFB and NCSAB supported the phase-in schedule as proposed. The NCSAB stated that the rule should be completed by January 2014, according to the PSEA. Neither commenter suggested an alternative phase-in schedule.

All other commenters requested that NHTSA provide more lead time for compliance with the new safety standard. Some favored eliminating the phase-in altogether and establishing a single date for full compliance for all production hybrid and electric vehicles. Alternatively, commenters requested that NHTSA begin the phase-in at a later date, unless changes were made in the final rule to adopt performance requirements much less stringent than those in the NPRM. Honda and Alliance/Global requested that NHTSA allow for carry-forward credits which would give a manufacturer credit for meeting one of the phase-in stages prior to the deadline for that stage, and the manufacturer could use that credit if it did not fully meet a deadline of a later stage.

A heavy vehicle OEM commented that the proposed Part 585 phase-in reporting should not apply to a manufacturer that achieves 100 percent early compliance, and also stated that paragraph S9.5 of the NPRM, regarding phase-in for multi-stage vehicles, is unnecessary because only a final stage manufacturer would be responsible for meeting the phase-in requirements.

Porsche, a light vehicle manufacturer that produces only one hybrid model, provided proprietary production estimates through September 2018 indicating that they would not meet the 90 percent level by the third year of the proposed phase-in.

The EDTA commented that, due to the complexity of the proposal, as well as the technology needed to implement it, substantial lead time will be needed to design, develop, test and certify new alert systems. EDTA stated that it joined with Alliance/Global in recommending that, if the final rule is substantially the same as the proposal, the phase-in specified in the final rule should be limited to a single 100-percent compliance date that is set in accordance with the PSEA (*i.e.,* September 1st of the calendar year that begins three years after the date on which the final rule is issued).

Honda commented that, if the final rule must be complied with starting in September 2015, it would need more time to meet all the requirements proposed in the NPRM (modification of speakers, control unit, vehicle structural modifications, etc.). Therefore, Honda requested at least two or more years from the date that the final rule is issued before the phase-in requirements begin. As mentioned above, Honda also requested that a credit system be established as part of the phase-in.

Toyota stated that it is committed to pedestrian safety, and as such, has already equipped every hybrid and electric vehicle it produced since model year 2012 under the Toyota and Lexus brands (currently, there is no Scion HV or EV) with a pedestrian alert sound meeting the existing Japanese guidelines. However, Toyota noted that the proposed requirements of the NPRM would require significant redesign of Toyota's current production alert system, which will in turn require substantial development and test time. Therefore, Toyota recommended elimination of the phase-in requirements and suggested that NHTSA consolidate the schedule by simply requiring full compliance for all HVs and EVs by September 1, 2018 (assuming the final rule is published in calendar year 2014 or earlier).

Alliance/Global commented that it would not be possible for manufacturers to meet a phase-in beginning September 1, 2014. If the requirements of the final rule were to be substantially similar to the NPRM, they recommend foregoing the phase-in and going directly to full implementation on September 1, 2018. However, if the final rule instead were to approximate the Alliance/Global recommendations, then a phase-in period is feasible beginning with vehicles built on or after September 1, 2015, and ending with vehicles built on or after September 1, 2018 (those dates would need to be adjusted should the final rule be significantly delayed beyond the original January 2014 deadline).

Alliance/Global also commented that currently there are no EVs or HVs produced by their member companies that are capable of meeting the requirements proposed by NHTSA. They stated that several strategies had been considered, including reprogramming an existing alert sound control module. They also stated they had interviewed suppliers who currently manufacture alert systems in an effort to explore all possible solutions for meeting the NPRM. They concluded that considerably more time would be needed than a September 1, 2014 start of phase-in would allow to package/repackage components, develop new systems, source the components, and certify the new systems.

However, Alliance/Global commented that such a phase-in schedule as the one they suggested still would need assistance from carry-forward credits (including early carry-forward credits). They recommended full credits for EVs and HVs that comply with their suggested sound specifications (assuming those were implemented in the NHTSA final rule) and half-credit (*i.e.,* two vehicles equal one credit) for EVs and HVs that are equipped with pedestrian alert systems that do not meet the Alliance/Global suggested requirements, but that nevertheless comply with the spirit and purpose of the PSEA. If NHTSA specifies a phase-in, Alliance/Global stated that carry-forward credits are necessary for their member companies to avoid needless compliance expenditure on vehicle models imminently due to be phased out of production.

Alliance/Global commented that small manufacturers should not be required to comply until the end of the phase-in period. Because no current EV or HV pedestrian alert sound voluntarily implemented by vehicle manufacturers meets NHTSA's proposed requirements, if the agency proceeds to a final rule that is substantially similar to the NPRM, Alliance/Global would prefer that NHTSA does not specify a phase-in, and instead allows all manufacturers the maximum amount of time to comply with the requirements of the new safety standard.

Finally, Alliance/Global stated that phase-in language needs to clarify that requirements pertain only to vehicles described in the Applicability section of the regulation and not to every type of vehicle that a full-line manufacturer produces.

The MIC commented that, if NHTSA does decide to establish minimum sound requirements for motorcycles, it should extend the phase-in exemption for small manufacturers, including motorcycle manufacturers, indefinitely.

Nissan requested that the phase-in begin at least two years following the issuance of a final rule. Nissan also requested that NHTSA provide for the use of advanced credits for vehicles that comply before the final date for compliance.

Denso commented that vehicle manufacturers, as well as equipment suppliers, need three years of lead time before beginning phase-in of complying vehicles.

Navistar questioned how the proposed phase-in meshes with Parts 567 and 568 regarding certification of multistage vehicles.

OICA commented that the Phase-in should include only those vehicles to which the performance requirements are meant to apply, *i.e.,* certain hybrid and electric vehicles.

Agency Response to Comments

Given that this final rule is being published in calendar year 2016 and, furthermore, given that the PSEA stipulates full compliance on and after September 1st of the calendar year that begins three years after the date on which the final rule is issued, NHTSA is requiring compliance for 100 percent of HVs and EVs produced for sale in the U.S. by all manufacturers by no later than September 1, 2019. This compliance date is set forth in the Applicability section of the regulatory text of this final rule.

In addition, after review of the comments submitted, NHTSA is adopting a one-year, 50 percent phase-in. Under this phase-in, 50 percent of the total production volume of each manufacturer's hybrid and electric vehicles to which the safety standard applies, and which are produced by the manufacturer for sale in the United States., must comply by no later than September 1, 2018.

This phase-in does not apply to multi-stage and small volume manufacturers. Those manufacturers would have until September 1, 2019, to comply. This should not have any significant effect on traffic safety because of the relatively small number of vehicles they produce.

Because the phase-in period will have a duration of only one year, carry-forward credits would not be of any benefit. Therefore, NHTSA is not making any provisions in this rule for carry-forward credits.

The agency's decision on the phase-in issues is a compromise that responds to comments about reducing the phase-in or eliminating it altogether. The one year phase-in addresses the mandatory PSEA requirements and ensures that any delay in getting complying vehicles to market will be minimized. At the same time, it responds to commenters' requests for additional lead time to comply and to their suggestions that the NPRM phase-in should be consolidated and simplified. A one-year phase-in provides additional flexibility for manufacturers as to when they bring their model lines into compliance.

Furthermore, NHTSA has reviewed current model lines of vehicle manufacturers using OVSC annual compliance information and has determined that several of the OEMs that produce HVs and/or EVs have only one or two such models among their vehicle lines. This is one factor that we have considered in choosing an appropriate phase-in period. These manufacturers will benefit from a shortened phase-in schedule that provides additional lead time prior to the initial date on which the phase-in begins.

IV. International Harmonization and Stakeholder Consultation

NHTSA is required by the PSEA to consult with the following organizations as part of this rulemaking: The Environmental Protection Agency (EPA) to assure that any alert sound required by the rulemaking is consistent with noise regulations issued by that agency; consumer groups representing visually-impaired individuals; automobile manufacturers and trade associations representing them; technical standardization organizations responsible for measurement methods such as the Society of Automotive Engineers, the International Organization for Standardization (ISO), and the UNECE World Forum for Harmonization of Vehicle Regulations (WP.29).

The agency has established three dockets to enhance and facilitate cooperation with outside entities including international organizations. The first docket (No. NHTSA–2008–0108) was created after the 2008 public meeting was held; it contains a copy of the notice of public meeting in the **Federal Register**, a transcript of the meeting, presentations prepared for the meeting and comment submissions. It also includes NHTSA's research plan, our ''Notice of Intent to Prepare an Environmental Assessment for the Pedestrian Safety Enhancement Act of 2010'' published on July 12th 2011 in the **Federal Register**, and the agency's Phase 1 and 2 research reports. (The Notice of Intent [NOI] and the agency's research are discussed more fully in other parts of this document.) The second docket (No. NHTSA–2011–0100) was created to collect comments on the NOI; it also includes a copy of that notice. The third docket (No. NHTSA–2011–0148) was created in September 2011 to include materials related to the rulemaking process (''The Pedestrian Safety Enhancement Act of 2010,'' Phase 1 and 2 research reports, statistical reports, meeting presentations, etc.), and outside comments.

On June 25, 1998, the United States signed the 1998 Global Agreement, which entered into force on August 25, 2000. This agreement was negotiated under the auspices of the United Nations Economic Commission for Europe (UNECE) under the leadership of the U.S., the European Community (EC) and Japan. The 1998 Agreement provides for the establishment of Global Technical Regulations (GTRs) regarding the safety, emissions, energy conservation and theft prevention of wheeled vehicles, equipment and parts. By establishing GTRs under the 1998 Agreement, the Contracting Parties seek to pursue harmonization in motor vehicle regulations not only at the national and regional levels, but worldwide as well.

As a general matter, governments, vehicle manufacturers, and ultimately, consumers, both here and abroad, can expect to achieve cost savings through the formal harmonization of differing sets of standards when the contracting parties to the 1998 Global Agreement implement new GTRs. Formal harmonization also improves safety by assisting us in identifying and adopting best safety practices from around the world and reducing diverging and unwarranted regulatory requirements. The harmonization process also allows manufacturers to focus their compliance and safety resources on regulatory requirements whose differences government experts have worked to converge as narrowly as possible. Compliance with a single standard will enhance design flexibility and allow manufacturers to design vehicles that better meet safety standards, resulting in safer vehicles. Further, we support the harmonization process because it allows the agency to leverage scarce resources by consulting with other governing bodies and international experts to share data and knowledge in developing modernized testing and performance standards that enhance safety.

Under the 1998 Agreement, countries voting in favor of establishing a GTR, agree in principle to begin their internal implementation processes for adopting the provisions of the GTR, *e.g.,* in the U.S., to issue an NPRM or Advanced NPRM, within one year. The ultimate decision whether or not to adopt the GTR is at each contracting party's discretion, however, based on its determination that the GTR meets or does not meet its safety needs. The UNECE World Forum for Harmonization of Vehicle Regulations (WP.29) administers the 1998 Agreement.

In 2009, the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) of Japan assembled a committee to study the issue of the quietness of HVs. The committee concluded that an Approaching Vehicle Audible System (AVAS) was a realistic alternative to allow pedestrians who are blind or visually-impaired to detect quiet vehicles. In 2010, MLIT announced guidelines for AVAS based on the recommendations of the study committee. Although several vehicles were considered in the initial scope, MLIT concluded that AVAS should be

installed only on HVs that can run on electric motors, EVs and fuel-cell vehicles. In terms of the activation condition, the MLIT recommended that AVAS automatically generate sound at least in a speed range from the start of a vehicle until reaching 20 km/h (12 mph) and when moving in reverse. The AVAS would not be required when a vehicle is stopped. The system may include a switch to temporarily halt the operation of the AVAS. The reason for including this switch is because the committee believes that the system is not needed on expressways where there are no pedestrians and to reduce other issues such as drivers deliberately increasing vehicle speed in order to stop the AVAS.

In its March 2011 session, WP.29 determined that vehicles propelled in whole or in part by electric means, present a danger to pedestrians and consequently adopted Guidelines covering alert sounds for electric and hybrid vehicles that are closely based on the Japanese Government's guidelines. The Guidelines were published as an annex to the UNECE Consolidated Resolution on the Construction of Vehicles (R.E.3). Considering the international interest and work in this new area of safety, the U.S. decided to lead the efforts on the new GTR, with Japan as co-sponsor, and develop harmonized pedestrian alert sound requirements for electric and hybrid-electric vehicles under the 1998 Global Agreement. Development of the GTR for pedestrian alert sound has been assigned to the Group of Experts on Noise (GRB), the group most experienced with vehicle sound emissions. GRB is in the process of assessing the safety, environmental and technological concerns to develop a GTR that leverages expertise and research from around the world and feedback from consumer groups. The U.S. is the co-chair (with Japan) of the informal working group on Quiet Road Transport Vehicles (QRTV) assigned to develop the GTR and, therefore, will guide the informal working group's development of the GTR. GRB will meet regularly and report to WP.29 until the establishment of the new GTR. NHTSA has been participating in the QRTV's meetings since its foundation and has kept the group informed about ongoing agency research activities as well as the results from completed research studies. At the time the NPRM was issued, the QRTV informal group had held five sessions to discuss development of a GTR on quiet vehicles.

NHTSA has also hosted roundtable meetings with industry, technical organizations and groups representing people who are visually-impaired for the purpose of consulting with these groups on topics related to this rulemaking. Participating in these meetings were representatives from the Alliance of Automotive Manufacturers, the Global Automakers (formerly Association of International Automobile Manufacturers (AIAM)), American Council of the Blind, The American Foundation of the Blind (AFB), the National Federation of the Blind (NFB), The International Organization for Standardizations (ISO), The Society of Automotive Engineers (SAE), the International Organization of Motor Vehicles Manufacturers (OICA), The Environmental Protection Agency (EPA) and Japan Automobile Manufacturers Association (JAMA).

Representatives of the EPA have also been included in our activities with outside organizations. They have been kept updated on our research activities and have actively participated in our outreach efforts. NHTSA has also kept up to date on EPA activities on the international front through the activities of the UNECE Working Party of Noise (GRB).

The American Foundation of the Blind, the American Council of the Blind and the National Federation of the Blind have provided NHTSA with invaluable information about visually-impaired pedestrian safety needs since the 2008 Public Meeting was held.

The Alliance of Automobile Manufacturers and Global Automakers have met separately with the agency to discuss our research findings and their ideas regarding this rulemaking. Members of both organizations have also met separately with the agency to discuss their own research findings and ideas for a potential regulatory approach to address the safety issues of interest to the agency.

Automotive manufacturers that produce EVs for the U.S. market have developed various pedestrian alert sounds, recognizing that these vehicles, when operating at low speeds, may pose an elevated safety risk to pedestrians. They have made vehicles with sound alert systems available for lease by NHTSA for research purposes. This information has been helpful in the agency decision making process.

The Society of Automotive Engineers (SAE) established the Vehicle Sound for Pedestrians (VSP) subcommittee in November 2007 with the purpose of developing a recommended practice to measure sounds emitted by ICE vehicles and alert sounds for use on EVs and HVs. Their efforts resulted in recommended practice SAE J2889–1, *Measurement of Minimum Noise Emitted by Road Vehicles.* The agency had been sending a liaison to VSP meetings starting in 2008. SAE is the U.S. technical advisory group to the International Organization for Standardization (ISO), and they both have cooperated in the development of the industry safety standard. The ISO document (ISO/NP 16254, *Measurement of Minimum Noise Emitted by Road Vehicles*) and the SAE document are technically identical. The agency used SAE J2889–1 and ISO 16254 as references in the NHTSA test procedure development. Other international organizations, such as the International Organization of Motor Vehicle Manufacturers (OICA) and Japan Automobile Manufacturers Association (JAMA) have provided NHTSA with research findings and also have attended various quiet vehicle meetings.

In the NPRM, the agency concluded that the voluntary guidelines adopted by the Japanese government, and subsequently by the UNECE WP.29 Committee, did not have the level of detail necessary for NHTSA to establish objective minimum performance requirements for creation of an FMVSS. We did not believe that the agency would be able to tell if a sound fell within one of the exclusions by means of an objective measurement, nor would we be able to adequately ensure that sound levels would be detectable by pedestrians or provide manufacturers with a set of requirements that they would be able to meet. The NPRM noted that the WP.29 QRTV work was scheduled to be completed in 2014, and a draft GTR adopted in November 2014.

OICA, EU, Chrysler, EDTA, VW, and Alliance/Global all suggested delaying the development of a U.S. regulation on minimum noise levels until WP.29 has had sufficient time to develop a globally harmonized set of regulations via the GTR process. They stated that establishment of separate requirements that may or may not be harmonized with the recommendations under negotiation through WP.29 would harm development of electric drive vehicles globally and constrain the growth of the market as a whole.

OICA, EU, VW, and Alliance/Global commented that the PSEA statute does not provide enough time for WP.29 to address all remaining technical issues in development of a globally harmonized standard that the U.S. could then adopt. EU commented that if the agency is unable to delay publication of a final rule that would harmonize with the international community, it should at a minimum ensure that any U.S. regulations are consistent with the recommendations of the WP.29 Informal

Working Group on Quiet Road Transport Vehicles.

The EU questioned to what extent NHTSA had taken into consideration the conclusions and results of the QRTV–IWG. They believed a delay in the NPRM process and the finalization of the new FMVSS until the new GTR has been drafted would contribute towards a common approach and an overall consensus at the international level with respect to EVs and HEVs.

VW and Alliance/Global commented that if NHTSA is unable to delay the enactment based on statutes within the PSEA, NHTSA should inform the United States Congress that additional time to complete this rulemaking is required in order to allow for completion of the GTR so that a harmonized regulation can be achieved.

Alliance/Global commented that in accordance with the QRTV Terms of Reference, the development of the GTR should be concluded in the fall of 2014, with status reports provided along the way so that the public can monitor the status of the activity. Alliance/Global explained that the benefits of having consensus on a global technical regulation are enormous and any potential downside related to allowing an accelerated GTR process to conclude prior to finalizing the NHTSA regulation will be negligible given that a majority of current production EVs and HVs are already voluntarily equipped with audible pedestrian alert systems.

EU, VW, Chrysler, and Alliance/Global all supported using the GTR process to finalize any remaining technical issues towards a globally harmonized standard.

WBU and MB supported using the NPRM as a basis for development of the WP.29 GTR.

Agency Response to Comments

The NPRM stated that the recommendations of the QRTV informal working group do not include objective criteria with which the agency could ensure vehicles comply with an FMVSS. The agency maintains that this is still the case. Further, as discussed above, the agency has determined that a crossover speed of 30 km/h is necessary because our conclusion from the data we have acquired to date from all sources (*i.e.,* from commenters and from our own vehicle evaluations) is that some hybrid and electric vehicles continue to need sound enhancement at speeds above 20 km/h in order to ensure that they are adequately detectable.

Most of the commenters recommended that the agency wait until the WP.29 World Forum can complete development of a GTR for minimum sound levels, or, at a minimum, work closely with the QRTV in development of requirements that could be recognized globally. The agency, through its leadership role in the QRTV informal group, continues to work with the international community in development of criteria that are technically sound and objective. We note that the WP.29 QRTV work has been extended until late 2015, at the earliest, with expected eventual adoption of a GTR on minimum noise requirements for electrically driven vehicles. Adoption of the GTR is only the beginning of the process of regulating minimum noise levels by signatories of the 1998 UN agreement. After a GTR on minimum noise requirements is adopted, NHTSA would still need to issue an NPRM or an SNPRM (Supplemental Notice of Proposed Rulemaking) to begin the process of adopting the GTR as an FMVSS. This could result in several additional years of delay before an FMVSS mandating sound for EVs and HVs could be issued. We do not believe that a delay of this length is justified from a safety perspective. We believe the agency's approach in development of this final rule to be consistent with both the mission and safety goals of the agency and with the PSEA and Safety Act.

We agree with WBU and MB that development of U.S. regulations for minimum noise levels might aid WP.29 in addressing some of the technical issues that hinder development of a global regulation that is both measurable and enforceable. We note that the leadership role of the U.S. delegation in development of a global regulation for minimum noise levels is consistent with the comments regarding using the GTR process to refine a harmonized regulation. In that light, we believe that development of a U.S. regulation would aid WP.29 in drafting a global regulatory framework that is both measureable and enforceable.

The agency has also continued to actively monitor the work that has been done internationally by SAE and ISO. The SAE recently issued an updated version of J2889–1 dated December 2014. The ISO recently submitted the latest draft of ISO 16254 to the agency's docket.[164] The agency has taken into consideration these documents to the extent possible for the development of this final rule.

[164] NHTSA–2011–0148–0334.

V. Analysis of Costs, Benefits, and Environmental Effects

A. Benefits

As stated above in the discussion of the statistical analysis of safety need done for this rulemaking (see Section II.B), the data from 16 states cannot be used to directly estimate the national problem size. Also, an analysis of pedestrian fatalities rather than injuries is not appropriate for this rulemaking. The target population analysis will therefore focus on injuries only.

The PSEA directs NHTSA to establish minimum sound requirements for EVs and HVs as a means of addressing the increased rate of pedestrian crashes for these vehicles. In calculating the benefits of this rulemaking we have assumed that adding sound to EVs and HVs will bring the pedestrian crash rates for these vehicles in line with the pedestrian crash rates for ICE vehicles because the minimum sound requirements in the proposed rule would ensure that EVs and HVs are at least as detectable to pedestrians as ICE vehicles. This approach assumes that EVs and HVs have higher pedestrian crash rates than ICE vehicles because of the differences in sound levels produced by these vehicles. Therefore, the target population for this rulemaking is the number of crashes that would be avoided if the crash rates for hybrid and electric vehicles were the same as the crash rate for ICE vehicles.

No quantifiable benefits are estimated for EVs because we assume that EV manufacturers would have added alert sounds to their cars in the absence of this proposed rule and the PSEA.

NHTSA was not able to directly measure the safety differences between hybrids with and without sound. Although there are now some hybrids in the market that produce sounds to alert pedestrians and pedalcyclists, the agency is unable to directly measure the effectiveness rate of sound by using data from these new hybrid vehicles because there is not sufficient crash data on new model hybrid vehicles with sound to be able to make a statistically significant comparison to hybrids without sound. The agency's data base for low speed injuries is a sample, and data on crashes involving hybrid vehicles that emit sound is limited. Furthermore, the data set used to analyze differences in crash rates for this rulemaking consists of crash data from 16 states. At this time, only half of the states have submitted data for the 2012 or later calendar years. Since we believe that most hybrid vehicles have been equipped with some type of alert sound only since 2012, any effect that voluntary adoption would

have on pedestrian crash rates would not be captured by this data set. In addition, none of the recently introduced hybrids with sounds were designed to meet all of the requirements in this rule. Therefore, any change in crash rate between original quiet HVs and these voluntarily-equipped HVs would not necessarily be indicative of the full safety benefits of compliant sounds.

NHTSA has also been unable to directly measure the pedestrian and pedalcyclist crash rates per mile travelled for HVs and EVs to the rates for ICEs because the agency does not have data on VMT for HVs and EVs. To calculate the difference in crash rates between HVs and ICEs NHTSA computes the ratio of the number of pedestrian and pedalcyclist crashes involving HVs to the number of other types of accidents involving HVs and compares it to a similar ratio for ICEs. While this is a standard technique in analyzing crash risk, it does raise a problem in this case because NHTSA was not able to control for VMT. NHTSA assumes that any difference in these ratios is attributable to the lack of sound in HVs. However, it is possible that there are other explanations for differences. For example, there may be reasons other than sound for why HVs have higher numbers of pedestrian and pedalcyclist accidents. Or there may be reasons why ICEs have higher numbers of other types of accidents.[165] This could result in a lower ratio for ICEs even if the two types of vehicles had similar pedestrian and pedalcyclist crash rates.

The first step in NHTSA's analysis was to use injury estimates from the 2006–2012 National Automotive Sampling System—General Estimates System (NASS–GES) and both 2007 and 2008–2011 Not in Traffic Surveillance (NiTS) database to provide an average estimate for combined in-traffic and relevant not-in-traffic crashes. In order to combine the GES and NiTS data in a meaningful way, it was assumed that the ratio of GES to NiTS will be constant for all years 2006 to 2012.

Because both the GES and NiTS databases rely on police-reported crashes, these databases do not accurately reflect all vehicle crashes involving pedestrians because many of these crashes are not reported to the police. The agency estimates that the number of unreported crashes for pedestrians is equal to 100.8 percent of the reported crashes. That is to say, for every 100 police-reported pedestrian crashes, there exist 100.8 additional unreported pedestrian crashes.

Table 20 shows the reported and unreported crashes by injury severity. Only injury counts will be examined for the purpose of benefits calculations and, as such, fatalities and uninjured (MAIS 0) counts are not included.

TABLE 20—ESTIMATED ANNUAL QUIET CARS TARGET POPULATION INJURIES REPORTED (GES 2006–2012, NITS 2007, 2008–2011) AND UNREPORTED PEDESTRIANS AND PEDALCYCLISTS, BY VEHICLE

MAIS level	1	2	3	4	5	TOTAL 1–5
Reported (GES+NiTS) and Unreported Injured Pedestrians						
Passenger Car (PC)	69,453	11,093	2,249	529	214	83,538
Light Trucks & Vans (LTV)	47,604	7,852	1,629	387	156	57,626
Total Light Vehicles (PC+LTV)	117,056	18,945	3,877	916	370	141,164
Reported (GES+NiTS) and Unreported Injured Pedalcyclists						
MAIS level	1	2	3	4	5	TOTAL 1–5
Passenger Car (PC)	42,943	6,148	1,082	239	84	50,495
Light Trucks & Vans (LTV)	26,932	3,957	715	160	56	31,820
Total Light Vehicles (PC+LTV)	69,875	10,105	1,796	400	140	82,315

The estimates in Table 20 are based on the current make-up of the fleet for all propulsion types. Next, we make the assumption that because the hybrid and electric vehicles pose a higher risk of pedestrian collisions, each hybrid and electric vehicle is producing more injuries per year than their ICE counterparts. Thus, while the 2006–2012 time period resulted in 141,164 pedestrian injuries annually, this injury count is the result of the mixed hybrid/electric/ICE fleet during that period. Based on the odds ratios from our crash analysis, we can calculate what size of theoretical ICE-only fleet would have been needed to generate as many injuries during that same time period.

The estimated injuries in Table 21 and Table 22 are created by combining the estimated percentage of annual sales of hybrid and electric vehicles for MY2020 from Table 23 with the odds ratio of 1.18, representing the increased risk of an HV being involved in a pedestrian crash, and the odds ratio of 1.51, representing the increased risk of an HV being involved in a pedalcyclist crash.[166] Thus, when considering pedestrians injured by MY2020 vehicles and assuming these pedestrian crashes occurred because the pedestrians failed to detect these vehicles by hearing, the rulemaking applies to the 877 injury difference between that theoretical ICE-only fleet (140,663 injuries) and the estimated lifetime injuries from the MY2020 fleet (141,567). Given the effectiveness assumption of 97 percent, the rulemaking addresses 850 of those 877 injuries. When considering pedalcyclists injured by MY2020 vehicles, the rulemaking is applied to the 1,514 injury difference between that theoretical fleet (81,455 injuries) and the estimated lifetime injuries from the MY2020 fleet (83,015). Given our assumption that the pedestrian and pedalcyclists crash rates for LSVs without sound is similar to that for other types of light vehicles without sound, the rule would also reduce pedestrian injuries by 4 over the lifetime of the MY2020 fleet of LSVs and

[165] For example, HLDI compared overall rates of injury for hybrid vehicles and their ICE non-hybrid twins and found that crash rates are lower for hybrids. HLDI concluded that the heavier weight of hybrids was an important factor in this lower overall crash rate for hybrids. Highway Loss Data Institute. ''Injury Odds and Vehicle Weight Comparison of Hybrids and Conventional Counterparts.'' HLDI Bulletin 28(10). Arlington, VA, 2011.

[166] Wu, J. (2015). Updated Analysis of Pedestrian and Pedalcyclist Crashes by Hybrid Vehicles with Larger Samples and Multiple Risk Factors. Washington, DC: National Highway Traffic Safety Administration.

pedalcyclist injuries by 7 over the lifetime of the MY2020 fleet of LSVs.

TABLE 21—ENHANCED INJURY RATE (EIR) FOR PEDESTRIANS FOR 2020 MODEL YEAR [167]

	Mild hybrids (%)	Strong hybrids (%)	EVs + fuel cell (%)	ICEs (%)	Total (%)	Injuries assuming 100% ICE fleet	Injuries assuming predicted fleet	Injury difference	Benefits
Passenger Car	6.94	6.86	0.21	87.02	101.03	83,101	83,953	853	827
Light Trucks & Vans	7.97	0.59	0.08	91.45	100.09	57,563	57,614	51	50
Total	.....	.....	.....	.....	.....	140,663	141,567	904	877

TABLE 22—ENHANCED INJURY RATE (EIR) FOR PEDALCYCLISTS FOR 2020 MODEL YEAR [168]

	Mild hybrids (%)	Strong hybrids (%)	EVs + fuel cell (%)	ICEs (%)	Total (%)	Injuries assuming 100% ICE fleet	Injuries assuming predicted fleet	Injury difference	Benefits
Passenger Car	6.94	8.80	0.21	87.02	102.97	49,737	51,215	1,479	1,434
Light Trucks & Vans	7.97	0.76	0.08	91.45	100.26	31,719	31,800	81	79
Total	.....	.....	.....	.....	.....	81,455	83,015	1,560	1,514

As discussed in the Final Regulatory Impact Analysis (FRIA), MAIS injury levels are converted to dollar amounts. The benefits across passenger cars, LTVs, and LSVs of reducing 2,401 pedestrian and pedalcyclist injuries, or 32 undiscounted equivalent lives saved (19.80 equivalent lives at the 7-percent discount rate and 25.64 at the 3-percent discount rate), is estimated to be $320 million at the 3-percent discount rate and $247.5 million at the 7-percent discount rate.

The agency calculated the benefits of this rule by calculating the ''injury differences'' between ICE vehicles and HVs. The ''injury differences'' assume that the difference between crash rates for ICEs and non-ICEs is explained wholly by the difference in sounds produced by these two vehicle types of vehicles and the failure of pedestrians and pedalcyclists to detect these vehicles by hearing. It is possible that there are other factors responsible for some of the difference in crash rates, which would mean that adding sound to hybrid and electric vehicles would not reduce pedestrian and pedalcyclist crash rates for hybrids to that of ICE vehicles. Based on research conducted by NHTSA's VOPLE Center,[169] NHTSA also assumes the sound added to hybrid and electric vehicles will be 97-percent effective in providing warning to pedestrians as the sound produced by a vehicle's ICE.

In addition to the benefits in injury reduction due to this rule, there is also the benefit to blind and visually impaired individuals of continued independent mobility. The increase in navigational ability resulting from this rule is hard to quantify and thus this benefit is mentioned but not assigned a specific productivity or quality of life monetization. By requiring alert sounds on hybrid and electric vehicles, blind pedestrians will be able to navigate roads as safely and effectively as if the fleet were entirely ICE vehicles. The benefit of independent navigation leads to the ability to travel independently and will, therefore, also lead to increased employment and the ability to live independently.

B. Costs

Based on Ward's Automotive Yearbook 2014,[170] there were 597,035 hybrid engine installations in light vehicles (96 percent were in passenger cars and 4 percent were in light trucks) sold in MY2013, which accounts for 3.5 percent of the total 17.2 million MY2013 light vehicles. There were a smaller number of MY2013 electric vehicles: 17,480 passenger cars and 1,046 LTVs, representing 0.1 percent of the overall sales. The Annual Energy Outlook (AEO) for 2014 provides future estimates of the fleet broken down into hybrid and electric vehicles.[171] The number of vehicles that the agency projects will be required to meet the standard is shown in Table 23.

TABLE 23—ESTIMATED/PREDICTED HYBRID AND ELECTRIC VEHICLE SALES PROPOSED TO BE REQUIRED TO PROVIDE AN ALERT SOUND

	Estimated 2013 sales source: Ward's	Predicted 2020 sales source: AEO & NHTSA
Low-Speed Vehicles	1,500	2,500

[167] Table values may not add up to the correct total due to rounding.

[168] Table values may not add up to the correct value due to rounding.

[169] See ''Robustness'' discussion in Section III.E.

[170] *Ward's Automotive Yearbook CD.* Path: \2014 YB CDROM\5. North America\c. U.S. Auto Industry\3. Engines\Engines by Type.xls

[171] In calculating the costs of this rule the agency only included those vehicles that can operate solely via the vehicle's electric motor. The agency did not included ''micro hybrids'' whose ICE is always running when the vehicle is motion when calculating the costs of this rule.

TABLE 23—ESTIMATED/PREDICTED HYBRID AND ELECTRIC VEHICLE SALES PROPOSED TO BE REQUIRED TO PROVIDE AN ALERT SOUND—Continued

	Estimated 2013 sales source: Ward's	Predicted 2020 sales source: AEO & NHTSA
Light Vehicles Electric	18,526	15,020
Light Vehicles Fuel Cells	0	5,606
Light Vehicles Hybrid	597,035 *	506,701
Light Vehicles subtotal	594,061	527,327
Total Sales	602,061	561,327

* **Note**—This estimate of vehicle sales includes micro-hybrids which the rule does not apply to. This overestimation of hybrid vehicle sales is addressed in the MY2020 column, where propulsion source is provided by AEO.

The Nissan Leaf and other fully electric vehicles come equipped with an alert sound system. Based on what manufacturers have voluntarily provided in their fully electric vehicles, the agency assumes that fully electric vehicles and hydrogen fuel-cell vehicles will provide an alert sound system voluntarily and, therefore, for costing purposes we assumed a small upgrade cost in order to bring these existing systems up to compliance. In addition, we assume that some hybrid light vehicles, particularly those manufactured by Toyota, come equipped with some form of speaker system, similar to the ones expected to be found on electric vehicles. Furthermore, *www.energy.gov* data indicates that these partially-equipped light vehicles make up about 67% of the hybrids that fall under the rule. Thus, the number of light vehicles that have to add (or upgrade) an alert sound system for costing purposes for MY2020 is 561,327 vehicles.

Based on informal discussions with suppliers and industry experts, in addition to confidential documents provided to the agency, we estimate that the total consumer cost for a system that produces sounds meeting the requirement of this rule is $125.34 per hybrid light vehicle. In cases where a sound system already exists on a light vehicle (hybrid vehicles voluntarily equipped, electric vehicles, and fuel cell vehicles), we assume a cost of $50.49. This estimate includes the cost of a dynamic speaker system that is packaged for protection from the elements and that is attached with mounting hardware and wiring in order to power the speaker(s) and receive signal inputs, and a digital signal processor that receives information from the vehicle regarding vehicle operating status (to produce sounds dependent upon vehicle speed, for example.) We assume there will be no other structural changes or installation costs associated with complying with the rule's requirements. We believe the same system can be used for both LSVs and light vehicles. We estimate that the added weight of the system would increase fuel costs for light vehicles by about $4 to $5 over the lifetime of the vehicle. Average vehicle costs reflect the different installation costs determined by propulsion source and vehicle make as described above.

TABLE 24—COST SUMMARY (IN $M, 2013 ECONOMICS)

	3% Discount rate ($)	7% Discount rate ($)
Per vehicle costs:		
Passenger Cars, Per Vehicle *	$79.06	$78.16
Light Trucks, Per Vehicle *	77.27	76.17
Low Speed Vehicles (LSVs), Per Vehicle *	78.91	77.99
Total Cost by Vehicle Type:.		
Passenger Cars	38.2M	37.8M
Light Trucks	3.6M	3.5M
Light Vehicles, PCs + LTVs Subtotal	41.8M	41.3M
Low Speed Vehicles (LSVs)	0.3M	0.3M
Total (PC + LTV + LSV)	42.1M	41.6M

In addition to the quantifiable costs discussed above, there may be a cost of adding sound to quiet vehicles to owners who value quietness of vehicle operation and to society at large. NHTSA is not aware of a method to quantify the value of quietness for a driver's own vehicle. Some sound from these systems may intrude into the passenger compartment. The use of multiple speakers with directional characteristics might mitigate these costs. Sound insulation also can counteract interior noise, and a sensitivity analysis for sound insulation cost is provided in the accompanying FRIA.

As explained further in the Environmental Assessment (EA), we expect that the increase in noise from the alert sound will be no louder than that from an average ICE vehicle and that aggregate sound from these vehicles will not create an appreciable increase over current noise levels. Given the low increase in overall noise caused by this rule, we expect that any costs that may exist due to added sound will be minimal. NHTSA has not found any way to value the increase in noise to society at large, and, thus it is a non-quantified cost.

C. Comparison of Costs and Benefits

Comparison of costs and benefits expected due to this rule provides a

savings of $0.4 million per equivalent life saved to a cost of $0.04 million per equivalent life saved across the 3-percent and 7-percent discount levels. This falls under NHTSA's value of a statistical life of $10.8 million, (for MY2020) and therefore this rulemaking is assumed to be cost beneficial. Since the lifetime monetized benefits (VSL+Economic) of MY2020 light vehicles (and LSVs) is expected to be between $197.6M and $244.9M, the net impact of the rule on light vehicles and LSVs is a positive one, even with the estimated $46 million required to install speakers [172] and $3 million in lifetime fuel costs.

TABLE 25—DISCOUNTED BENEFITS (PC+LTV) MY2020, 2013$

	Total PED + CYC	
	Total Monetized Benefits	Total ELS
3% discount		
(PC)	$301,146,801	24.25
(LTV)	17,381,812	1.39
Total	318,528,614	25.64
7% discount		
(PC)	233,031,924	18.74
(LTV)	13,258,335	1.06
Total	246,290,259	19.80

TABLE 26—TOTAL COSTS (PC+LTV) 2013$

	Total cost/veh	Total costs
3% discount		
(PC)	$79.06	$38,223,782
(LTV)	77.27	3,587,400
Total	78.91	41,811,182
7% discount:		
(PC)	78.16	37,788,667
(LTV)	76.17	3,536,329
Total	77.99	41,324,996

TABLE 27—NET IMPACTS (PC+LTV) 2013$

	Net impact/veh	Net impact	Net costs/ELS (in $M)
3% Discount			
(PC)	$543.83	$262,923,019	−0.1
(LTV)	297.12	13,794,413	0.93
Total	522.22	276,717,432	−0.04
7% Discount			
(PC)	403.84	195,243,258	0.33
(LTV)	209.40	9,722,005	1.67
Total	386.81	204,965,263	0.4

The net impact of this rule on LSVs is also expected to be positive. The net benefits of the minimum sound requirements for these vehicles is $1,023,934 at the 3-percent discount rate and $788,953 at the 7-percent discount rate. Thus, the total net impact of the rule considering both the MY2016 light vehicle and LSV fleet is positive.

[172] Based on the assumption in this analysis that manufacturers will install speakers to meet the rule.

TABLE 28—COSTS AND SCALED BENEFITS FOR LSVS, MY2020 [173]

Discount rate	Sales ratio LSV to light vehicle	Sales	Scaled costs	Scaled injuries (undisc.)	Scaled ELS	Scaled benefits	Scaled benefits minus scaled costs
3%	0.47%	2,500	$197,264	11.28	0.1210	$1,189,469	$1,305,543
7%	0.47%	2,500	194,970	11.28	0.0934	848,651	967,019

D. Retrospective Review

NHTSA has been unable to directly compare pedestrian and pedalcyclist crash rates for hybrids with and without sound because sufficient data is not yet available. As a result, we have not been able to directly determine whether lack of sound is the cause of the difference in pedestrian and pedalcyclist crash rates between hybrids and ICEs. For this reason, we intend conduct an expedited retrospective review of this rule once data are available. Although some hybrid manufacturers began putting alert sound in their vehicles around 2012, the state data from this period needed for our analysis is just starting to become available. While these voluntarily equipped vehicles will not be fully compliant with this rule, within the next four years we will conduct a preliminary study to determine whether adding sound eliminates some pedestrian and pedalcyclist crashes should we have sufficient data for such analysis. It will take several more years until data from fully compliant vehicles are available for analysis. Therefore, we expect to complete our retrospective review of this rule within eight years of when this rule is finalized. For LSVs, sufficient data may not be available and it may be necessary to use a Special Crash Investigation to determine whether adding sound makes these types of vehicles safer than those without sound should we be able to identify any such crashes.

E. Environmental Assessment

The agency has prepared an Environmental Assessment (EA) to analyze and disclose the potential environmental impacts of a reasonable range of minimum sound requirements for HVs and EVs, including a preferred alternative. The alternatives the agency analyzed include a No Action Alterative, under which the agency would not establish any minimum sound requirements for EVs/HVs, and two action alternatives. Under Alternative 2 (the final rule), the agency would require a sound addition at speeds at or below 30 km/h and would require that covered vehicles produce sound at the stationary but active operating condition. Under Alternative 3, the agency would require a minimum sound pressure level of 48 A-weighted dB for speeds at or below 20 km/h; there would be no sound requirement when the vehicle is stationary.

In order to determine the potential environmental impacts of the alternatives, NHTSA estimated the amount of travel covered by vehicles and changes in sound level projected to occur under each of the alternatives. NHTSA separately analyzed the projected environmental impacts of each of the three alternatives in both urban and non-urban environments because differences in population, vehicle speeds, and deployment of EVs/HVs in these areas could affect the potential environmental impacts. The EA calculates the potential noise impacts of the alternatives in two different ways.

In one analysis, NHTSA analyzed the potential for change in sound levels experienced by an individual listener near a roadway as a result of the final alternatives by single vehicle passes by. In the second analysis, NHTSA compared the sound levels experienced by a single listener among sets of vehicles with varying percentages of EVs/HVs when these vehicles were assumed to have no minimum sound requirement versus when producing the sound level specified under each of the action alternatives. For this analysis, NHTSA calculated the difference in sound perceived by a person standing either 7.5 or 15 meters (25 or 50 feet, respectively) away from the source to replicate the difference in sound between the alternatives experienced by a person standing near a busy roadway.

Our first analysis for both action alternatives suggest that in urban environments, a single listener would not perceive a noticeable difference in sound when standing 7.5 meters from the roadway compared to the no action alternative. In a non-urban environment, a single listener would not perceive a noticeable difference under Alternative 3, but under the Preferred Alternative a single listener would perceive a noticeable difference in sound level when standing 7.5 meters from the roadway compared to the no action alternative.

The results from second analysis show that changes in overall sound levels near a busy roadway for either action alternative compared to the No Action Alternative would not exceed 3 dB, the commonly used threshold for noticeability by human listeners, even assuming that up to 20% of vehicles on the road are EVs/HVs, which is nearly three times the deployment level currently projected for 2035. When non-urban or urban ambient sound levels are taken into account, the perceived sound level change is further reduced to well under the 3 dB threshold.

In addition to analyzing the projected impact of the action alternatives on an individual listener, NHTSA computed the magnitude of the change in sound levels nationally as a result of the alternatives. This analysis takes into account the National Household Travel Survey (NHTS) distribution of trip miles, the Annual Energy Outlook (AEO) forecast of the deployment of EVs/HVs, and Environmental Protection Agency (EPA) drive cycle speed distributions. Because the action alternatives would only affect specific vehicles in certain operating conditions, this analysis calculates the total U.S. vehicle operations affected by the action alternatives as a proportion of total U.S. vehicle operations, and analyzes the overall change in sound levels projected to occur as a result of the action alternatives.

Based on this analysis of national impacts, NHTSA projects that under the Preferred Alternative, 2.3 percent of all urban U.S. light duty vehicle hours travelled and 0.3 percent of all non-urban U.S. light duty vehicle hours travelled potentially would be impacted by the minimum sound requirement. Under Alternative 3, NHTSA projects that 0.9 percent of all urban U.S. light duty vehicle hours and 0.1 percent of all nonurban U.S. light duty vehicle hours potentially would be impacted by the minimum sound requirement.

[173] Scaled benefits and costs for low speed vehicles are estimated to be directly proportional to light vehicles based on sales. Scaled costs include both installation costs for the system and fuel costs.

Given the extremely small percentage of vehicle hours travelled impacted by this rule and the fact the sounds under the final rule would only be noticeable to a single listener standing 7.5 meters from the roadway under the single vehicle pass by condition, the environmental impacts of the final rule are expected to be negligible. In addition, the EA anticipates no or negligible additional impacts on wildlife; topography, geology, and soils; hazardous materials, hazardous waste, and solid waste; water resources; historical and archeological resources; farmland resources; air quality and climate; and environmental justice populations.

VI. Regulatory Notices and Analyses

Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563, and DOT Regulatory Policies and Procedures

The agency has considered the impact of this rulemaking action under E.O. 12866, E.O. 13563, and the Department of Transportation's regulatory policies and procedures. This action was reviewed by the Office of Management and Budget under E.O. 12866. This action is ''significant'' under the Department of Transportation's regulatory policies and procedures (44 FR 11034; February 26, 1979).

This action is significant because it is the subject of congressional interest and because it is a mandate under the PSEA. The agency has prepared and placed in the docket a Final Regulatory Impact Analysis.

We estimate the total fuel and installation costs of this rule to the light EV, HV and LSV fleet to be $41.8M at the 3-percent discount rate and $41.3M at the 7-percent discount rate. We estimate that the impact of this rule in pedestrian and pedalcyclist injury reduction in light vehicles and LSVs will be 30.69 equivalent lives saved at the 3-percent discount rate and 24.75 equivalent lives saved at the 7-percent discount rate. The benefits of applying this rule to light EVs and HVs are estimated to be $260.1 million at the 3-percent discount rate and $209.5 million at the 7-percent discount rate. Thus, this action is also significant because it has an annual economic impact greater than $100 million.

Executive Order 13609: Promoting International Regulatory Cooperation

The policy statement in Section 1 of Executive Order 13609 provides, in part:

> The regulatory approaches taken by foreign governments may differ from those taken by U.S. regulatory agencies to address similar issues. In some cases, the differences between the regulatory approaches of U.S. agencies and those of their foreign counterparts might not be necessary and might impair the ability of American businesses to export and compete internationally. In meeting shared challenges involving health, safety, labor, security, environmental, and other issues, international regulatory cooperation can identify approaches that are at least as protective as those that are or would be adopted in the absence of such cooperation. International regulatory cooperation can also reduce, eliminate, or prevent unnecessary differences in regulatory requirements.

We received several comments regarding the impact of the rulemaking schedule on the development of GTR of this topic. As discussed in Section IV of this notice, given the deadlines for issuing a final rule provided in the PSEA, the agency did not think that it would be feasible to delay issuing a final rule until after the GTR is completed.

NHTSA also received comments regarding the approach taken in guidelines developed by the UNECE and Japan regarding the crossover speed and whether HVs and EVs should be required to produce sound when they are not in motion. For the reasons discussed in Section III.D of this notice, we believe that a crossover speed of 30 km/h is necessary to ensure that blind, visually-impaired, and sighted pedestrians can safely detect EVs and HVs operating at low speeds. For the reasons discussed in Section III.C of this notice, we believe that EVs and HVs must produce sound when stationary with their gear selector is in any position other than park to prevent collisions and because of the language of the PSEA.

National Environmental Policy Act

Concurrently with this final rule, NHTSA is releasing a Final EA, pursuant to the National Environmental Policy Act, 42 U.S.C. 4321–4347, and implementing regulations issued by the Council on Environmental Quality (CEQ), 40 CFR part 1500, and NHTSA, 49 CFR part 520. NHTSA prepared the EA to analyze and disclose the potential environmental impacts of the requirements of the proposed action and a range of alternatives. The EA analyzes direct, indirect, and cumulative impacts and analyzes impacts in proportion to their significance.

Because this rule will increase the amount of sound produced by a certain segment of the vehicle fleet, the EA considers the possible impacts of increased ambient noise levels on both urban and rural environments. The EA also describes potential environmental impacts to a variety of resources including biological resources, waste, and environmental justice populations. The findings of the EA are summarized in Section V.D.

The Final EA is available in Docket No. NHTSA–2011–0100 at *http://www.regulations.gov/* as well as on NHTSA's Web site at *http://www.nhtsa.gov/*. Additionally, hard copies may be obtained by contacting Mike Pyne, Safety Standards Engineer, National Highway Traffic Safety Administration, 1200 New Jersey Ave. SE., Washington, DC 20590–0001.

I have reviewed the Final EA, which is hereby incorporated by reference. As described in that Final EA and summarized above, this rulemaking is anticipated to have no or negligible impacts on the human environment. Based on the Final EA, I conclude that implementation of any of the action alternatives (including the final rule) will not have a significant effect on the human environment and that a ''finding of no significant impact'' (*see* 40 CFR 1501.4(e)(1) and 1508.13) is appropriate. This statement constitutes the agency's ''finding of no significant impact,'' and an environmental impact statement will not be prepared.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions). The Small Business Administration's regulations at 13 CFR part 121 define a small business, in part, as a business entity ''which operates primarily within the United States.'' [174] No regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

In issuing this rule, I the undersigned hereby certify that this rule will not have a significant economic impact on a substantial number of small entities.

[174] 13 CFR 121.105(a).

We believe that the rulemaking will not have a significant economic impact on the small vehicle manufacturers because the systems are not technically difficult to develop or install and the cost of the systems between $50.49 and $125.34 is small in proportion to the overall vehicle cost for most small vehicle manufacturers.

This rule will directly affect motor vehicle manufacturers and final-stage manufacturers that produce EVs and HVs. The majority of motor vehicle manufacturers will not qualify as a small business. There are less than five manufacturers of light hybrid and electric vehicles that would be subject to the requirements of this proposal that are small businesses. Similarly, there are several manufacturers of low-speed vehicles that are small businesses.

Because the PSEA applies to all motor vehicles (except trailers) in its mandate to reduce quiet vehicle collisions with pedestrians, all of these small manufacturers that produce hybrid or electric vehicles are affected by the requirements in today's final rule. However, the economic impact upon these entities will not be significant for the following reasons.

(1) The cost of the systems is a small proportion of the overall vehicle cost for even the least expensive electric vehicles.

(2) This final rule provides a three year lead-time and allows small volume manufacturers the option of waiting until the end of the phase-in (September 1, 2018) to meet the minimum sound requirements.

Executive Order 13132 (Federalism)

NHTSA has examined today's rule pursuant to Executive Order 13132 (64 FR 43255, August 10, 1999) and concluded that no additional consultation with States, local governments or their representatives is mandated beyond the rulemaking process. The agency has concluded that the rulemaking would not have sufficient federalism implications to warrant consultation with State and local officials or the preparation of a federalism summary impact statement. The proposed rule would not have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

NHTSA rules can preempt in two ways. First, the National Traffic and Motor Vehicle Safety Act contains an express preemption provision: When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. 49 U.S.C. 30103(b)(1). It is this statutory command by Congress that preempts any non-identical State legislative and administrative law addressing the same aspect of performance.

The express preemption provision described above is subject to a savings clause under which ''[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.'' (49 U.S.C. 30103(e)). Pursuant to this provision, State common law tort causes of action against motor vehicle manufacturers that might otherwise be preempted by the express preemption provision are generally preserved. However, the Supreme Court has recognized the possibility, in some instances, of implied preemption of such State common law tort causes of action by virtue of NHTSA's rules, even if not expressly preempted. This second way that NHTSA rules can preempt is dependent upon there being an actual conflict between an FMVSS and the higher standard that would effectively be imposed on motor vehicle manufacturers if someone obtained a State common law tort judgment against the manufacturer, notwithstanding the manufacturer's compliance with the NHTSA standard. Because most NHTSA standards established by an FMVSS are minimum standards, a State common law tort cause of action that seeks to impose a higher standard on motor vehicle manufacturers will generally not be preempted. However, if and when such a conflict does exist—for example, when the standard at issue is both a minimum and a maximum standard—the State common law tort cause of action is impliedly preempted. See Geier v. American Honda Motor Co., 529 U.S. 861 (2000).

Pursuant to Executive Order 13132 and 12988, NHTSA has considered whether this rule could or should preempt State common law causes of action. The agency's ability to announce its conclusion regarding the preemptive effect of one of its rules reduces the likelihood that preemption will be an issue in any subsequent tort litigation.

To this end, the agency has examined the nature (*e.g.,* the language and structure of the regulatory text) and objectives of today's rule and finds that this rule, like many NHTSA rules, prescribes only a minimum safety standard. As such, NHTSA does not intend that this rule preempt state tort law that would effectively impose a higher standard on motor vehicle manufacturers than that established by today's final rule. Establishment of a higher standard by means of State tort law would not conflict with the minimum standard promulgated here. Without any conflict, there could not be any implied preemption of a State common law tort cause of action.

Executive Order 12988 (Civil Justice Reform)

With respect to the review of the promulgation of a new regulation, Section 3(b) of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4729; Feb. 7, 1996), requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect; (2) clearly specifies the effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) clearly specifies the retroactive effect, if any; (5) specifies whether administrative proceedings are to be required before parties file suit in court; (6) adequately defines key terms; and (7) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. This document is consistent with that requirement.

Pursuant to this Order, NHTSA notes as follows. The issue of preemption is discussed above. NHTSA notes further that there is no requirement that individuals submit a petition for reconsideration or pursue other administrative proceedings before they may file suit in court.

Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires federal agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually (adjusted for inflation with base year of 1995). Adjusting this amount by the implicit gross domestic product price deflator for 2010 results in $136 million (110.659/81.536 = 1.36).

As noted previously, the agency has prepared a detailed economic assessment in the FRIA. We estimate the annual total fuel and installation costs of this final rule to the light EV, HV and LSV fleet to be $41.8 million at the 3-

percent discount rate and $41.3 million at the 7-percent discount rate. Therefore, this rule is not expected to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $136 million annually.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. The final rule contains reporting requirements so that the agency can determine if manufacturers comply with the phase in schedule.

In compliance with the PRA, this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to OMB for review and comment. The ICR describes the nature of the information collections and their expected burden. This is a request for new collection.

Agency: National Highway Traffic Safety Administration (NHTSA).

Title: 49 CFR part 575.141, Minimum Sound Requirements for Hybrid and Electric Vehicles.

Type of Request: New collection.

OMB Clearance Number: Not assigned.

Form Number: The collection of this information will not use any standard forms.

Requested Expiration Date of Approval: Three years from the date of approval.

Summary of the Collection of Information: This collection would require manufacturers of passenger cars, multipurpose passenger vehicles, trucks, buses, and low speed vehicles subject to the phase-in schedule to provide motor vehicle production data for one year: September 1, 2018 to August 31, 2019.

Description of the Need for the Information and Use of the Information: The purpose of the reporting requirements will be to aid NHTSA in determining whether a manufacturer has complied with the requirements of Federal Motor Vehicle Safety Standard No. 141, *Minimum Sound for Hybrid and Electric Vehicles,* during the phase-in of those requirements.

Description of the Likely Respondents (Including Estimated Number, and Proposed Frequency of Response to the Collection of Information): The respondents are manufacturers of hybrid and electric passenger cars, multipurpose passenger vehicles, trucks, buses, and low-speed vehicles with a GVWR of 4,536 kg (10,000 lbs.) or less. The agency estimates that there are approximately 21 such manufacturers. The proposed collection would occur one per year.

Estimate of the Total Annual Reporting and Recordkeeping Burden Resulting from the Collection of Information: NHTSA estimates that the total annual burden is 42 hours (2 hours per manufacturer per year).

Comments are invited on:

- 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.
- Whether the Department's estimate for the burden of the information collection is accurate.
- Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is most effective if OMB receives it within 30 days of publication. Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attn: NHTSA Desk Officer. PRA comments are due within 30 days following publication of this document in the **Federal Register**.

The agency recognizes that the collection of information contained in today's final rule may be subject to revision in response to public comments and the OMB review.

Executive Order 13045

Executive Order 13045 [175] applies to any rule that: (1) Is determined to be economically significant as defined under E.O. 12866, and (2) concerns an environmental, health or safety risk that NHTSA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the proposed rule on children, and explain why the proposed regulation is preferable to other potentially effective and reasonably feasible alternatives considered by us.

This rule will not pose such a risk for children. The primary effects of this rule are to ensure that hybrid and electric vehicles produce enough sound so that pedestrians can detect them. We expect this rule to reduce the risk of injuries to children and other pedestrians.

National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) requires NHTSA to evaluate and use existing voluntary consensus standards in its regulatory activities unless doing so would be inconsistent with applicable law (*e.g.,* the statutory provisions regarding NHTSA's vehicle safety authority) or otherwise impractical.

Voluntary consensus standards are technical standards developed or adopted by voluntary consensus standards bodies. Technical standards are defined by the NTTAA as ''performance-based or design-specific technical specification and related management systems practices.'' They pertain to ''products and processes, such as size, strength, or technical performance of a product, process or material.''

Examples of organizations generally regarded as voluntary consensus standards bodies include the American Society for Testing and Materials (ASTM), the Society of Automotive Engineers (SAE), and the American National Standards Institute (ANSI). If NHTSA does not use available and potentially applicable voluntary consensus standards, we are required by the Act to provide Congress, through OMB, an explanation of the reasons for not using such standards.

The agency uses certain parts of voluntary consensus standard SAE J2889–1, *Measurement of Minimum Noise Emitted by Road Vehicles,* in the test procedure contained in this final rule. SAE J2889–1 only contains measurement procedures and does not contain any minimum performance requirements. The agency did not use any voluntary consensus standards for the minimum acoustic requirements contained in today's final rule because no such voluntary consensus standards exist. The agency added additional test scenarios other than those contained in SAE J2889–1 because those additional test scenarios address aspects of performance not covered in that standard.

The agency also used voluntary consensus standard ISO 10844 ''Acoustics—Test Surface for Road Vehicle Noise Measurements,'' to specify the road surface to be used for compliance testing under this standard. We also used ANSI S1.11 ''Specification for Octave-Band and Fractional-Octave-Band Analog and Digital Filters,'' to specify the filter roll-offs to be used during the analyses of data collected during compliance testing.

Incorporation by Reference

As discussed earlier in the relevant portions of this document, we are incorporating by reference various

[175] 62 FR 19885 (Apr. 23, 1997).

materials into the Code of Federal Regulations in this rulemaking. The standards we are incorporating are ANSI S1.11–2004, ''Specification for Octave-Band and Fractional-Octave-Band Analog and Digital Filters,'' the 1994, 2011, and 2014 versions of ISO 10844 [176] and SAE Standard J2889–1 Dec. 2014, ''Measurement of Minimum Noise Emitted by Road Vehicles,''

Under 5 U.S.C. 552(a)(1)(E), Congress allows agencies to incorporate by reference materials that are reasonably available to the class of persons affected if the agency has approval from the Director of the Federal Register. As a part of that approval process, the Director of the Federal Register (in 1 CFR 51.5) directs agencies to discuss (in the preamble) the ways that the materials we are incorporating by reference are reasonably available to interested parties.

NHTSA has worked to ensure that standards being considered for incorporation by reference are reasonably available to the class of persons affected. In this case, those directly affected by incorporated provisions are NHTSA and parties contracting with NHTSA to conduct testing of new vehicles. New vehicle manufacturers may also be affected to the extent they wish to conduct NHTSA's compliance test procedures on their own vehicles. These entities have access to copies of aforementioned standards through ANSI, ISO and SAE International for a reasonable fee. These entities have the financial capability to obtain a copy of the material incorporated by reference. Other interested parties in the rulemaking process beyond the class affected by the regulation include members of the public, safety advocacy groups, etc. Such interested parties can access the standard by obtaining a copy from the aforementioned standards development organizations.

Interested parties may also access the standards through NHTSA. All approved material is available for inspection at NHTSA, 1200 New Jersey Avenue SE., Washington, DC 20590, and at the National Archives and Records Administration (NARA). For information on the availability of this material at NHTSA, contact NHTSA's Office of Technical Information Services, phone number (202) 366–2588.

[176] The 1994 version of ISO 10844 is titled ''Acoustics—Test Surface for Road Vehicle Noise Measurements'' the 2011 and 2014 versions of ISO 10844 are titled ''Acoustics—Specification of test tracks for measuring noise emitted by road vehicles and their tyres.''

Executive Order 13211

Executive Order 13211 [177] applies to any rule that: (1) Is determined to be economically significant as defined under E.O. 12866, and is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. If the regulatory action meets either criterion, we must evaluate the adverse energy effects of the proposed rule and explain why the proposed regulation is preferable to other potentially effective and reasonably feasible alternatives considered by NHTSA.

This rule seeks to ensure that hybrid and electric vehicles are detectable by pedestrians. The average weight gain for a light vehicle is estimated to be 1.5 pounds (based upon a similar waterproof speaker used for marine purposes), resulting in 2.3 more gallons of fuel being used over the lifetime of a passenger car and 2.5 more gallons of fuel being used over the lifetime of a light truck. When divided by the life time of the vehicle (26 years for passenger cars and 36 years for light trucks) the yearly increase in fuel consumption attributed to this proposed rule would be negligible. Therefore, this proposed rule would not have a significant adverse effect on the use of energy. Accordingly, this rulemaking action is not designated as a significant energy action.

Regulation Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

List of Subjects in 49 CFR Part 571

Imports, Incorporation by reference, Motor vehicle safety, Reporting and recordkeeping requirements, Tires.

Regulatory Text

In accordance with the forgoing, NHTSA is amending 49 CFR part 571 as follows:

[177] 66 FR 28355 (May 18, 2001).

PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

■ 1. The authority citation for part 571 continues to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117, and 30166; delegation of authority at 49 CFR 1.95.

■ 2. In § 571.5:
■ a. Redesignate paragraphs (c)(1) through (4) as paragraphs (c)(2) through (5);
■ b. Add new paragraph (c)(1);
■ c. Add paragraphs (i)(2) through (4); and
■ d. Redesignate paragraph (l)(49) as paragrapgh (l)(50) and, and add new paragraah (l)(49).

The additions read as follows:

§ 571.5 Matter incorporated by reference.

* * * * *

(c) * * *

(1) ANSI S1.11–2004, ''Specification for Octave-Band and Fractional-Octave-Band Analog and Digital Filters,'' approved February 19, 2004, into § 571.141.

* * * * *

(i) * * *

(2) ISO 10844:1994(E) ''Acoustics—Test Surface for Road Vehicle Noise Measurements,'' First edition, 1994–09–01, into § 571.141.

(3) ISO 10844: 2011(E) ''Acoustics—Specification of test tracks for measuring noise emitted by road vehicles and their tyres,'' Second edition, 2011–02–01 into § 571.141.

(4) ISO 10844: 2014(E) ''Acoustics—Specification of test tracks for measuring noise emitted by road vehicles and their tyres,'' Third edition, 2014–05–15 into § 571.141.

* * * * *

(l) * * *

(49) SAE Standard J2889–1, ''Measurement of Minimum Noise Emitted by Road Vehicles,'' December 2014 into § 571.141.

* * * * *

■ 3. Section 571.141 is added to read as follows:

§ 571.141 Standard No. 141; Minimum Sound Requirements for Hybrid and Electric Vehicles.

S1. *Scope.* This standard establishes performance requirements for pedestrian alert sounds for motor vehicles.

S2. *Purpose.* The purpose of this standard is to reduce the number of injuries that result from electric and hybrid vehicle crashes with pedestrians by providing a sound level and sound characteristics necessary for these vehicles to be detected and recognized by pedestrians.

S3. *Application.* This standard applies to—

(a) Electric vehicles with a gross vehicle weight rating (GVWR) of 4,536 Kg or less that are passenger cars, multipurpose passenger vehicles, trucks, or buses;

(b) Hybrid vehicles with a gross vehicle weight rating (GVWR) of 4,536 Kg or less that are passenger cars, multipurpose passenger vehicles, trucks, or buses; and

(c) Electric vehicles and hybrid vehicles that are low speed vehicles.

S4. Definitions. Band or *one-third octave band* means one of thirteen one-third octave bands having nominal center frequencies ranging from 315 to 5000Hz. These are Bands 25 through 37 as defined in Table A1, Mid-band Frequencies for One-Third-Octave-Band and Octave-Band Filters in the Audio Range, of ANSI S1.11–2004: ''Specification for Octave-Band and Fractional-Octave-Band Analog and Digital Filters'' (incorporated by reference, see § 571.5).

Band sum means the combination of Sound Pressure Levels (SPLs) from selected bands that produce an SPL representing the sound in all of these bands. Band sum is calculated with the following equation:

$$Band\ Sum = 10\ log_{10} \sum_{i=1}^{2} 10^{(SPL_i/10)}$$

where SPL_i is the sound pressure level in each selected band.

Electric vehicle means a motor vehicle with an electric motor as its sole means of propulsion.

Front plane of the vehicle means a vertical plane tangent to the leading edge of the vehicle during forward operation.

Hybrid vehicle means a motor vehicle which has more than one means of propulsion for which the vehicle's propulsion system can propel the vehicle in the normal travel mode in at least one forward drive gear or reverse without the internal combustion engine operating.

Rear plane means a vertical plane tangent to the leading edge of the rear of the vehicle during operation in reverse.

S5. *Requirements.* Subject to the phase-in set forth in S9 of this standard, each hybrid and electric vehicle must meet the requirements specified in either S5.1 or S5.2. subject to the requirements in S5.3. Each vehicle must also meet the requirements in S5.4 and S5.5.

S5.1 *Performance requirements for four-band alert sounds.*

S5.1.1 *Stationary.* When stationary the vehicle must satisfy S5.1.1.1 and S5.1.1.2 whenever the vehicle's propulsion system is activated and:

(i) In the case of a vehicle with an automatic transmission, the vehicle's gear selector is in Neutral or any gear position other than Park that provides forward vehicle propulsion;

(iii) in the case of a vehicle with a manual transmission, the vehicle's parking brake is released and the gear selector is not in Reverse.

S5.1.1.1 For *detection,* the vehicle must emit a sound having at least the A-weighted sound pressure level according to Table 1 in each of four non-adjacent bands spanning no fewer than 9 of the 13 bands from 315 to 5000 Hz.

S5.1.1.2 For *directivity,* the vehicle must emit a sound measured at the microphone on the line CC' having at least the A-weighted sound pressure level according to Table 1 in each of four non-adjacent bands spanning no fewer than 9 of the 13 bands from 315 to 5000Hz.

TABLE 1—ONE-THIRD OCTAVE BAND MIN. SPL REQUIREMENTS FOR SOUND WHEN STATIONARY AND CONSTANT SPEEDS LESS THAN 10KM/H

One-third octave band center frequency, Hz	Min SPL, A-weighted dB
315	39
400	39
500	40
630	40
800	41
1000	41
1250	42
1600	39
2000	39
2500	37
3150	34
4000	32
5000	31

S5.1.2 *Reverse.* For vehicles capable of rearward self-propulsion, whenever the vehicle's gear selector is in the Reverse position, the vehicle must emit a sound having at least the A-weighted sound pressure level according to Table 2 in each of four non-adjacent bands spanning no fewer than 9 of the 13 bands from 315 to 5000Hz.

TABLE 2—ONE-THIRD OCTAVE BAND MIN. SPL REQUIREMENTS FOR SOUND WHILE IN REVERSE

One-third octave band center frequency, Hz	Min SPL, A-weighted dB
315	42
400	41

TABLE 2—ONE-THIRD OCTAVE BAND MIN. SPL REQUIREMENTS FOR SOUND WHILE IN REVERSE—Continued

One-third octave band center frequency, Hz	Min SPL, A-weighted dB
500	43
630	43
800	44
1000	44
1250	45
1600	41
2000	42
2500	40
3150	37
4000	35
5000	33

S5.1.3 *Constant pass-by speeds greater than 0 km/h but less than 20 km/h.* When at a constant speed greater than 0 km/h but less than 20 km/h the vehicle must emit a sound having at least the A-weighted sound pressure level according to Table 1 or Table 3 as applicable based upon vehicle test speed in each of four non-adjacent bands spanning no fewer than 9 of the 13 bands from 315 to 5000 Hz.

TABLE 3—ONE-THIRD OCTAVE BAND MIN. SPL REQUIREMENTS FOR CONSTANT PASS-BY SPEEDS GREATER THAN OR EQUAL TO 10 KM/H BUT LESS THAN 20 KM/H

One-third octave band center frequency, Hz	Min SPL, A-weighted dB
315	45
400	44
500	46
630	46
800	47
1000	47
1250	48
1600	44
2000	45
2500	43
3150	40

TABLE 3—ONE-THIRD OCTAVE BAND MIN. SPL REQUIREMENTS FOR CONSTANT PASS-BY SPEEDS GREATER THAN OR EQUAL TO 10 KM/H BUT LESS THAN 20 KM/H—Continued

One-third octave band center frequency, Hz	Min SPL, A-weighted dB
4000	38
5000	36

S5.1.4 *Constant pass-by speeds greater than or equal to 20km/h but less than 30 km/h.* When at a constant speed equal to or greater than 20 km/h but less than 30 km/h the vehicle must emit a sound having at least the A-weighted sound pressure level according to Table 4 in each of four non-adjacent bands spanning no fewer than 9 of the 13 bands from 315 to 5000 Hz.

TABLE 4—ONE-THIRD OCTAVE BAND MIN. SPL REQUIREMENTS FOR CONSTANT PASS-BY SPEEDS GREATER THAN OR EQUAL TO 20 KM/H BUT LESS THAN 30 KM/H

One-third octave band center frequency, Hz	Min SPL, A-weighted dB
315	52
400	51
500	52
630	53
800	53
1000	54

TABLE 4—ONE-THIRD OCTAVE BAND MIN. SPL REQUIREMENTS FOR CONSTANT PASS-BY SPEEDS GREATER THAN OR EQUAL TO 20 KM/H BUT LESS THAN 30 KM/H—Continued

One-third octave band center frequency, Hz	Min SPL, A-weighted dB
1250	54
1600	51
2000	51
2500	50
3150	47
4000	45
5000	43

S5.1.5 *Constant 30km/h pass-by.* When at a constant speed of 30–32 km/h the vehicle must emit a sound having at least the A-weighted sound pressure level according to Table 5 in each of four non-adjacent bands spanning no fewer than 9 of the 13 bands from 315 to 5000 Hz.

TABLE 5—ONE-THIRD OCTAVE BAND MIN. SPL REQUIREMENTS FOR 30–32 KM/H PASS-BY

One-third octave band center frequency, Hz	Min SPL, A-weighted dB
315	56
400	55
500	57
630	57
800	58
1000	58

TABLE 5—ONE-THIRD OCTAVE BAND MIN. SPL REQUIREMENTS FOR 30–32 KM/H PASS-BY—Continued

One-third octave band center frequency, Hz	Min SPL, A-weighted dB
1250	59
1600	55
2000	55
2500	54
3150	51
4000	49
5000	47

S5.2 *Performance requirements for two-band alert sounds.* When operating under the vehicle speed conditions specified in Table 6, the vehicle must emit sound having two non-adjacent one-third octave bands from 315 to 3150 Hz each having at least the A-weighted sound pressure level according to the minimum SPL requirements in Table 6 and spanning no fewer than three one-third octave bands from 315 to 3150 Hz. One of the two bands meeting the minimum requirements in Table 6 shall be the band that has the highest SPL of the 315 to 800 Hz bands and the second band shall be the band meeting the minimum requirements in Table 6 that has the highest SPL of the 1000 to 3150 Hz bands. The two bands used to meet the two-band minimum requirements must also meet the band sum requirements as specified in Table 6.

TABLE 6—ONE-THIRD OCTAVE BAND MINIMUM REQUIREMENTS FOR TWO-BAND ALERT

Vehicle speed	A-weighted SPL, dB(A)	
	Minimum in each band	Band sum
Reverse	40	48
Stationary and up to but not including 10 km/h	40	44
10 km/h up to but not including 20 km/h	42	51
20 km/h up to but not including 30 km/h	47	57
30 km/h	52	62

S5.2.1 When tested according to the test procedure in S7.1 the vehicle must emit a sound measured at the microphone on the line CC' having at least two non-adjacent octave bands from 315 to 3150 Hz each having at least the A-weighted sound pressure level, indicated in the ''Minimum in Each Band'' column in Table 6 for the ''Stationary up to but not including 10 km/h'' condition. The two bands used to meet the two-band minimum requirements must also meet the Band Sum as specified in Table 6.

S5.3 If a hybrid vehicle to which this standard applies is evaluated for compliance with requirements in S5.1.1 through S5.1.5 or S5.2 (Stationary, Reverse, Pass-by at 10 km/h, 20 km/h, and 30 km/h, respectively), and during testing to any one of those requirements the vehicle is measured for ten consecutive times without recording a valid measurement, or for a total of 20 times without recording four valid measurements because the vehicle's ICE remains active for the entire duration of a measurement or the vehicle's ICE activates intermittently during every measurement, the vehicle is exempted from meeting the specific requirement that was under evaluation at the time the ICE interfered in the prescribed manner.

S5.4 *Relative volume change to signify acceleration and deceleration.* The sound produced by the vehicle in accordance with paragraph S5 shall change in volume, as calculated in S7.6, from one critical operating condition to the next in accordance with the requirements in Table 7.

TABLE 7—MINIMUM RELATIVE VOLUME CHANGE REQUIREMENTS

Critical operating speed intervals	Minimum relative volume change, dB
Between:	
Stationary and 10 km/h	3
10 km/h and 20 km/h	3
20 km/h and 30 km/h	3

S5.5 *Sameness requirement*

S5.5.1 Any two vehicles of the same make, model, and model year (as those terms are defined at 49 CFR 565.12) to which this safety standard applies shall use the same pedestrian alert system and shall be designed to have the same pedestrian alert sound when operating in any given condition for which an alert sound is required in Section S5 of this safety standard.

S5.5.2 For the purposes of this requirement, a pedestrian alert system includes all hardware and software components that are utilized to generate an alert sound. Aspects of an alert system which shall be the same include, if applicable: Alert system hardware components including speakers, speaker modules, and control modules, as evidenced by specific details such as part numbers and technical illustrations; the location, orientation, and mountings of the hardware components within the vehicle; the digital sound file or other digitally encoded source; the software and/or firmware and algorithms which generate the pedestrian alert sound and/or which process the digital source to generate a pedestrian alert sound; vehicle inputs including vehicle speed and gear selector position utilized by the alert system; any other design features necessary for vehicles of the same make, model, and model year to have the same pedestrian alert sound at each given operating condition specified in this safety standard.

S6. *Test Conditions.*

S6.1 *Weather conditions.* The ambient conditions specified by this section will be met at all times during the tests described in S7. Conditions will be measured with the accuracy required in S6.3.3 at the microphone height specified in S6.4 +/−0.02 m.

S6.1.1 The ambient temperature will be between 5 °C (41 °F) and 40 °C (104 °F).

S6.1.2 The maximum wind speed at the microphone height is no greater than 5 m/s (11 mph), including gusts.

S6.1.3 No precipitation and the test surface is dry.

S6.1.4 *Background noise level.* The background noise level will be measured and reported as specified in S6.7, *Ambient correction.*

S6.2 *Test surface.* Test surface will meet the requirements of ISO 10844:1994, ISO 10844:2011, or ISO 10844:2014 (incorporated by reference, see § 571.5).

S6.3 *Instrumentation.*

S6.3.1 *Acoustical measurement.* Instruments for acoustical measurement will meet the requirements of S5.1 of SAE J2889–1 (incorporated by reference, see § 571.5).

S6.3.2 *Vehicle speed measurement.* Instruments used to measure vehicle speed during the constant speed pass-by tests in S7 of this standard will be capable of either continuous measurement of speed within ±0.5 km/h over the entire measurement zone specified in S6.4 or independent measurements of speed within ±0.2 km/h at the beginning and end of the measurement zone specified in S6.4.

S6.3.3 *Meteorological instrumentation.* Instruments used to measure ambient conditions at the test site will meet the requirements of S5.3 of SAE J2889–1 (incorporated by reference, see § 571.5).

S6.4 *Test site.* The test site will be established per the requirements of 6.1 of SAE J2889–1 (incorporated by reference, see § 571.5), including Figure 1, ''Test Site Dimensions'' with the definitions of the abbreviations in Figure 1 as given in Table 1of SAE J2889–1 (incorporated by reference, see § 571.5). Microphone positions will meet the requirements of 7.1.1 of SAE J2889–1 (incorporated by reference, see § 571.5).

S6.5 *Test set up for directivity measurement* will be as per S6.4 with the addition of one microphone meeting the requirements of S6.3.1 placed on the line CC', 2m forward of the line PP' at a height of 1.2m above ground level.

S6.6 *Vehicle condition*

(a) The vehicle's doors are shut and locked and windows are shut.

(b) All accessory equipment (air conditioner, wipers, heat, HVAC fan, audio/video systems, etc.) that can be shut down, will be off. Propulsion battery cooling fans and pumps and other components of the vehicle's propulsion battery thermal management system are not considered accessory equipment. During night time testing test vehicle headlights may be activated.

(c) Vehicle's electric propulsion batteries, if any, are charged according to the requirements of S7.1.2.2 of SAE J2889–1 (incorporated by reference, see § 571.5). If propulsion batteries must be recharged during testing to ensure internal combustion engine does not activate, manufacturer instructions will be followed.

(d) Vehicle test weight, including the driver and instrumentation, will be evenly distributed between the left and right side of the vehicle and will not exceed the vehicle's GVWR or GAWR:

(1) For passenger cars, and MPVs, trucks, and buses with a GVWR of 4,536 kg (10,000 pounds) or less, the vehicle test weight is the unloaded vehicle weight plus 180 kg (396 pounds);

(2) For LSVs, the test weight is the unloaded vehicle weight plus 78 kg (170 pounds).

(e) Tires will be free of all debris and each tire's cold tire inflation pressure set to:

(1) For passenger cars, and MPVs, trucks, and buses with a GVWR of 4,536 kg (10,000 pounds) or less, the inflation pressure specified on the vehicle placard in FMVSS No. 110;

(2) For LSVs, the inflation pressure recommended by the manufacturer for GVWR; if none is specified, the maximum inflation pressure listed on the sidewall of the tires.

(f) Tires are conditioned by driving the test vehicle around a circle 30 meters (100 feet) in diameter at a speed that produces a lateral acceleration of 0.5 to 0.6 g for three clockwise laps followed by three counterclockwise laps;

S6.7 *Ambient correction.*

S6.7.1 Measure the ambient noise for at least 30 seconds immediately before and after each series of vehicle tests. A series is a test condition, *i.e.* stationary, reverse, 10 km/h pass-by test, 20 km/h pass-by test, or 30 km/h pass-by test. Ambient noise data files will be collected from each microphone required by the test procedures in S7.

S6.7.2 For each microphone, determine the minimum A-weighted overall ambient SPL during the 60 seconds (or more) of recorded ambient noise consisting of at least 30 seconds recorded immediately before and at least 30 seconds immediately after each test series.

S6.7.3 For each of the 13 one-third octave bands, the minimum A-weighted ambient noise level during the 60 seconds (or more) from the two 30 second periods of ambient noise recorded immediately before and after each test series will be determined for each microphone.

S6.7.4 To correct overall SPL values for ambient noise, calculate the difference, for each microphone, between the measured overall SPL values for a test vehicle obtained in sections S7.1.4(b) and S7.3.4(b) and the minimum overall ambient SPL values

determined in S6.7.2, above. Using Table 8, determine a correction factor for each microphone. Subtract the correction factor from the overall SPL value measured under sections S7.1.4(b) and S7.3.4(b) to calculate the corrected overall SPL value. Any test for which the minimum overall SPL of the ambient is within 3 dB of the uncorrected overall SPL of the vehicle is invalid and not analyzed further.

S6.7.5 To correct one-third octave band sound levels for ambient noise, calculate the difference, for each microphone, between the uncorrected level for a one-third octave band (obtained in sections S7.1.5(b), S7.1.6(b) and S7.3.5(b)) and the minimum ambient level in the same one-third octave band as determined in S6.7.3. Use Table 9 to determine if a correction is required for each microphone and one-third octave band. If a correction is required, subtract the appropriate correction factor in Table 9 from the uncorrected one-third octave band sound level to calculate the corrected level for each one-third octave band. If the level of any ambient one-third octave band is within 3 dB of the corresponding uncorrected one-third octave band level, then that one-third octave band is invalid and not analyzed further.

TABLE 8—OVERALL SPL CORRECTIONS FOR AMBIENT NOISE

Difference between vehicle measurement and ambient noise level	Correction
Greater than 10 dB	0 dB.
Greater than 8 dB but less than or equal to 10 dB	0.5 dB.
Greater than 6 dB but less than or equal to 8 dB	1.0 dB.
Greater than 4.5 dB but less than or equal to 6 dB	1.5 dB.
Greater than 3 dB but less than or equal to 4.5 dB	2.5 dB.
Less than or equal to 3 dB	Invalid test run.

TABLE 9—1/3 OCTAVE BAND CORRECTIONS FOR AMBIENT NOISE

Difference between vehicle 1/3 octave band sound pressure level and ambient noise level	Correction
Greater than 6 dB	0 dB.
Greater than 4.5 dB but less than or equal to 6 dB	1.5 dB.
Greater than 3 dB but less than or equal to 4.5 dB	2.5 dB.
Less than or equal to 3 dB	Specific 1/3 octave band is not useable.

S7. Test Procedure.

S7.1 Vehicle stationary

S7.1.1 Execute stationary tests and collect acoustic sound files.

(a) Position the vehicle with the front plane at the line PP', the vehicle centerline on the line CC' and the starting system deactivated. For vehicle equipped with a Park position, place the vehicle's gear selector in ''Park'' and engage the parking brake. For vehicles not equipped with a Park position, place the vehicle's gear selector in ''Neutral'' and engage the parking brake. Activate the starting system to energize the vehicle's propulsion system.

(b) For vehicles equipped with a Park position for the gear selector, after activating the starting system to energize the vehicle's propulsion system, apply and maintain a full application of the service brake, disengage the vehicle parking brake and then place the vehicle's gear selector in ''Drive,'' or any forward gear. For vehicles not equipped with a Park position for the gear selector, after activating the starting system to energize the vehicle's propulsion system, apply and maintain a full application of the service brake, disengage the vehicle parking brake, disengage the manual clutch (fully depress and hold the clutch pedal), and place the vehicle's gear selector in any forward gear.

(c) Execute multiple tests to acquire at least four valid tests within 2 dBA overall SPL in accordance with S7.1.2 and S7.1.3. For each test, measure the sound emitted by the stationary test vehicle for a duration of 10 seconds.

(d) During each test a left (driver's side), a right (passenger side), and a front-center acoustic file will be recorded.

S7.1.2. Eliminate invalid tests.

(a) Determine validity of sound files collected during S7.1.1 tests. Measurements that contain any distinct, transient, loud sounds (*e.g.,* chirping birds, overhead planes, trains, car doors being slammed, etc.) are considered invalid. Measurements that contain sounds emitted by any vehicle system that is automatically activated and constantly engaged during the entire 10 second performance test are considered valid. Measurements that contain sound emitted by any vehicle system that is automatically activated and intermittently engaged at any time during the stationary performance test, are considered invalid. Additionally, when testing a hybrid vehicle with an internal combustion engine, measurements that include sound emitted by the ICE either intermittently or continuously are considered invalid. A valid test requires a valid left side, a valid right side, and a valid front-center acoustic sound file.

(b) Sequentially number all tests which are deemed valid based upon the chronological order in which they were conducted. Acoustic files will be identified with a test sequence number and their association with the left side, right side, or front center microphone.

S7.1.3 Identify first four valid tests within 2dBA.

(a) For each valid test sound file identified in S7.1.2, determine a maximum overall SPL value, in decibels. Each SPL value will be reported to the nearest tenth of a decibel.

(b) Compare the first four left-side SPL values from S7.1.3(a) of this paragraph, and determine the range by taking the difference between the largest and smallest of the four values. In the same manner, determine the range of SPL values for the first four right-side and the first four front-center sound files. If the range for the left side, right side, and front-center are all less than or equal to 2.0 dB, then the twelve sound files associated with the first four valid tests will be used for the one-third octave band evaluations in S7.1.5. and S7.1.6. If the range of the SPL values for

the left side are not within 2 dBA, or for the right side are not within 2 dBA, or for the front-center of the vehicle are not within 2 dBA, an iterative process will be used to consider sound files from additional sequential tests until the range for all three microphone locations are within 2 dBA for the same sequence number recordings for all three locations.

S7.1.4 Compare the average overall SPL for the left and right side of the test vehicle to determine which is lower.

(a) Document the maximum overall SPL values in each of the eight acoustic data files (four left side files and four right side files) identified in S7.1.3.

(b) Correct each of the eight SPL values from S7.1.4(a) according to S6.7 using the ambient sound level recorded during the test. The results will be reported to the nearest tenth of a decibel.

(c) Calculate a left-side average and a right-side average from the ambient-corrected overall SPL values from S71.4(b), and determine the lower of the two sides. The result will be reported to the nearest tenth of a decibel.

(d) If the left-side value from S7.1.4(c) is the lower one, then the left side acoustic data will be further evaluated for compliance at the one-third octave band levels in accordance with S7.1.5. If the left-side value from S7.1.4(c) is not the lower one, the right-side acoustic data will be further evaluated for compliance at the one-third octave band level in accordance with S7.1.5.

S7.1.5 Select one-third octave bands to be used for evaluating compliance with detection requirements.

(a) For each of the four left-side or right-side acoustic files, which ever was selected in S7.1.4, determine the sound pressure level in each one-third octave band from 315 Hz up to and including 5000 Hz.

(b) Correct the one-third octave band levels in all four sound files to adjust for the ambient sound level recorded during the test according to paragraph S6.7.

(c) For each one-third octave band, average the corrected levels from the four sound files. The results will be reported to the nearest tenth of a decibel.

(d) For alerts designed to meet the four one-third octave band alert sound requirements:

(i) Select any four one-third octave bands that are non-adjacent to each other and that span a range of at least nine one-third octave bands in the range of 315 Hz up to and including 5000 Hz to evaluate according to paragraph S7.1.5(d)(ii). This step will be repeated until compliance is established or it is determined that no combination meeting this selection criterion can satisfy paragraph S7.1.5(d)(ii).

(ii) Compare the average corrected sound pressure level from S7.1.5(c) of this paragraph in each of the four one-third octave bands selected in paragraph S7.1.5(d)(i) to the required minimum level of the corresponding one-third octave band specified in paragraph S5.1.1, Table 1, to determine compliance.

(e) For alerts designed to meet the two-one-third octave band requirements:

(i) Select the two highest one-third octave bands that are non-adjacent to each other and within the range of 315 Hz up to and including 3150 Hz to evaluate according to paragraph (ii), below. This step will be repeated until compliance is established or it is determined that no combination meeting this selection criterion can satisfy paragraph S7.1.5(e)(ii).

(ii) Compare the average corrected sound pressure level from (c) in each of the two one-third octave bands selected in paragraph S7.1.5(e)(i) to the required minimum level of the corresponding one-third octave band specified in paragraph S5.2 Table 6. Also, compare the band sum of the two bands to the required minimum level in Table 6.

S7.1.6 *Procedure for selected one-third octave bands to be used for evaluating compliance with directivity requirements.*

(a) Determine the one-third octave band levels associated with the four front center sound files selected in S7.1.3.

(b) The identified one-third octave band levels in each of the four sound files will be corrected for the measured ambient levels as specified in paragraph S6.7.

(c) The four corrected sound pressure level values calculated from each of the four sound files in each one-third octave band will be averaged together to get the average corrected sound pressure level in each one-third octave band.

(d) For alerts designed to meet the four one-third octave band requirements.

(i) Select any four one-third octave bands that are non-adjacent to each other and that span a range of at least nine one-third octave bands in the range of 315 Hz up to and including 5000 Hz to evaluate according to paragraph S7.1.6(d)(ii). This step will be repeated until compliance is established or it is determined that no combination meeting this selection criterion can satisfy paragraph S7.1.6(d)(ii).

(ii) Compare the average corrected sound pressure level from (c) of this paragraph in each of the four one-third octave bands selected in paragraph S7.1.6(d)(i) to the required minimum level of the corresponding one-third octave band specified in paragraph S5.1.1, Table 1, to determine compliance.

(e) For alerts designed to meet the two one-third octave band requirements.

(i) Select the two highest one-third octave bands that are non-adjacent to each other and within the range of 315 Hz up to and including 3150 Hz to evaluate according to paragraph (ii), below. One band shall be below 1000 Hz and one band shall be at or greater than 1000 Hz. This step will be repeated until compliance is established or it is determined that no combination meeting this selection criterion can satisfy paragraph S7.1.6(e)(ii).

(ii) Compare the average corrected sound pressure level from S7.1.6(c) of this paragraph in each of the two one-third octave bands selected in paragraph S7.1.6(e)(i) to the required minimum level of the corresponding one-third octave band specified in paragraph S5.2 Table 6. Also, compare the band sum of the two bands to the required minimum level in Table 6.

S7.2 *Reverse.* Test the vehicle per S7.1 (S7.1.1–S7.1.5), except that the rear plane of the vehicle is placed on line PP', no third microphone (front center) is used, and the vehicle's gear selector is placed in ''Reverse.''

S7.3 *Constant speed pass-by tests at speeds greater than 0 km/h but less than 20 km/h.*

S7.3.1 Execute pass-by tests at 11km/h (+/− 1 km/h) and collect acoustic sound files.

(a) For each test, measure the sound emitted by the test vehicle while at a constant speed of 11km/h (+/− 1km/h) throughout the measurement zone specified in S6.4 between lines AA' and PP'. Execute multiple test runs at 11km/h (+/−1km/h) to acquire at least four valid tests within 2dBA in accordance with S7.3.2 and S7.3.3.

(b) During each test, record a left (driver's side) and a right (passenger side) acoustic sound file.

S7.3.2 Eliminate invalid tests and acoustic sound files

(a) Determine validity of sound files collected during S7.3.1 tests. Measurements that contain any distinct, transient, background sounds (*e.g.,* chirping birds, overhead planes, car doors being slammed, etc.) are considered invalid. Measurements that contain sounds emitted by any vehicle system that is automatically activated and constantly engaged during the entire performance test are considered valid. Measurements that contain sound

emitted by any vehicle system that is automatically activated, and intermittently engaged at any time during the performance test, are considered invalid. Additionally, when testing a hybrid vehicle with an internal combustion engine that runs intermittently during a specific test, measurements that contain sound emitted by the ICE are considered invalid. A valid test requires both a valid left side and a valid right side acoustic sound file.

(b) Tests which are deemed valid will be numbered sequentially based upon the chronological order in which they were collected. Sound files will retain their test sequence number and their association with the left side or right side microphone.

S7.3.3 Identify ''first four valid tests within 2 dBA''.

(a) For each valid test sound file identified in S7.3.2, determine a maximum overall SPL value, in decibels. The SPL value will be reported to the nearest tenth of a decibel.

(b) Compare the first four left side maximum overall SPL values. Of the four SPL values calculate the difference between the largest and smallest maximum SPL values. The same process will be used to determine the difference between the largest and smallest maximum SPL values for the first four right side maximum SPL values. If the difference values on the left and right sides of the test vehicle are both less than or equal to 2.0 dB, then the eight sound files associated with the first four valid tests will be used for the final one-third octave band evaluation in accordance with S7.3.4. and S7.3.5. If the first four test sound files on each side of the vehicle are not within 2 dBA, an iterative process will be used to consider sound files from additional sequential tests until the range for both microphone locations are within 2 dBA for the same sequence number recordings for both locations.

S7.3.4 Determine average overall SPL value on each side (left and right) of test vehicle.

(a) Document the maximum overall SPL value in decibels for each of the eight acoustic sound data files (four left-side files and four right-side files) identified in S7.3.3.

(b) Each of the eight acoustic sound data file maximum overall SPL values will be corrected for the recorded ambient conditions as specified in paragraph S6.7. The test results will be reported to the nearest tenth of a decibel.

(c) Calculate the average of the four overall ambient-corrected SPL values on each side of the vehicle to derive one corrected maximum overall SPL value for each side of the vehicle. The result will be reported to the nearest tenth of a decibel.

(d) The side of the vehicle with the lowest average corrected maximum overall SPL value will be the side of the vehicle that is further evaluated for compliance at the one-third octave band levels in accordance with S7.3.5.

S7.3.5 Complete one-third octave band evaluation for compliance verification.

(a) The side of the vehicle selected in S7.3.4 will have four associated individual acoustic sound data files. Each sound file shall be broken down into its one-third octave band levels.

(b) The identified octave band levels in each of the four sound files will be corrected for the measured ambient levels as specified in paragraph S6.7.

(c) The four corrected sound pressure level values calculated from each of the four sound files in each one-third octave band will be averaged together to get the average corrected sound pressure level in each one-third octave band.

(d) For alerts designed to meet the four one-third octave band requirements.

(i) Select any four one-third octave bands that are non-adjacent to each other and that span a range of at least nine one-third octave bands in the range of 315 Hz up to and including 5000 Hz to evaluate according to paragraph S7.3.5(d)(ii). This step will be repeated until compliance is established or it is determined that no combination meeting this selection criterion can satisfy paragraph S7.3.5(d)(ii).

(ii) Compare the average corrected sound pressure level from S7.3.5(c) in each of the four one-third octave bands selected in paragraph S7.3.5(d)(i) to the required minimum level of the corresponding one-third octave band specified in paragraph S5.1.3, Table 3, to determine compliance.

(e) For alerts designed to meet the two one-third octave band requirements.

(i) Select the two highest one-third octave bands that are non-adjacent to each other and within the range of 315 Hz up to and including 3150 Hz to evaluate according to paragraph S7.3.5(e)(ii). This step will be repeated until compliance is established or it is determined that no combination meeting this selection criterion can satisfy paragraph S7.3.5(e)(ii).

(ii) Compare the average corrected sound pressure level from S7.3.5(c) in each of the two one-third octave bands selected in paragraph S7.3.5(e)(i) to the required minimum level of the corresponding one-third octave band specified in paragraph S5.2 and Table 6. Also, compare the band sum of the two bands to the required minimum level in Table 6.

S7.3.6 Repeat S7.3.1–S7.3.5 using any other constant vehicle speed equal to or greater than 10 km/h but less than 20 km/h.

S7.4 *Constant speed pass-by tests at speeds greater than or equal to 20 km/h but less than 30 km/h.* Repeat the test of S7.3 at 21 km/h (+/−1km/h). In S7.3.6, the 21km/h (+/−1km/h) test speed can be replaced using any constant speed greater than or equal to 20 km/h but less than 30 km/h.

S7.5 *Constant speed pass-by tests at 30 km/h.* Repeat the test of S7.3 at 31 km/h (+/−1km/h)

S7.6 *Relative volume change.* The valid test run data selected for each critical operating scenario in S7.1 (S7.1.5(c)), S7.3 (S7.3.5(c)), S7.4 and S7.5 will be used to derive relative volume change as required in S5.4 as follows:

S7.6.1 Calculate the average sound pressure level for each of the 13 one-third octave bands (315 Hz to 5000 Hz) using the four valid test runs identified for each critical operating scenario from S7.1.3 and S7.3.3 (stationary, 10 km/h (11+/−1km/h), 20 km/h (21+/−1km/h), and 30 km/h (31+/−1km/h)).

S7.6.2 For each critical operating scenario, normalize the levels of the 13 one-third octave bands by subtracting the corresponding minimum SPL values specified in Table 1 for the stationary operating condition from each of the one-third octave band averages calculated in S7.6.1.

S7.6.3 Calculate the NORMALIZED BAND SUM for each critical operating scenario (stationary, 10 km/h (11+/−1km/h), 20 km/h (21+/−1km/h), and 30 km/h (31+/−1km/h)) as follows:

$$NORMALIZEDBANDSUM = 10 * \log_{10}\left(\sum_{13}^{i=1} 10^{\frac{Normalized\ Band\ Level_i}{10}}\right)$$

Where:

i represents the 13 one-third octave bands and *Normalized Band Level*$_i$ is the normalized one-third octave band value derived in S7.6.2.

S7.6.4 Calculate the relative volume change between critical operating scenarios (stationary to 10km/h; 10km/h to 20 km/h; 20km/h to 30 km/h) by subtracting the NORMALIZED BAND SUM of the lower speed operating scenario from the NORMALIZED BAND SUM of the next higher speed operating scenario. *For example, the relative volume change between 10 km/h (11+/−1km/h) and 20 km/h (21+/−1km/h) would be the* NORMALIZED BAND SUM *level at 21+/−1km/h minus the* NORMALIZED BAND SUM *level at 11+/−1km/h.*

S8 *Prohibition on altering the sound of a vehicle subject to this standard.* No entity subject to the authority of the National Highway Traffic Safety Administration may:

(a) Disable, alter, replace or modify any element of a vehicle installed as original equipment for purposes of complying with this Standard, except in connection with a repair of a vehicle malfunction related to its sound emission or to remedy a defect or non-compliance with this standard; or

(b) Provide any person with any mechanism, equipment, process or device intended to disable, alter, replace or modify the sound emitting capability of a vehicle subject to this standard, except in connection with a repair of vehicle malfunction related to its sound emission or to remedy a defect or non-compliance with this standard.

S9 *Phase-in schedule.*

S9.1 *Hybrid and Electric Vehicles manufactured on or after September 1, 2018, and before September 1, 2019.* For hybrid and electric vehicles to which this standard applies manufactured on or after September 1, 2018, and before September 1, 2019, except vehicles produced by small volume manufacturers, the quantity of hybrid and electric vehicles complying with this safety standard shall be not less than 50 percent of one or both of the following:

(a) A manufacturer's average annual production of hybrid and electric vehicles on and after September 1, 2015, and before September 1, 2018;

(b) A manufacturer's total production of hybrid and electric vehicles on and after September 1, 2018, and before September 1, 2019.

S9.2 *Hybrid and Electric Vehicles manufactured on or after September 1, 2019.* All hybrid and electric vehicles to which this standard applies manufactured on or after September 1, 2019, shall comply with this safety standard.

■ 4. Section 571.500 is amended by adding paragraph S5.(b)(12) to read as follows:

§ 571.500 Standard No. 500; Low-speed vehicles.

* * * * *

S5.(b) * * *

(12) An alert sound as required by § 571.141.

* * * * *

PART 585—PHASE-IN REPORTING REQUIREMENTS

■ 4. The authority citation for part 585 is revised to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117, and 30166; delegation of authority at 49 CFR 1.95

■ 5. Add Subpart N to read as follows:

Subpart N—Minimum Sound Requirements for Hybrid and Electric Vehicles Reporting Requirements

Sec.

585.128 Scope.
585.129 Purpose.
585.130 Applicability.
585.131 Definitions.
585.132 Response to inquiries.
585.133 Reporting requirements.
585.134 Records.

Subpart N—Minimum Sound Requirements for Hybrid and Electric Vehicles Reporting Requirements

§ 585.128 Scope.

This subpart establishes requirements for manufacturers of hybrid and electric passenger cars, trucks, buses, multipurpose passenger vehicles, and low-speed vehicles to submit a report, and maintain records related to the report, concerning the number of such vehicles that meet minimum sound requirements of Standard No. 141, Minimum Sound Requirements for Hybrid and Electric Vehicles (49 CFR 571.141).

§ 585.129 Purpose.

The purpose of these reporting requirements is to assist the National Highway Traffic Safety Administration in determining whether a manufacturer has complied with the minimum sound requirements of Standard No. 141, Minimum Sound for Hybrid and Electric Vehicles (49 CFR 571.141).

§ 585.130 Applicability.

This subpart applies to manufacturers of hybrid and electric passenger cars, trucks, buses, multipurpose passenger vehicles, and low-speed vehicles subject to the phase-in requirements of § 571.141, S9.1 *Hybrid and Electric Vehicles manufactured on or after September 1, 2018, and before September 1, 2019.*

§ 585.131 Definitions.

(a) All terms defined in 49 U.S.C. 30102 are used in their statutory meaning.

(b) Bus, gross vehicle weight rating or GVWR, low-speed vehicle, multipurpose passenger vehicle, passenger car, truck, and motorcycle are used as defined in § 571.3 of this chapter.

(c) Production year means the 12-month period between September 1 of one year and August 31 of the following year, inclusive.

(d) Electric Vehicle, and hybrid vehicle are used as defined in § 571.141 of this chapter.

§ 585.132 Response to inquiries.

At any time during the production year ending August 31, 2018, each manufacturer shall, upon request from the Office of Vehicle Safety Compliance, provide information identifying the vehicles (by make, model and vehicle identification number) that have been certified as complying with the requirements of Standard No. 141, Minimum Sound Requirements for Hybrid and Electric Vehicles (49 CFR 571.141). The manufacturer's designation of a vehicle as a certified vehicle is irrevocable.

§ 585.133 Reporting requirements.

(a) Phase-in reporting requirements. Within 60 days after the end of the production year ending August 31, 2018, each manufacturer shall submit a report to the National Highway Traffic Safety Administration concerning its compliance with the requirements of Standard No. 141 Minimum Sound Requirements for Hybrid and Electric Vehicles (49 CFR 571.141) for its vehicles produced in that year. Each report shall provide the information specified in paragraph (b) of this section and in § 585.2 of this part.

(b) Phase-in report content—

(1) Basis for phase-in production goals. Each manufacturer shall provide the number of hybrid vehicles and electric vehicles manufactured in the current production year or, at the manufacturer's option, in each of the three previous production years. A manufacturer that is, for the first time, manufacturing vehicles for sale in the United States must report the number of vehicles manufactured during the current production year.

(2) Production of complying vehicles—

Each manufacturer shall report for the production year being reported on, and

each preceding production year, to the extent that vehicles produced during the preceding years are treated under Standard No. 141 as having been produced during the production year being reported on, information on the number of vehicles that meet the requirements of Standard No. 141, Minimum Sound Requirements for Hybrid and Electric Vehicles (49 CFR 571.141).

§ 585.134 Records.

Each manufacturer shall maintain records of the Vehicle Identification Number for each vehicle for which information is reported under § 585.133 until December 31, 2023.

Issued on November 10, 2016 in Washington, DC, under authority delegated in 49 CFR 1.95 and 501.5.

Mark R. Rosekind,

Administrator.

[FR Doc. 2016–28804 Filed 12–13–16; 8:45 am]

BILLING CODE 4910–59–P

FEDERAL REGISTER

Vol. 81 Wednesday,

No. 240 December 14, 2016

Part III

Department of Health and Human Services

Administration for Children and Families

45 CFR Part 1355

Adoption and Foster Care Analysis and Reporting System; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1355

RIN 0970–AC47

Adoption and Foster Care Analysis and Reporting System

AGENCY: Administration on Children, Youth and Families (ACYF), Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: The Social Security Act (the Act) requires that ACF regulate a national data collection system that provides comprehensive demographic and case-specific information on children who are in foster care and adopted. This final rule replaces existing Adoption and Foster Care Analysis and Reporting System (AFCARS) regulations and the appendices to require title IV–E agencies to collect and report data to ACF on children in out-of-home care, and who exit out-of-home care to adoption or legal guardianship, children in out-of-home care who are covered by the Indian Child Welfare Act, and children who are covered by a title IV–E adoption or guardianship assistance agreement.

DATES: This rule is effective on January 13, 2017 except for the removal of § 1355.40 (amendatory instruction 3) and Appendices A through E to Part 1355 (amendatory instruction 5), which are effective as of October 1, 2019.

FOR FURTHER INFORMATION CONTACT: Kathleen McHugh, Director, Policy Division, Children's Bureau, 330 C Street, SW., Washington, DC 20201. Email address: *cbcomments@acf.hhs.gov.* Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1–800–877–8339 between 8:00 a.m. and 7:00 p.m. Eastern Time.

SUPPLEMENTARY INFORMATION:

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I. Executive Summary per Executive Order 13563

Executive Order 13563 requires that regulations be accessible, consistent, written in plain language, and easy to understand. This means that regulatory preambles for lengthy or complex rules (both proposed and final) must include executive summaries. Below is the executive summary for this AFCARS final rule.

(1) Purpose of the AFCARS Final Rule

(a) *The need for the regulatory action and how the action will meet that need:* This rule finalizes AFCARS revisions proposed in a Notice of Proposed Rulemaking on February 9, 2015 (80 FR 7132, hereafter referred to as the 2015 NPRM) and in a Supplemental Notice of Proposed Rulemaking on April 7, 2016 (81 FR 20283, hereafter referred to as the 2016 SNPRM). We revised the AFCARS regulations to: (1) Incorporate statutory requirements enacted since 1993; (2) implement the statutory mandate to assess penalties for noncompliant data submissions; (3) enhance the type and quality of information title IV–E agencies report to ACF; and (4) incorporate data elements related to the Indian Child Welfare Act (ICWA). Title IV–E agencies must submit data files on a semi-annual basis to ACF. The regulations specify the reporting population, standards for compliance, and all data elements. The final rule will improve the data reported to ACF by including more comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children for whom ICWA applies and historical data on children in foster care and adds new data elements to better understand a child's experience in out-of-home care.

(b) *Legal authority for the final rule:* Section 479 of the Act mandates HHS regulate a data collection system for national adoption and foster care data. Section 474(f) of the Act requires HHS to impose penalties for non-compliant AFCARS data. Section 1102 of the Act instructs the Secretary to promulgate regulations necessary for the effective administration of the functions for which HHS is responsible under the Act.

(2) Summary of the Major Provisions of the Final Rule

(a) *Reporting Populations.* AFCARS will have two reporting populations: the out-of-home care reporting population and the adoption and guardianship assistance reporting population. The out-of-home care reporting population includes a child of any age who is in foster care under the placement and care responsibility of the title IV–E agency; is receiving title IV–E foster care maintenance payments under a title IV–E agreement; or has run away or whose whereabouts are unknown at the time the title IV–E agency becomes responsible for the child. Once the child enters the reporting population, he or she remains in the reporting population until the title IV–E agency's responsibility for the child ends or the child's title IV–E foster care maintenance payment pursuant to a title IV–E agreement ends. The adoption and guardianship assistance reporting population includes a child whose adoption or guardianship was finalized during the report period, and the child's adoptive parents or guardians have a title IV–E adoption or guardianship assistance agreement with the reporting title IV–E agency.

(b) *Data Structure.* Title IV–E agencies must report AFCARS information in two separate data files: an out-of-home care data file and an adoption and guardianship assistance data file. The out-of-home care data file is a combination of point-in-time information (*e.g.,* demographics) and information on the events in the child's life over time (*e.g.,* every living arrangement and permanency plan). The adoption and guardianship assistance data file contains data that capture a child's demographic information, payment information, and certain agreement information.

(c) *Data Elements.* We retained the majority of data elements proposed for the out-of-home care reporting population proposed in the 2015 NPRM, but removed some data elements in response to comments (*e.g.,* concurrent permanency plans) and modified others (*e.g.,* caseworker visits and prior adoption/guardianship). We reduced the adoption and guardianship assistance reporting to include data on the child's demographics, subsidy amounts, adoption finalization date, and agreement termination date. Also, we retained nearly all of the data elements proposed in the 2016 SNPRM for the out-of-home care reporting population specific to Indian children as defined in ICWA, but removed two data elements: one data element requiring states to report if they provided additional information requested by tribes related to notification and one data element indicating the date when the state title IV–E agency began making active efforts.

(d) *Compliance and Penalties.* The final rule strengthens our ability to hold title IV–E agencies accountable for submitting quality data. A title IV–E

agency must meet basic file standards, such as timely data file submissions and more specific data quality standards, such as 10 percent or less of a variety of errors. A title IV–E agency that does not meet the standards upon initial submission of the data will have six months to correct and submit the corrected data. If a title IV–E agency does not meet the standards after corrective action, ACF will apply the penalties required in statute (section 474(f) of the Act).

(3) *Costs and Benefits.* We estimate that costs for the final rule will be approximately $40.7 million. Benefits are that we will have an updated AFCARS regulation for the first time since 1993. In addition to the current uses of the data, the new information will provide more comprehensive information to deepen our understanding of guardianships and to address the unique needs of Indian children as defined in ICWA who are in the state's placement and care responsibility and who exit to reunification, adoption or who are transferred to the custody of the Indian tribe. This will further our work to draw national statistics and trends about the foster care, adoption, and guardianship populations for assessing the current state of these federal programs and inform national policies with respect to adoption, guardianship, and foster care.

II. Background on AFCARS

AFCARS regulations were originally published in December 1993 in response to the statutory mandate for adoption and foster care data in section 479 of the Act. That mandate is for a data collection system which provides comprehensive national information on:

- the demographic characteristics of adopted and foster children and their parents;
- the status and characteristics of the foster care population;
- the number and characteristics of children entering and exiting foster care, children adopted and children placed in living arrangements outside of the responsible title IV–E agency;
- the extent and nature of assistance provided by government programs for foster care and adoption and the characteristics of the children that receive the assistance; and
- the number of foster children identified as sex trafficking victims before entering or while in foster care.

We use AFCARS data to:

- Draw national statistics and trends about the foster care and adoption populations for assessing the current state of foster care and adoption.
- Complete the annual Child Welfare Outcomes Report to Congress (section 479A of the Act).
- Develop our budgets.
- Calculate payments for the Adoption and Guardianship Incentive Payments program.
- Monitor title IV–E agency compliance with title IV–B and IV–E requirements, including drawing the population sample for title IV–E reviews.
- Develop appropriate national policies with respect to adoption and foster care; and
- Address the unique needs of Indian children as defined by ICWA in foster care or who exit to adoption, and their families.

III. Regulation Development

Proposed Rules: We published a NPRM on January 11, 2008 to revise AFCARS (73 FR 2082). We did not finalize that NPRM due to the President signing into law the Fostering Connections to Success and Increasing Adoptions Act of 2008 (Public Law 110–351) that substantially changed the title IV–E program. Rather, we analyzed the comments and sought additional comments through a **Federal Register** Notice (75 FR 43187, issued July 23, 2010). In September 2014, the President signed into law the Preventing Sex Trafficking and Strengthening Families Act (Public Law 113–183) that modified the AFCARS requirements in section 479 of the Act, the annual Child Welfare Outcomes Report in section 479A of the Act, and added a requirement for HHS to submit several reports to Congress requiring the collection and reporting of information on victims of sex trafficking, children in foster care who are pregnant or parenting, and children in foster care in non-foster family settings and the services they receive. We published the 2015 NPRM proposing to modify the requirements for title IV–E agencies to collect and report data to ACF on children in out-of-home care and who were adopted or in a legal guardianship with a title IV–E adoption or guardianship assistance agreement. In April 2015, we announced our intent to publish a supplemental NPRM that would propose adding ICWA-related data elements to AFCARS (80 FR 17713, issued April 2, 2015). ICWA establishes minimum federal standards for the removal of Indian children from their families and the placement of such children in foster care or adoptive placements that reflect the unique values of Indian culture. In cooperation with the Children's Bureau, the National Association of Public Child Welfare Administrators (NAPCWA), an affiliate of the American Public Human Services Association (APHSA) hosted a conference call with state members of NAPCWA (*i.e.,* representatives of state child welfare agencies) on April 27, 2015. The purpose of the call was to obtain input from state members on what data state title IV–E agencies currently collect regarding ICWA and what they believed were the most important information title IV–E agencies should report in AFCARS related to ICWA. In addition, the Children's Bureau held a tribal consultation via conference call on May 1, 2015 to obtain input from tribal leaders on proposed AFCARS data elements related to ICWA. Comments were solicited during the call to determine essential data elements that title IV–E agencies should report to AFCARS. As part of on-going intra- and inter-agency collaboration, ACF consulted with federal experts on whether data exists, or not, and its utility in understanding the well-being of Indian children, youth, and families. ACF also consulted with federal partners at the Department of Justice (DOJ) and the Bureau of Indian Affairs (BIA) at the Department of the Interior on the ICWA statutory requirements in 25 U.S.C 1901 *et seq.,* the Department of Interior, Bureau of Indian Affairs Guidelines for State Courts and Agencies in Indian Child Custody Proceedings (80 FR 10146 issued February 25, 2015, hereafter referred to as BIA's Guidelines), and Notice of Proposed Rulemaking to Implement Regulations for State Courts and Agencies in Indian Child Custody Proceedings (80 FR 14880, issued March 20, 2015). After considering all of the aforementioned input, the 2016 SNPRM was published on April 7, 2016 (81 FR 20283) and proposed to require that state title IV–E agencies collect and report certain information related to ICWA for Indian children in the AFCARS out-of-home care reporting population.

2015 NPRM Comments: In response to the 2015 NPRM, we received 126 comment letters from states, Indian tribes and organizations representing tribal interests, national advocacy/public interests groups, universities, and private citizens. Many commenters supported many of the revisions we proposed for reporting historical data and collecting new information on topics such as caseworker visits, transition plans, and siblings. Commenters suggested including data elements related to ICWA. However, some commenters expressed concern

with the burden of modifying state systems to report the additional data elements. Suggestions included that we pare down the overall number of data elements to a core set that collects essential information. Commenters suggested that some of the proposed data elements were better suited in case narratives or case reviews rather than AFCARS. We expand on these comments in the section-by-section discussion.

2016 SNPRM Comments: In response to the 2016 SNPRM, we received 91 comment letters from states, Indian tribes and organizations representing tribal interests, national child welfare advocacy/public interest groups, universities, and private citizens. Many commenters supported collecting ICWA-related data in AFCARS and stated that it will better inform practice for Indian children as defined in ICWA. However, many commenters also expressed concerns with the burden of modifying state data systems to collect and report new and additional data elements. They suggested that we pare down the overall number of data elements to a core set that collects essential information related to ICWA. Commenters stated that much of the proposed data elements were better suited for case reviews rather than AFCARS because much of the information is currently in case narratives. We expand on these comments in the section-by-section discussion.

IV. Discussion of Major Changes to the Final Rule

Discussed below are the major changes and provisions of the final rule.

A. Changes to the Out-of-Home Care Data File

We received many comments in response to the AFCARS out-of-home care data elements proposed in the 2015 NPRM and 2016 SNPRM that helped us strengthen, clarify, and streamline the data elements. In general, states and the national organization that represents state child welfare agencies believe there are data elements in both the 2015 NPRM and the 2016 SNPRM that exceed the scope of the requirements of recent child welfare legislation and they recommend that ACF review each proposed data element and focus on essential data elements that can be reasonably collected and compared across states. Some states expressed concerns about the proposed data elements, implementation period, penalties, timeframe for submission, limited access to court records, and associated burden. They suggested paring down the number of data elements, providing adequate timeline and structure to implement changes including data exchanges with courts, and requested additional resources to meet the burden of implementation and training staff. In addition, some states expressed concerns that the rule includes data elements that attempt to capture qualitative and quantitative information that is not easily reducible to a single data field, and are more appropriate for a qualitative case review rather than an administrative data collection. We made the following major changes in the out-of-home care data file based on public comments:

Citizenship and Immigration

Throughout the final rule, we removed proposed data elements that required agencies to report whether or not the child or parent was born in the United States. State title IV–E agencies and a national organization representing state child welfare agencies were overwhelmingly opposed to agencies being required to report this in AFCARS, commenting that the data elements are not relevant to their work at the state and local level and could adversely impact the worker's relationship with families. However, in response to suggestions to add data elements related to parental immigration detainment or deportation, we included these as response options in the *Child and family circumstances at removal* data element in section 1355.43(d). These changes are explained in further detail in the section-by-section discussion.

Sexual Orientation

We requested public input in the 2015 NPRM on whether AFCARS should include information on whether a child identifies as lesbian, gay, bisexual, transgender, or questioning (LGBTQ). We received comments both in favor and against title IV–E agencies collecting and reporting this information to AFCARS but we were convinced to include data elements in the final rule related to the sexual orientation of the child (section 1355.44(b)), the child's foster parent(s) (section 1355.44(e)), and adoptive parent(s) or legal guardian(s) (sections 1355.44(h)). Our goal in including this information is that the data will assist title IV–E agencies to help meet the needs of LGBTQ youth in foster care.

Information on sexual orientation should be obtained and maintained in a manner that reflects respectful treatment, sensitivity, and confidentiality. Several state and county agencies, advocacy organizations and human rights organizations have developed guidance and recommended practices for how to promote these conditions in serving LGBT youth in adoption, foster care and out-of-home placement settings. ACF provides state and tribal resources for Working With LGBTQ Youth and Families at the Child Welfare Information Gateway. The following links are provided as general examples of such guidance (Minnesota and California examples). ACF will provide technical assistance to agencies on collecting this information.

We also added, based on comments, whether there is family conflict related to the child's sexual orientation, gender identify, or gender expression as a *Child and family circumstance at removal* reported when a child is removed from home in section 1355.44(d).

Child Financial and Medical Assistance

We proposed in the 2015 NPRM to collect financial and medical assistance information that support the child in two separate data elements: (1) Identify the source of federal assistance and total per diem payment amount for each of the child's living arrangements from a list seven types of assistance; and (2) identify whether the child received specific non-title IV–E federal or state/tribal financial and medical assistance during the report period. We received many comments expressing concern about the increased burden in particular to report specific federal assistance per diem payment amounts for every living arrangement. In response to these concerns, we were persuaded to revise the data elements by removing the data element related to per diem payment amounts for every living arrangement and consolidated the response options from both data elements into one data element. As a result, in section 1355.44(b) of the final rule, we require title IV–E agencies to report if the child received any of 13 types of state/tribal and federal financial and medical assistance during the report period.

Health, Behavioral or Mental Health Conditions and IDEA Qualifying Disability

We proposed in the 2015 NPRM to require agencies to report on a child's health, behavior or mental health conditions in one data element and the child's qualifying disability as defined by the Individuals with Disabilities Education Act (IDEA) if he/she has an Individualized Education Program (IEP) or Individual Family Service Plan (IFSP) in another. We received many comments from state title IV–E agencies that the response options for both data elements were very similar conditions,

the distinction confusing, and could lead to unreliable data. We were persuaded by the commenters to streamline and consolidate the two data elements and as a result removed the specific requirement for agencies to report a child's qualifying disability, and modified and combined the response options into one data element called health, behavioral or mental health conditions with 11 conditions for agency to report on the child (section 1355.43(b)). This will provide us with better data on the child's health characteristics and meets the federal requirement to collect this information per section 479A(a)(7)(A)(v) of the Act regarding reporting clinically diagnosed conditions for certain children in foster care.

Siblings

We revised how we will collect information on siblings in the out-of-home care data file in the final rule. In the 2015 NPRM, we proposed to collect sibling information in both the out-of-home care data file and the title IV–E adoption and guardianship assistance data file:

- The number of siblings of the child who are in out-of-home care and the child record numbers for those siblings, those siblings who are placed together in out-of-home care and those not placed together; and
- the number of siblings who exited out-of-home care to adoption or guardianship and the child record numbers of those siblings who are living with the child and the child record numbers of those not living with the child.

Commenters generally agreed that information about siblings is important to collect, but had concerns that our proposal was too complicated and would not yield reliable information because there are many and varied reasons for siblings not being placed together. Commenters thought the proposal did not take into account the complexity of what may constitute a family in the eyes of a child, and this information is best captured qualitatively. We carefully reviewed the comments and recommendations. While we understand the concerns and issues the commenters raised that may make it difficult to report sibling information, we determined that we must continue to require agencies to report information about sibling placements. As we noted in the preamble to the 2015 NPRM, section 471(a)(31)(A) of the Act requires title IV–E agencies to make reasonable efforts to place siblings removed from their home in the same foster care, kinship guardianship or adoptive placement, unless such a placement is contrary to the safety or well-being of any of the siblings. While we retained the core requirement for agencies to report on whether siblings are placed together in foster care and when siblings exit to adoption, we simplified reporting. We removed the data elements requiring the agency to report the sibling's child record numbers which was one of the concerns raised by commenters. Thus, the agency reports in the out-of-home care data file the following:

- The number of siblings of the child that are in foster care, and the number of siblings in the same living arrangement as the child on the last day of the report period (section 1355.42(b)).
- The number of siblings of the child who are in the same adoptive or guardianship home as the child, if the child exited foster care to adoption or guardianship (section 1355.44(h)).

Data Elements Related to ICWA

2016 SNPRM Rationale: The Government Accountability Office (GAO) reported in 2005 that there is no national data on children subject to ICWA by which to assess the experiences of AI/AN children in child welfare systems or with which to target guidance and assistance to states (GAO–05–290 Indian Child Welfare Act). Further, in response to comments on the 2015 NPRM and a reevaluation of our data collection authority, we were persuaded to propose that state title IV–E agencies report ICWA-related data. We proposed the data elements in the 2016 SNPRM as paragraph (i) to the proposed section 1355.43 (from the 2015 NPRM) after considering input from comments and federal agency experts. Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations and federal agencies have stated that ICWA is the ''gold standard'' of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.

Comments: Generally, tribes, organizations representing tribal interests, national child welfare advocacy organizations, and private citizens fully support the overall goal and purpose of including ICWA-related data in AFCARS, and the data elements as proposed in the 2016 SNPRM. These commenters believe that collecting ICWA-related data in AFCARS will:

1. provide data on core ICWA requirements such as ''active efforts'' and placement preferences, as well as assess how the child welfare system is working for Indian children as defined by ICWA, families and communities;
2. facilitate access to culturally-appropriate services to extended families and other tribal members who can serve as resources and high quality placements for tribal children;
3. help address and reduce the disproportionality of AI/AN children in foster care; and
4. provide avenues for collaboration between states and tribes that are more meaningful and outcome driven, including improved policy development, technical assistance, training and resource allocation as a result of having reliable data available.

Overall, tribal commenters and national child welfare advocacy organizations believe that collecting ICWA-related data in AFCARS is a step in the right direction to ensure that Indian families will be kept together when possible, and will help prevent AI/AN children from entering the foster care system. Many of the tribal commenters that supported the 2016 SNPRM also recommended extensive training for title IV–E agencies and court personnel in order to ensure accurate and reliable data reporting. Some commenters recommended additional data elements.

Commenters from some states and the national organization representing state child welfare agencies generally supported the overall goal and purpose of including ICWA-related data in AFCARS. One state commented that reporting national data related to ICWA was needed and long over-due. Some states reiterated concerns expressed in their comments to the NPRM related to the implementation period, penalties, timeline for submission, limited access to court records and the associated burden. Those states made similar recommendations to reduce the number of elements, provide an adequate implementation timeline, and requested additional resources to implement and train staff. As with their comments to the NPRM, some states identified proposed ICWA-related data elements that they believe would not be easily captured in a single data field and may therefore be better assessed through qualitative case file review. Some states also suggested that we clarify the language of the ICWA-related data elements and definitions in relation to BIA's regulations in order to increase national uniformity of practice and data collection. Several states said that they have a small number of AI/AN children

in their AFCARS reporting population and they requested that federal funding be made available to the fullest extent possible to help prepare for the low-occurring event of reporting the ICWA-related information.

Final Rule: We understand the burden issues that states raised in collecting and reporting additional data to AFCARS; however, we have determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data. Most states commented positively about improving data on Indian children as defined in ICWA. As we stated in the 2016 SNPRM, it is unclear how well state title IV–E agencies implement ICWA's requirements because of the lack of data related to ICWA. Even in states with large AI/AN populations, there may be confusion regarding how and when to apply ICWA.

We retained most of the data elements proposed in the 2016 SNPRM with some minor revisions to be consistent with the final rule published by the Department of the Interior, Bureau of Indian Affairs that addresses requirements for state courts regarding ICWA (81 FR 38778). We modified our final AFCARS rule requiring state title IV–E agencies to report whether active efforts were made prior to removal and prior to a termination of parental rights (TPR), and to identify which active efforts were made prior to removal and during the child's out-of-home care episode. We agree with commenters' suggestions that we include information when a state title IV–E agency inquired of extended family if the child is an Indian child because extended family may have information that parents do not know. We removed the requirement for states to report the date on which the state title IV–E agency began making active efforts in order to coordinate with the BIA's regulation clarifying that ICWA applies when the state title IV–E agency knows or has reason to know that a child is an Indian child as defined in ICWA. We removed the data element requiring states to report whether the state provided additional information the tribe requested related to notification. We explain this more in the section-by-section discussion.

We determined the best approach for the final rule is to integrate the data elements proposed in the 2016 SNPRM as section 1355.43(i) into applicable sections of this final rule at section 1355.44. These sections are: Child information (section 1355.44(b)); Parent or legal guardian information (section 1355.44(c)); Removal information (section 1355.44(d)); Living arrangement and provider information (section 1355.44(e)); Permanency planning (section 1355.44(f)); General exit information (section 1355.44(g)); and Exit to adoption and guardianship information (section 1355.44(h)).

On June 14, 2016, BIA published the final rule, Indian Child Welfare Act Proceedings (81 FR 38778). BIA's final rule requires fewer court orders than its proposed rule and increases flexibility for recording court decisions. In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV–E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV–E agency more flexibility, alleviate some of the burden and other concerns identified by states, help target technical assistance to increase state title IV–E agency communication and coordination with courts, and improve practice and national data on all children who are in foster care.

B. Revisions to Data on Children Who Are Adopted and Children Who Are Placed in Legal Guardianships

2015 NPRM Proposal and Rationale: In the 2015 NPRM, we proposed a new data file to collect information on children who have title IV–E adoption or guardianship assistance agreements and several new out-of-home care data elements to collect information on children who exit out-of-home care to adoption or legal guardianship.

Title IV–E Adoption and Guardianship Assistance data file: We proposed in the 2015 NPRM to require the title IV–E agency to report ongoing information on children under a title IV–E adoption and guardianship assistance agreement (called the title IV–E adoption and guardianship assistance data file), regardless of whether the agreement is for an ongoing subsidy, nonrecurring costs or in the case of a title IV–E finalized adoption, a Medicaid-only subsidy. The information included: demographics on each child, finalization/legalization dates, jurisdiction of the adoption, adoption or guardianship placing agency, subsidy and nonrecurring costs amounts, and sibling information.

Section 1355.44(h) Exit to adoption and guardianship information: We also proposed data elements in the out-of-home care data file related to all children who exit out-of-home care to adoption or legal guardianship. This included children who have a title IV–E adoption or guardianship assistance agreement, with or without a subsidy, and those who do not have either an agreement or subsidy. We proposed to require that the title IV–E agency report information on children who exit out-of-home care to adoption or legal guardianship, including: Demographic information (race, ethnicity, date of birth) on the adoptive parents/legal guardians; child's relationship to the adoptive parents/legal guardians; whether the child was placed within or outside of the state or tribal service area, or into another country for adoption or legal guardianship, and if so the name of the jurisdiction; and the agency that placed the child.

Comments: We received public comments on the overall proposal to collect information on children under title IV–E adoption and guardianship agreements, comments on individual data elements, and suggestions for expanding the information to be reported. A national organization representing state child welfare agencies requested that we remove the title IV–E adoption and guardianship assistance data file from the final rule and in general recommended that all AFCARS data elements be clearly defined and structured to provide accurate, reliable, and valid information. Additional comments and concerns raised by the organization were that: some state laws and/or policies regarding the oversight allowed with an adoptive family restricts the ongoing collection and use of information about these children; children under guardianship and adoption assistance agreements do not have open service cases even when there is a subsidy; many states capture the financial information regarding title IV–E adoption and guardianship subsidies in other systems; and many states would be required to make a significant changes to their application and report programs. In addition, the organization specifically noted that requiring agencies to report on an optional program for a child under a title IV–E guardianship assistance agreement reaches beyond our statutory authority. Several others, including states, agreed with the recommendation to remove the title IV–E adoption and guardianship assistance data file, raising additional concerns about the burden on workers. Some national advocacy/public interest groups representing children and adoption agency interests supported the collection of information on children under title IV–E assistance agreements. Some of these groups suggested including data elements on children with state guardianship agreements and additional historical

data elements. We also received specific comments on the data elements in section 1355.44(h) that we address in the section-by section discussion of the preamble related to gender of the adoptive parents and legal guardians, sexual orientation of the adoptive parents and legal guardians, the definition of kin, and information on siblings.

We carefully reviewed all of the comments and reconsidered our essential needs at the federal level for data on children who are adopted and in legal guardianships, and revised the final rule as described below.

Final Rule: Adoption Assistance data file: We retained the adoption and guardianship assistance reporting population as proposed, given the growing dominance of this population as a component of the title IV–E beneficiary population. However, we reduced the data elements to those that are essential for our needs in understanding this population of children who are receiving Federal benefits: a child's basic demographic information, subsidy amounts, and adoption and guardianship finalization and subsidy termination dates. As specified in the NPRM, this information will be used to discern changing circumstances and fluctuations in title IV–E payment amounts, responding to questions raised by Congress, and for budgetary planning and projection purposes. We removed the requirements for agencies to report non-recurring costs amounts as we do not have a specified need for this case level information and agencies report this type of information in the aggregate. We reduced reporting on siblings which is only reported in the out-of-home care file, as is the adoption jurisdiction and adoption reporting agency.

Final Rule: Section 1355.44(h) Exit to adoption and guardianship information: We determined that it was essential for us to have more robust information about all children who exit state or tribal foster care to adoption or legal guardianship, which is found in the out-of-home care data file at section 1355.44(h). We added and revised data elements based on commenters' suggestions to ensure we have a comprehensive set of information about children who exit foster care to adoption and guardianship. The most notable data elements we added to the out-of-home care data file for children who exit to adoption or guardianship are:

- Sexual orientation of the adoptive parent(s) or legal guardian(s);
- Tribal membership of the adoptive parent(s) or legal guardian(s);
- The assistance agreement type (adoption assistance agreement, state/tribal adoption assistance agreement, adoption-title IV–E agreement, non-recurring expenses only; Medicaid only; title IV–E guardianship assistance agreement, state/tribal guardianship assistance agreement, or no agreement); and
- The number of siblings of the child who are in the same adoptive or guardianship home as the child who exited out-of-home care to adoption or guardianship.

C. Report Periods and Deadlines

In section 1355.43(a) *Report periods and deadlines,* we modified the final rule to allow title IV–E agencies up to 45 days after the end of the report period to transmit the AFCARS data files.

V. Implementation Timeframe

We are providing two fiscal years for title IV–E agencies to comply with sections 1355.41 through 1355.47. State and tribal title IV–E agencies must continue to report data related to children in foster care and who have been adopted with title IV–E agency involvement to ACF in accordance with section 1355.40 and the appendix to part 1355 during the implementation period. It is essential for agencies to continue to report AFCARS data to ACF without interruption because AFCARS data is used for various reports, planning and monitoring, and to make the Adoption and Guardianship Incentive awards.

We received comments from many states on the implementation timeframe and several offered suggestions. State commenters to both the 2015 NPRM and the 2016 SNPRM indicated they would need sufficient time to make changes to their electronic case management systems to collect new information. Several state title IV–E agencies and a national organization representing state title IV–E agencies indicated that implementing the ICWA-related data elements proposed in the 2016 SNPRM in addition to the elements proposed in the 2015 NPRM would require more time than one year and two states indicated a need for two to three years. Several state title IV–E agencies indicated that ICWA-related information is documented in case files and in narrative formats. Additionally, several state title IV–E agencies noted that collecting the information from courts would impact their implementation timeframe because the court information systems do not always contain the information proposed in the 2016 SNPRM or because there is no data exchange interface between the court and state title IV–E agency's case management system. Commenters to the 2015 NPRM also suggested that this final rule not be implemented until after Round 3 of the Child and Family Services Reviews (CFSR).

State title IV–E agencies and the national organization representing state title IV–E agencies recommended either a tiered or a phased-in approach to compliance with the AFCARS requirements and penalties. Several of those commenters suggested that we allow agencies additional time to implement the changes proposed in the 2016 SNPRM regarding ICWA data elements.

We understand states' concerns about the system changes that are needed since this final rule will implement the statutory AFCARS penalties. However, we determined that a two federal fiscal year period is sufficient for states to implement all changes for the AFCARS final rule. We are not providing a phase-in period for the ICWA-related data elements. As we noted in the 2016 SNPRM, we are issuing one final rule on AFCARS and we considered all comments on the 2015 NPRM and the 2016 SNPRM.

VI. Section-by-Section Discussion of Comments and Regulatory Provisions

Section 1355.40 Foster Care and Adoption Data Collection

In this section, we modified the requirements in the current section 1355.40 to require title IV–E agencies to continue to submit AFCARS data during the implementation timeframe. We must keep the current AFCARS regulations at section 1355.40 and the appendices to part 1355 until the dates listed in the **DATES** section of this rule. This means that title IV–E agencies must continue to report AFCARS data in the same manner they do currently until the implementation date of this final rule as discussed in section V of this final rule.

Section 1355.41 Scope of the Adoption and Foster Care Analysis and Reporting System

In this section, we set forth the scope of AFCARS.

In paragraph (a), we specify that state and tribal title IV–E agencies must collect and report AFCARS data, unless it is indicated for state title IV–E agencies only.

In paragraph (b), we specify that title IV–E agencies must submit the data to ACF on a semi-annual basis as required in section 1355.43 in a format according to ACF's specifications.

In paragraph (c)(1), we clarified that the terms in section 1355.41 through

1355.47 are defined as they appear in 45 CFR 1355.20, except that for purposes of specified data elements related to the Indian Child Welfare Act of 1978 (ICWA), terms are defined as they appear in 25 CFR 23.2 and 25 U.S.C. 1903. This is similar to paragraph (i)(1) as proposed in the 2016 SNPRM and incorporates the definitions recently promulgated in BIA's regulations at 25 CFR 23.2.

In paragraph (c)(2), we clarified for state title IV–E agencies that in cases where ICWA applies, the term ''legal guardian'' includes an Indian custodian as defined in ICWA at 25 U.S.C. 1903. These data elements are in sections 1355.44(c)(1), (c)(2), (d)(4), and (d)(5). We understand that there are instances when ICWA applies where Indian custodians may have legal responsibility for the child. Since we are integrating the ICWA-related data elements into select sections of this regulation, we want to take this opportunity to clarify that in the instances where ICWA applies and an Indian custodian may have legal responsibility of the child who is now in out-of-home care, the term ''legal guardian'' includes an Indian custodian.

Comment: A few commenters suggested additional definitions, such as ''voluntary'' placement, ''ICWA eligible child,'' and ''reactivation'' of children who have multiple removals for the same reasons, and to expand the definition of tribe to distinguish between federally recognized, non-federally recognized, and historic/aboriginal tribes.

Response: We did not add a definition of ''voluntary'' placement because the term is already defined by section 472(f) of the Act. We did not define ''reactivation'' because it is not a term used in these regulations. We did not specifically define ''ICWA eligible child'' in this regulation, but we did include by reference definitions in the BIA's ICWA regulation at 25 CFR 23.2 so if the BIA amends the definition of children to whom ICWA applies, it will automatically be changed for the purpose of these regulations rather than requiring ACF to issue another regulatory action. Since we integrated the ICWA-related data elements into other sections of the final rule we no longer have a list of applicable definitions pertaining to the ICWA-related data elements. Rather, section 1355.41(c)(1) specifies that terms in sections 1355.41 through 1355.47 are defined as they appear in 45 CFR 1355.20, except that for purposes of data elements related to ICWA, terms that appear in sections 1344.44(b)(3) through (b)(8), (c)(3), (c)(4), (c)(6), (c)(7), (d)(3), (e)(8) through (e)(11), (f)(10), and (h)(20) through (h)(23) are defined as they appear in 25 CFR 23.2 and 25 U.S.C. 1903. This means that the ICWA-related data elements will follow either BIA regulations as they appear in 25 CFR 23.2 or the statute at 25 U.S.C. 1903. In paragraph (c)(2), we clarified for state title IV–E agencies that in cases where ICWA applies, the term ''legal guardian'' includes an Indian custodian as defined in ICWA at 25 U.S.C. 1903. These data elements are in sections 1355.44(c)(1), (c)(2), (d)(4), and (d)(5).

Section 1355.42 Reporting Populations

In this section, we define the reporting populations for the AFCARS out-of-home care and adoption and guardianship assistance data files.

Section 1355.42(a) Out-of-Home Care Reporting Population

In paragraph (a), we define and clarify the out-of-home care reporting population. Consistent with current AFCARS, the child enters the out-of-home care reporting population when the child's first placement meets the definition of foster care in section 1355.20. A title IV–E agency must report a child of any age who is in out-of-home care for more than 24 hours.

Comment: Several state title IV–E agencies, a national organization representing state child welfare agencies and other commenters supported the out-of-home care reporting population. However, several states and others expressed confusion over who is included in this population, particularly juvenile justice youth, runaway and homeless youth, youth on a trial home visit and children who reenter care.

Response: We take this opportunity to clarify the reporting population for out-of-home care. Overall, the out-of-home care reporting population includes a child of any age who is in foster care as defined in 1355.20 for longer than 24 hours until the title IV–E agency no longer has placement and care responsibility. The out-of-home care reporting population includes a child under the title IV–E agency's placement and care who:

- Has run away or whose whereabouts are unknown at the time the title IV–E agency becomes responsible for the child, until the title IV–E agency's responsibility for placement and care ends;
- is placed into foster care after a non-foster care setting, until the title IV–E agency's placement and care responsibility ends;
- is placed at home, including a child on a trial discharge or trial home visit, until the title IV–E agency's placement and care responsibility ends;
- is placed from a foster care placement into a non-foster care setting, until the title IV–E agency's placement and care responsibility ends;
- is age 18 and older, including those in a supervised independent living setting, until the title IV–E agency's placement and care responsibility ends.

The out-of-home care reporting population also includes a child who is under the placement and care responsibility of another public agency that has an agreement with the title IV–E agency pursuant to section 472(a)(2)(B) of the Act, or an Indian tribe, tribal organization or consortium with which the title IV–E agency has an agreement, and, on whose behalf title IV–E foster care maintenance payments are made until title IV–E foster care maintenance payments cease to be made on behalf of the child. We specifically note that children placed pursuant to title IV–E agreements are reported in the out-of-home care reporting population only if the child is receiving a title IV–E foster care maintenance payment under the title IV–E agreement. We added the phrase ''for more than 24 hours'' to the regulation so that it now reads ''A title IV–E agency must report a child of any age who is in out-of-home care for more than 24 hours.'' We want to be clear how title IV–E agencies must report children in the out-of-home care reporting population, consistent with current AFCARS regulations, found in the Appendix to section 1355. Since we removed the appendix, we are adding it to the regulation. During AFCARS Assessment Reviews, states have inquired about this policy many times and we feel that it is clearer to specify this in regulation.

Consistent with existing AFCARS policy, the out-of-home care reporting population also includes a child who is in foster care under the joint responsibility of another public agency, such as the juvenile justice agency, and the title IV–E agency until title IV–E foster care maintenance payments cease to be made on behalf of the child (see the Child Welfare Policy Manual section 1.3, question 13).

We understand there has been confusion in the past both in the reporting and analysis of the current AFCARS foster care reporting population related to children who are under the responsibility of another public agency or an Indian tribe pursuant to a title IV–E agreement. As noted in paragraph (a)(1)(ii), title IV–E agencies must include children for whom title IV–E foster care maintenance payments are provided under a title IV–

E agreement between the title IV–E agency and a public agency or an Indian tribe. We would like to clarify that only those children who are provided a title IV–E foster care maintenance payment under the title IV–E agreement are included in the out-of-home care reporting population; it does not include all the children in the other public agency or Indian tribe's placement and care responsibility. In paragraph (a)(1)(ii) we refer to only title IV–E agreements that meet the requirements of section 472(a)(2) of the Act; not all interagency agreements or contracts with the other public agency or Indian tribe for services or payments meet these requirements. Section 472(a)(2) of the Act allows for payment of title IV–E foster care maintenance on behalf of an eligible child if there is a title IV–E agreement with another public agency or Indian tribe even though the child is not under the placement and care responsibility of the reporting title IV–E agency. This clarification reflects a continuation of the AFCARS reporting requirements and is not a change in the out-of-home care reporting population. To further clarify the children in the out-of-home care reporting population, we modified the regulation in section 1355.44(d)(6) *Child and family circumstances at removal* to identify these children reported in AFCARS and we discuss in the preamble for that section.

Comment: Several state title IV–E agencies expressed concerns that the proposal expands the reporting population and will be burdensome for agencies to report all data elements on the reporting population; one state expressed concern that the reporting population would impact their CFSR measures; and one state commented that the expansion of the reporting population imposes an unrealistic mandate on state child welfare agencies to be responsible and penalized for data collected by other agencies.

Response: We retained the requirement for title IV–E agencies to report a child until the title IV–E agency no longer has placement and care responsibility. We expect that title IV–E agencies would have the information that we require to be reported if they have responsibility for the child, regardless of where the child is placed. The revision to the out-of-home care reporting population has no impact on the population of children for the CFSR measures because only the children in foster care will be included in the outcome measures. We continue to believe that the benefits of data reporting on the out-of-home care reporting population will allow ACF to develop a comprehensive picture of a child's experience in the title IV–E agency's placement and care with all removals, living arrangements, permanency plans, and exits from out-of-home care and the ability to better inform our monitoring efforts. We will provide technical assistance to agencies on any remaining clarifications regarding state specific questions related to the reporting population.

Section 1355.42(b) Adoption and Guardianship Assistance Reporting Population

In paragraph (b), we define the reporting population for the adoption and guardianship assistance data file.

In paragraph (b)(1) we require that the title IV–E agency must report data as described in section 1355.45 on each child who meets one of the conditions in the paragraphs (b)(1)(i) or (b)(1)(ii).

In paragraph (b)(1)(i), we require the title IV–E agency to report information required by section 1355.45 on any child for whom there is a finalized adoption under a title IV–E adoption assistance agreement (per section 473(a) of the Act) with the reporting title IV–E agency that is or was in effect at some point during the report period.

In paragraph (b)(1)(ii), we collect the information in section 1355.45 on any child in a legal guardianship who is under a title IV–E guardianship assistance agreement, pursuant to section 473(d) of the Act, with the reporting title IV–E agency that is or was in effect at some point during the current report period.

In paragraph (b)(2), we clarify that a child remains in the adoption and guardianship assistance reporting population through the end of the report period in which the title IV–E agreement ends or is terminated.

Comment: Many commenters objected to reporting ongoing information on children who are in this reporting population, stating that adopted children do not have open service cases even when there is a subsidy attached. Additionally, many commenters felt that collecting information on any child who is in a legal guardianship under a title IV–E guardianship assistance agreement reaches beyond our statutory authority and would require a significant change in the application and report programs and laws and policies in many states. Several other groups agreed with this opinion and raised concerns about the burden on workers and duplication to information in the out-of-home care data file (section 1355.44(h)). Some national advocacy/public interest groups representing children and adoption agency interests were supportive of the separate data file proposed in the 2015 NPRM, and some suggested including children for whom there are finalized adoptions and guardianships without title IV–E assistance agreements.

Response: We carefully considered the comments and have retained the adoption and guardianship assistance reporting population as proposed for the reasons we identified in the NPRM and given the growing dominance of this population as a component of the title IV–E beneficiary population. Overall, we believe there is a basic good governance principle at stake in having data about children who are receiving Federal benefits, especially considering the tremendous growth in the title IV–E adoption and guardianship assistance population over the last several years. While there is no statutory mandate to collect information for children under a title IV–E guardianship assistance agreement, section 479(c)(3)(C)(i) of the Act authorizes AFCARS to collect data on the ''characteristics of children . . . removed from foster care'', which encompasses the title IV–E guardianship assistance population. We continue to believe it is essential to collect the same information on children under title IV–E guardianship agreements as for title IV–E adoption agreements because we have the same need for the information for children supported by title IV–E funding.

Section 1355.43 Data Reporting Requirements

This section contains the AFCARS data reporting requirements.

Section 1355.43(a) Report Periods and Deadlines

In paragraph (a), we specify that: (1) There are two six-month report periods based on the federal fiscal year, October 1 to March 31 and April 1 to September 30 and; (2) the title IV–E agency must submit the AFCARS data files to ACF within 45 days of the end of the report period (*i.e.,* by May 15 and November 14).

Comment: A national organization representing state child welfare agencies recommended that we maintain the 45 day window for submitting data. They believe the 30 day requirement proposed in the 2015 NPRM would compromise data accuracy and integrity because some data may be excluded and there would not be enough time for agencies to check for errors in 30 days, particularly for state-supervised, county-administered states. Eight states and three other commenters opposed the shortened timeframe for the same reasons.

Response: We modified the regulation to allow title IV–E agencies up to 45 days after the end of the report period to transmit the AFCARS file to accommodate commenter concerns. However, we wish to emphasize that the purpose of this 45 day transmission period is to extract the data and ensure the file is in the proper format for transmission. Data accuracy and integrity is to be completed by the IV–E agency on a continuous basis throughout the year. This is consistent with current AFCARS guidance.

Section 1355.43(b) Out-of-Home Care Data File

In paragraph (b), we provide instructions on how the title IV–E agency must report information for the out-of-home care reporting population.

In paragraph (b)(1), we require a title IV–E agency to submit the most recent information for data elements in the *General information* (section 1355.44(a)) and *Child information* (section 1355.44(b)) sections of the out-of-home care data file.

In paragraph (b)(2), we require the title IV–E agency to submit the most recent and historical information for most data elements in the following sections of the out-of-home care data file, unless the exception in paragraph (b)(3) applies:

- § 1355.44(c) Parent or legal guardian information
- § 1355.44(d) Removal information
- § 1355.44(e) Living arrangement and provider information
- § 1355.44(f) Permanency planning
- § 1355.44(g) General exit information
- § 1355.44(h) Exit to adoption and guardianship information

Comment: In general, states, a national organization representing state child welfare agencies, and other national/advocacy organizations and individuals were supportive of the move to a historical data set because of the benefits in understanding outcomes for children and their experiences in out-of-home care. However, many commented that they are concerned that the final rule will be a challenge for states to implement because of a significant burden to title IV–E agencies to collect and report new additional historical data with existing resources. In addition, they expressed concern with the magnitude of historical data that would be required to be reported as it would need to be tracked at local levels in order to produce six-month report period data files.

Several national advocacy organizations and others made suggestions to expand historical reporting to other data elements, while others, mostly state title IV–E agencies, suggested we limit the data to ''core elements'' that have utility and validity at the national level. A national organization representing state child welfare agencies suggested that we allow AFCARS revisions to occur in stages, by first creating historical data files and then adding data elements that are truly necessary in a federal database.

Response: We are retaining the requirement that title IV–E agencies report certain historical data for the original reasons we proposed. In general, we removed several data elements and included other data elements as appropriate, which we explain in the section-by-section preamble. We acknowledge that there are a few states that currently do not have a comprehensive electronic case management system or central database that contains the child's information across all counties. However, based on AFCARS Assessment Reviews, we believe that many of the historical data elements are available in the state's information system or electronic case record. We continue to believe that the benefits of historical data reporting will allow ACF to develop a comprehensive picture of a child's experience in the title IV–E agency's placement and care with all entries, living arrangements, permanency plans, and exits from out-of-home care. We believe there will be many benefits from receiving historical data, including: eliminating information gaps that exist in current AFCARS data which raise questions about the child's experiences and make the data more difficult to analyze; building upon ACF's ability to conduct sophisticated analyses of what happens to a child or groups of children in foster care; and providing better data to inform the current CFSR and other outcome monitoring efforts such as time in foster care, foster care re-entries and the stability of foster care placements. Finally, we did not revise the regulation to allow AFCARS revisions to occur in stages. Issuing one final rule on AFCARS with all revisions is the efficient way to revise AFCARS, since revisions to AFCARS have been proposed since the 2008 NPRM. We will provide technical assistance via webinars and other media channels to facilitate AFCARS implementation as well as offer one-on-one assistance to title IV–E agencies.

Comment: Several states noted that there was not enough detail on the technical specifics related to the structure of the data set and asked for more specificity to better understand how title IV–E agencies will need to modify their systems. States, organizations, and others asked technical clarification questions and several recommended that states have access to these data files. Finally, there were a few technical clarification questions about the state specific system issues.

Response: While we are not regulating the technical specifications for reporting historical data, we anticipate that title IV–E agencies will submit a data file in much the same way that they submit it now, only with more information. Most of the information that will be historical is currently stored in a state's electronic case file, based on our current knowledge of agency systems through our AFCARS Assessment Reviews. We will work through these technical pieces during implementation, which is consistent with the approach we took for the National Youth in Transition Database (NYTD). We intend to issue technical guidance as noted throughout the preamble regarding file specifications. Also, we will provide technical assistance via webinars and other media to implement AFCARS as well as providing one-on-one assistance with title IV–E agencies.

In paragraph (b)(3), we require that the title IV–E agency report the date of removal, exit date, and exit reason for each child who had an out-of-home care episode prior to the final rule. This means that title IV–E agencies do not need to report complete historical and current information for these children. We did not receive any comments.

Section 1355.43(c) Adoption and Guardianship Assistance Data File

In paragraph (c), we require that the title IV–E agency report the most recent information for the applicable data elements in § 1355.45 that pertains to each child in the adoption and guardianship assistance reporting population on the last day of the report period. We did not receive comments on the 2015 NPRM specific to this paragraph.

Section 1355.43(d) Missing Information

In paragraph (d), we specify how the title IV–E agency must report missing information.

Comment: Several states and a national organization representing state child welfare agencies were concerned about the burden on workers of having to manually fill in blank information and stated that data systems should be able to automatically mark as blank.

Response: We would like to take this opportunity to explain what is meant by ''missing'' information as workers will not ''manually fill in blank

information.'' The requirements in this paragraph relate to the technical aspects of creating the AFCARS data file and prohibit defaulting to a valid response option when the worker did not enter information into the case management system and it is therefore missing. This prohibition is longstanding ACF practice and consistent with the statutory mandate in section 479(c)(2) of the Act that any AFCARS data collected must be reliable and consistent over time. If the worker did not enter information into the case management system necessary for reporting on a particular data element (for example, it is missing), then the agency must report the data element as blank. We did not make substantive changes to the final rule in response to comments.

Comment: Several commenters asked how ''blank'' information is distinguished from missing data and if missing information could be used to determine penalties.

Response: ''Blank'' is a valid response option only when specified in individual data elements in section 1355.44. When ''blank'' is not a valid response option, and no information was entered into the information system for a data element, then that is considered a missing data error under section 1355.46(b)(1). This is consistent with ACF's longstanding practice. Errors under section 1355.46(b) are subject to the penalty provisions of section 1355.47.

Section 1355.43(e) Electronic Submission

In paragraph (e), we require a title IV–E agency to submit its data files to ACF electronically, in a format according to ACF's specifications.

Comment: Several commenters requested details for data file submissions, the type of technologies title IV–E agencies must use to submit AFCARS data, and made a recommendation to use the same electronic submission process used for the NYTD.

Response: We have intentionally left the specific details for electronic submissions out of the regulation. We have learned through our experience with the existing AFCARS that it is prudent not to regulate the technical specifications for transmitting data because as technology changes, we must keep pace with the most current, practical, and efficient transmission methods that will meet title IV–E agency and federal needs. We currently provide guidance on submission of technical requirements and specifications through official ACF policy and technical bulletins and we will continue to do so in providing guidance on the final rule. We appreciate the suggestion with regard to the NYTD process, and we will determine whether we can use a similar process upon implementation of the final rule.

Section 1355.43(f) Record Retention

In paragraph (f), we require that title IV–E agencies must retain all records necessary to comply with the data requirements in sections 1355.41 through 1355.45. As we stated in the 2015 NPRM (80 FR 7146), practically, this means the title IV–E agency must keep applicable records until the child is no longer of an age to be in the reporting populations.

Comment: Four states expressed concerns with the proposed record retention timeframes, stating that they extend beyond the state's record retention and destruction laws, may require a legislative change to meet this retention schedule, and potential costs to procure new storage hardware or expand data centers.

Response: This is a clarification of current AFCARS requirements. Currently, title IV–E agencies must maintain the child's history up to the time the child would no longer be eligible for services due to age in order to report the date of the first removal, the number of removals, and the date of discharge from the prior removals. Based on our AFCARS and SACWIS reviews, we understand that all agencies have electronic case records and that title IV–E agencies maintain all the information in their systems up to the time the child would no longer be eligible for services due to age. We understand that the typical age will be between 18 and 21, depending on the state or tribe's foster care program and we will work with agencies on this at implementation. We want to be clear that title IV–E agencies must retain all information on a child that is required to be reported to AFCARS electronically and not purge the data since AFCARS data files will now contain certain historical information on children in the out-of-home care reporting population. We are retaining the data element without changes in the final rule because title IV–E agencies must report historical information on a child in out-of-home care to be in compliance.

Section 1355.44 Out-of-Home Care Data File Elements

This section includes all of the data element descriptions for the out-of-home care reporting population.

Section 1355.44(a) General Information

In paragraphs (a)(1) through (a)(3), we require that title IV–E agencies collect and report the following general information: (1) The title IV–E agency submitting the AFCARS data; (2) the report period date; and (3) the local county, jurisdiction or equivalent unit that has responsibility for the child. We received no substantive comments on the general information data elements in paragraphs (a)(1) through (a)(3) or recommendations for changes. However, we clarified in the regulation text that the information must be submitted in a format according to ACF's specifications.

In paragraph (a)(4), we require that the title IV–E agency report the child's record number, which is an encrypted unique person identification number that is the same for the child, no matter where the child lives while in the placement and care responsibility of the title IV–E agency in out-of-home care and across all report periods and episodes.

Comment: A couple of commenters noted that maintaining one encrypted record number for each child would be useful, for example, in reducing duplicate entries and erroneous eligibility determinations. However, a couple of state title IV–E agencies questioned why the agency must maintain the same number since agencies must include the complete placement history in each AFCARS transmission noting the administrative burden associated with maintaining the same number. Another commenter indicated there could be difficulties in maintaining the same child record number if the child was previously placed in a different county.

Response: Our proposal for a consistent, unique, encrypted child record number for AFCARS reporting purposes is consistent with current practice. Ensuring that the child record number is consistent throughout the child's entire out-of-home care experience ensures that the agency reports the child's entire history. It also assists us in the analysis of the NYTD data, which also requires the use of an encrypted child record number. We are retaining this requirement and will provide technical assistance around this data element, including assistance related to maintaining record numbers across counties, to any agency requesting it at implementation.

Section 1355.44(b) Child Information

In paragraph (b), we require that the title IV–E agency report information about the child in out-of-home care

including demographic, health, parenting, and other pertinent information about the child. We made several revisions to this section from the 2015 NPRM and integrated ICWA-related data elements that were proposed in the 2016 SNPRM, revised data elements as suggested by commenters, moved data elements, and removed some proposed data elements that we describe below:

- Removed the data element requiring agencies to report whether or not the child was born in the United States. State title IV–E agencies and a national organization representing state child welfare agencies were opposed, stating: this level of specificity is not relevant to child welfare practice, could adversely impact work with families, and is not necessary in the AFCARS; it will be difficult to draw conclusions from this element; and, it does not address other situations, for example, whether the child is a naturalized citizen or one of the many U.S. citizens who are born on foreign soil. We still believe it is important to track information related to parental immigration detainment or deportation because we understand that this contributes to children entering foster care across the nation. In fact, the Applied Research Center recently estimated that up to 5,100 children were in foster care after their parents were detained or deported. Therefore, we added a circumstance at removal in paragraph (d) to address this instead.
- Removed data elements requiring agencies to report information related to the child's qualifying disability under IDEA. Several state title IV–E agencies and a national organization representing state child welfare agencies expressed confusion with the conditions in this data element and the health, behavioral or mental health conditions stating that the conditions were cumbersome and overlapped, which would lead to confusion among workers and commenters suggested the conditions be reconciled. Thus, we removed the data element on IDEA qualifying disability and revised the data element on health, behavioral or mental health conditions because we still want to track child disabilities, but we do not need to know the disability that qualified a child for IDEA (discussed below).

Section 1355.44(b)(1) Child's Date of Birth

In paragraph (b)(1), we require the title IV–E agency to report the child's birthdate. If the actual date of birth is unknown because the child has been abandoned, the agency must provide an estimated date of birth.

Comment: One commenter suggested that we expand the definition of ''abandoned'' to include circumstances where the child was left with others and the identity of the parent(s) is known, but the parent(s) has not returned and therefore the child's date of birth is not known.

Response: We have provided a specific definition of abandoned as follows: The child was left alone or with others and the identity of the parent(s) or legal guardian(s) is unknown and cannot be ascertained. We will retain the data element as proposed because an estimated date of birth is to be used in very restrictive circumstances when a parent's identity is not known, and not for an instance when a parent may be temporarily unavailable to provide the actual date of birth.

Section 1355.44(b)(2)(i) Child's Gender

In paragraph (b)(2)(i), we require that the title IV–E agency report the child's gender. We did not receive any relevant comments on this data element, however, we made a minor revision to rename the data element ''Child's gender.''

Section 1355.44(b)(2)(ii) Child's Sexual Orientation

In paragraph (b)(2)(ii), we require that the title IV–E agency report the child's self-reported sexual orientation for youth age 14 and older. The title IV–E agency must report whether the child self-identifies as ''straight or heterosexual,'' ''gay or lesbian,'' ''bisexual,'' ''don't know,'' ''something else,'' or ''decline'' if the child declined to provide the information. The title IV–E agency must report ''not applicable'' for youth age 13 and under.

Comment: We requested input on whether to require title IV–E agencies to collect LGBTQ-related data on youth in AFCARS. State title IV–E agencies, national advocacy/public interests groups and other organizations submitted comments on this topic. Commenters who supported collecting LGBTQ-related data were primarily advocacy organizations representing LGTBQ interests and generally asserted that such children/youth are over-represented in the child welfare system, but we do not have a full picture of their experiences in foster care. Supportive commenters also noted that such youth often have unique service needs, are at an increased risk for poor outcomes, are more likely to be placed in group settings and experience more placements. Many of these same commenters suggested that we require agencies to collect information about a child's gender identity or gender expression, or the assigned gender of the child or caregiver at birth, which would allow agencies to understand data about gender transition over the course of a child's life. One commenter suggested adding ''two spirited'' to address American Indian and Alaska Native children's identities. In contrast, other commenters, primarily state IV–E agencies and a national organization representing state child welfare agencies, suggested that we should not collect data related to sexual orientation in AFCARS. However, they expressed appreciation for ACF's interest in supporting and protecting LGBTQ youth in foster care and agreed that it is important to work toward a mechanism for collecting information related to a youth's sexual orientation, gender identity and expression. State commenters pointed to the following reasons for their objection to collecting the data: It is unlikely that the data will be reliable and consistent because the youth would self-report which could result in an undercount of LGBTQ children in foster care; the sensitive and private nature of the data and sexual identity issues and questioned the implications of having this information in a government record and it being used in a discriminatory way; and collecting the data may pose safety concerns because the LGBTQ community is still vulnerable to discrimination in many parts of the country. State commenters also expressed the importance of proper staff training to collect information for a data element on sexual orientation.

Response: We were persuaded by the commenters who suggested we include a data element on a child's self-reported sexual orientation. In this final rule, we require title IV–E agencies to indicate whether the child self identifies as ''straight or heterosexual,'' ''gay or lesbian,'' ''bisexual,'' ''don't know,'' ''something else,'' or ''decline'' if the child declined to report this information. These response options are consistent with the Youth Risk Behavior Surveillance System (YRBSS) questionnaire from the Centers for Disease Control and Prevention. We did not add a response option of ''two spirited'' to be consistent with the YRBSS. By requiring this information to be reported, we hope to move closer toward our goal to better support children and youth in foster care who identify as LGBTQ and ensure that foster care placement resources and services are designed appropriately to meet their needs. We are aware of situations where youth in foster care have been unsupported in their foster

care placements when their foster caregivers became aware of their sexual orientation. We did not add data elements requiring agencies to report information about a child's gender identity or gender expression, or the assigned gender of the child. We understand the concerns expressed by commenters; however, we anticipate that adding this data element is the first step in addressing the needs of this population, and also will assist title IV–E agencies in recruiting and training foster care providers in meeting the needs of these youth. In regard to the concern that youth should not be obligated to report this sensitive and private information to their caseworker, the youth must self-report this information and if they do not feel comfortable disclosing such information, they may decline to report the information. In regard to the concern about having this information in a government record, information in state and tribal systems is protected by confidentiality requirements. We require title IV–E agencies to report ''not applicable'' for children age 13 and under to align with other statutory case planning requirements that apply to youth age 14 and older, for example the child's case plan must be developed in consultation with the child age 14 and older and the child's case planning team (at the child's option) (sections 475(1)(B) and 475(5)(C)(iv) of the Act) and must document the child's rights, including the right to receive a credit report annually. Additionally, the child must sign an acknowledgement that he/she received these rights and that they were explained in an age appropriate way (section 475A of the Act). We will provide technical assistance to agencies on collecting this information as needed.

Section 1355.44(b)(3) Reason To Know a Child Is an Indian Child as Defined in the Indian Child Welfare Act

In paragraph (b)(3), we require that the state title IV–E agency report whether the state title IV–E agency researched whether there is reason to know that a child is an ''Indian Child'' as defined in ICWA by: Inquiring with the child, the child's biological or adoptive parents (if not deceased), the child's Indian custodian (if the child has one), and the child's extended family; indicating whether the child is a member or eligible for membership in a tribe; and indicating whether the domicile or residence of the child, parent, or the Indian custodian is on an Indian reservation or in an Alaska Native Village. This is similar to paragraph (i)(3) as proposed in the 2016 SNPRM, however we moved data elements related to ascertaining the tribal membership status of the child's parents to section 1355.44(c)(3) and (c)(4), and we added, in response to comments discussed later, a data element for inquiring with the child's extended family in paragraph (b)(3)(iv).

Comment: Tribes, tribal organizations, child welfare organizations, and some states expressed that researching to determine whether a child may be an Indian child under ICWA is necessary to determine tribal status and for implementation of ICWA. Commenters stated that failure to research whether a child is an Indian child risks Indian children not being identified, and risks delay, expensive repetition of court proceedings, and placement instability if it is later discovered that a child is an Indian child under ICWA. Several states said that information on identifying whether a child is an Indian child as defined in ICWA is currently collected, although states varied in how they collect this information with some stating that it is collected through case narratives (electronic or paper). A state objected to expending resources required to report data in AFCARS that is already collected in case narrative. Several states and the national organization representing state child welfare agencies suggested simplifying the data element, stating that the primary focus should be on whether the agency made an inquiry, of whom, and whether that triggered notice per ICWA to a federally recognized tribe. One state suggested including a response option noting whether a particular data element is ''not applicable due to age or developmental ability.''

Response: We did not make changes based on these comments to simplify the data elements. We retained the data elements to reflect requirements in BIA's regulation at 25 CFR 23.107(a). BIA's regulation requires state courts to ask each participant in an emergency, voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The data will help identify of which sources title IV–E agencies most often inquire about whether a child is an Indian child as defined in ICWA and for which sources title IV–E agencies may need resource or training to support inquiry. Further, we are not revising the response options to allow for a ''not applicable'' response option. The requirement is for the state title IV–E agency to report whether or not it inquired of the specific individuals listed, including the child, whether the child is a member of or eligible for membership in an Indian tribe. If the state title IV–E agency was unable to inquire with the child, the agency would respond ''no.''

Comment: A state commented that these data elements ask for responses of ''yes'' or ''no'' that removes a level of specificity and obscures some incomplete data, such as there is no way to indicate when there are multiple tribes involved.

Response: We understand the suggestion to be a technical issue for when states design their systems to report the required information and does not require a change in the final rule. We will work with state title IV–E agencies as they implement the final rule as needed.

Comment: A state expressed that this data element doesn't explicitly note there is a single parent by indicating the response option of ''no'' and stated that the elements are gender specific.

Response: We understand the suggestion to be a technical issue for when states design their systems to report the required information. We will work with state title IV–E agencies as they implement the final rule.

Comment: One state suggested adding a data element that records when a tribe confirms that the child is a member or eligible for membership.

Response: We did not revise the final rule in response to these suggestions. The final rule contains the data elements we believe are most critical in relation to children to whom ICWA applies.

Comment: A tribe stated that the language ''inquired'' is vague and was confused what the agency is inquiring about in this section.

Response: We modified the language of the data element to require the state title IV–E agency to indicate whether the state title IV–E agency researched whether there is a reason to know that the child is an Indian child as defined in ICWA. In each paragraph (b)(3)(i) through (b)(3)(vii), the state title IV–E agency must respond to these threshold questions that indicate whether the state title IV–E agency knows or has ''reason to know'' that a child is an Indian child and thus is subject to the protections under ICWA.

Comment: Tribes and several national advocacy organizations suggested adding the phrase ''extended family'' to the list of persons to whom the state may have inquired stating that the extended family would have useful information regarding whether the child may be an Indian child.

Response: We agree with the suggestion and added the requirement for the state title IV–E agency to also report whether it inquired with the

child's extended family in paragraph (b)(3)(iv).

Comment: Tribes and organizations representing tribal interests recommended replacing ''on an Indian reservation'' with ''within a predominantly Indian community'' to be more inclusive to tribal communities. A state suggested adding individual data elements to inquire about the residences of each child, parent, and Indian custodian to determine whether any of them are domiciled on a reservation.

Response: We did not revise the final rule in response to these suggestions because the data element in paragraph (b)(5)(vii) follows the language used in several sections of BIA's regulation (*e.g.,* 25 CFR 23.107 and 23.113) about the ''domicile or residence . . . on a reservation or in an Alaska Native village.''

Section 1355.44(b)(4) Application of ICWA and (b)(5) Court Determination That ICWA Applies

In paragraph (b)(4), we require that the state title IV–E agency indicate whether it knows or has reason to know that a child is an Indian child as defined in ICWA. If the state title IV–E agency indicates ''yes,'' the state title IV–E agency must indicate the date it first discovered information that indicates that the child is or may be an Indian child as defined by ICWA in paragraph (b)(4)(i) and all federally recognized Indian tribes that are or may potentially be the Indian child's tribe(s) in paragraph (b)(4)(ii).

In paragraph (b)(5), we require that the state title IV–E agency indicate whether a court determined that ICWA applies or that the court is applying ICWA because it knows or has reason to know a child is an Indian child as defined in ICWA in accordance with 25 CFR 23.107(b)(2), by indicating ''yes, ICWA applies,'' ''no, ICWA does not apply,'' or ''no court determination.'' If the state title IV–E agency indicated ''yes, ICWA applies,'' the state title IV–E agency must report the date that the court determined that ICWA applies in paragraph (b)(5)(i), and the Indian tribe the court determined to be the Indian child's tribe for ICWA purposes in paragraph (b)(5)(ii). This is similar to paragraph (i)(5) as proposed in the 2016 SNPRM.

Comment: States commented that some state laws offer protections that exceed the minimum federal standards in ICWA. For example, some states require ICWA protections for children who are members of state recognized tribes, children who are descendants but not enrolled, or eligible for enrollment in a tribe, or for children who are members of tribes in Canada.

Response: We encourage states to collect data they need to implement and evaluate state child welfare laws but only require collecting and reporting the ICWA related data through AFCARS as outlined in this rule.

Comment: One commenter was concerned about reporting the court finding because the state may not know whether the tribe was asked or verified the child's membership status. Another commenter recommended that this element be removed because of uncertainty in how this element is different from asking if the state agency has reason to know the child is covered by ICWA.

Response: We did not make any changes to the final rule to remove this data element. As we indicated in our rational in the 2016 SNPRM, data elements related to whether ICWA applies are essential because application of ICWA triggers procedural and substantive protections and this data will provide a national number of children in the out-of-home care reporting population to whom ICWA applies. However, we revised the final rule to reflect the language in the BIA's regulation at 25 CFR 23.107, which does not require a court order but instead a ''court determination.'' We also revised the final rule for the state title IV–E agency to indicate the date that the court determined that ICWA applies (paragraph (b)(5)(i)), rather than the date of the court order.

Comment: One tribe suggested that the state title IV–E agency should be required to continue to report data that accurately reflects tribal involvement even when a court order does not include the information. The commenter felt this is important to capture to ensure that courts are diligent about engaging the tribe and avoid opportunities to misrepresent the true number of ICWA cases involved in State court.

Response: We agree that tribal involvement is an essential component of ensuring the courts are diligent about engaging tribes. However, we did not add the suggested data element because we must balance the need to have the information with the burden and cost it places on state agencies to do so.

Comment: One commenter asked whether ACF will compare the name of the tribe indicated in this data element, with the name of the tribe listed in other data elements, and whether it will be considered an error if the name of the tribe is different for each element. The commenter suggests that the data element instead ask whether the title IV–E agency verified that agency records regarding the name of the Indian tribe matched state records.

Response: ACF will develop and issue error specifications in separate guidance and will work with state title IV–E agencies during implementation to address these types of technical issues with reporting the data.

Section 1355.44(b)(6) Notification

In paragraph (b)(6), if a state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), we require that the state title IV–E agency report: Whether the Indian child's parent or Indian custodian was sent legal notice of the child custody proceeding more than 10 days prior to the first child custody proceeding in accordance with 25 U.S.C. 1912(a); whether the Indian child's tribe(s) (if known) was sent legal notice of the child custody proceedings more than 10 days prior to the first child custody proceeding; and the name(s) of the tribe(s) sent notice. The first two requirements are similar to paragraph (i)(8) as proposed in the 2016 SNPRM and the third requirement is the same as paragraph (i)(9) as proposed in the 2016 SNPRM.

Comment: Two states suggested requiring the state to report the date that the tribe, mother, father, and Indian custodian were notified of the child's removal as that will provide information on whether the 10 day legal notice requirements were met. One state commented that because they do not know 10 days in advance when a child is going to be removed that we instead require the state to report the date that the notice was sent. Another state suggested adding a data element asking when a notification was made to the tribe and when/if the tribe provided a response, and another state suggested removing notification elements until data exchanges are improved with the court to make this efficient. One state suggested removing the response option ''the child's Indian tribe is unknown'' and for the state to report the Indian child's tribe's name.

Response: We did not make any changes to the final rule to remove the suggested response option or to require agencies to provide the date of notification. We determined that the actual date of the notification is not essential, but instead, as we proposed, whether the state sent the notice within the statutory 10 day notification requirement. We are retaining the response option ''the child's Indian tribe is unknown'' as we are aware that there may be instances where ICWA applies because a state knows or has reason to

know a child is an Indian child yet the name of the child's tribe is unknown. We proposed in the 2016 SNPRM and retained in the final rule the requirement for the state to indicate the name of the Indian child's tribe that was sent proper legal notice more than 10 days prior to the first child custody proceeding in accordance with 25 U.S.C. 1912. We have, however, removed the requirement for the state title IV–E agency to report whether the state title IV–E agency replied with additional information that the Indian child's tribe(s) requested, if such a request was made.

Comment: A state noted the proposed data element does not accommodate a situation when there are potentially multiple tribes that were sent the notification.

Response: We are retaining the requirement in the final rule for the state to indicate whether the Indian child's tribe(s) was given proper legal notice more than 10 days prior to the first child custody proceeding in accordance with 25 U.S.C. 1912(a). We will provide technical assistance to states that need assistance in reporting multiple tribes.

Comment: The national organization representing state child welfare agencies supports the notification data elements that align with ICWA mandates. They noted that states have different methods to notify the parties, such as through a court process, the state's attorney general's office, or by the state agency. The organization recommends simplifying the data elements to require the agency to report to whom the agency gave proper notice, *i.e.,* parents, custodians, and tribes.

Response: We understand the suggestion to be a technical issue for when states design their systems to collect the required information that would not require a change to the final rule. States may design a drop down menu or another mechanism appropriate to their system to report the notice requirements as long as the state can report whether the state sent the notice to the mandated parties more than 10 days prior to the proceeding.

Comment: A tribe recommended that we also require states to report that the state sent the notifications when parental rights will be terminated for an Indian child.

Response: We are retaining the notification requirements for the state to report whether it provided the 10 day notifications in reference to the first child custody proceeding. The BIA defines child-custody proceeding for ICWA purposes to mean and include any action, other than an emergency proceeding, that may culminate in one of the following outcomes: Foster-care placement, termination of parental rights, pre-adoptive placement, and adoptive placement. Therefore, if the first child custody proceeding is in reference to a TPR, the agency must report that information to AFCARS.

Comment: Two organizations suggested that we require states to report whether a state court or agency used the list of tribes published by the Bureau of Indian Affairs to notify a tribe of the first child custody hearing.

Response: We determined that it is not essential for states to specify in AFCARS whether they sent the notice to the tribe as it is listed in the BIA publication. As we indicated in the preamble to the 2016 SNPRM, the timing of the notice is an essential procedural protection provided by ICWA. Hence, we proposed and issued in the final rule the requirement for states to report whether proper legal notice of the child custody proceedings was sent more than 10 days prior to the first child custody proceeding. This is consistent with the requirements under the ICWA statute at 25 U.S.C. 1912(a) and the BIA regulations at 23.11(c).

Comment: Two organizations suggested that we require the state to report whether legal notice was provided for the first child custody hearing to the same grandparents and other adult relatives who were notified about a child's placement into foster care as required by title IV–E.

Response: We tailored the ICWA data elements that we proposed and issued in the final rule to be consistent with the requirements under the ICWA statute and the BIA regulations, and relative notification of the first child custody hearing is not required. However, we added a requirement in 1355.44(b)(3)(iv) for the state to report whether the state title IV–E agency researched whether there is a reason to know that the child is an Indian child as defined in ICWA by indicating whether the state agency inquired with the child's extended family. We believe this could respond to the intent of the commenter's suggestion, which is to ensure that an Indian child's relatives are made aware when a child in their family is placed into foster care.

Comment: We received several comments regarding the proposed data element requiring the state to report in instances where the tribe(s) requested additional information, whether the state title IV–E agency replied with the additional information that the Indian tribe(s) requested. One state commented that the data element is unclear and asked whether the timeframe was at any time during the six month report period or whether it only applied to the first child custody proceeding. Another state commented that it does not collect data on whether the tribe(s) requested additional information or whether the agency replied to the request. The national organization representing state child welfare agencies also recommended removing the element because they did not believe the proposed data file element provides essential information on children for whom ICWA applies. A tribe recommended adding the date of the tribal request for additional information and the date the agency responded to the tribe's request for additional information.

Response: We agree with the suggestions to remove the data element in proposed (i)(10) in the 2016 SNPRM that required the state to indicate whether the state title IV–E agency replied with the additional information that the Indian tribe(s) requested. We have removed this data element from the final rule.

Section 1355.44(b)(7) Request To Transfer to Tribal Court and (b)(8) Denial of Transfer

In paragraph (b)(7), if the state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), we require that the state title IV–E agency report whether either parent, the Indian custodian, or Indian child's tribe requested, orally on the record or in writing, that the state court transfer the foster care or termination of parental rights proceeding to the jurisdiction of the child's tribe at any point during the report period. This is similar to paragraph (i)(6) as proposed in the 2016 SNPRM, except that the language was updated to be consistent with 25 CFR 23.115.

In paragraph (b)(8), if the state title IV–E agency indicated ''yes'' to paragraph (b)(7), we require that the state title IV–E agency report whether the state court denied the request to transfer the case to tribal jurisdiction and if so, the reason for the denial from a list of three options, as outlined in ICWA statute: (1) Either of the parents objected to transferring the case to the tribal court; or (2) the tribal court declined the transfer to the tribal court; or (3) the state court determined good cause exists for denying the transfer to the tribal court. This is similar to paragraph (i)(7) as proposed in the 2016 SNPRM, except that we updated the language to be consistent with 25 CFR 23.118.

Comment: A tribe commented that ''good cause'' findings should be made as outlined in the BIA's Guidelines and suggested that we add a data element that captures the specific ''good cause'' finding used to decline each transfer.

Response: We have not made any changes to the final rule to incorporate recommendations for the noted BIA's Guidelines. Rather in the final rule, if the state court determined that transfer is not appropriate, the state must report which reason from among a list of three options, as outlined in ICWA statute (25 U.S.C. 1911(b)) and BIA's regulation at 25 CFR 23.117: (1) Either of the parents objected to transferring the case to the tribal court; or (2) the tribal court declined the transfer to the tribal court; or (3) the state court determined good cause exists for denying the transfer to the tribal court.

Comment: The national organization representing state child welfare agencies supports capturing data from the court order indicating a transfer of the case to the tribal court of the Indian child's tribe and an indication on the reason for denial (when applicable). However, they suggested simplifying the data elements to ask only whether a tribe requested to transfer the case to tribal court and if yes, whether the transfer was ordered. We also received suggestions from states on revising the element. One state recommended changing the data element to capture the most recent transfer request regardless of when the request occurred as long as it is during the current removal episode.

Response: ACF is not persuaded by the comments to revise the data elements regarding transferring cases from state court to tribal jurisdictions. We are retaining the two proposed data elements with modifications to be consistent with the BIA regulation at 25 CFR 23.115. That regulation states that the parents, Indian custodian, or the Indian child's tribe may request, orally on the record or in writing, that the state court transfer the child custody proceeding to tribal jurisdiction. It does not require that the request be contained in a court order. Therefore we are removing the requirement for the agency to report only when there is a specific court order requesting a transfer of jurisdiction and adopting the same BIA regulatory language so that we are consistent. Further, we clarified the instructions for this element in the final rule to require the state to report if there was a request at any point during the report period.

Comment: Several organizations representing tribal interests suggested that we require the state to report the date that the state court approved transfer of jurisdiction to the tribe.

Response: We appreciate the suggestion and understand the value for determining timely implementation of ICWA and case transfer between jurisdictions, however, we did not change the final rule to add this data element. Rather, we retained the two transfer data elements we proposed in the 2016 SNPRM and modified them to be consistent with the BIA regulations. As we indicated in the 2016 SNPRM, we require two transfer data elements to provide an understanding of how many children in foster care with ICWA protections are or are not transferred to the Indian child's tribe, the reasons why a state court did not transfer the case, and aid in identifying tribal capacity needs and issues that may prevent tribes from taking jurisdiction.

Comment: One tribe suggested that the phrase ''a court order'' be expanded to include ''or other entry of the Court'', as at times the state court may not enter an order transferring the case at the same hearing as when a petition to transfer is submitted to a court.

Response: We have removed the term ''court order'' from paragraphs (b)(7) and (b)(8) to be consistent with the BIA regulation at 25 CFR 23.115 through 23.117. That regulation states that the parents, Indian custodian, or the Indian child's tribe may request, orally on the record or in writing, that the state court transfer the child custody proceeding to tribal jurisdiction. The BIA regulation does not require that the request or the order for transfer be contained in a court order.

Section 1355.44(b)(9) Child's Race

In paragraph (b)(9), we require that the title IV–E agency report the race of the child. The options are: American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, White, declined, abandoned, and unknown because the child or parent or legal guardian does not know or is unable to communicate the child's race, or at least one race of the child.

Comment: Two states and one other commenter did not agree that we should include ''race-abandoned'' as a response option in this data element because it is not a race. One commenter also noted that including ''race-abandoned'' and ''race-unknown'' as response options are confusing.

Response: We provide the agency with the option of not reporting a specific race in two situations when the race is not known: When the child is abandoned and therefore the race of the child is unknown (race-abandoned) or that the race is unknown because the child or parent or legal guardian does not know or is unable to communicate the child's race (race-unknown). The response option of race-abandoned allows us to differentiate when there is no parent available to provide race information from when the child or parent does not know or is unable to communicate it. A child's race can be categorized as unknown only if a child or his parents do not actually know the child's race. If the title IV–E agency has not asked the child or parent for the child's race, the agency may not report unknown as the response. Further, it is acceptable for the child to identify that he or she is multi-racial, but does not know one of those races. In such cases, the title IV–E agency must indicate the racial classifications that apply and also indicate that a race is unknown.

Comment: Two commenters representing tribal interests suggested that we amend the racial category of American Indian or Alaska Native to include whether the child has origins in any of the original peoples of North or South America and if yes, whether the child is a member of, or eligible for, membership in a federally recognized Indian tribe. Both commenters also recommended that we delete the language, ''maintains tribal affiliation and community attachment'' in the race definition of American Indian or Alaska Native.

Response: The language used reflects the OMB Revised Standards for the Classification of Federal Data on Race and Ethnicity, standardizing federal data collection. We agree that requiring state title IV–E agencies to collect and report data that could identify a child as an Indian child as defined in ICWA is of paramount importance. Therefore, while we did not revise this data element, we require additional information on the child's tribal membership or eligibility for tribal membership in paragraphs (b)(3), (b)(4), and (b)(5).

Section 1355.44(b)(10) Child's Hispanic or Latino Ethnicity

In paragraph (b)(10), we require that the title IV–E agency report the Hispanic or Latino ethnicity of the child. The agency must respond ''yes,'' ''no,'' ''declined,'' ''abandoned,'' or ''unknown'' because the child, parent or legal guardian does not know or is unable to communicate the child's ethnicity.

Comment: One commenter suggested that we expand the definition of ''abandoned'' to include circumstances where the child was left with others and the identity of the parent(s) is known,

but the parent(s) has failed to return and therefore the child's Hispanic or Latino ethnicity is not known.

Response: We have provided a specific definition of abandoned as follows: The child was left alone or with others and the identity of the parent(s) or legal guardian(s) is unknown and cannot be ascertained. We will retain the data element as proposed as it is to be used in very limited circumstances when a parent's identity is not known, and therefore not available to identify the child's ethnicity, and not any time a parent may be temporarily unavailable.

Section 1355.44(b)(11) and (b)(12) Health Assessment Date and Timely

In paragraphs (b)(11) and (12), we require the title IV–E agency to report whether the child had a health assessment during the current out-of-home care episode, and if so, the date of the child's most recent health assessment and if it was within the timeframes established by the title IV–E agency.

Comment: State title IV–E agencies and a national organization representing state child welfare agencies raised concerns about collecting information on timeliness and frequency of health assessments. They indicated that health assessment requirements would differ based on the agency's schedule and individual child circumstances, such as age and medical condition; therefore, it would be difficult to compare data across title IV–E agencies. They stated that to answer the question of timeliness, the system must know the assessment schedule and dates of assessments, doubling the data entry requirements. States suggested that this information would be better assessed as part of a qualitative assessment that focuses on child well-being outcomes or case reviews, rather than a national data set. One state recommended that we require agencies to report health assessment information according to an established federal timeline.

Response: We appreciate the comments, but did not remove the requirement for reporting on health assessments because we still believe it is important to ensure that the title IV–E agency is identifying and addressing the health needs of children in foster care. As we indicated in the 2015 NPRM, collecting this information will allow us to ensure children in foster care are receiving health assessments in accordance with the title IV–E agency's established schedule per the statutory requirements in section 422(b)(15)(A) of the Act. It also provides us an opportunity to ensure that the child's health needs are identified, reviewed, and addressed by a medical professional through routine health assessments. These data elements may also serve as a proxy for other well-being indicators. We also did not impose a requirement that title IV–E agencies report health assessment information according to an established federal timeline because section 422(b)(15)(A) does not provide ACF with the authority to impose a federal timeframe on title IV–E agencies. Instead, agencies describe and adhere to the timeframes described in their Child and Family Services Plan.

Comment: One national advocacy/public interest group supported including this data, but suggested clarifying the language to read ''timely health assessment as defined by the state.'' Another national advocacy/public interest group pointed out that the term ''health assessment'' has varying implications and suggested that ACF provide guidance on the difference between health screenings and health evaluations.

Response: In reference to the suggestion to clarify that the assessments are timely based on title IV–E agency specific definitions, paragraph (b)(11) asks whether the date reported in paragraph (b)(12)(ii), if applicable, is ''within the timeframes for initial and follow-up health screenings established by the title IV–E agency, as required by section 422(b)(15)(A) of the Act.'' Hence, the information that the title IV–E agency indicates should be in the context of this title IV–B plan requirement regarding the ongoing oversight of health care services, with which agencies are already complying. The title IV–E agency must report the most recent health screenings that are conducted according to the agency's established schedule. ACF provided guidance in ACF–CB–PI–10–11 that agency schedules for initial and periodic health screenings ''should mirror or incorporate elements of existing professional guidelines for physical, mental, and dental health screenings and standards of care.'' In regard to the request to distinguish between a health screening and a health evaluation, we will provide technical assistance to states if they need assistance in determining how to report on a child's health assessment, which could be either a screening or an evaluation, depending on the agency's process.

Comment: State title IV–E agencies felt that the language of the data elements was vague and questioned how to report whether a health assessment is ''timely'' based on the agency's ''own established schedule.'' Several states asked whether these data elements included all initial or follow-up assessments during the out-of-home care episode and pre-placement screenings.

Response: We appreciate the commenters' questions and revised the regulation to clarify the instructions, based on the commenters' concerns. We revised the regulation to require first that the agency report whether the child had a health assessment during the current out-of-home care episode in paragraph (b)(11)(i). The assessment could include an initial health screening or any follow-up health screening per section 422(b)(15)(A) of the Act. If so, the title IV–E agency must report the date the child's most recent health assessment during the out-of-home care episode and whether it is within the timeframes for initial and follow-up health screenings established by the title IV–E agency per section 422(b)(15)(A) of the Act (paragraphs (b)(11)(ii) and (b)(12)). This revision is to make clear that the agency is to report on the timeliness of the most recent health assessment. If the agency indicates that there was no health assessment done, there is no requirement to report the date and timeliness of the assessment.

Comment: A state title IV–E agency asked how a blank response is distinguished from missing data and how to report if a child is not in care long enough to receive a health assessment or the timeliness straddles reporting periods.

Response: In reference to the blank response query, consistent with ACF's longstanding practice, ''blank'' is a valid response option only when specified in individual data elements. In paragraph (b)(11)(i), the agency must report either ''yes'' or ''no;'' ''blank'' is not an appropriate response and is considered a missing data error under section 1355.46(b)(1). ''Blank'' is an appropriate response for paragraphs (b)(11)(ii) and (b)(12) only if the response to paragraph (b)(11)(i) is ''no.'' Thus, if a child has not been in foster care long enough to have an assessment, the agency would report no in paragraph (b)(11)(i) and blank for paragraphs (b)(11)(ii) and (b)(12).

Comment: Several national advocacy/public interest groups suggested additional data elements, such as specific dates of the initial health assessment; initial dental evaluations and other preventative dental care; whether children in foster care are receiving Early and Period Screening, Diagnosis, and Treatment (EPSDT) services under Medicaid; and for title IV–E agencies to report on each aspect of the title IV–B Health Care

Coordination and Oversight Plan under section 422(b)(15)(A) of the Act (for example, how children's medical information will be updated, steps to ensure continuity of health services, and protocols for the oversight of prescription medicines).

Response: As we indicated in the 2015 NPRM, collecting health, behavioral or mental health related information will allow us to ensure children in foster care are receiving health assessments in accordance with the title IV–E agency's established schedule per the statutory requirements in section 422(b)(15)(A) if the Act. Therefore, we will not require agencies to report additional health assessment information because we do not have a need for those details at the national level.

Section 1355.44(b)(13) Health, Behavioral or Mental Health Conditions

In paragraph (b)(13), we require the title IV–E agency to report whether the child was diagnosed by a qualified professional as having one or more health, behavioral or mental health conditions from a list of eleven conditions prior to or during the child's current out-of-home care episode. If so, the agency must report whether it's an existing condition or a previous condition (a previous diagnoses that no longer exists as a current condition). The title IV–E agency must also report if the child had an exam or assessment, but none of the conditions apply, or if the agency has not received the results of the exam or assessment. When the child has not had an exam or assessment, the agency must indicate so.

Comment: State title IV–E agencies, a national organization representing state child welfare agencies, and many other national advocacy/public interest groups indicated that the qualifying disabilities of the proposed element *IDEA Qualifying Disability* and the conditions for health, behavioral or mental health conditions overlapped which would confuse workers and lead to inaccurate and misleading data at a national level. Some national advocacy/public interest groups also suggested including specific additional conditions, such as oppositional defiant disorder, major depressive disorder, attention deficit hyperactivity disorder, and traumatic brain injury.

Response: We were persuaded by the number of commenters who expressed concern about the overlapping health, behavioral or mental health conditions and the IDEA qualifying disabilities and revised the final rule so that there is one element that addresses a child's health, behavioral or mental health conditions. We removed the data element *IDEA Qualifying Disability* in the final rule. We combined some of the conditions we proposed for the *IDEA Qualifying Disability* data element with the *Health, behavioral or mental health conditions* that we modified to update with current common diagnoses suggested by several commenters, separated out conditions that are currently reported together, as suggested by commenters, and revised to more closely align with definitions for diagnoses from the National Institutes of Health (NIH). We describe these revisions below. We believe that this revised list will provide us with better data on the child's health characteristics and meet the requirement of section 479A(a)(7)(A)(v) of the Act regarding reporting clinically diagnosed conditions for certain children in foster care.

Paragraph (b)(13)(i) is ''Intellectual disability'' '' and is unchanged from the 2015 NPRM because we did not receive comments specifically asking for a revision to this definition.

Paragraph (b)(13)(ii) is ''Autism spectrum disorder'' that we combined from the *IDEA qualifying disability* data element proposed in the 2015 NPRM and revised to be more closely aligned with the definition from the *NIH Neurological Disorders and Stroke.*

Paragraph (b)(13)(iii) is ''Visual impairment and blindness'' that we combined from the *IDEA qualifying disability* and *Health, behavioral or mental health conditions* data elements proposed in the 2015 NPRM.

Paragraph (b)(13)(iv) is ''Hearing impairment and deafness'' that we combined from the *IDEA qualifying disability* and *Health, behavioral or mental health conditions* data elements proposed in the 2015 NPRM.

Paragraph (b)(13)(v) is ''Orthopedic impairment or other physical condition'' that we combined from the *IDEA qualifying disability* and *Health, behavioral or mental health conditions* data elements proposed in the 2015 NPRM.

Paragraph (b)(13)(vi) is ''Mental/emotional disorders'' that we combined from the *IDEA qualifying disability* and *Health, behavioral or mental health conditions* data elements proposed in the 2015 NPRM.

Paragraph (b)(13)(vii) is ''Attention deficit hyperactivity disorder'' that we included as a separate condition, based on comments suggesting that it not be included with another condition. The *definition is based on the definition from the NIH National Institutes of Mental Health.*

Paragraph (b)(13)(viii) is ''Serious mental disorders'' that we included as a separate condition that comprises several disorders previously proposed under the *IDEA qualifying disability* and *Health, behavioral or mental health conditions* data elements. The definition is also based in part on the definitions for bipolar disorder and psychotic disorders from the NIH National Library of Medicine.

Paragraph (b)(13)(ix) is ''Developmental delay'' that we combined from the *IDEA qualifying disability* data element proposed in the 2015 NPRM and revised to include delays related to language/speech and motor skills.

Paragraph (b)(13)(x) is ''Developmental disability'' and is unchanged from the 2015 NPRM because it is based on statute.

Paragraph (b)(13)(xi) is ''Other diagnosed condition'' that we combined from several conditions proposed in the *IDEA qualifying disability* and *Health, behavioral or mental health conditions* data elements proposed in the 2015 NPRM.

Comment: A national organization representing state child welfare agencies and a few states commented that reporting over time whether a child's condition is existing, previous, or does not apply could make the data file cumbersome, confuse aggregate data at the federal level, and place burden on workers who may not have the training or expertise on detailed, technical health care information. They felt that what was collected in AFCARS for conditions is reasonable because it informs the relevant issues at a high level. They made suggestions for other mechanisms to report the data, such as data sharing agreements with other agencies.

Response: We have not removed the requirement for agencies to report whether a child's condition is existing, previous, or does not apply. We continue to believe, as we stated in the 2015 NPRM, that it is important to capture comprehensive information on a child's diagnosed health, behavioral and mental health conditions beyond the current AFCARS report period, which this data element will allow. Collecting conditions for which the child was previously diagnosed, but do not exist as current diagnoses, will provide increased opportunities for analysis regarding the health and service needs of children in out-of-home care, which current AFCARS data does not allow. We will provide technical assistance on reporting this information as needed.

Comment: Two states asked for clarification as to who is considered a ''qualified professional.''

Response: As stated in the 2015 NPRM preamble (80 FR 7149), a qualified professional is determined by applicable laws and policies of the state or tribal service area and may include a doctor, psychiatrist, or, if applicable in the state or tribal service area, a licensed clinical psychologist or social worker. This is consistent with current AFCARS practice.

Comment: Two states were confused by the response options on whether a qualified professional has conducted an exam or assessment and recommend we only provide two response options for the agency to indicate whether or not the child has a diagnosed condition, or if it's unknown.

Response: We did not revise the final rule based on the comments to allow for an ''unknown'' response option. We intentionally did not propose a response option of ''unknown'' because it is too broad for a meaningful analysis and has a high potential to be overused. These responses as well as the response options for previous or existing condition are designed to give us information regarding a child's health, behavioral or mental health conditions that vary over time without having to track other more complicated historical information such as start and end dates of conditions. We believe that this will provide us with better data on the child's health characteristics and meet the requirement of section 479A(a)(7)(A)(v) of the Act regarding reporting clinically diagnosed conditions for certain children in foster care. Additionally, we will provide technical assistance on reporting this information as needed.

Comment: Six states sought clarification on when to mark conditions as ''previous.''

Response: The agency reports the response option of ''previous'' when a child was diagnosed for a condition that no longer exists as decided by a medical professional.

Comment: One state suggested that agencies should collect start and end dates of diagnoses to allow for a more robust analysis and would give agencies the ability to determine when a diagnosis was applicable if the diagnosis changes during the report period.

Response: We did not make changes to the final rule based on this comment as the response options of existing condition, previous condition, and does not apply will provide us an adequate history on the occurrence of a child's conditions at the federal level without the dates of diagnosis.

Section 1355.44(b)(14) School Enrollment, (b)(15) Educational Level, and (b)(16) Educational Stability

In paragraph (b)(14), the title IV–E agency must report whether the child is a full-time student at and enrolled in (or in the process of enrolling in) elementary or secondary education, or is a full or part-time student at and enrolled in post-secondary education or training, or college, or whether the child is not enrolled in any school setting. We made a minor revision to this data element in the final rule to include part-time students in the response options ''post-secondary education or training'' or ''college.''

In paragraph (b)(15), the title IV–E agency must report the highest educational level from kindergarten to college or post-secondary education/training completed by the child as of the last day of the report period. We made a minor change to this data element in the final rule to add a response option of ''GED'' if the child has completed a general equivalency degree or other high school equivalent.

In paragraph (b)(16), the title IV–E agency must report if the child is enrolled or is in the process of enrolling in a new elementary or secondary school prompted by an initial placement after entry into foster care or a placement change during the report period and if so, reason(s) for the change in enrollment (paragraphs (b)(16)(i) through (b)(16)(vii)).

Comment: In general, a national organization representing state child welfare agencies and states expressed concerns with state title IV–E agencies gathering data elements related to educational information because they stated it would create a burden for workers and would not result in accurate or useful data at the federal level since educational information, such as enrollment information, varies among jurisdictions and states. Three state commenters suggested forming a data exchange with the Department of Education instead of state title IV–E agencies collecting education information proposed through AFCARS.

Response: We considered the comments concerned about the increased burden, however we are retaining the educational data elements related to school enrollment, educational level, and educational stability because, as we stated in the 2015 NPRM, these data elements address the requirements in section 471(a)(30) of the Act relating to an assurance for title IV–E eligible children being full-time elementary or secondary school students or completed secondary school, section 475(1)(C)(ii) of the Act relating to the child's health and education records and grade level performance while in foster care, and section 475(1)(G) of the Act relating to the case plan requirement to develop an educational stability plan for a child in foster care. We have learned through AFCARS Assessment Reviews and technical assistance that several title IV–E agencies already collect information on school enrollment, the highest level of education completed, and the reasons for changes in school enrollment. These data elements provide important information about this issue. As we explained in the 2015 NPRM, we believe that it is beneficial to collect information on the highest educational achievement of the child so that we can analyze trends in the relationship between a child's age and his or her educational achievement. Information on a child's recently completed grade level measures educational progress and aligns with statutory changes made by the Fostering Connections to Success and Increasing Adoptions Act of 2008 (Pub. L. 110–351). Collecting information on the reasons title IV–E agencies determine that remaining in the school of origin or a previous school is not in the child's best interest will help to identify and address barriers to educational stability after an initial placement into foster care or a change in living arrangements. In reference to the suggestion for a data exchange with the Department of Education to collect a child's education information rather than collect it through AFCARS, we determined that approach would not yield consistent information. The Department of Education collects different and varied data from states, none of which is at the child level, as is the case with AFCARS. We will provide technical assistance as needed to title IV–E agencies to ensure accuracy of reporting.

Comment: In response to paragraph (b)(14), a national organization representing state child welfare agencies and state title IV–E agencies expressed concerns about consistency in reporting school enrollment information due to variations in the definitions of elementary, secondary, post-secondary education or training, college, not school-age, and not enrolled among jurisdictions. They suggested removing the data element. Other states and national advocacy/public interest groups suggested reporting children enrolled in any ''formal education program'' to capture children in half and full-day kindergarten programs in

states where compulsory attendance begins at first grade.

Response: We did not remove the requirement for agencies to report on student enrollment or make changes to the definitions of ''elementary'' or ''secondary'' based on the comments because the data element is based on the statutory requirement in section 471(a)(30) of the Act. That provision specifies that title IV–E agencies must assure that each child who has attained the minimum age for compulsory school attendance under state law and with respect to whom there is eligibility for a payment under the title IV–E plan is a full-time elementary or secondary school student or has completed secondary school. The provision also defines an ''elementary or secondary school student'' as ''the child is (A) enrolled (or in the process of enrolling) in an institution which provides elementary or secondary education, as determined under the law of the State or other jurisdiction in which the institution is located; (B) instructed in an elementary or secondary education program in accordance with a home school law of the State or other jurisdiction in which the home is located; (C) in an independent study elementary or secondary education program, in accordance with the law of the State or other jurisdiction in which the program is located, that is administered by the local school or school district; or (D) incapable of attending school on a fulltime basis due to the medical condition of the child, which incapability is supported by regularly updated information in the case plan of the child.''

Comment: In response to paragraph (b)(14), state title IV–E agencies and national advocacy/public interest groups suggested that agencies report ''part-time'' post-secondary education.

Response: We agreed with the commenters to include ''part-time'' enrollment in addition to full-time and revised the definitions for the response options ''post-secondary education or training'' and ''college'' to include part-time enrollment. Now, the regulation specifies that enrollment in ''post-secondary education or training'' refers to full or part-time enrollment in any post-secondary education or training, other than an education pursued at a college or university and enrollment in ''college'' refers to a child that is enrolled full or part-time at a college or university. We understand that many older foster youth who are enrolled in post-secondary education or training or college attend part-time and therefore, we wish to capture both enrollment options for these older youth.

Comment: In response to paragraph (b)(15), three states expressed concern with the proposal to report the highest educational level completed by the child as of the last day of the report period, noting that a child who is in kindergarten on the last day of the report period will be reported as ''not school-age.''

Response: We understand the commenter's concern, however, we are retaining the requirement for the agency to report the highest educational level completed by the child as of the last day of the report period. We are not seeking information on the child's current educational level. As we explained in the 2015 NPRM, we proposed to collect information on the child's highest educational level which measures educational progress and aligns with section 475(1)(C)(ii) of the Act relating to the child's health and education records and grade level performance while in foster care.

Comment: In response to paragraph (b)(15), national advocacy/public interest groups suggested additions to paragraph (b)(15) that included, adding early childhood response options, adding general equivalency degree (GED) or other high school equivalent, and adding different levels of higher education to include one year and two year degrees/certificates.

Response: We agree with the commenters who recommended adding GED as a response option, so we added it to the regulation which now reads: ''Indicate ''GED'' if the child has completed a general equivalency degree or other high school equivalent.'' We did not add response options recommended by other comments because we do not need the suggested detail about different levels of early childhood education or higher education for children in foster care at the national level.

Comments: In response to paragraph (b)(16), a national organization representing state child welfare agencies and three state title IV–E agencies suggested removing the data element on educational stability stating that the data would be unreliable and not useful because the reasons for new school enrollments are often more complex than the six response options presented. They also suggested that a child's educational stability would be better assessed through a qualitative review and recommended that we collect only whether a change in a child's school occurred. One commenter was concerned that due to the complexity of this data element, workers would be likely to select ''other,'' reducing the accuracy of the responses.

Response: We did not make changes to the regulation based on these comments because we continue to believe that a child's educational stability is an important issue and this data element is a step to gathering more information on this issue. As we stated in the 2015 NPRM, we seek this information because it will conform to section 475(1)(G) of the Act which is a case plan requirement to ensure the development of a plan for the educational stability of a child in foster care. We will provide technical assistance to title IV–E agencies as needed to ensure that this data element is reported accurately.

Comment: In response to paragraph (b)(16), national advocacy/public interest groups recommend requiring agencies to report all school changes during a report period. They also recommended adding more data elements to gather information about whether or not school changes were in the best interests of a child, including whether the placement supports the child's permanency plan, whether it was a school discipline transfer, and whether there was a lack of living options near the original school.

Response: We are retaining the language proposed in the 2015 NPRM in the final rule and did not add the response options recommended by the commenters for several reasons. We do not need details at the national level about multiple school changes during a report period or other more detailed reasons for a school change. As we indicated in the 2015 NPRM, collecting information on the reasons title IV–E agencies determine that remaining in the school of origin or a previous school is not in the child's best interest will help to identify and address barriers to educational stability after an initial placement into foster care or a change in living arrangements. We believe the response options in paragraphs (b)(16)(i) through (b)(16)(vii) will allow us to identify those barriers and to determine ways to best address them.

Section 1355.44(b)(17) Pregnant or Parenting

In paragraph (b)(17)(i), the title IV–E agency must report whether the child is pregnant as of the end of the report period. We revised this data element in the final rule. In the 2015 NPRM, we proposed to require the agency to report whether the child is or was previously pregnant.

In paragraph (b)(17)(ii), the title IV–E agency must report whether the child has ever fathered or bore a child. We revised this data element in the final rule. In the 2015 NPRM, we proposed to

require the agency to report the number of children of the minor parent.

In paragraph (b)(17)(iii), the title IV–E agency must report whether the child and his/her child(ren) are placed together in foster care. We revised this data element in the final rule. In the 2015 NPRM, we proposed to require the agency to report the number of children living with the minor parent.

Comment: Several states and a national organization representing state child welfare agencies generally objected to collecting information on children in foster care who are parents or pregnant for various reasons including: It is relevant in the NYTD (see 45 CFR 1356.83(g)(52)) not AFCARS; it will only be applicable to a small number of children and will not result in accurate reporting; it could impose an extensive data collection burden on case workers since there is no minimum age imposed on who the agency is to report, it is difficult to know a pregnancy begin date, and it would inappropriately apply to youth who are not of child-bearing age.

Response: We require information on children in foster care who are pregnant or parenting to be reported in AFCARS because state-by-state data on this topic is required to be included in the annual report to Congress per section 479A(a)(7)(B) of the Act. The NYTD does not provide case level information on all children in foster care; therefore this type of data is not available in the NYTD. We revised the proposed data elements on pregnancy and minor parents and combined them into one data element that will meet the data needed in section 479A(A)(7)(B) of the Act for the report to Congress. We now require agencies to meet this requirement through one yes/no element, thus reducing the reporting burden for these elements. We moved away from our 2015 NPRM proposal that required agencies to report the total number of biological children either fathered or borne by the child because we do not need that level of information. Lastly, while we still require agencies to report whether the child in foster care is placed with his/her children, we limited the scope to any point during the report period, and not for each living arrangement. We will provide technical assistance to title IV–E agencies as needed to ensure that this data element is reported accurately.

Comment: Several commenters suggested that agencies report more information about children in foster care who are pregnant or parenting, such as data on fathers and parenting responsibilities of youth in care, and situations when the child is placed separately in foster care from the minor parent.

Response: We revised the data elements on children who are pregnant or parenting for purposes of meeting the data reporting requirement in section 479A(a)(7)(B) of the Act for the Annual Report to Congress. These suggestions would go beyond the data we need for that report and therefore, are not needed at the federal level.

Section 1355.44(b)(18) Special Education

In paragraph (b)(18), we require the title IV–E agency to report on the child's special education, status by indicating whether the child has an Individualized Education Program (IEP) or an Individualized Family Service Program (IFSP).

Comment: A state title IV–E agency, the association representing state title IV–E agencies, and others recommended that we simplify data reporting regarding a child's special education status. They did not believe it would be useful to distinguish between an IEP and IFSP for comparison across states due to the variability across jurisdictions. Since only children from birth through age three will have an IFSP, the age of the child will indicate which type of plan is in place for the child. One state asked when the state should report about a child's IEP/IFSP.

Response: We made revisions to the final rule in response to these comments. Agencies will be required to indicate ''yes'' or ''no'' as to whether the child has an IEP/IFSP. The agency reports this information as of the end of the report period.

Comment: One state asked if children with an IEP for advanced placement should be included in the element.

Response: Yes, if the IEP meets the definition in section 614(d)(1) of Part B of Title I of the IDEA and implementing regulations.

Comment: Several commenters suggested additional data elements such as specifics on the types of special needs services provided to a child, whether a representative from the agency attended the child's IEP/IFSP meetings, and to provide an option to identify children who are receiving services and accommodations in compliance with section 504 of the Rehabilitation Act.

Response: We did not make changes to the final rule in response to these comments because the overwhelming number of comments we received asked us to simplify this element. In addition, we wanted to note that it would not be appropriate for us to require agencies to report about a child's services under section 504 of the Rehabilitation Act as it is a civil rights statute which prohibits discrimination against individuals with disabilities, which we did not propose in the 2015 NPRM. This data element relates to special education as defined in 20 U.S.C. 1401(29), which means specifically designed instruction, at no cost to the parent(s), to meet the unique needs of a child with a disability (80 FR 7151, Feb. 9, 2015).

Section 1355.44(b)(19) Prior Adoption

In paragraph (b)(19), the title IV–E agency must report whether the child experienced a prior legal adoption, including any public, private, or independent adoption in the United States or adoption in another country, and a tribal customary adoption, prior to the current out-of-home care episode. If so, in paragraph (b)(19)(i), the title IV–E agency must report the date it was finalized, and in paragraph (b)(19)(ii), the title IV–E agency must report whether the child's prior adoption was an intercountry adoption.

Comment: Several states, a national organization representing state child welfare agencies, and others objected to us collecting data on all of the child's prior adoptions including the detailed information on the type of the prior adoption, and where the child was previously adopted. The commenters concerns were that agencies capture information on prior adoptions ad hoc based on the willingness of the person to provide the information; that this level of detail may not exist; that the reliability of collecting every prior adoption is questionable; that it would be overly burdensome to research all of the child's prior adoptions and questioned the usefulness of the information and our authority to collect it. Several states suggested instead that we collect only the date of the most recent prior adoption and whether or not the child was adopted within the state.

Response: We were persuaded by the objections noted about these data elements and revised the final rule to address some of the concerns We are statutorily mandated to collect information about the number of children who enter foster care after an adoption was legalized per section 479(d) of the Act. As such, we did not remove the prior adoption data elements entirely, but revised them to require the title IV–E agency to report information for the most recent prior adoption only. We also revised the data element on the type of each prior adoption to instead require the title IV–E agency to report if a prior adoption was an intercountry adoption and revised the name of the

data element. This is to address reporting on disrupted intercountry adoptions required under section 422(b)(12) of the Act which is currently provided in the state's annual title IV–B plan update. We removed the data element proposed in the 2015 NPRM asking for the jurisdiction name of each prior adoption.

Comment: Associations representing tribal interests suggested including customary tribal adoptions to bring awareness and data to this issue.

Response: We agree and revised the final rule to include that title IV–E agencies report whether the child experienced a prior legal adoption, including a tribal customary adoption, before the current out-of-home care episode.

Comment: National advocacy/public interest groups suggested that we collect more information on prior adoptions, such as the child's birth country, whether the previous adoption assistance agreement was terminated and the previous adoptive parents are still receiving subsidies, whether the previous adoption was open or closed, the reasons why the adoption disrupted/dissolved, and categorizing adoption dissolutions and disruptions separately.

Response: We considered these comments, but did not make any changes to the final rule based on this comment and instead reduced the information required on prior adoptions to collect information needed to satisfy statutory requirements in section 479(d) and 422(b)(12) of the Act. In addition, we took into consideration the overwhelming response from state agencies that our proposal to collect more details on prior adoptions would be burdensome and outweighs its utility.

Comment: States questioned how they would report on prior adoptions if they did not know or could not ascertain the information. They were concerned about missing data counting towards a penalty.

Response: We have revised the requirements for reporting on prior adoptions so that the agency only has to report the most recent prior adoption. As such, we do not expect that agencies will have difficulty in ascertaining whether the child was adopted prior to entering foster care. If the information is unknown because the child was abandoned, then the title IV–E agency would report ''abandoned'' for paragraph (b)(19).

Section 1355.44(b)(20) Prior Guardianship

In paragraph (b)(20)(i), the title IV–E agency must report whether the child experienced a prior legal guardianship and if so, to report the date that the prior legal guardianship became legalized in paragraph (b)(20)(ii). We revised our 2015 NPRM proposal to only require the title IV–E agency report the date of the most recent prior guardianship and eliminated reporting on the type and jurisdiction of each prior guardianship.

Comment: Several states objected to us collecting all of the child's prior legal guardianships, and the detailed information on the type of the prior guardianship and where the child had a prior legal guardianship. The commenters concerns were that agencies capture information on prior guardianships ad hoc based on the willingness of the person to provide the information; that this level of detail may not exist; that the reliability of collecting every prior guardianship is questionable; that it would be overly burdensome to research all of the child's prior guardianships; and questioned how useful the information is and our authority for collecting it.

Response: We were persuaded by the objections noted and revised the final rule to address the concerns about reporting each prior legal guardianship and the type and jurisdiction of each prior guardianship. We are statutorily mandated to collect information about the number of children who enter foster care after a legalized guardianship per section 479(d) of the Act. As such, we did not remove the prior legal guardianship data element entirely, but revised it to require the title IV–E agency to report the date of the most recent prior legal guardianship only if the child experiences a prior legal guardianship. In addition, we removed the data elements proposed in the 2015 NPRM on the type and jurisdiction of each prior guardianship.

Section 1355.44(b)(21) Child Financial and Medical Assistance

In paragraph (b)(21), we require the title IV–E agency to report whether the child received financial and medical assistance, other than title IV–E foster care maintenance payments. If so, in paragraphs (b)(21)(i) through (b)(21)(xiii), the title IV–E agency must indicate whether each type of federal or state/tribal assistance applies: SSI or Social Security benefits; Title XIX Medicaid; Title XXI SCHIP; State/Tribal adoption assistance; State/Tribal foster care; Child support; Title IV–E adoption subsidy; Title IV–E guardianship assistance; Title IV–A TANF; Title IV–B; SSBG; Chafee Foster Care Independence Program; Other.

Comment: States, a national organization representing state child welfare agencies, and others opposed our proposal to require the title IV–E agency to report specific federal assistance per diem payment amounts for each of the child's living arrangements and expressed concern about the increased burden and potential inaccuracies in reporting the data. One commenter indicated that collecting this information would be burdensome for counties.

Response: In response to these concerns, we were persuaded to revise the financial assistance data elements by removing the data element related to federal assistance per diem payment amounts for every living arrangement and consolidated the financial and medical assistance response options into one data element. We must still collect the extent and nature of assistance per section 479(c) of the Act; therefore, in paragraph (b)(21) we require title IV–E agencies to report whether or not the child is receiving each of 13 types of state/tribal and federal financial and medical assistance during the report period.

Comment: One commenter questioned whether this data element includes a situation where a child returns home but remains in the agency's custody and whether the data element applies to financial and medical assistance that the child received during the reporting period but prior to coming into the agency's custody.

Response: The title IV–E agency must report the assistance that applies beginning when the child enters the reporting population and continues until the child is no longer in the agency's placement and care responsibility. Therefore, yes the agency must report the assistance that applies if the child is placed at home and remains under the placement and care responsibility of the title IV–E agency.

Section 1355.44(b)(22) Title IV–E Foster Care During Report Period

In paragraph (b)(22), we require the title IV–E agency to report whether a title IV–E foster care maintenance payment was paid on behalf of the child at any point during the report period. We received no comments on this data element.

Section 1355.43(b)(23) Through (b)(25) Siblings

In paragraph (b)(23), we require the title IV–E agency to report the total number of siblings that the child under the placement and care responsibility of the title IV–E agency has, if applicable.

In paragraph (b)(24), we require the title IV–E agency to report the number of siblings of the child who are in foster care as defined in section 1355.20.

In paragraph (b)(25), we require the title IV–E agency to report the number of siblings of the child who are in the same living arrangement as the child, on the last day of the report period.

Comment: In general, several states and a national organization representing state child welfare agencies agreed that the issue of sibling placement is important at the practice level when planning for children, but is better captured as a qualitative data set. Commenters noted it may not be possible for the caseworker to know whether the child has siblings and if so how many, because agencies encounter multiple overlapping sibling groups, uncertain parentage, and mixed biological, legal, and step-parent relationships. They had concerns and questions about the 2015 NPRM proposal on siblings (which were in the sections 1355.43(e) and 1355.44 of the 2015 NPRM) including the definition of siblings, reporting sibling record numbers, and the reliability and consistency of the data. They commented that it would not provide meaningful valid information for national review, pointed out that there are many varied reasons for siblings not being be placed together, and that our proposal would not take into account the complexity of what may constitute a family in the eyes of a child. Some states questioned the value of trying to match sibling record numbers and believe this requirement is onerous and of limited value. Some commenters recommended that if data on siblings must be gathered in AFCARS, we should collect the number of siblings of the child, the number of siblings who are also in care, and the number of siblings who are in the same placement with the child. Another commenter recommended that we collect the number of siblings placed with the child at the start of the placement and at any point during the child's time in this placement to determine if the child was placed with siblings when initially removed from home.

Response: We carefully reviewed the comments and suggestions and while we understand the concerns raised, we determined that it is important to continue require title IV–E agencies to report information about siblings. We acknowledge that there are many issues that make collecting data on siblings difficult. As we noted in the preamble to the 2015 NPRM, section 471(a)(31)(A) of the Act requires title IV–E agencies to make reasonable efforts to place siblings removed from their home in the same foster care, kinship guardianship, or adoptive placement, unless such a placement is contrary to the safety or well-being of any of the siblings. However, we were persuaded to revise the sibling data elements to address commenter concerns and simplify reporting. We addressed one of the major concerns raised by commenters by removing the data elements requiring the agency to report the sibling's child record numbers, which indicated which siblings were or were not placed with the child. Now, title IV–E agencies must report the total number of siblings of the child, the number of siblings that are also in foster care as defined in section 1355.20, and the number in the same living arrangement on the last day of the report period. We recognize the frequent movement of children makes it difficult to capture sibling information, so we will only require reporting as of the last day of the report period for the data element on siblings who are in the same living arrangement.

Comment: States asked for a clearer definition of sibling and questioned, for example whether to report if the child in foster care has step-siblings with which the child has no contact.

Response: We define a sibling to the child as his or her brother or sister by biological, legal, or marital connection. We acknowledge that title IV–E agencies may confront issues that may make collecting data on siblings difficult; however, we are not providing further specifics on the definition of sibling. The definition is broad and would include reporting the total number of step-siblings which constitutes a legal connection.

Section 1355.44(c) Parent or Legal Guardian Information

In paragraph (c), the title IV–E agency must report information on the child's parent(s) or legal guardian(s). In the 2015 NPRM we proposed to require the title IV–E agency to report the date of the first judicial finding that the child has been subject to child abuse or neglect, if applicable. We received comments from states requesting that we remove this data element stating that is excessive information, has limited value in measuring outcomes, and it does not add substantive value to the data file. States also questioned the usefulness of this data element due to varying state practices and believed it would be best left to a qualitative review process to determine how timeframes for permanency are being met by agencies rather than collecting information that may or may not be applicable. Another state and a university expressed confusion in how to report a judicial finding for multiple removals and a private citizen suggested revising the name of the data element to use broader judicial terminology for states that do not have judicial findings of abuse or neglect. We were persuaded by the commenters and removed this element.

Section 1355.44(c)(1) and (c)(2) Year of Birth Parent or Legal Guardian

In paragraphs (c)(1) and (c)(2), the title IV–E agency must report the birth year of the child's parent(s) or legal guardian(s). We did not receive comments on these data elements.

Section 1355.44(c)(3) and (c)(4) Tribal Membership for Mother and Father

In these paragraphs, state title IV–E agencies must indicate whether the mother and father are members of an Indian tribe. In the 2016 SNPRM we proposed that state title IV–E agencies gather information about the parents' tribal membership in sections 1355.43(i)(3)(ii) and (i)(3)(iv). We determined that this information is better integrated in section 1355.44(c) with other data elements on parent and legal guardian information. We retained the requirement in the 2016 SNPRM that these elements apply only to state title IV–E agencies because they collect information related to the potential application of ICWA. We did not receive substantive comments to the 2016 SNPRM on this specific data element and have retained it in the final rule.

Section 1355.44(c)(5) Termination/Modification of Parental Rights

In paragraph (c)(5), the title IV–E agency must report whether the parents' rights were terminated or modified on a voluntary or involuntary basis. A voluntary termination means the parent(s) voluntarily relinquished their parental rights to the title IV–E agency, with or without court involvement. This is a new data element that we added in response to a state commenter who asked for clarification on how the agency should report voluntary surrenders, stating that the type of termination of parental rights (TPR) and the pertinent dates can be different for each parent. In the 2016 SNPRM, we proposed to require that the state title IV–E agency report whether the rights of the Indian child's parents or Indian custodian were involuntarily or voluntarily terminated in paragraph (i)(19). However, this information is already required in paragraph (c)(5).

In paragraph (c)(5)(i), the title IV–E agency must report each date the title IV–E agency filed a petition to

terminate/modify parental rights regarding the child's biological, legal, and/or putative parent(s), if applicable.

Comment: An organization representing tribal interests commented that the data element for the TPR petition filing date should be consistent with ACF's policy that allows tribes to use alternative methods for helping a child achieve a permanent placement, such as modification or suspension of parental rights (Child Welfare Policy Manual section 9.2, question 12).

Response: We agree that the regulation should be consistent with the noted policy and revised the regulation to require the title IV–E agency to report the dates the agency filed a petition for a ''modification'' of parental rights or a termination of parental rights.

Comment: Two states commented that we should eliminate the data element for the TPR petition filing date stating it does not provide substantive value to the data file. They suggested that we should limit reporting to the most recent petition filing date if the child is currently available for adoption or was available during the reporting period. A university asked whether we need the TPR filing petition date for national policy development or program monitoring. A state supported the TPR petition filing date element to analyze the length of time it takes for a child to achieve permanency through adoption but questioned the purpose of reporting each petition date when multiple petitions are filed.

Response: We are retaining the requirement for the title IV–E agency to report each date the agency filed a petition to terminate or modify parental rights of the child's biological, legal, and/or putative parent(s), if applicable. The petition date and date of the termination or modification of parental rights in paragraph (c)(5)(ii) will allow us to determine the time between when the agency files a petition to terminate or modify parental rights and the actual date of the termination or modification. Additionally, AFCARS Assessment Reviews have shown that TPR filing petition dates are typically in the state electronic case files. Regarding multiple petitions, we require title IV–E agencies to report each petition date in the event that multiple petitions are filed for putative parents. As we stated in the 2015 NPRM, we require title IV–E agencies to report information on a child's putative father, if applicable. A putative father is a person who is alleged to be the father of a child, or who claims to be the father of a child, at a time when there may not be enough evidence or information available to determine if that is correct. For the existing AFCARS, we have fielded questions on whether title IV–E agencies should provide information on putative fathers. Since the parental rights of any putative fathers may need to be terminated before a child legally is free for adoption in some jurisdictions, we want to be clear that we are interested in collecting information on putative fathers as well. We will work with title IV–E agencies during implementation and provide technical bulletins for reporting the termination and modification of parental rights petition dates.

Comment: Two states commented that the petition and termination/modification dates should be tied to the individual parent.

Response: We agree and will work with title IV–E agencies during implementation if there is any additional clarification needed.

Comment: Two states asked how to report the petition dates if the child was previously adopted and whether it is limited to the current removal episode.

Response: We'd like to clarify. If a child was adopted, later enters the out-of-home-care reporting population, and the agency files a petition to terminate or modify parental rights, the agency must report the petition filing date for the adoptive parent because that is the parent of the child. We will work with title IV–E agencies during implementation if further clarification is needed.

In paragraph (c)(5)(ii), the title IV–E agency must report the date that parental rights are voluntarily or involuntarily terminated/modified for each biological, legal and/or putative parent, if applicable.

Comment: An organization representing tribal interests commented that this data element should include language consistent with ACF's policy that allows tribes to use alternative methods for helping a child achieve a permanent placement, such as modification or suspension of parental rights (Child Welfare Policy Manual section 9.2, question 12).

Response: We agree that the regulation should be consistent with the noted policy and revised the regulation to require the title IV–E agency to report the dates of a ''modification'' of parental rights or a termination of parental rights.

Section 1355.44(c)(6) Involuntary Termination/Modification of Parental Rights Under ICWA

If the state title IV–E agency indicated in paragraph (c)(5) that the TPR was involuntary and if a state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), we require that the state title IV–E agency indicate:

- Whether the state court found beyond a reasonable doubt, that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child in accordance with 25 U.S.C. 1912(f) (paragraph (c)(6)(i));
- whether the court decision to involuntarily terminate parental rights included the testimony of one or more qualified expert witnesses (QEW) in accordance with 25 U.S.C. 1912(f) (paragraph (c)(6)(ii)); and
- whether prior to TPR, the court concluded that active efforts have been made to prevent the breakup of the Indian family and that those efforts were unsuccessful in accordance with 25 U.S.C. 1912(d) (paragraph (c)(6)(iii)).

These are similar to paragraph s (i)(20) and (i)(21) of the 2016 SNPRM except that we updated the language consistent with 25 CFR 23.121.

Comment: The national organization representing state child welfare agencies and state title IV–E agencies suggested revisions to simplify this section, such as reporting only whether a court made findings that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage for termination of parental rights and if yes, did a QEW support this finding or only report court order information for involuntary TPRs. Another state suggested that we re-order and simplify the voluntary TPR data elements. A commenter also suggested that we ask whether a TPR was voluntary or involuntary.

Response: We did not make changes to the final rule in response to these comments to simplify these elements. As we indicated in the 2016 SNPRM preamble, termination standards are important protections for Indian children as defined in ICWA given that Congress specifically created minimum federal standards for removal of an Indian child to prevent the breakup of Indian families and to promote the stability and security of families and Indian tribes by preserving the child's links to their parents and to the tribe through the child's parent(s). Further, distinguishing between involuntary and voluntary terminations of parental rights is important in ICWA given specific protections that must be provided in each context (25 U.S.C. 1912(e), (f) and 25 U.S.C. 1913). The final rule now requires state and tribal title IV–E agencies to report whether a TPR is voluntary or involuntary in paragraph (c)(5). Furthermore, we integrated the

ICWA-related data elements into certain sections of the final rule, thereby moving the data elements on TPR proposed in the 2016 SNPRM to paragraph (c) and added a new data element on active efforts at involuntary TPR (paragraph (c)(6)(iii)).

Comment: A state recommended that we require states to list the reasons for involuntary TPR, using the reasons from its state statute, such as whether a parent is palpably unfit or abuses chemicals.

Response: We did not make changes in response to these suggestions. States information systems differ and include information useful for their own internal purposes, but not mandated by AFCARS. We encourage states to consider collecting data that helps states to evaluate and implement state law, but we do not require that they report those data to AFCARS.

Comment: A state and tribe suggested adding data elements asking about alternatives to TPR, such as tribal customary adoption, where the parental rights are modified and not severed, and the adoptive parent is granted the same rights and responsibilities as they would under a contemporary adoption.

Response: We'd like to clarify. As we explained in the preamble to the 2016 SNPRM, the state title IV–E agency must report information regarding voluntary and involuntary terminations/modification of parental rights, which include tribal customary adoptions.

Comment: Tribes and organizations representing tribal interests recommend that we add numerous data elements, including:

- Whether the court made a determination in a court order that active efforts at TPR had been made by the state title IV–E agency and whether active efforts were provided by any party seeking TPR.
- whether the tribe was notified when a state seeks TPR for an Indian child.

Response: We agree with the suggestion to require state title IV–E agencies to report on active efforts at involuntary TPR. Active efforts are required under the ICWA to prevent the breakup of the Indian family in two instances: Prior to removal and prior to involuntary TPR. Specifically in paragraph (c)(6)(iii), we require state title IV–E agencies to report for involuntary TPR whether prior to terminating parental rights, the court concluded that active efforts have been made to prevent the breakup of the Indian family and that those efforts were unsuccessful in accordance with 25 U.S.C. 1912(d). This language is consistent with the BIA regulation at 25 CFR 23.120 which requires that a court concluded that active efforts were made, and does not require a court order. We decline to require state title IV–E agencies to report the date on which the tribe was notified when a state seeks involuntary TPR for an Indian child and provide our reasoning in the preamble section on *Notification* in paragraph (b).

Section 1355.44(c)(7) Voluntary Termination/Modification of Parental Rights Under ICWA

If the title IV–E agency indicates in paragraph (c)(5) that the TPR was voluntary, and the state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), the state title IV–E agency must indicate whether the consent to termination of parental or Indian custodian rights was executed in writing and recorded before a court of competent jurisdiction with a certification by the court that the terms and consequences of consent were explained on the record in detail and were fully understood by the parent or Indian custodian in accordance with 25 CFR 23.125(a) and (c). This is similar to sections 1355.43(i)(22), (i)(23) and (i)(24) as proposed in the 2016 SNPRM, however, we updated the language consistent with 25 CFR 23.125.

Comment: One state recommended including a mechanism or process to ensure that an Indian child retains tribal membership after voluntary TPR because it's important for a child to know his/her lineage and tribal membership, which offers benefits such as health services and educational resources for higher education.

Response: We agree that it is important to recognize such mechanisms and revised the regulation to refer to either a ''modification'' of parental rights or a termination of parental rights. However, AFCARS is not the appropriate vehicle for establishing a mechanism or process regarding maintaining tribal membership because AFCARS is a data reporting system.

Section 1355.44(d) Removal Information

In paragraph (d), we require that the title IV–E agency report information on each of the child's removal(s) from home.

Section 1355.44(d)(1) Date of Child's Removal

In paragraphs (d)(1)(i) through (d)(1)(iii), we require the title IV–E agency to collect and report the date(s) on which the child was removed for each removal of a child who enters the placement and care responsibility of the title IV–E agency. We received no comments on this data element and have retained the 2015 NPRM proposed language in the final rule.

Section 1355.44(d)(2) Removal Transaction Date

In paragraph (d)(2) we require the title IV–E agency to report the transaction date for each of the child's removal dates reported in paragraph (d)(1). The transaction date is a non-modifiable, computer-generated date which accurately indicates the month, day and year each response to paragraph (d)(1) was entered into the information system. We did not receive relevant comments on this data element and have retained the 2015 NPRM proposed language.

Section 1355.44(d)(3) Removals Under ICWA

In paragraph (d)(3), if a state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), we require that the state title IV–E agency indicate:

- Whether the court order for foster care placement was made as a result of clear and convincing evidence that continued custody of the Indian child by the parent or Indian custodian was likely to result in serious emotional or physical damage to the Indian child in accordance with 25 U.S.C. 1912(e) and 25 CFR 23.121(a) (paragraph (d)(3)(i));
- whether the evidence presented for foster care placement as indicated in paragraph (d)(3)(i) included the testimony of a qualified expert witness in accordance with 25 U.S.C. 1912(e) and 25 CFR 23.121(a) (paragraph (d)(3)(ii)); and
- whether the evidence presented for foster care placement as indicated in paragraph (d)(3)(i) indicates that prior to each removal reported in paragraph (d)(1) that active efforts have been made to prevent the breakup of the Indian family and that those efforts were unsuccessful in accordance with 25 U.S.C. 1912(d) (paragraph (d)(3)(iii)).

These are similar to sections 1355.43(i)(12) and (i)(14) as proposed in the 2016 SNPRM.

Comment: The national organization representing state child welfare agencies was in support of a data element asking about court determinations of active efforts because members believe this is the best data element to capture information on active efforts to prevent the breakup of the Indian family. One tribal commenter noted that in some state courts, local practice has been to stipulate to active efforts, rather than creating a record that demonstrates active efforts.

Response: We retained the requirement regarding court determinations that active efforts were made to prevent the breakup of the Indian family with modifications to be consistent with BIA regulations at 25 CFR 23.120. We now require state title IV–E agencies to indicate in paragraph (d)(3)(iii) whether the evidence presented for foster care placement as indicated in paragraph (d)(3)(i) indicates that prior to each removal active efforts were made to prevent the breakup of the Indian family and that these efforts were unsuccessful in accordance with 25 U.S.C. 1912(d).

Comment: We received several concerns and suggestions about the requirement for the state title IV–E agency to report whether the court found that continued custody of the Indian child by the parent or Indian custodian was likely to result in serious emotional or physical damage to the Indian child and that the evidence presented included testimony by a QEW. Two tribes suggested that states be required to report whether the QEW meets the standards per the BIA's Guidelines. The national organization representing state child welfare agencies noted that states experience challenges in meeting the requirement in ICWA for QEWs, stating there are not enough QEWs to meet the need for court proceedings. One state noted that there is no way to report that a court does not require a QEW to testify even if the agency knows that a QEW should testify.

Response: We did not make changes to the final rule in response to these comments. We are retaining the requirement that the state must report whether evidence presented included the testimony of a QEW for the specified court finding but updated the language to reflect the BIA regulation at 25 CFR 121(a). As we noted in the preamble to the 2016 SNPRM, the removal data elements will provide data on the extent to which Indian children as defined in ICWA are removed in a manner that conforms to ICWA's standards, informs ACF about the frequency of and evidentiary standards applied to removals of Indian children, helps identify needs for training and technical assistance related to ICWA, and highlights substantive opportunities for building and improving relationships between states and tribes. Removing the requirement for agencies to report whether a QEW provided testimony would diminish our ability to achieve these purposes. We require the state title IV–E agency to report whether the evidence presented for foster care placement as indicated in paragraph (d)(3)(i) included the testimony of a QEW in accordance with 25 U.S.C. 1912(e) and 25 CFR 121(a) (paragraph (d)(3)(ii)). Thus, we are not asking whether or not the state title IV–E agency knows that ICWA requires a QEW's testimony, rather we are requiring the state title IV–E agency to indicate whether the evidence presented included the testimony of a QEW.

Comment: We received comments suggesting additional data elements related to: Emergency removals per section 1922 of ICWA, such as whether the court determined that the state properly removed the Indian child and how long the emergency removal lasted; and foster care voluntary removals, such as whether a court order indicates that the voluntary consent to a foster care placement was made in writing and recorded in the presence of a judge.

Response: We did not revise the final rule in response to these suggestions. We understand the value of collecting data related to voluntary foster placements and emergency removals of children to whom ICWA applies. We encourage states to consider collecting this information, if consistent with their own practice models, but we decline to require collecting and reporting it to AFCARS. At this time, we seek to understand the scope of all removals of children to whom ICWA applies and therefore we've required broad data elements we believe are most critical in relation to Indian children as defined in ICWA.

Section 1355.44(d)(4) Environment at Removal

In paragraph (d)(4) we require the title IV–E agency to report the type of environment (household or facility) from a list of seven that the child was living in at the time of each of the child's removals reported in paragraph (d)(1).

Comment: One state recommended adding whether a legal guardian is a child's relative as a response option because in the proposal, both ''legal guardian'' and ''child's relative'' are defined to exclude the other choice, even though the legal guardian may be a child's relative. Other homelessness advocacy groups suggested adding ''homeless'' as a separate response option because they feel that data on homelessness is very important and relevant to collect to get a more detailed picture of where youth running away from system involvement are running to.

Response: We agree with the suggestion to add ''relative legal guardian'' as a response option to distinguish between a guardian who is or is not related to the child. We did not add a separate response option for ''homelessness'' because it is included in the response option of ''other.'' However, we added ''homelessness'' as a circumstance of removal at paragraph (d)(6)(xxxiv).

Comment: Three commenters representing tribal interests recommended adding a response option for ''Indian custodian,'' who is a person recognized under ICWA that may not be a relative, parent, or legal guardian.

Response: We specified in section 1355.41(c)(2) that for an Indian child as defined in ICWA, the term ''legal guardian'' in the specific data elements of §§ 1355.44(c)(1), (c)(2), (d)(4), and (d)(5), includes an Indian custodian as defined in ICWA at 25 U.S.C. 1903 if the Indian custodian has legal responsibility for the child.

Section 1355.44(d)(5) Authority for Placement and Care Responsibility

In paragraph (d)(5) we require the title IV–E agency to indicate, for each of the child's removals, whether the title IV–E agency's authority for placement and care responsibility of the child was based on a court order. We did not receive substantive comments to this data element and have mostly retained the language as proposed in the 2015 NPRM, clarifying only that we intended ''guardian'' to refer to ''legal guardian''.

Section 1355.44(d)(6) Child and Family Circumstances at Removal

In paragraph (d)(6), we require the title IV–E agency to report all of the circumstances surrounding the child and family at each removal reported in paragraph (d)(1) from a list of 35 circumstances. The agency must report all child and family circumstances that are present at the time of each removal, including the circumstances that contributed to the decision to place the child into foster care.

We modified the regulation by revising the name of two circumstances at removal. In paragraph (d)(6)(xi) we revised the name of the circumstance from ''caretaker's alcohol abuse'' to ''caretaker's alcohol use'' and in paragraph (d)(6)(xii) we revised the name of the circumstance from ''caretaker's drug abuse'' to ''caretaker's drug use.'' We did not change the definition of the data element. These language changes are based on language guidelines (*https://www.whitehouse.gov/ondcp/changing-the-language-draft*) recently released by the White House Office of National Drug Control Policy that are designed to reduce the harmful stigma associated

with substance use disorders and addiction.

We also modified the regulation by adding two circumstances at removal (paragraphs (d)(6)(xxxii) and (d)(6)(xxxiii)) so that we can identify children who are under a title IV–E agreement for title IV–E foster care maintenance payments. A commenter to the 2015 NPRM suggested that we add a data element allowing title IV–E agencies to specify children reported to AFCARS who are under title IV–E agreements. We have also received this suggestion from several states during AFCARS Assessment Reviews. We believe that the best way to address these comments is to add a circumstance at removal that title IV–E agencies may indicate if this situation applies for a child. We believe this will lead to more accurate reporting and analysis of the appropriate children. In addition, this will allow us to clearly identify when an Indian child is under the state title IV–E agency's placement and care responsibility versus receiving a title IV–E foster care maintenance payment under a title IV–E agreement. We believe this information, along with the ICWA-related data elements state title IV–E agencies are now required to report will provide a clearer picture of the AFCARS out-of-home care reporting population. We included separate circumstances at removal for title IV–E agreements with another public agency and title IV–E agreements with an Indian tribe to better inform which title IV–E agreement the child is reported under and provide clarity for title IV–E agencies on who is to be included in the out-of-home care reporting population.

Comments: Several commenters suggested adding ''sex trafficking victim'' as a circumstance at removal.

Response: We agree with the suggestions to add ''sex trafficking victim'' as a circumstance and have added it as paragraph (d)(6)(xxviii). This will inform us whether the child is a sex trafficking victim at the time the child entered the out-of-home care reporting population. The requirements to collect sex trafficking information in paragraphs (d)(7) and (d)(8) relate to a child who was a victim prior to or while in foster care, which is designed to meet statutory reporting requirements.

Comment: One commenter suggested adding ''prenatal substance exposure'' as a circumstance at removal.

Response: We did not add ''prenatal substance exposure'' as a child and family circumstance at removal because we already have response options ''prenatal alcohol exposure'' and ''prenatal drug exposure.''

Comment: Advocacy organizations suggested adding immigration-related response options as child and family circumstances at removal stating that a child's immigration status is important to understand the barriers and services to support this population. They also noted that an unintended consequence of immigration enforcement can be the separation of detained parents from their children.

Response: We were persuaded by commenters who suggested it was important to know when a circumstance at removal is that the parent was detained or deported for immigration reasons and added ''parental immigration detainment or deportation'' as a child and family circumstance at removal to paragraph (d)(6)(xxix). Commenters pointed out that this information is important in order to assess the critical services that may be required to support the child and the family. In addition, it is important to understand what barriers exist for the child and family. We removed the data elements from the 2015 NPRM proposal in paragraphs (b) and (c) to collect whether the child and parents were born in the U.S. for the reasons noted by many commenters who opposed them and instead require that agencies report this circumstance at removal. We did not add a data element on a child's immigration status because that information is not needed at the federal level since agencies at the state, tribal, and local level determine a child's eligibility for services.

Comment: Advocates and organizations representing the homeless suggested adding many separate circumstances at removal related to homelessness stating that data on homelessness is important and relevant to collect. Recommendations included types of homelessness habitations and particular family situations such as: ''places not meant for human habitation'' (*i.e.,* abandoned buildings); ''couch-surfing''; ''family is living in a shelter or on the streets''; ''family home is overcrowded''; and ''family home is hazardous condition.''

Response: We agree with the suggestions to add ''homelessness'' as a circumstance and have added it as paragraph (d)(6)(xxxiv). Such information can help agencies identify services and support for children and families. We define homelessness consistent with the definition used in the National Youth in Transition Database (NYTD) at 1356.83(g)(49).

Comment: Commenters expressed confusion on why we provided domestic violence as a child and family circumstance at removal stating that the reason for removal would be harm to the child. Other commenters suggested that we should modify the domestic violence circumstance to require agencies to report intimate partner violence experienced or perpetrated by a child of any age and not only those who are eighteen years of age and older.

Response: We appreciate the suggestions to revise this circumstance at removal and revised it to make it more consistent with the definition of domestic violence in the Family Violence Prevention and Services Act (FVPSA). In response to the confusion on why we provided domestic violence as a child and family circumstance at removal, we noted in the 2015 NPRM that the agency must report all of the circumstances that are present at the time of the child's removal, in addition to the circumstances or reasons for the child's removal and placement into foster care.

Comment: In the 2015 NPRM we solicited comments on whether we should collect information on LGBTQ youth, and if so, what information. Several commenters pointed out the unique plight of LGBTQ youth in foster care stating that research indicates that LGBTQ youth are disproportionately represented within the child welfare system, experience high rates of family rejection, and experience unique challenges to their personal safety and stability.

Response: We support further understanding of LGBTQ youth in foster care and their experiences while in foster care. Such information can help agencies improve their supports and services to these young people. We included a circumstance at removal in paragraph (d)(6)(xxx) as to whether there is ''family conflict related to the child's sexual orientation, gender identity, or gender expression'' to aid us in recognizing the needs and experiences of LGBTQ youth who enter foster care. Knowing whether family conflict regarding the child's sexual orientation, gender identity, or gender expression was a circumstance at the child's removal may allow the title IV–E agency to more accurately assess the child and plan for the child's safety, permanency, and well-being while in foster care.

Comment: National advocacy/public interest groups suggested that we add educational neglect and unaccompanied minor as child and family circumstances at removal.

Response: We agree it is important to capture whether educational neglect is a child and family circumstance at removal and included it. We defined ''educational neglect'' based on the

American Humane Association definition as ''alleged or substantiated failure of a parent or caregiver to enroll a child of mandatory school age in school or provide appropriate home schooling or needed special educational training, thus allowing the child or youth to engage in chronic truancy.'' We did not include ''unaccompanied minor'' as one of the circumstances at removal since the child's immigration status is irrelevant to their placement in foster care. We did, however, include a circumstance at removal of ''parental immigration detainment or deportation'' to paragraph (d)(6)(xxix).

Section 1355.44(d)(7) Victim of Sex Trafficking Prior To Entering Foster Care

In paragraph (d)(7), we require the title IV–E agency to report whether the child had been a victim of sex trafficking before the current out-of-home care episode. If so, in paragraphs (d)(7)(i) and (d)(7)(ii) we require the title IV–E agency to indicate whether the agency reported each instance to law enforcement and the dates of each report.

Comment: One commenter asked if the agency should report this information for a time prior to the title IV–E agency's involvement with the child or family.

Response: Yes, the responses to paragraphs (d)(7)(i) and (d)(7)(ii) require the title IV–E agency to report about victims of sex trafficking prior to entering foster care and prior to any agency involvement. We have retained the proposed rule language with minor edits.

Section 1355.44(d)(8) Victim of Sex Trafficking While in Foster Care

In paragraph (d)(8), we require the title IV–E agency to report whether the child was a victim of sex trafficking while in out-of-home care during the current episode. If so, in paragraphs (d)(8)(i) and (d)(8)(ii) we require the title IV–E agency to indicate whether the agency reported each instance to law enforcement and the dates of each report. We have retained the proposed rule language with minor edits.

Comment: A commenter sought clarification on whether the agency should report a date the report was made to law enforcement if an agency other than the title IV–E agency made the report.

Response: No, the agency reports on whether or not the title IV–E agency itself made the report to law enforcement. We modified the regulation to make this clearer.

Comment: Many commenters asked if it will be possible for the agency to report data on multiple instances of sex trafficking that may have occurred during the report period. Another commenter suggested that we include sex trafficking as a child and family circumstance at the time of removal.

Response: We agree with the suggestion to add sex trafficking as a response option in paragraph (d)(6) *Child and family circumstances at removal.* Because this information is to be reported as it relates to each removal episode and is not information that is to be overwritten, we have moved it to, the ''removal'' section of the final rule and specified that each instance of sex trafficking, report to law enforcement, and date must be reported. In addition, we modified the language and location of these elements to allow agencies to report multiple instances of sex trafficking. We believe these changes clarify many of the questions raised by commenters.

Comment: Organizations representing tribal interests noted that there are federal laws and policy barriers that prevent tribes from submitting any criminal or civil data to certain national databases, therefore tribes should be allowed to indicate they were not authorized or allowed to report information about sex trafficking to law enforcement.

Response: Title IV–E agencies are only required to report in AFCARS whether or not they reported a child that they identified as a sex trafficking victim to law enforcement. Therefore, in the instance where the tribe was prohibited by federal law or otherwise to make a report to law enforcement and therefore did not make a report the tribe would indicate ''no.'' This data element is not a mandate on the tribe to make a report of sex trafficking to law enforcement, but to indicate in AFCARS whether or not they made a report.

Comment: We received several other suggestions. One organization suggested we provide greater guidance and clarity about child victims of sex trafficking when they run away from foster care; several commenters suggested including additional elements, including health and mental health services a child receives related to sex trafficking, whether a sex-trafficking victim was criminally charged, had been homeless, missing or a runaway. Further, several commenters suggested that we include this information in a different data collection system, the National Child Abuse and Neglect Data System (NCANDS).

Response: We examined the suggestions to add data elements regarding victims of sex trafficking, but have not made further changes. We do not have a specific use for the additional detailed information the commenters requested as we are requiring reporting on sex trafficking victims to meet statutory requirements for reporting this information to Congress per section 105 of Public Law 113–183 and for including this information in AFCARS per section 479(c)(3)(E) of the Act. In addition, the statute mandates that this specific sex trafficking victim data we are requiring title IV–E agencies to report be included in AFCARS and not NCANDS. However, effective May 29, 2017, Child Abuse Prevention and Treatment Act (CAPTA) state grant recipients must report, to the maximum extent practicable, the number of children determined to be victims of sex trafficking (section 106(d)(17) of CAPTA).

Section 1355.44(e) Living Arrangement and Provider Information

In paragraph (e), we require that the title IV–E agency report information on each of the child's living arrangements for each out-of-home care episode. We revised some of the proposed data elements as suggested by commenters, integrated data elements relating to ICWA placement preferences proposed in the 2016 SNPRM, and removed others as follows:

- Removed a data element requiring agencies to report the total number of children who are living with their minor parent in each living arrangement. We instead require agencies to report whether the child and his/her child(ren) are placed together at any point during the report period in paragraph (b).
- Removed the data element requiring agencies to report the assistance that supports each of the child's living arrangements. We merged this list of assistance with the data element *Child financial and medical assistance* in paragraph (b).
- Removed a data element requiring agencies to report the total per diem amount of the title IV–E foster care maintenance, adoption assistance, or guardianship assistance payment that the child is eligible for or received in response to comments. Commenters stated that reporting a child's eligibility for a funding source, and the amount for which the child is eligible, when a payment has not actually been made creates the potential for inaccurate data. In addition a national organization representing state child welfare agencies commented that reporting these data elements outweighs its usefulness.
- Removed the requirement the title IV–E agency report whether the child is

receiving the following types of services if placed in a non-foster family home living arrangement: Specialized education, treatment, counseling, and other services. Some commenters noted that collecting this service data would be difficult and costly, other commenters pointed out that this requirement is not well defined, and it is unclear how ACF would use this data.

Section 1355.44(e)(1) Date of Living Arrangement

In paragraph (e)(1), we require the title IV–E agency to report the dates of placement for each of the child's living arrangements for each out-of-home care episode. We received no comments and have retained the 2015 NPRM proposed rule language.

Section 1355.44(e)(2) Foster Family Home

In paragraph (e)(2), we require the title IV–E agency to report whether each of the child's living arrangements is a foster family home. We received no comments and have made only minor conforming changes to this paragraph.

Section 1355.44(e)(3) Foster Family Home Type

In paragraph (e)(3), we require the title IV–E agency to report whether each type of foster family home, from a list of six, applies for each foster family home reported. These are: Licensed home, therapeutic foster family home, shelter care foster family home, relative foster family home, pre-adoptive home, or kin foster family home.

Comment: Several commenters supported the inclusion of a response option of ''kin foster family home'' but were concerned that workers will be confused about who should be included in this category and misreport data. Many agencies define ''kin'' to include relatives by blood, marriage or adoption, in addition to what is frequently referred to as ''fictive kin'' and this could lead to worker confusion about when to indicate the response option ''relative foster family home'' versus ''kin foster family home.'' Thus, commenters suggested that we revise the definition of ''kin foster family home'' to specifically note that the child is not related to the foster parent(s) by biological, legal or marital connection. Commenters made similar comments for the data elements *Child's relationships to the foster parent(s)* in paragraph (e)(13) and *Child's relationship to the adoptive parent(s) or guardian(s)* in paragraph (h)(2).

Response: We agree with the suggestion to modify the definition of ''kin foster family home'' so it now specifies that the child is not related to the foster parent by a ''biological, legal or marital connection.'' The revised definition reads: ''The home is one in which there is a kin relationship as defined by the title IV–E agency, such as one where a psychological, cultural or emotional relationship between the child or the child's family and the foster parent(s) and there is not a legal, biological, or marital connection between the child and foster parent.'' We also made a similar modification to the definition of ''kin'' in the data elements *Child's relationships to the foster parent(s)* in paragraph (e)(13) and *Child's relationship to the adoptive parent(s) or guardian(s)* in paragraph (h)(2). The remaining foster family home type definitions are retained as proposed in the 2015 NPRM.

Section 1355.44(e)(4) Other Living Arrangement Type

In paragraph (e)(4), we require the title IV–E agency to report whether a child who is not placed in a foster family home is placed in one of the following thirteen living arrangements: Group home-family-operated, group home-staff-operated, group home-shelter care, residential treatment center, child care institution, child care institution-shelter care, supervised independent living, juvenile justice facility, medical or rehabilitative facility, psychiatric hospital, runaway, whereabouts unknown and placed at home. We retained the response options as proposed in the 2015 NPRM.

Comment: A commenter requested definitions for each of the other living arrangement types.

Response: Each response option for the types of other living arrangements is explained in detail in paragraph (e)(4) of the regulation text. For example ''residential treatment center'' is defined as a facility that has the purpose of treating children with mental health or behavioral conditions; ''supervised independent living'' is defined as where the child is living independently in a supervised setting; and ''medical or rehabilitative facility'' is defined as where an individual receives medical or physical health care, such as a hospital.

Comment: One commenter suggested that title IV–E agencies have the option of classifying a ''group home-family operated'' as a type of foster family home. Also, a national organization representing state child welfare agencies commented that ''group home family operated'' and ''group home staff operated'' are different across jurisdictions and may be confusing to agencies.

Response: We recognize there are variations in how agencies license and approve group homes and will provide technical assistance to title IV–E agencies on a case by case basis on how to categorize group home living arrangements in their jurisdiction for AFCARS reporting purposes.

Comment: One commenter asked if medical and rehabilitative facilities include children in a hospital for illness. The commenter also asked if psychiatric hospitals include acute care (*e.g.,* three to five days).

Response: Yes, a ''medical or rehabilitative facility'' is one where a child receives medical or physical health care, and includes a hospital. Paragraph (e) includes options for where a child is currently placed and a time frame is irrelevant as the title IV–E agency must to report all living arrangements regardless of length of stay. We will work with title IV–E agencies on reporting children in these facilities as needed upon implementation.

Section 1355.44(e)(5) Private Agency Living Arrangement

In paragraph (e)(5), we require the title IV–E agency to report whether each of the child's living arrangements is licensed, managed, or run by a private agency. We received no comments on this data element and have retained the 2015 NPRM proposed rule language.

Section 1355.44(e)(6) Location of Living Arrangement

In paragraph (e)(6), we require that the title IV–E agency report the jurisdiction of the child's living arrangement, specifically whether the child is placed within or outside of the reporting agency's jurisdiction. The agency must also indicate if the child ran away or his or her whereabouts are unknown. We received no comments on this data element and have retained the 2015 NPRM proposed rule language with minor clarifying edits.

Section 1355.44(e)(7) Jurisdiction or Country Where Child Is Living

In paragraph (e)(7), we require the title IV–E agency to report the name of the state, tribal service area, Indian reservation or country where the title IV–E agency placed the child for each living arrangement, for children placed outside their jurisdiction. We received no substantive comments on this data element but added a sentence that IV–E agencies must report the information in a format according to ACF's specifications to conform with this revision throughout the rule. We will

work with title IV–E agencies on how to report this information.

Section 1355.44(e)(8) Available ICWA Foster Care and Pre-Adoptive Placement Preferences

In paragraph (e)(8), if the state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), we require that the state title IV–E agency indicate which of the foster care and pre-adoptive placements from a list of five are willing to accept placement of the Indian child. The five placements options are: A member of the Indian child's extended family; a foster home licensed, approved, or specified by the Indian child's tribe; an Indian foster home licensed or approved by an authorized non-Indian licensing authority; an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs; and a placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child's tribe, in accordance with 25 U.S.C. 1915(c). This is similar to paragraph (i)(15) as proposed in the 2016 SNPRM.

Comment: The national organization representing state child welfare agencies suggested we eliminate the requirement for the state to report on the availability of foster care placements that meet ICWA placement preferences stating that it is not essential. One state, citing burden, also recommended that we eliminate this data element because other information collected on foster care placement preferences is more salient. Another state sought clarification on whether this data element is asking a broad question about the availability of foster care providers or if it is child specific and suggested simplifying the information to only indicate with whom the child is placed and not availability. Another suggested revising the element to indicate all that apply rather than asking for yes/no responses. One tribe was concerned that the language ''were available to accept placement'' is subjective. They suggested revising the language as follows: ''were pursued to accept placement pursuant to subsection 13(xi).''

Response: We were not persuaded to remove the data element indicating the availability of foster care placements that meet ICWA's preferences nor make any of the other recommended changes in the final rule. No tribes, national tribal organization, or national child welfare organizations suggested removing or modifying data elements related to the availability of homes that meet ICWA foster or pre-adoptive placement preferences. However, we modified the term 'available' to 'willing' to be consistent with the adoption placement preference data element at paragraph (h), although we presume that any home that meets ICWA placement preferences that is willing to foster the Indian child is also available, and that a home that meets ICWA placement preferences but is unwilling to foster the Indian child is unavailable. The option to use terminology ''check all that apply'' versus responding with ''yes'' or ''no'' is an implementation issue that does not require a regulation change and we will provide technical assistance on this as needed.

The availability of foster care placements that meet ICWA's preferences is critical for meeting the purposes of ICWA. This information is essential for ACF to determine whether resources are needed for recruitment to increase the availability of AI/AN homes that can meet ICWA's placement preferences. Under the BIA's regulations at 25 CFR 23.132, whether a home is available is not a subjective state title IV–E agency determination. Rather it is evidence offered by the state title IV–E agency to the court that there is good cause to deviate from ICWA's placement preferences in a particular case where there is also evidence that the state title IV–E agency conducted a diligent search to identify a placement that meets the preferences (25 CFR 23.132).

Comment: One state commented that at the time of placement, the agency does not exhaust all possible relative placements for any child, so they are unclear which relatives ACF expects to be included, noting that their information system would have to be modified to include placement preference elements.

Response: We'd like to clarify the data element, as it does not require the state to report whether they exhausted all relative placements. The state is to indicate ''yes'' or ''no'' whether there was a member of the Indian child's extended family willing to provide a foster care or pre-adoptive placement. Such a member would meet the placement preferences of ICWA in 25 U.S.C. 1915(b).

Section 1355.44(e)(9) Foster Care and Pre-Adoptive Placement Preferences Under ICWA

In paragraph (e)(9) if the state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), we require that the state title IV–E agency indicate whether each of the Indian child's placements (indicated in paragraph (e)(1)) meets the placement preferences of ICWA at 25 U.S.C. 1915(b) by indicating with whom the Indian child is placed from a list of six response options. This is similar to paragraph (i)(16) as proposed in the 2016 SNPRM, except that we changed the response option of ''none'' to ''placement does not meet ICWA placement preferences.''

Comment: The national organization representing state child welfare agencies suggested we reduce the data elements by asking only whether the child was placed in compliance with the placement preferences and if no, whether a court make a finding of good cause to deviate from the placement preferences.

Response: We did not make any changes in response to the comment to only require reporting on whether or not the child is in a foster care or pre-adoptive placement that meets the ICWA placement preferences. We seek information on the specific placement because the requirements around placement preferences in ICWA are a key piece of the protections mandated by ICWA. Placement preferences serve to protect the best interests of Indian children and promote the stability and security of families and Indian tribes by keeping Indian children with their extended families or in Indian foster homes and communities. Factors unique to Indian children, including the availability of American Indian foster homes, influence decisions about the placement of Indian children.

Comment: One state recommended that we add a response option for ''group home approved or operated by Indian tribe/organization.''

Response: We considered this suggestion but decline to make a change because our response options reflect the foster care placement preference language in ICWA at 25 U.S.C. 1915(b).

Comment: A tribe suggested including if the tribe agreed with the application of the placement preferences.

Response: We are not making a change as a result of this comment. If the tribe has established by resolution a different order of preference than that specified in ICWA, the tribe's placement preferences apply subject to requirements of 25 U.S.C. 1915(c) and 25 CFR 23.131 and these placements are captured in AFCARS.

Comment: Several organizations suggested that we clarify whether the placements were tribally licensed or approved homes or another Indian family guardian home approved by the state.

Response: We considered this suggestion but decline to make additional changes because our response options reflect the foster care placement preference language in ICWA in 25 U.S.C. 1915(b).

Section 1355.44(e)(10) Good Cause Under ICWA

In paragraph (e)(10), if a state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), and the state title IV–E agency indicated ''placement does not meet ICWA placement preferences'' in paragraph (e)(9), we require the state title IV–E agency to indicate whether the court determined by clear and convincing evidence, on the record or in writing, a good cause to depart from the ICWA placement preferences (25 U.S.C. 1915(b)), or the Indian child's tribe, if the placement preferences for foster care and pre-adoptive placements were not followed. This is similar to paragraph (i)(17) as proposed in the 2016 SNPRM, except that we updated the language consistent with 25 CFR 23.132.

Comment: The national organization representing state child welfare agencies suggested that we remove the language ''as indicated on court order'' from this data element because it could be interpreted in different ways and may not accurately reflect the court orders finding of good cause.

Response: We modified the regulation text so that the final rule does not include a requirement for the state to report only if the court order included the good cause determination. This is consistent with the BIA's regulations at 25 CFR 23.132(c). The data element as revised requires states to indicate whether the court determined by clear and convincing evidence on the record or in writing, a good cause to depart from the ICWA placement preferences under 25 U.S.C. 1915(a) or to depart from the placement preferences of the Indian child's tribe under 25 U.S.C. 1915(c). This provides states with multiple options for obtaining the information.

Section 1355.44(e)(11) Basis for Good Cause

In paragraph (e)(11), if a state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), and the state title IV–E agency indicated ''yes'' to paragraph (e)(10), we require that the state title IV–E agency indicate the state court's basis for the determination of good cause to depart from the ICWA placement preferences from a list of five response options. This is similar to paragraph (i)(18) as proposed in the 2016 SNPRM except that we updated the language consistent with 25 CFR 23.132.

Comment: A tribe stated that they are not clear what the response option of ''other'' indicates and recommended that we clarify the response option. One state recommended adding a list of ''extraordinary physical or emotional needs of the Indian child'' to the good cause reasons.

Response: We removed the ''other'' option and modified the list of reasons for the state court's basis for the determination of good cause to depart from ICWA placement preferences in ICWA to be consistent with 23.132(c) of the BIA regulations. The final regulation no longer includes the response option of ''other.''

Section 1355.44(e)(12) Marital Status of the Foster Parent(s)

In paragraph (e)(12), we require the title IV–E agency to report information regarding the marital status of the each of the foster parent(s) where the child is placed. While we received no comments on this data element, we revised the final rule to be consistent with reporting the marital status of adoptive parents and legal guardians in paragraph (h). As we also explain in paragraph (h), several commenters recommended that we revise the marital status response options. As such, the response options will be as follows: Married couple, unmarried couple, separated, and single adult. We replaced the response options of ''single male'' and ''single female'' with ''single adult.''

Section 1355.44(e)(13) Child's Relationships to the Foster Parent(s)

In paragraph (e)(13), we require the title IV–E agency to report the type of relationship between the child and the foster parent(s) for each foster family home in which the child is placed, from one of seven options: Paternal grandparent(s), maternal grandparent(s), other parental relative(s), other maternal relative(s), non-relative(s), kin, or sibling(s).

Comment: One commenter suggested that we modify the term ''kin'' when describing the relationship between the child and foster parent to make clear that the child is not related to the foster parent(s) by biological, legal or marital connection. Commenters made similar comments for the data elements *Foster family home type* in paragraph (e)(3) and *Child's relationship to the adoptive parent(s) or guardian(s)* in paragraph (h)(2).

Response: We appreciate the suggestion and modified the term ''kin'' to indicate that there is not a legal, biological, or marital connection between the child and foster parent. We also made a similar modification to the definition of ''kin'' in the data elements *Foster family home type* in paragraph (e)(3) and *Child's relationship to the adoptive parent(s) or guardian(s)* in paragraph (h)(2).

Comment: One commenter suggested that we add aunt and uncle as response options for the child's relationship to the foster parents.

Response: If a child is placed with an aunt or uncle, the level of information we are seeking is whether it was a maternal or paternal relative, and are not seeking more detailed information than that. We did not make changes in response to the suggestion.

Section 1355.44(e)(14) and (e)(20) Year of Birth for Foster Parent(s)

In paragraphs (e)(14) and (e)(20), we require the title IV–E agency to report the year of birth of each of the child's foster parent(s). We received no comments on this data element and have retained the language as proposed in the 2015 NPRM.

Section 1355.44(e)(15) and (e)(21) Foster Parent(s) Tribal Membership

In paragraphs (e)(15) and (e)(21), we require the title IV–E agency to report whether the foster parent(s) is a member of an Indian tribe. These are new data elements not previously proposed in the 2015 NPRM or 2016 SNPRM. Additionally, we are collecting the same information in paragraph (h) regarding adoptive parents and legal guardians. It was clear as we analyzed the comments to the 2016 SNPRM that including data elements that inquire about the tribal membership of the foster parent(s) is information that is in line with our goals to expand the information we collect on foster care providers for children in out-of-home care. We believe that this information will provide more insight on meeting the requirements in ICWA on foster care placement preferences and will inform recruitment of foster care providers that meet the needs of AI/AN children in out-of-home care.

Section 1355.44(e)(16) and (e)(22) Race of Foster Parent(s)

In paragraphs (e)(16)(i) through (e)(16)(vii) and (e)(22)(i) through (e)(22)(vii), we require the title IV–E agency to report the race of each of the foster parent(s) which the child has been placed.

Comment: Organizations representing tribal interests recommended we include whether: (1) The foster parent have origins in any of the original peoples of North and South America; (2)

whether the foster parent is a member of a federally recognized Indian tribe and; if so, (3) the name of the tribe.

Response: The response options are consistent with the OMB Revised Standards for the Classification of Federal Data on Race and Ethnicity, and therefore, we are unable to make a change. These definitions can be found at: *http://www.whitehouse.gov/omb/inforeg/re_guidance2000update.pdf.* While we did not revise this data element, at section 1355.44(e)(16) and (e)(22) we require the state title IV–E agency report whether the foster parent(s) is a member of an Indian tribe in paragraphs (e)(15) and (e)(21).

Section 1355.44(e)(17) and (e)(23) Hispanic or Latino Ethnicity for Foster Parent(s)

In paragraphs (e)(17) and (e)(23), we require the title IV–E agency to report the Hispanic or Latino ethnicity of the foster parent(s), if applicable. We received no comments on this data element.

Section 1355.44(e)(18) and (e)(24) Gender of Foster Parent(s) and (e)(19) and (e)(25) Foster Parent(s) Sexual Orientation

In paragraphs (e)(18) and (e)(24), we added a requirement for the title IV–E agency to indicate whether each foster parent self identifies as ''male'' or ''female.''

In paragraph (e)(19) and (e)(25), we added a requirement that the title IV–E agency report whether the foster parent(s) self identifies as ''straight or heterosexual,'' ''gay or lesbian,'' ''bisexual,'' ''don't know,'' ''something else,'' or ''declined'' if the second foster parent declined to identify his/her status.

Comment: While we requested input in the 2015 NPRM on whether to require title IV–E agencies to collect LGBTQ-related data in AFCARS on children, we received comments about collecting sexual orientation data on foster and adoptive parents from state title IV–E agencies, national advocacy/public interest groups and other organizations. Those that supported collecting data on the foster parents' sexual orientation were primarily advocacy organizations representing LGBTQ interests and generally noted that the LGBTQ community remains an untapped resource for finding permanent families for children and youth in foster care. They stated that some of these prospective parents face barriers when they attempt to foster or adopt because they identify as LGBTQ. They further commented that including this information in AFCARS will promote routine discussions between prospective foster parents and title IV–E agencies, normalize conversations around sexual orientation, and signal increased acceptance of LGBTQ caretakers. State title IV–E agencies expressed some of the same concerns with collecting sexual orientation data on foster parents as they did for children in foster care: Privacy concerns and implications of having this information in a government record; concerns that the data may be used in a discriminatory way; and they expressed the importance of proper staff training for data elements on sexual orientation.

Response: We were persuaded by the commenters who suggested data elements in AFCARS on a foster parent's sexual orientation and require agencies to report when a foster parent self identifies as ''straight or heterosexual,'' ''gay or lesbian,'' ''bisexual,'' ''don't know,'' ''something else,'' or ''declined.'' We anticipate that these data elements will assist title IV–E agencies in recruiting, training, and retaining an increased pool of foster care providers who can meet the needs of children in foster care. We specifically added a decline response option to respond to the privacy issues raised by commenters. Information on sexual orientation should be obtained and maintained in a manner that reflects respectful treatment, sensitivity, and confidentiality. Several state and county agencies, advocacy organizations and human rights organizations have developed guidance and recommended practices for how to promote these conditions in serving LGBTQ youth in adoption, foster care and out-of-home placement settings. ACF provides state and tribal resources for Working With LGBTQ Youth and Families at the Child Welfare Information Gateway. The following links are provided as general examples of such guidance (Minnesota and California examples). ACF will provide technical assistance to agencies on collecting this information. Additionally, for the same reasons, we made corresponding changes in paragraph (h) related to the adoptive parent or legal guardian. We also made a minor change in reporting the foster parent's gender, in that we require the title IV–E agency to indicate whether each foster parent self identifies as ''male'' or ''female'' and made the same change for the adoptive parent or legal guardian.

Section 1355.44(f) Permanency Planning

In paragraph (f), we require that the title IV–E agency report information related to permanency planning for children in foster care. We made several revisions to this section from the 2015 NPRM to remove some proposed data elements that we describe below:

- We removed the requirement for agencies to report concurrent planning information based on the comments from a national organization representing state child welfare agencies and several states. They suggested that this information is better captured at the case level and noted that since that concurrent planning is an optional practice that not all title IV–E agencies use, the information would not be useful at a national level.
- We removed the requirement for agencies to report the reason(s) for permanency plan changes based on comments from a national organization representing state child welfare agencies and many state title IV–E agencies stating that the data element is too subjective, the response options are overly broad, the data element will not capture plans that change more than once during a report period, and the data is too qualitative for AFCARS and better analyzed at the case level. The commenters also said that reporting this information would be burdensome and training workers and monitoring data quality would be challenging.
- We removed the requirement for agencies to report the purpose of each in person, face-to-face visit based on comments that this data element is not well defined, and that many visits involve multiple purposes and will not be well distinguished.
- We removed the requirement for agencies to report whether the caseworker visited with the child alone. Several commenters were in support of this data element, however, the statutory requirement is for agencies to report whether a face-to-face visit has occurred within the calendar month and whether it occurred in the child's residence. In addition, commenters indicated that collecting information on if a worker visits alone would be time consuming and it is not always appropriate for the caseworker to visit the child alone.
- We removed the requirement that agencies indicate whether the contents of the transition plan apply based on comments that while the existence of the plan and its timing is knowable, reporting the provisions contained in the transition plan is unnecessary because the quality and relevance of a transition plan cannot be determined quantitatively.

Section 1355.44(f)(1) and (2) Permanency Plan and Date

In paragraph (f)(1), we require that the title IV–E agency report each

permanency plan for the child and in (f)(2) the date each plan(s) was established during each out-of-home care episode. There are six options: Reunify with parent(s) or legal guardian(s), live with other relatives, adoption, guardianship, and another planned permanent living arrangement.

Comment: Two states sought clarification on how these elements apply to children who have runaway and whether the response options should be consistent with CFSR.

Response: We require the permanency plan response options to be consistent with the law at section 475(5)(C) of the Act. The permanency plan options in the CFSR are broader and encompasses the discrete response options from AFCARS because AFCARS applies to all youth in the out-of-home care reporting population, which includes children for whom the title IV–E agency has placement and care responsibility but who have runaway or whose whereabouts are unknown at the time that the title IV–E agency receives placement and care responsibility for the child.

Comment: Other commenters, including national advocacy/public interest groups and a private citizen, offered several suggestions, including: Adding data that addresses whether the child was consulted or participated in developing the permanency plan; about the visitation and services the agency provided during visits for children with a permanency plan of reunification; and adding a permanency plan response option for ''waiting for adoption.'' One commenter questioned the usefulness of this data at a federal level.

Response: We reviewed these suggestions, however we did not make changes in response to the commenter's suggestions This level of detail and specific case level information go beyond designating a child's permanency plan and are not needed at the federal level to meet the requirements of section 479(c)(3) of the Act. Additionally, we currently collect the child's most recent case plan goal in AFCARS.

Section 1355.44(f)(3) and (4) Periodic Review and Permanency Hearing Dates

In paragraphs (f)(3) and (4), the title IV–E agency must report the date of each periodic review and the date of each permanency hearing (per section 475(5)(C) of the Act). We did not receive substantive comments on these data elements and have retained them as proposed in the 2015 NPRM.

Section 1355.44(f)(5) Juvenile Justice

In paragraph (f)(5), we require the title IV–E agency to report whether a juvenile judge or court found the child to be a status offender or adjudicated delinquent during the report period.

Comment: Four states expressed concerns with our proposal for agencies to report specifically whether the court identified the child to be an ''adjudicated delinquent'' or a ''status offender.'' They cited concerns about training workers to ensure data quality and difficulty in distinguishing the proposed response option ''adjudicated delinquent'' from ''status offender.'' One organization representing state child welfare agencies suggested that agencies simply report whether or not the court found a child to be either a status offender or an adjudicated delinquent because distinguishing between the two is not necessary and will vary by and within jurisdictions.

Response: We were persuaded by the commenters who said we did not need to distinguish the specific type of juvenile justice involvement for each child. As such, we revised the data element to require title IV–E agencies to report yes/no whether or not a court found the child to be a status offender or adjudicated delinquent, no longer requiring the agency to distinguish between the two.

Section 1355.44(f)(6) and (7) Caseworker Visit Dates and Location

In paragraphs (f)(6) and (f)(7), we require the title IV–E agency to report information on visits between the child's caseworker and the child. In paragraph (f)(6), we require the title IV–E agency to report the date of each in-person, face-to-face visit between the caseworker and the child. In paragraph (f)(7), we require the title IV–E agency to report the location of each in-person visit between the caseworker and the child.

Comment: A state asked if this data element pertains to visits during the reporting period, the removal episode, or the child's lifetime involvement with child welfare services.

Response: We'd like to clarify that the title IV–E agency must collect and report the date and other required information for each in-person, face-to-face caseworker visit during each six month report period. Therefore, if the worker visits the child in-person, face-to-face each month during the six month report period, the agency will report the six dates and locations of the visits.

Comment: One commenter questioned why we require the agency to report caseworker visit information for every case worker visit to a child.

Response: We require agencies to collect and report the date and location of each in-person, face-to-face caseworker visit to meet the requirements in section 424(f) of the Act, which requires that 90 percent of children in foster care are visited on a monthly basis by their workers, and that the majority of the visits occur in the residence of the child.

Comment: Several commenters recommended that we require agencies to also report: What went on during the caseworker visit; the types of services provided by the caseworker during the visit; and whether coaching or mental health treatment was provided during the visit. One commenter suggested that we also collect information on a child's visits with biological parents.

Response: We are retaining the requirements for the title IV–E agency to report the date and location of each in-person, face-to-face caseworker visits to meet the statutory requirements in section 424(f) of the Act. Therefore, we did not make any additional changes to include the suggested information as we do not have a specific use for it and will not require the agency to collect information not required by the law.

Section 1355.44(f)(8) and (f)(9) Transition Plans

In paragraph (f)(8), we require the title IV–E agency to report whether the child has a transition plan that meets the requirements of section 475(5)(H) of the Act. If the child has a transition plan, the title IV–E agency must report the plan date in paragraph (f)(9).

Comment: A national organization representing state child welfare agencies and states objected to reporting the content of the transition plan. They indicated that while the existence of the plan and its timing is knowable, reporting the provisions contained in the transition plan is unnecessary because the quality and relevance of a transition plan cannot be determined quantitatively. Other national advocacy/public interest groups supported collecting data we proposed on transition plans.

Response: We were persuaded by the comments and removed the data element.

Commenters: One state asked whether agencies must report transition plans that are developed before the 90-day period before the youth turns age 18 (or greater age).

Response: Yes, agencies must report a transition plan developed before the 90-day period. We amended the regulation text to make it clear that agencies should report all plans developed in

response to the statute, even if it is before the 90 day period.

Commenters: An organization representing tribal interests suggested that we collect information about whether Indian children have information on and access to tribal specific resources and services for youth and young adults.

Response: While there is not requirement for transition plans to be this detailed, agencies should be responsive to the individualized needs of a specific Indian child.

Section 1355.44(f)(10) Active Efforts

In paragraph (f)(10), if a state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), we require the state title IV–E agency to indicate whether the active efforts in each paragraph (f)(10)(i) through (f)(10)(xiii) ''applies'' or ''does not apply.'' The state title IV–E agency must indicate all of the active efforts that apply once the child enters the AFCARS out-of-home care reporting population per section 1355.42(a) through the child's exit per paragraph (g)(1) of this section and the active efforts made to prevent removal prior to the child entering the out-of-home care reporting population. This is similar to paragraph (i)(13) as proposed in the 2016 SNPRM, however, we updated the language consistent with BIA's regulation at 25 CFR 23.2.

Comment: Many commenters suggested that the response options be updated consistent with BIA's Guidelines and BIA's regulations at 25 CFR 23.2 and several commenters suggested allowing state title IV–E agencies to incorporate active efforts as defined under state law.

Response: We agree and revised the final rule to be consistent with the BIA regulations at 25 CFR 23.2, which contains the regulatory definition of active efforts. Section 1355.41(c) specifies that terms in ICWA for specified data elements mean the same as in ICWA at 25 U.S.C. 1903 and 25 CFR 23.2. As such, the state title IV–E agency must report if any of the active efforts listed in paragraphs (f)(10)(i) through (f)(10)(xiii) were provided prior to and during the child's stay in out-of-home care. The state title IV–E agency may report active efforts as defined under state law under the response option of ''other active efforts tailored to the facts and circumstances of the case'', as appropriate.

Comment: Tribes and organizations representing tribal interests commented that data on active efforts is important to report to AFCARS because it impacts the individual child's case and is a key protection provided in ICWA. However, several commenters and the national organization representing state child welfare agencies do not support requiring the state title IV–E agency to report information on active efforts as it was proposed in the 2016 SNPRM. They recommended removing the data element because state title IV–E agencies already mirror the best practices that strengthen and ensure the safety of families by limiting the need to remove children from their homes and separating from parents, guardians or caregivers for early outreach and engagement to provide support and services for families before a removal is warranted. Several commenters believe that collecting information on the specific active efforts that were provided is more appropriate for a case review than for AFCARS data collection because these responses do not get to the quality of those efforts. Several commenters expressed concerns with the functionality of this data element for national reporting. One commenter expressed an issue with an absence of court orders expressly describing the active efforts and therefore state title IV–E agencies will not be able to accurately report this information.

Response: We are not persuaded by these comments to revise the final rule because the ''active efforts'' requirement is a vital part of ICWA's requirements. The preamble to the BIA's final regulation at 25 CFR 23.2 details at length the reasons for and benefits of active efforts including that ICWA's active efforts requirement continues to provide a critical protection against the removal and TPR of an Indian child from a fit and loving parent by ensuring that parents who are or may readily become fit parents are provided with service necessary to retain or regain custody of their child. Data about the frequency with which each active effort type is made will help develop policy, resources, and technical assistance to support states to employ a range of efforts that can meet the needs of Indian children in out-of-home care. Lastly, we revised the data element language to reflect BIA's regulation at 23.2 and 23.120(a).

Comment: One commenter requested clarification on whether the response options are based on the court identifying that the state title IV–E agency did one or more of the active efforts listed or whether it is the state title IV–E agency making a determination as to which active efforts were made.

Response: The state must report the active efforts which the state title IV–E agency made throughout the child's stay in out-of-home care, which may or may not be documented in a court order.

Comment: Commenters requested clarification on the terminology used in the active efforts examples, such as what ACF considers to be part of an ''extended family,'' how ACF defines the ''most natural setting safely possible,'' and how ''regular visits'' and ''trial home visits'' differs from regular caseworker contacts.

Response: The list of active efforts in paragraphs (f)(10)(i) through (f)(10)(xiii) are examples of active efforts drawn from BIA's definition of ''active efforts'' in 25 CFR 23.2. The BIA does not define the terms used in the examples and therefore, we will not define the terminology further. Consistent with BIA's regulation at 25 CFR 23.2, to the extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions of the Indian child's tribe, and in partnership with the child, parents, extended family, and tribe.

Comment: A commenter recommended adding data elements to capture whether the state title IV–E agency conducted or caused to be conducted a diligent search for the Indian child's extended family members for assistance and possible placement, and if no extended family members are identified, whether the state title IV–E agency conducted a diligent search for other ICWA-compliant placement options.

Response: We did not make changes to the response options based on this comment because we wanted to be consistent with the BIA's regulation and examples of ''active efforts'' in 25 CFR 23.2. However, we added ''extended family'' to paragraph (f)(10)(v) to match the addition of this in paragraph (b).

Comment: One commenter suggested that if siblings are not kept together, that the state title IV–E agency must report why the siblings were separated. The commenter stated that collecting this information would strengthen the data and create new opportunities to address the needs of Indian children in out-of-home care. Two commenters suggest that because we proposed in the 2015 NPRM data elements related to siblings for all children in the out-of-home care reporting population, this data element should be removed. The commenter stated that keeping siblings together captures a goal that agencies attempt to achieve for all families.

Response: Although information about siblings is collected elsewhere in the final rule for all children in the out-of-home care reporting population, we did not make changes to the response options in paragraph (f)(10) based on

this comment because this data element is consistent with BIA's regulation at 25 CFR 23.2.

In the 2016 SNPRM, we proposed that title IV–E agencies report the date active efforts began in paragraph (i)(11), however after reviewing the comments we removed this proposed data element.

Comment: The national organization representing state child welfare agencies recommended that ACF remove this data element because state agencies follow practice standards for early outreach and engagement to provide support and services for families before a removal is warranted. In addition, the organization recommended overall that we remove data elements that may be unreliable, potentially invalid, and that place unnecessary burdens. We also received a state comment requesting clarification and another state noted they did not currently collect this information.

Response: We agree with the suggestion to remove the date active efforts began and revised the final rule accordingly. The BIA's regulation at 23.107 specifies that ICWA applies when it is known or there is reason to know a child is an Indian child as defined in ICWA and that treatment as an Indian child continues until it is determined on the court record that the child does not meet the definition of an Indian child in ICWA.

Section 1355.44(g) General Exit Information

In paragraph (g), we require that the title IV–E agency must report when and why a child exits the out-of-home care reporting population.

Section 1355.44(g)(1) Date of Exit

In paragraph (g)(1), we require the title IV–E agency to report the date for each of the child's exits from out-of-home care, if applicable. We did not receive relevant comments on this data element and retained the 2015 NPRM proposed rule language.

Section 1355.44(g)(2) Exit Transaction Date

In paragraph (g)(2), we require the title IV–E agency to report the transaction date for each exit date reported in paragraph (g)(1). The transaction date is a non-modifiable, computer-generated date which accurately indicates the month, day and year each response to paragraph (g)(1) was entered into the information system. We did not receive relevant comments on this data element and have retained the 2015 NPRM proposed rule language.

Section 1355.44(g)(3) and (4) Exit Reason and Transfer to Another Agency

In paragraphs (g)(3) and (4), we require the title IV–E agency to report the reason for each of the child's exit(s) from out-of-home care, and if the exit reason is ''transfer to another agency,'' the agency type.

Comment: We received several suggestions to modify the exit reason response options to: Identify the manner of a child's death; change how a child who exits foster care for jail or prison is reported; add exit reasons to identify when a youth becomes ineligible for extended foster care; and when a youth voluntarily leaves extended foster care. A few states disagreed with some of our proposed response options for exit reason.

Response: We made a minor change to remove the response option ''other'' proposed in the 2015 NPRM because based on our experience, we believe that the response options adequately reflect the reasons why children exit out-of-home care and we do not need a response option of ''other.'' We do not need to revise or add other reasons because these exit reasons are designed to capture information about when and where a child exits out-of-home care, and are not intended to identify other specifics about the child's exit.

Comment: For the response option ''transfer to another agency'' in paragraph (g)(3), a commenter asked for clarification about the phrase ''but not if the transfer is to a public agency, Indian Tribe, Tribal organization or consortium that has an agreement with a title IV–E agency under section 472(a)(2)(B) of the Act.''

Response: We recognized that this language as proposed in the 2015 NPRM can be confusing because of variation in title IV–E agency policies and procedures for transfers and title IV–E agreements. Therefore, we revised the response option ''transfer to another agency'' in the regulation to be less specific than we proposed in the 2015 NPRM to read as follows: Indicate ''transfer to another agency'' if placement and care responsibility for the child was transferred to another agency, either within or outside of the reporting state or tribal service area. This revision will permit ACF to provide targeted technical assistance for case specific circumstances.

Section 1355.44(h) Exit to Adoption and Guardianship Information

In paragraph (h), we require that the title IV–E agency report information on the child's exit from out-of-home care to a finalized adoption or legal guardianship.

Comment: Several national advocacy/public interest groups recommended that we add the following elements: ''sex assigned at birth of adoptive parent(s) or legal guardian(s),'' ''gender identity of adoptive parent(s) or legal guardian(s),'' ''sex of adoptive parents/legal guardians,'' and ''sexual orientation of adoptive parent(s) or legal guardian(s).''

Response: In response to these suggestions, we removed the response options ''single female'' and ''single male'' and replaced them with ''single adult.'' We added new data elements on the gender of the adoptive parent(s) or legal guardian(s) with the other demographic information on adoptive parents and legal guardians. This will provide the gender of each adoptive parent or legal guardian separately from their marital status. The new data elements are in paragraphs (h)(7) for the first adoptive parent or legal guardian and (h)(13) for the second adoptive parent or legal guardian. These revisions are similar to revisions we made in response to comments regarding foster parent demographic information in paragraph (e).

Section 1355.44(h)(1) Marital Status of the Adoptive Parent(s) or Guardian(s)

In paragraph 1355.43(h)(1), the title IV–E agency must report the marital status of the adoptive parent(s) or legal guardian(s).

Comment: We received several recommendations to revise the marital status response options, as well as a recommendation to remove this data element stating that there is no need for this level of detail at the national level. The commenters recommended revisions to the marital status response options here and the foster parent marital status response options in paragraph (e) or to include other response options, such as ''separated'' and ''married, but adopting individually.''

Response: We examined the suggestions and modified the marital status response options. We added the response options of ''separated'' and ''married, but adopting or obtaining legal guardianship individually.'' Since we added the response option ''married, but adopting or obtaining legal guardianship individually,'' we no longer need, and removed for the final rule, the instruction we included in the 2015 NPRM that instructed title IV–E agencies to ''complete this data element even if only one person of the married or common law married couple is the adoptive parent or legal guardian of the child.''

Section 1355.44(h)(2) Child's Relationship to the Adoptive Parent(s) or Guardian(s)

In paragraph (h)(2), we require the title IV–E agency to report the relationship(s) between the child and his or her adoptive parent(s) or legal guardian(s) from eight options: Paternal grandparent(s), maternal grandparent(s), other paternal relative(s), other maternal relative(s), sibling(s), kin, non-relative(s), and foster parent(s).

Comment: Several commenters supported the inclusion of ''kin'' as a response option for this data element, but asked for clarification on the definition. Another commenter suggested that we not include ''kin'' as an option because it is confusing, overlaps with ''non-relative'' and is a colloquial term with varied meanings. Commenters stated that many agencies define ''kin'' to include relatives by blood, marriage or adoption, in addition to what is frequently referred to as ''fictive kin'' and this could lead to worker confusion about when to indicate the response option ''kin'' verse the other response options for relatives. Commenters made similar comments for the data elements *Foster family home type* in paragraph (e)(3) and *Child's relationships to the foster parent(s)* in paragraph (e)(13).

Response: We agree with the suggestion to modify the definition of ''kin'' so it now specifies that the child is not related to the adoptive parent or legal guardian by a ''biological, legal or marital connection.'' The revised definition reads: ''The adoptive parent(s) or legal guardian(s) has a kin relationship with the child, as defined by the title IV–E agency, such as one where there is a psychological, cultural or emotional relationship between the child or the child's family and the adoptive parent(s) or legal guardian(s) and there is not a legal, biological, or marital connection between the child and foster parent.'' We also made a similar modification to the definition of ''kin foster family home'' in the data element *Foster family home type* in paragraph (e)(3) and *Child's relationships to the foster parent(s)* in paragraph (e)(13).

Section 1355.44(h)(3) and (h)(9) Date of Birth of Adoptive Parent(s) or Guardian(s)

In paragraphs (h)(3) and (h)(9), we require the title IV–E agency to report each adoptive parent or legal guardian's birthdate. We received no comments on these data elements and have retained the language as proposed in the 2015 NPRM.

Section 1355.44(h)(4) and (h)(10) Adoptive Parent(s) Tribal Membership

In paragraphs (h)(4) and (h)(10), we require the title IV–E agency to report whether the adoptive parent(s) or legal guardian is a member of an Indian tribe. These are data elements not previously proposed in the 2015 NPRM or 2016 SNPRM. Additionally, we are collecting the same information in paragraph (e) regarding foster parents. It was clear as we analyzed the comments to the 2016 SNPRM that including data elements that inquire about the tribal membership of the adoptive parent(s) or legal guardian is information that is in line with our goals to expand the information we collect on adoptive parents and guardians of children who exit out-of-home care to adoption or legal guardianship. We believe that this information will provide more insight on meeting the requirements to meet placement preferences under ICWA and will inform recruitment of providers that meet the needs of AI/AN children who exit out-of-home care to adoption or legal guardianship.

Section 1355.44(h)(5) and (h)(11) Race of Adoptive Parent(s) or Guardian(s)

In paragraphs (h)(5)(i) through (h)(5)(vii) and (h)(11)(i) through (h)(11)(vii), we require the title IV–E agency to report the race of each adoptive parent or legal guardian.

Comment: Groups representing tribal interests recommended that we include whether the adoptive parent/legal guardian has origins in any of the original peoples of North and South America and if so whether the adoptive or guardian parent a member of a federally recognized Indian tribe and the name of the tribe, and if the child maintains tribal affiliation and community attachment.

Response: The response options for race are consistent with the OMB Revised Standards for the Classification of Federal Data on Race and Ethnicity, and therefore, we are unable to make a change. These definitions can be found at: *http://www.whitehouse.gov/omb/inforeg/re_guidance2000update.pdf.* While we did not revise this data element, we require at paragraphs 1355.44(h)(4) and (h)(10) that title IV–E agencies report whether the adoptive parent(s) or legal guardian is a member of an Indian tribe in paragraphs (h)(4) and (h)(10).

Section 1355.44(h)(6) and (h)(12) Hispanic or Latino Ethnicity of Birth of Adoptive Parent(s) or Guardian(s)

In paragraphs (h)(6) and (h)(12), we require the title IV–E agency to report the Hispanic or Latino ethnicity of each adoptive parent or legal guardian. We received no comments on these data elements.

Section 1355.44(h)(7) and (h)(13) Gender of Adoptive Parent(s) or Guardian(s), and (h)(8) and (h)(14) Adoptive Parent(s) or Guardian(s), Sexual Orientation

In paragraphs (h)(7) and (h)(13), we require the title IV–E agency to indicate whether each adoptive parent(s) or legal guardian(s) self identifies as ''male'' or ''female.''

In paragraph (h)(8) and (h)(14), we require that the title IV–E agency report whether the adoptive parent(s) or legal guardian(s) self identifies as ''straight or heterosexual,'' ''gay or lesbian,'' ''bisexual,'' ''don't know,'' ''something else,'' or ''declined'' if the second adoptive parent(s) or legal guardian(s) declined to identify his/her status.

Comment: Although we requested input on whether to require title IV–E agencies to collect LGBTQ-related data in AFCARS for youth, we received comments from state title IV–E agencies, national advocacy/public interest groups and other organizations specifically commented on collecting whether a caretaker identifies as LGBTQ. Those that supported collecting LGBTQ-related data on adoptive parents or legal guardians were primarily advocacy organizations representing LGBTQ interests and generally noted that the LGBTQ community remains an untapped resource for finding permanent families for children and youth in foster care. They stated that some of these prospective parents face barriers when they attempt to adopt or obtain legal guardianship because they identify as LGBTQ. They further commented that including this information in AFCARS will promote routine discussions between prospective adoptive parents or legal guardians and title IV–E agencies, normalize conversations around sexual orientation, and signal increased acceptance of LGBTQ caretakers. State title IV–E agencies expressed some of the same concerns with collecting LGBTQ-related data on adoptive parents or legal guardians as they did for children in foster care: Privacy concerns and implications of having this information in a government record; concerns that the data may be used in a discriminatory way; and they expressed the importance of proper staff training for data elements on sexual orientation.

Response: We were persuaded by the commenters and we include data elements in AFCARS on an adoptive

parent's or legal guardian's self-reported gender and sexual orientation. We anticipate that these data elements will assist title IV–E agencies in recruiting, training, and retaining an increased pool of providers who can meet the needs of children who exit out-of-home care to adoption or legal guardianship. We specifically added a decline response option to respond to the privacy issues raised by commenters. Additionally, for the same reasons, we made corresponding changes in paragraph (e) related to the foster parent(s). As previously stated, information on sexual orientation should be obtained and maintained in a manner that reflects respectful treatment, sensitivity, and confidentiality. Several state and county agencies, advocacy organizations and human rights organizations have developed guidance and recommended practices for how to promote these conditions in serving LGBTQ youth in adoption, foster care and out-of-home placement settings. ACF provides state and tribal resources for Working With LGBTQ Youth and Families at the Child Welfare Information Gateway. The following links are provided as general examples of such guidance (Minnesota and California examples). ACF will provide technical assistance to agencies on collecting this information. We also made a minor change in reporting the adoptive parents' or legal guardians' gender, in that we require the title IV–E agency to indicate whether each self identifies as ''male'' or ''female'' and made the same change for foster parent(s) in paragraph (e).

Section 1355.44(h)(15) and (16) Inter/Intrajurisdictional Adoption or Guardianship

In paragraphs (h)(15) through (h)(16), we require the title IV–E agency to report information on the jurisdiction where the child was placed for the adoption or legal guardianship.

Comment: One commenter indicated that collecting information on private or international adoptions will impose additional workload on staff and will require policy, training, and information system changes.

Response: We do not expect that reporting these data elements would require additional work or training for the title IV–E agency since they apply only to children who are under the placement and care responsibility of the title IV–E agency when they exit foster care to adoption or guardianship. The title IV–E agency would have been reporting the children while in foster care, and thus would know where they placed these children, and whether it is in another country or by a private agency through an arrangement with the title IV–E agency. As we stated in the 2015 NPRM, similar information on adoptions is already collected in the current AFCARS.

Comment: A commenter was concerned that interjurisdictional and intrajurisdictional are too much alike and will continually be confused.

Response: We believe the regulation is clear. The response options for reporting where a child is placed for adoption or guardianship within the U.S. are limited to placements within or outside of the title IV–E agency's jurisdiction. We can provide technical assistance during implementation to agencies that need it.

Section 1355.44(h)(17) Adoption or Guardianship Placing Agency

In paragraph (h)(17), we require the title IV–E agency to report the agency that placed the child for adoption or legal guardianship. We received no comments on this data element and have retained the language proposed in the 2015 NPRM.

Section 1355.44(h)(18) Assistance Agreement Type

In paragraph (h)(18), we require the title IV–E agency to report the type of assistance agreement that the child has from five response options: Title IV–E adoption assistance agreement; State/tribal adoption assistance agreement; Adoption-Title IV–E agreement non-recurring expenses only; Adoption-Title IV–E agreement Medicaid only; Title IV–E guardianship assistance agreement; State/tribal guardianship assistance agreement; or no agreement. We originally proposed to collect information about whether a child was receiving a title IV–E adoption or guardianship assistance subsidy in a separate data file, which we explained in the preamble discussion for section 1355.45 that we removed for the final rule. Since we are still interested in knowing how a child is supported when he or she exits to adoption or guardianship, we now collect information on title IV–E assistance agreements and non-title IV–E assistance agreements in the out-of-home care data file. We also have a response option for ''no agreement'' if a child exits out-of-home care to adoption or guardianship without an assistance agreement. We did not receive comments on this data element as proposed in the 2015 NPRM as section 1355.44(c)(1).

Section 1355.44(h)(19) Siblings in Adoptive or Guardianship Home

In paragraph (h)(19), we require title IV–E agencies to report the number of siblings of the child who are in the same adoptive or guardianship home as the child.

Comment: We received several comments to our 2015 NPRM proposal to collect information on siblings, which we also discussed in paragraph (b). In general, several states and a national organization representing state child welfare agencies agreed that the issue of sibling placement is important at the practice level when planning for children, but is better captured as a qualitative data set. Commenters noted it may not be possible for the caseworker to know whether the child has siblings and if so how many because agencies encounter multiple overlapping sibling groups, uncertain parentage, and mixed biological, legal, and stepparent relationships. They had concerns and questions about the 2015 NPRM proposal on siblings (which were in the sections 1355.43(e) and 1355.44 of the 2015 NPRM) including the definition of siblings, reporting sibling record numbers, and the reliability and consistency of the data. Specifically related to siblings placed together in adoption or guardianship, commenters had questions about whether and when to report the child record number for a sibling who exited to adoption or legal guardianship and one state commented that sibling information is not carried into TPR and adoption cases and so the agency would not be able to report if a child in out-of-home care is placed in the same setting as a sibling who is adopted. One commenter suggested that we simplify the reporting and require agencies to report if siblings who exited foster care were placed together in the same adoptive or guardianship home.

Response: We carefully reviewed the comments and suggestions and while we understand the concerns raised, we determined that it is important to continue to require title IV–E agencies to report information about siblings. As we noted in the preamble to the 2015 NPRM, section 471(a)(31)(A) of the Act requires title IV–E agencies to make reasonable efforts to place siblings removed from their home in the same foster care, kinship guardianship, or adoptive placement, unless such a placement is contrary to the safety or well-being of any of the siblings. However, we acknowledge that there are many issues that make collecting data on siblings difficult and we were persuaded to revise the sibling data elements to address commenter concerns and simplify reporting. Therefore, we revised the regulation to require the agency to report the number of the child's siblings who are in the same adoptive or guardianship home as

the child. We believe that this data element, along with the data elements in paragraph (b) related to siblings placed together in out-of-home care, are less complicated than the 2015 NPRM proposal and will yield useful information about siblings.

Section 1355.44(h)(20) Available ICWA Adoptive Placements

In paragraph (h)(20), if a state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), we require that the state title IV–E agency to indicate which adoptive placements from a list of four were willing to accept placement of the Indian child. This is the same as paragraph (i)(26) proposed in the 2016 SNPRM.

Comment: A few state and tribal commenters recommend this data element be removed. One state believes that while it is 'nice to know' which placements are 'willing', the more salient questions are whether the preferences were followed in regard to the child's adoption and, if not, why not. Another commenter is concerned the language seems to leave the answer open to a very subjective interpretation of ''were available/willing to accept placement'' and answering ''yes'' or ''no'' does not document diligent or active efforts to ensure the child is adopted by an ICWA compliant placement. That commenter suggests replacing it with which ICWA placement preferences were pursued to accept a placement for adoption. One tribal commenter expressed concern about asking which ICWA placement preferences were willing to accept placement because if there are not enough willing Indian foster and adoptive homes, it may appear that tribes are disinterested in providing homes for Indian children.

Response: We were not persuaded to remove the data element indicating the availability of adoptive placements that meet ICWA's placement preferences. The availability of adoptive placements that meet ICWA's preferences is critical for meeting the purposes of ICWA. This information is essential for ACF to determine whether resources are needed for recruitment to increase the availability of AI/AN homes that can meet ICWA's placement preferences for adoption. Under the BIA's regulation at 25 CFR 23.130, whether a home is available is not a subjective state title IV–E agency determination but rather is evidence offered by the state title IV–E agency to the court that there is good cause to deviate from ICWA's placement preferences in a particular case where there is also evidence that the state title IV–E agency conducted a diligent search to identify a placement that meets the preferences (25 CFR 23.130).

Section 1355.44(h)(21) Adoption Placement Preferences Under ICWA

In paragraph (h)(21), if a state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), we require the state title IV–E agency indicate whether each placement reported in paragraph (h)(1) meets the placement preferences of ICWA in 25 U.S.C. 1915(a) by indicating with whom the Indian child is placed from a list of five response options. This is similar to paragraph (i)(27) as proposed in the 2016 SNPRM, except that we changed the response option ''none'' to ''placement does not meet ICWA placement preferences.''

Comment: One commenter recommends adding a data element to collect information on whether the tribe supported the placement and adoption of the child.

Response: We are not making a change as a result of this comment. Rather, we are retaining the data elements as proposed to require that the state title IV–E agency report certain information on adoptive placement preferences, which are requirements in ICWA at 25 U.S.C. 1915(a), if the Indian child exited foster care to adoption. Collecting information on whether the tribe supported the placement and adoption of the child is not required by ICWA at 25 U.S.C. 1915(a).

Section 1355.44(h)(22) Good Cause Under ICWA

In paragraph (h)(22), if a state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), we require that if the state title IV–E agency indicated ''placement does not meet ICWA placement preferences'' in paragraph (h)(21), the state title IV–E agency indicate whether the court determined by clear and convincing evidence, on the record or in writing, a good cause to depart from the ICWA placement preferences (25 U.S.C. 1915(a)) or to depart from the placement preferences of the Indian child's tribe (25 U.S.C. 1915(c)). This is similar to paragraph (i)(28) as proposed in the 2016 SNPRM, except that we updated the language consistent with 25 CFR 23.132.

Comment: The national organization representing state child welfare agencies recommended removing this data element, or alternatively, modifying this data element to read ''indicate whether there is a court order that indicates the court's basis for the finding of good cause.''

Response: We are not persuaded to remove this data element for the reasons we set forth in the preamble to the 2016 SNPRM. However, the final rule does not include a requirement for the state to report only if the determination was made in a court order. We revised the data element to be consistent with the BIA's regulations at 25 CFR 23.132(c). Now, states are to indicate whether the court determined by clear and convincing evidence on the record or in writing, a good cause to depart from the ICWA placement preferences under 25 U.S.C. 1915(a) or to depart from the placement preferences of the Indian child's tribe under 25 U.S.C. 1915(c). This provides states with multiple options for obtaining the information.

Section 1355.44(h)(23) Basis for Good Cause

In paragraph (h)(23), if a state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), and the state title IV–E agency indicated ''placement does not meet ICWA placement preferences'' in paragraph (h)(22), we require that the state title IV–E agency indicate the state court's basis for the determination of good cause to depart from ICWA placement preferences, from a list of five response options. This is similar to paragraph (i)(29) as proposed in the 2016 SNPRM except that we updated the language consistent with 25 CFR 23.132; removed the response option ''other''; and added a response option ''The presence of a sibling attachment that can be maintained only through a particular placement.''

Comment: The national organization representing state child welfare agencies recommends removing the courts basis for the finding of good cause so that states can focus on the one essential data file element to understand how many Indian children exited the child welfare system to a permanent adoption placement. Another commenter requested clarification regarding what an ''other'' good cause might be, and recommended that if ''other'' is selected, the worker must enter into a narrative field explanation of the court's finding.

Response: We were not persuaded to remove the data element indicating the reasons for good cause not to place according to ICWA placement preferences. As we indicated in the preamble to the 2016 SNPRM, reporting information on good cause will help agencies better understand why the ICWA placement preferences are not followed. In addition, such information will aid in targeting training and resources needed to assist states in improving Indian child outcomes.

However, we integrated the ICWA-related data elements into other sections of the final rule, thereby moving the data elements on adoption placement preferences proposed in the 2016 SNPRM in paragraph (i) to paragraph (h) and modified the list of reasons for the state court's basis for the determination of good cause to depart from ICWA placement preferences in ICWA to be consistent with 25 CFR 23.132(c) of the BIA regulations. The possible reasons no longer include the option of ''other'' and now include the following options: Request of one or both of the child's parents; request of the Indian child; the unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the placement preferences in ICWA at 25 U.S.C. 1915(a) but none has been located; the extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live; and the presence of a sibling attachment that can be maintained only through a particular placement.

Section 1355.45 Adoption and Guardianship Assistance Data File Elements

In this section, we require the title IV–E agency to report: (1) Information on the title IV–E agency submitting the adoption and guardianship assistance data file and the report date; (2) basic demographic information on each child, including the child's date of birth, gender, race and ethnicity; (3) information in the child's title IV–E adoption or guardianship agreement, including the date of adoption or guardianship finalization, and amount of subsidy, and 4) information about the agreement termination date, if applicable.

We retained many of the data elements proposed in the 2015 NPRM, but modified section 1355.45 of the final rule to remove the proposal to collect information regarding: Whether a child is born in the U.S., non-recurring costs, inter/intra-jurisdictional adoption or guardianship, inter-jurisdictional adoption or guardianship jurisdiction, adoption or guardianship placing agency information, and sibling information. These response options ensure that title IV–E agencies report only the essential core set of data elements that we describe below.

Section 1355.45(a) General Information

In paragraph (a), we require that the title IV–E agency report information about the title IV–E agency, report date and child record number.

Section 1355.45(a)(1) Title IV–E Agency

In paragraph (a)(1), we require that the title IV–E agency indicate the title IV–E agency responsible for submitting AFCARS data to ACF. We received no comments on this element.

Section 1355.45(a)(2) Report Date

In paragraph (a)(2), we require that a title IV–E agency indicate the current report period. We received no comments on this element.

Section 1355.45(a)(3) Child Record Number

In paragraph (a)(3), we require that the title IV–E agency report the child's record number. We received no relevant comments on this element.

Section 1355.45(b) Child Demographics

In paragraph (b), we require that the title IV–E agency report information on the child's date of birth, gender, race and ethnicity.

Section 1355.45(b)(1) Child's Date of Birth

In paragraph (b)(1), we require the agency to report the child's birthdate. This data element will be used with paragraph (d) to determine whether the child is in either the ''pre-adolescent child adoption'' or ''older child adoption'' category. We received no comments on this element.

Section 1355.45(b)(2) Child's Gender

In paragraph (b)(2) we require the title IV–E agency to indicate whether the child is ''male'' or ''female'' as appropriate.

Comment: One state commented that all gender fields should include additional response option(s) to capture transgender, gender fluid, and other non-binary individuals.

Response: We revised the name of the data elements in sections 1355.44(e) and (h) to require title IV–E agencies to report the gender of the foster parent(s), adoptive parent(s), and legal guardian(s).

Section 1355.45(b)(3) Child's Race

In paragraph (b)(3), we require the title IV–E agency to indicate a child's race as determined by the child or the child's parent(s) or legal guardians from a list categories described in paragraphs (b)(3)(i) through (b)(3)(viii) of this section.

Comment: One group recommended asking about membership in a federally-recognized tribe. One commenter suggested that regional standards and practices should be documented regarding Latinos that show over-representation and outcome disparities, stating that without specific efforts to collect data related to Indian, African American and Latino families, the information will continually be left out of scrutiny and interpretation of data will lack the substance necessary to identify successful efforts and areas that are lacking.

Response: The language used reflects the OMB Revised Standards for the Classification of Federal Data on Race and Ethnicity, standardizing federal data collection. We agree that requiring state title IV–E agencies to collect and report data that could identify a child as an Indian child as defined in ICWA is of paramount importance. Therefore, while we did not revise this data element, we require additional information on the child's tribal membership or eligibility for tribal membership in the out-of-home care population.

Section 1355.45(b)(4) Hispanic or Latino Ethnicity

In paragraph (b)(4), we require the title IV–E agency to indicate a child's ethnicity as determined by the child or the child's parent(s) or legal guardian(s). We received no comments on this element.

In paragraph (c) we require that the title IV–E agency report information on the type of assistance agreement, and the subsidy amount.

Comment: Several national organizations recommended that we require title IV–E agencies to report additional data elements including: when a successor adopter or guardian has been named in the agreement for Adoption Assistance or guardianship assistance, whether the successor became the adoptive parent or guardian, whether the caretaker has been informed of federal and/or state post-permanency services available outside of the adoption assistance or guardianship assistance funds subsidy and/or Medicaid specific benefits. Commenters recommend these additional data elements because they believe the data can provide more information about what work is needed to ensure successors are named in the agreements whenever possible, and to prevent unnecessary re-entry into foster care.

Response: We considered these suggestions, but did not make changes in response. States information systems differ and include information useful for their own internal purposes, but not mandated by AFCARS. We encourage states to consider collecting data that

helps states identify how to ensure successors are named in the agreements whenever possible, and to evaluate how to prevent unnecessary re-entry into foster care, but we do not require that they report those data to AFCARS.

Section 1355.45(c)(1) Assistance Agreement Type

In paragraph (c)(1) we require the title IV–E agency to report whether the child is or was in a finalized adoption with a title IV–E adoption assistance agreement or in a legal guardianship with a title IV–E guardianship assistance agreement, pursuant to sections 473(a) and 473(d) of the Act, in effect during the report period.

Comment: One state requested clarification regarding why title IV–E agencies must report information on only those children that have a title IV–E agreement. The state expressed concern that this limited information does not present a complete picture of adoptions across the state.

Response: We did not make changes in response to these suggestions. In the 2015 NPRM, we proposed one data element with narrowed response options since we propose to collect information on children under title IV–E adoption and guardianship assistance agreements only, rather than both title IV–E and non-title IV–E agreements. This is in line with our responsibility regarding matters related to children receiving Federal benefits, such as Federal budget projections. We encourage states to consider collecting data that helps states to evaluate and implement state law, but we do not require that they report those data to AFCARS.

Section 1355.45(c)(2) Adoption or Guardianship Subsidy Amount

In paragraph (c)(2), we require the title IV–E agency to report the per diem dollar amount of the financial subsidy paid to the adoptive parent(s) or legal guardian(s) on behalf of the child during the last month of the current report period, if any.

Comment: One national organization commented that children under guardianship of others and adopted children do not have open service cases even when there is a subsidy attached. The financial information for continuation of subsidy is captured by many states in other systems. Reporting on the expanded population would require a significant change in the application and report programs and laws and policies in many states.

Response: We are not persuaded to make a change based on this comment. We currently do not collect data on children receiving ongoing financial assistance after an adoption or guardianship is finalized, though those children typically receive benefits for many years, until age 18 and possibly up to age 21. When AFCARS was originally implemented, such children were a smaller portion of the caseload and program cost. However, in recent years, the adoption assistance caseload alone has grown dramatically, and now represents approximately 70 percent of title IV–E beneficiaries. As we explained in the 2015 NPRM, since title IV–E funds are reimbursed for adoption assistance and guardianship assistance costs, this information is essential for conducting budget projections and program planning for both title IV–E adoption assistance and guardianship assistance programs.

Section 1355.45(d) Adoption Finalization or Guardianship Legalization Date

In paragraph (d), we require the title IV–E agency to report the date that the title IV–E adoption was finalized or the guardianship became legalized. This data element will be used with paragraph (b) to determine whether the child is in either the ''pre-adolescent child adoption'' or ''older child adoption'' category. We received no comments on this element.

Section 1355.45(e) Agreement Termination Date

In paragraph (e), we require that if the title IV–E agency terminated the adoption assistance or guardianship assistance agreement or the agreement expired during the reporting period, the title IV–E agency to report the month, day and year that the agreement terminated or expired.

Comment: Several national organizations recommended that the title IV–E agency report the reason why guardianship and adoption agreements are terminated so that agencies can capture more information about dissolutions and identify what additional supports may be needed for the children involved, and recommended that such reasons include: Death of adoptive parent or guardian, incapacitation, dissolution, child reached age of majority, or other. One state requested that we explain the value of collecting Agreement Termination Dates, especially with not collecting why the agreements are closing.

Response: We considered these suggestions, but did not make changes in response to commenters because we determined that at a national level we do not have a use for or need for this level of detail to determine how many agreements exist. We are collecting the end dates for title IV–E adoption and guardianship assistance agreements because combined with the child's date of birth they will allow us to calculate more accurately the number of children served under title IV–E agreements, as well as the incidence of dissolution of adoption and legal guardianships for children supported by the title IV–E programs. States may include such additional data in their data system if it is useful for their own internal purposes, but not mandated by AFCARS.

Section 1355.46 Compliance

In section 1355.46, we specify the type of assessments we will conduct to determine the accuracy of a title IV–E agency's data, the data that is subject to these assessments, the compliance standards and the manner in which the title IV–E agency initially determined to be out of compliance can correct its data.

Comment: Overall, states that commented believe these compliance standards may negatively affect the status of a state's AFCARS Improvement Plan or SACWIS improvements, and that compliance with the new data requirements may require states to rebuild existing systems or may be incompatible with recent SACWIS improvements.

Response: We recognize that agencies will need to make revisions and improvements to their electronic case management systems for the final rule. We intend to close out all AFCARS Improvement Plans and we will work with title IV–E agencies to meet the final rule requirements. Enhancements to the title IV–E agency's case management system to support the revised data collection requirements may be eligible for title IV–E administrative funds for development costs.

Comment: One commenter pointed out that there appears to be no administrative process for a state to challenge ACF's initial assessment of data noncompliance.

Response: That is correct. Rather, we provide the title IV–E agency with an opportunity to appeal the ''final'' determination of compliance to the HHS Departmental Appeals Board (DAB) after the agency has had an opportunity to submit corrected data and come into compliance. This is covered in section 1355.47(d) ''Appeals.''

Section 1355.46(a) Files Subject to Compliance

In paragraph (a), we specify that ACF will determine whether a title IV–E

agency's AFCARS data are in compliance with section 1355.43 and data file and quality standards described in paragraphs (c) and (d). We specify that ACF will exempt records related to a child in either data file whose 18th birthday occurred in a prior report period and will exempt records relating to a child in the adoption and guardianship assistance data file who is in a title IV–E guardianship from a compliance determination as described in paragraph (e) of this section.

Comment: Several commenters believe that the data and the multiple data file requirements are complex and thus compliance failures and penalties are unavoidable.

Response: We understand the commenters to be concerned that because of the revised data file standards, it will be more difficult for a state to submit compliant data. The standards we set forth are authorized by the law and in line with the requirement that the data submitted to us is reliable and consistent. We established the specific standards for compliance consistent with our current requirements (see Appendix E to part 1355 of current regulations). Furthermore, the statute allows a six-month period for corrective action during which time technical assistance will be available to assist title IV–E agencies in submitting compliant data. The approach is also consistent with the how we implemented the NYTD.

Section 1355.46(b) Errors

In paragraph (b), we outline the definitions of errors in paragraphs (b)(1) through (b)(5) regarding missing data, invalid data, internally inconsistent data, cross-file errors, and tardy transactions. We also provide for how we will identify those errors when we assess information collected in a title IV–E agency's out-of-home care data file (per section 1355.44) and adoption and guardianship assistance data file (per section 1355.45).

Comment: Several commenters requested clarification about what ACF will consider ''errors'' for elements, whether errors would be identified by internal consistency checks within the data file, and whether errors would be identified by review during a later AFCARS or SACWIS audit.

Response: We identify five errors in paragraph (b) that we will assess: Missing data, invalid data, internally inconsistent data, cross-file errors, and tardy transactions. Assessing these errors will help ACF determine if the title IV–E agency's data files meet the data file submission and data quality standards outlined in paragraphs (c) and (d) of this section. ACF will develop and issue error specifications in separate guidance.

Comment: One commenter requested clarification about whether a title IV–E agency will be non-compliant if the data are incomplete or unavailable for the title IV–E kinship guardian assistance program or extension of foster care to age 21 programs.

Response: We'd like to clarify that the regulation text specifies that ACF will exempt records related to a child in either data file whose 18th birthday occurred in a prior report period and will exempt records relating to a child in the adoption and guardianship assistance data file who is in a title IV–E guardianship from a compliance determination as described in paragraph (e) of this section. However, this information is still important to ACF and we plan to ensure that title IV–E agencies submit quality data through such means as program improvement plans, targeted technical assistance, or data quality utilities.

Comment: One commenter stated that it is unreasonable that we are not publishing more detailed information on compliance standards in the regulation. Further, the commenter stated that changing internal consistency and cross-check standards ''as needed,'' results in the compliance target becoming elusive.

Response: We understand the commenter is concerned that we have chosen not to promulgate details on error specifications and checks through notice and comment rulemaking. Instead, we plan to publish these error checks outside of formal rulemaking through official technical bulletins and policy. This provides us the flexibility to update and revise them as needed to keep pace with changing and advancing technology. This is consistent with the approach we have taken with the NYTD compliance checks.

Comment: A national organization representing state child welfare agencies, four states and two other organizations objected to the 30 day transaction date timeframe for paragraphs (d)(2) and (g)(2) stating that it is an insufficient timeframe for entering the removal and exit dates. They recommended that it remain at 60 days as in current AFCARS. They cited the burden of the shorter timeframe, commenting that it is unduly onerous and would be a challenge for local agencies to meet.

Response: We understand the concern; however, we retained our proposal for the 30 day timeframe because ensuring a title IV–E agency's timely entry of removal and exit dates is critical to quality data. Additionally, as is the current practice in AFCARS, these errors are only assessed once. So, if the date was not entered in a timely manner, we will assess the title IV–E agency out of compliance for the report period the event occurred only and we will not re-assess it in the next and future report periods. The penalty, thus, will only be applied to the applicable six-month report period. We have retained paragraphs (b)(1) through (b)(5) as proposed in the 2015 NRPM.

Section 1355.46(c) Data File Standards

In paragraph (c), we set the data file submission standards (timely submission, proper format, and acceptable cross-file) for ACF to determine that the title IV–E agency's AFCARS data is in compliance. In paragraph (c)(1), we require that the title IV–E agency submit AFCARS data within 45 days of the end of each six-month report period. In paragraph (c)(2), we require that a title IV–E agency send us its data files in a format that meets our specifications and submit 100 percent error-free data on limited basic information including title IV–E agency name, report period, the child's demographic information for the out-of-home care data file and the adoption and guardianship assistance data file.

Comment: Four title IV–E agencies do not support the deadline of 30 days after the end of the report period to submit the data file believing it will limit the agency's ability to provide an accurate data file. They stated that they would have less time to ensure that all data is entered, provide direction to the field on any needed data corrections, and test and validate the data file before submitting it to ACF. The commenters recommended staying with the current 45 day submission deadline.

Response: We modified the regulation to allow title IV–E agencies up to 45 days after the end of the report period to transmit the AFCARS data files. However, we wish to emphasize that the purpose of this transmission period is to extract the data and ensure the file is in the proper format for transmission. Agencies should review the information in the system, including information used in AFCARS reporting, on a regular and ongoing basis in accordance with the title IV–B quality assurance system requirements. This is consistent with current practice with AFCARS.

Comment: A handful of commenters were concerned about ACF's data quality requirements of 100 percent compliance with data format standards believing it is unlikely any title IV–E agencies will be able to meet these standards. In addition, there was

confusion by some commenters misunderstanding that we expected 100 percent freedom from ''cross-file'' errors.

Response: We proposed 100 percent compliance for data format standards only for proper format and on certain data elements specified in section 1355.46(c)(2) because the proper format is crucial to the proper transmission and receipt of the data file. The administrative elements (agency, date, etc.) and the basic demographic data elements specified in section 1355.46(c)(2) contain information that is readily available to the title IV–E agency and is essential to our ability to analyze the data and determine whether the title IV–E agency is in compliance with the remaining data standards. The five data elements in the adoption assistance data file are basic administrative data elements and are directly linked to calculating adoption incentive payments under section 473A of the Act. Also, based on our experience with the existing AFCARS and with the NYTD, we have found that problems in these data elements are often the result of minor errors that can be rectified easily. We therefore believe that a 100 percent data format compliance standard for these basic and critical data elements specified in section 1355.46(c)(2) is appropriate. The approach is also consistent with how we implemented the NYTD. We will issue guidance on cross-file compliance during implementation.

Comment: One state suggested that ACF use a method similar to the NCANDS transmission method noting it is much simpler and more direct.

Response: The transmission method for AFCARS is outside the scope of the regulations as we did not regulate the specific method used by AFCARS, only that it must be electronic. However, we should note that the current AFCARS method is in compliance with federal security protocols for the proper submission of data files.

Comment: One commenter believes the data file structure needs to be clarified and the public should have the opportunity to comment. Another commenter asked if ACF will provide technical assistance or support to states that are unable to meet the AFCARS basic file standards.

Response: As we explained in the preamble to section 1355.46(b), we did not regulate the technical requirements for formatting or transmitting the AFCARS data files because of inevitable future advances in technology. Instead, we will issue technical requirements and specifications through official ACF policy and technical bulletins. Further, we will consider what form of technical assistance may be needed by title IV–E agencies to meet the AFCARS data file submission standards. The approach is also consistent with the how we implemented the NYTD.

Section 1355.46(d) Data Quality Standards

In paragraph (d)(1), we specify the data quality standards for the title IV–E agency to be in compliance with AFCARS requirements. We received no substantive comments on this section.

In paragraph (d)(2), we specify the acceptable cross-file standards, which are that the data files must be free of cross-file errors that exceed the acceptable thresholds, as defined by ACF. In the 2015 NPRM, we proposed this as paragraph (c)(3) of this section. We did not receive comments on this paragraph. However, to match the requirement in paragraph (e)(2) of this section, we moved the acceptable cross-file requirement to paragraph (d) with the data quality standards. If each data file meets the data file standards of paragraph (c) of this section, ACF will then determine whether each data file meets the data quality standards in paragraph (d) of this section.

Section 1355.46(e) Compliance Determination and Corrected Data

In paragraph (e), we specify the methodology for determining compliance and a title IV–E agency's opportunity to submit corrected data when ACF has initially determined that the title IV–E agency's original submission does not meet the AFCARS standards. We received no specific comments on this section and have retained the proposed language with minor conforming edits.

Section 1355.46(f) Noncompliance

In paragraph (f), we specify that a title IV–E agency has not complied with the AFCARS requirements if the title IV–E agency either does not submit corrected data files, or does not submit corrected data files that meet the compliance standards in paragraphs (c) and (d) of this section. We received no specific comments on this section and have retained the proposed language with minor conforming edits.

Section 1355.46(g) Other Assessments

In paragraph (g), we explain that ACF may use other monitoring tools that are not explicitly mentioned in regulation to determine whether the title IV–E agency meets all AFCARS requirements. We received no specific comments on this section and have retained the proposed language with minor conforming edits.

Section 1355.47 Penalties

In section 1355.47 we provide for how ACF will assess and take penalties for a title IV–E agency's noncompliance with AFCARS requirements outlined in section 1355.46.

Section 1355.47(a) Federal Funds Subject to a Penalty

In paragraph (a), we specify the pool of funds that are subject to a penalty for noncompliance as required by law. We did not receive specific comments on paragraph (a) and have retained the proposed language with minor conforming edits.

Section 1355.47(b) Penalty Amounts

In paragraphs (b)(1) and (b)(2), we specify the penalty amounts for noncompliance and continued noncompliance as required by section 474(f)(2) of the Act.

Comment: Many of commenters, particularly title IV–E agencies, do not support the penalty provisions as proposed in section 1355.47 and suggested a variety of alternatives, including phasing in the penalties, providing incentives, reinvesting penalties back into data improvements, or waiving penalties. A couple commenters believed that the penalty structure did not allow for a graduated or proportional structure to assess penalties reflective of an individual agency's level of compliance, or any consideration of past efforts to produce the required data. A few commenters supported penalties as a method to incentivize title IV–E agencies to fulfill their duties. One organization suggested applying the penalties to the optional title IV–E programs including kinship guardianship and extended foster care.

Response: We did not revise the penalty provisions in response to these comments because the penalties are required by law and the structure is consistent with section 474(f) of the Act. There is no provision in the law for incentives or reinvestment of penalties. The penalty structure applies to all title IV–E agencies and, we have retained our proposal not to apply the penalty to the optional title IV–E programs. We are allowing ample time for state and tribal title IV–E agencies to modify their systems to report quality data as required by the final rule.

Comment: A couple states oppose the timeframe for corrective action and penalties for subsequent reporting periods and one commenter suggested that we allow time for system

improvements as part of corrective action before ACF issues a penalty.

Response: We did not make any changes to address this comment because the statute specifies the time period for corrective action and thus we are unable to provide a lengthier timeframe for corrections to systems or otherwise.

Comment: A state commenter asked if there will be technical assistance and support offered to title IV–E agencies that are unable to meet basic file standards.

Response: We will continue to conduct AFCARS assessment reviews to address situations expressed by the commenter about quality data and engage state and tribal title IV–E agencies in technical assistance in all aspects of the implementation of AFCARS.

Section 1355.47(c) Penalty Reduction From Grant

In paragraph (c), we specify that we will collect an assessed penalty by reducing the title IV–E agency's title IV–E foster care funding following ACF's notification of the final determination of noncompliance. We did not receive any comments on paragraph (c).

Section 1355.47(d) Appeals

In paragraph (d), we specify that the title IV–E agency has an opportunity to appeal a final determination that the title IV–E agency is out of compliance and assessed financial penalties to the HHS Departmental Appeals Board (DAB). We did not receive any comments on paragraph (d).

VII. Regulatory Impact Analysis

Executive Order 12866 and 13563

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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Department has determined that this final rule is consistent with these priorities and principles. In particular, ACF has determined that a regulation is the best and most cost effective way to implement the statutory mandate for a data collection system regarding children in foster care and those who exit to permanency and support other statutory obligations to provide oversight of child welfare programs. ACF consulted with the Office of Management and Budget (OMB) and determined that this rule does meet the criteria for a significant regulatory action under E.O. 12866. Thus, it was subject to OMB review.

ACF determined that the costs to title IV–E agencies as a result of this rule will not be significant as defined in Executive Order 12866 (have an annual effect on the economy of $100 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). Federal reimbursement under title IV–E will be available for a portion of the costs that title IV–E agencies will incur as a result of the revisions in this rule, depending on each agency's cost allocation plan, information system, and other factors. Estimated burden and costs to the federal government are provided below in the Burden estimate section, which we estimate to be $40,749,492. As a result of this rule, title IV–E agencies will report historical data on children in out-of-home care and information on legal guardianships, and we will have national data on Indian children as defined in ICWA.

Alternatives Considered:

1. ACF considered whether other existing data sets could yield similar information. ACF determined that AFCARS is the only comprehensive case-level data set on the incidence and experiences of children who are in out-of-home care under the placement and care of the title IV–E agency or who are adopted under a title IV–E adoption assistance agreement.

2. We also received state comments to the 2016 SNPRM citing they have few Indian children in foster care, if any. ACF considered alternatives to collecting ICWA-related data through AFCARS, such as providing an exemption from reporting, but alternative approaches are not feasible due to:

- AFCARS data must be comprehensive per section 479(c)(3) of the Act and exempting some states from reporting the ICWA-related data elements is not consistent with this statutory mandate, and would render it difficult to use this data for development of national policies.
- Section 474(f) of the Act provides for mandatory penalties on the title IV–E agency for non-compliance on AFCARS data that is based on the total amount expended by the title IV–E agency for administration of foster care activities. Therefore, we are not authorized to permit some states to be subject to a penalty and not others. In addition, allowing states an alternate submission process would complicate and/or prevent the assessment of penalties per § 1355.47, including penalties for failure to submit data files free of cross-file errors, missing, invalid, or internally inconsistent data, or tardy transactions for each data element of applicable records.

Regulatory Flexibility Analysis

The Secretary certifies, under 5 U.S.C. 605(b), as enacted by the Regulatory Flexibility Act (Pub. L. 96–354), that this rule will not result in a significant impact on a substantial number of small entities. This final rule does not affect small entities because it is applicable only to state and tribal title IV–E agencies.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act (Pub. L. 104–4) requires agencies to prepare an assessment of anticipated costs and benefits before proposing any rule that may result in an annual expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation). That threshold level is currently approximately $146 million. This final rule does not impose any mandates on state, local, or tribal governments, or the private sector that will result in an annual expenditure of $146 million or more.

Congressional Review

This regulation is not a major rule as defined in 5 U.S.C. 8.

Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 2000 (Pub. L. 106–58) requires federal agencies to determine whether a policy or regulation may affect family well-being. If the agency's determination is affirmative, then the agency must prepare an impact assessment addressing seven criteria specified in the law. This final regulation will not have an impact on family well-being as defined in the law.

Executive Order 13132

Executive Order 13132 requires that federal agencies consult with state and local government officials in the development of regulatory policies with Federalism implications. Consistent with E.O. 13132 and *Guidance for Implementing E.O. 13132* issued on

October 28, 1999, the Department must include in ''a separately identified portion of the preamble to the regulation'' a ''federalism summary impact statement'' (Secs. 6(b)(2)(B) & (c)(2)). The Department's ''federalism summary impact statement'' is as follows—

• ''A description of the extent of the agency's prior consultation with State and local officials''—ACF held consultation calls for the 2015 NPRM on February 18 and 20, 2015 and public comment period was open from February 9, 2015 to April 10, 2015 where we solicited comments via *regulations.gov,* email, and postal mail. ACF held consultation calls for the 2016 SNPRM on April 15, 22, 25, and 29, 2016 and the public comment period was open from April 7, 2016 to May 9, 2016 where we solicited comments via *regulations.gov,* email, and postal mail.

• ''A summary of the nature of their concerns and the agency's position supporting the need to issue the regulation''—As we've discussed in the preamble to this final rule, many commenters to the 2015 NPRM supported many of the revisions we proposed for AFCARS; however, some commenters expressed concern with the burden of additional data elements. Many commenters to the 2016 SNPRM supported collecting ICWA-related data in AFCARS and stated that it will better inform practice for AI/AN children. However, they also expressed concern with the burden of additional data elements and suggested that we pare down the overall number of data element to a core set that collects essential information related to ICWA.

• ''A statement of the extent to which the concerns of State and local officials have been met'' (Secs. 6(b)(2)(B) & 6(c)(2))—As we discuss in the section-by-section discussion preamble, we streamlined many data elements that we proposed in the 2015 NPRM. We also sought to reduce duplication by integrating the ICWA-related data elements proposed in the 2016 SNPRM into other sections of AFCARS. We expand on these comments in the section-by-section discussion.

Paperwork Reduction Act

Under the Paperwork Reduction Act (44 U.S.C. 35, as amended) (PRA), all Departments are required to submit to OMB for review and approval any reporting or recordkeeping requirements inherent in a proposed or final rule. PRA rules require that ACF estimate the total burden created by this final rule regardless of what information is available. ACF provides burden and cost estimates using the best available information. Information collection for AFCARS is currently authorized under OMB number 0970–0422; however, this final rule significantly changes the collection requirements by requiring title IV–E agencies to report historical data and data related to ICWA. This final rule contains information collection requirements in proposed § 1355.44, the out-of-home care data file, and § 1355.45, the adoption and guardianship assistance data file, that the Department has submitted to OMB for its review. This final rule requires:

• State and tribal title IV–E agencies to report information on children who are in the out-of-home care reporting population per § 1355.42(a);

• State and tribal title IV–E agencies to report information on children who are in the adoption assistance reporting population per § 1355.42(b); and

• State title IV–E agencies to report ICWA-related information in the out-of-home care data file.

Comments to the 2015 NPRM: State title IV–E agencies and the national organization representing state child welfare agencies felt that our burden estimates were low, but very few states provided estimates on burden hours or costs to implement the 2015 NPRM as a comparison. The comments were primarily about technical or programmer costs to modify the information system and did not include the work associated with gathering information or training. The estimates we received to modify a state information system ranged from 2,000 hours to 20,000 hours.

Comments to the 2016 SNPRM: Overall, many states and the national organization representing state child welfare agencies felt that the burden of the 2016 SNPRM will be significantly higher than the estimates provided. They said that reporting ICWA-related information would require significant upgrades to the SACWIS or other case management system to be able to report the data. States said that they collect some information, but not all information (*e.g.,* name of tribes) is in an extractable data field and it is documented in case narratives. They also stated there will be an increased workload due to manually entering information from paper court orders or case narratives into the system for AFCARS reporting and limited or no electronic exchange exists in some states between the state title IV–E agency and state court. One organization expressed concern that the 2016 SNPRM burden calculations assumed all states would be equally impacted, and suggested that states with few Indian children, as defined in ICWA, be allowed to format data collection in a different way. This commenter also expressed that states with larger AI/AN population would face a large burden for staff to meet the mandates.

Five state title IV–E agencies provided specific burden and cost estimates and suggestions for how to calculate the estimates for the 2016 SNPRM. They ranged from:

• Implementation timeframe of 24 months to 3.5 years to design, develop, and implement system modifications.

• One-time costs of $100,000 to $803,000 to make system changes.

• Annual costs of $120,000 per year to enter data from court records.

• Increase the average hourly labor rate we used in the 2016 SNPRM include hourly rates for programming staff, staff attorneys, and paralegals because they would all be working together to implement the requirements of the 2016 SNPRM.

• Increase the time to determine whether a child is an Indian child as defined in ICWA to 1.5 hours per child.

• Base the estimates on all children entering foster care and not limit it to those for whom the race AI/AN was indicated.

Although ACF appreciates that these agencies provided this information on hourly and cost burden estimates, ACF received too few estimates to reference for calculating the cost and burden associated with this final rule. We understand the new data requirements could impact the time workers spend providing casework directly with children and families. However, this final rule reflects careful consideration of input received from states and tribes and balances the need for more current data with concerns from commenters about the burden that new reporting requirements represent. Thus, ACF carefully considered the statutory requirement in section 479(c)(1) of the Act to ''avoid unnecessary diversion of resources from agencies responsible for adoption and foster care'' and determined that the Final Rule does not represent an unnecessary diversion of resources. ACF provides estimates using the best available information.

Burden Estimate

The following are estimates.

Collection—AFCARS	Number of respondents	Number of responses per respondent	Average burden hours per response	Total annual burden hours
Recordkeeping	59	2	8,204.25	968,102
Reporting	59	2	18	2,124
Total				970,226

Respondents: The 59 respondents comprise 52 state title IV–E agencies and seven tribal title IV–E agencies, which are Indian tribes, tribal organizations or consortium with an approved title IV–E plan under section 479B of the Act.

Recordkeeping burden: Searching data sources, gathering information, and entering the information into the system, developing or modifying procedures and systems to collect, validate, and verify the information and adjusting existing ways to comply with AFCARS requirements, administrative tasks associated with training personnel on the AFCARS requirements (*e.g.,* reviewing instructions, developing the training and manuals), and training personnel on AFCARS requirements.

Reporting burden: Extracting the information for AFCARS reporting and transmitting the information to ACF.

Annualized Cost to the Federal Government

Federal reimbursement under title IV–E will be available for a portion of the costs that title IV–E agencies will incur as a result of the revisions proposed in this rule, depending on each agency's cost allocation plan, information system, and other factors. For this estimate, we used the 50% FFP rate.

Collection—AFCARS	Total annual burden hours	Average hourly labor rate	Total cost	Estimate Federal costs (50% FFP)
Recordkeeping	968,102	$84	$81,320,668	$40,660,284
Reporting	2,124	84	178,416	89,208
Total				40,749,492

Assumptions for Estimates

We made a number of assumptions when calculating the burden and costs:

- To determine the number of children for which title IV–E agencies will have to report in the out-of-home care data file, ACF used the most recent FY 2015 AFCARS data available:
  - 269,509 Number of children who entered foster care during FY 2015. Of those, 6,350 children had a reported race of AI/AN.
  - We estimate the number of children to whom the ICWA-related data elements apply by using as a proxy those children whose race was reported as ''American Indian or Alaska Native'' in the most recent FY 2015 AFCARS data available. This is the best available data we can use for the burden estimate of the ICWA-related information even though we understand that not every child of this reported race category will be covered under ICWA and would also include children reported by a tribal title IV–E agency. The state title IV–E agency must report whether all children who enter foster care may be Indian children as defined in ICWA.
- To determine the number of children for which title IV–E agencies must report in the adoption and guardianship assistance file, ACF used the most recent title IV–E Programs Quarterly Financial Report, CB–496, for FY 2015. 440,934 children received title IV–E adoption assistance and 21,173 children received guardianship assistance.
- For this final rule, we integrated the ICWA-related data elements into other sections of the regulation. Tribal title IV–E agencies are not required to collect the ICWA-related information.
- The state title IV–E agency will be required to collect information for approximately 98 data elements for all children who are in both the out-of-home care reporting population and adoption and guardianship assistance reporting population and for approximately 17 data elements on children to whom the ICWA-related data elements apply in the out-of-home care reporting population.
- Tribal title IV–E agencies will be required to collect information for approximately 95 data elements for all children who are in the out-of-home care reporting population and adoption and guardianship assistance reporting population.
- ACF assumed that the burden for state and tribal title IV–E agencies to modify systems is similar to how long it would take to make revisions to a Comprehensive Child Welfare Information Systems (CCWIS). Currently, 36 states have an operational SACWIS and title IV–E agencies will have the option to transition to or build a CCIWS under the revised regulations at 45 CFR 1355.50 et sq. ACF also recognizes that most title IV–E agencies will require revisions to electronic case management systems to meet the requirements of this final rule. As more title IV–E agencies build CCWIS, ACF anticipates it will lead to more efficiency in reporting and less costs and burden associated with this AFCARS final rule to the agencies.
- After reviewing the 2015 Bureau of Labor Statistics data and comments to the 2016 SNPRM to help determine the costs of the final rule, ACF assumed that there will be a mix of programming, management, caseworkers, and legal staff working to meet both the one-time and annual requirements of this final rule. For this estimate, we used the job roles of: Computer and Mathematical Operations (15–0000) with a hourly wage of $41.43; Social Workers (21–1020) with a mean hourly wage estimate of $23.88; Management Analyst (13–1111) with a mean hourly wage estimate of $44.12; Social and Community Service Managers (11–9151) with a mean hourly wage estimate of $33.38; and Paralegals and Legal Assistants (23–2011) with a mean hourly wage estimate of $25.19. Thus, ACF averaged these wages to come to an average labor rate of $42. In order to ensure we took into account overhead costs associated with these labor costs, ACF doubled this rate ($84).

Calculations for Estimates

Recordkeeping: Adding the bullets below produces a total of 968,102 record keeping hours annually.

- For the out-of-home care data file, searching data sources, gathering information, and entering the information into the system will take on average 3 hours annually for all children who enter foster care and 10 hours for children who are Indian children as defined in ICWA. (3 hours × 269,509 children = 808,527 annual hours. 10 hours × 6,350 children = 63,500 annual hours. 808,527 + 63,500 = 872,027 total annual hours for this bullet.)
- For the adoption and guardianship assistance data file, updates or changes on an annual or biennial basis will take an average of 0.2 hours annually for records of children who have an adoption assistance agreement and 0.3 hours annually for children who have an guardianship assistance agreement for a total annual hours of 94,539. (0.2 hours × 440,934 children = 88,187 hours. 0.3 hours × 21,173 children = 6,352 hours. 6,352 hours + 88,187 hours = 94,539 total annual burden hours for this bullet.)
- Developing or modifying procedures and systems to collect, validate, and verify the information and adjusting existing ways to comply with AFCARS requirements will take on average 230 hours annually.
- Administrative tasks associated with training personnel on the AFCARS requirements (*e.g.,* reviewing instructions, developing the training and manuals), and training personnel on AFCARS requirements will take on average 1,306 hours annually.

Reporting: Extracting the information for AFCARS reporting and transmitting the information to ACF will take on average 18 hours.

In the above estimates, ACF acknowledges: (1) ACF has used average figures for title IV–E agencies of very different sizes and of which, some states may have larger populations of children served than other agencies, (2) these are rough estimates of the burden because state title IV–E agencies have not been required previously to report ICWA-related information in AFCARS, and (3) as described, ACF has limited information to use in making these estimates.

OMB is required to make a decision concerning the collection of information contained in this regulation between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Department on the proposed regulations. Written comments to OMB or the proposed information collection should be sent directly to the following: Office of Management and Budget, either by fax to 202–395–6974 or by email to *OIRA_submission@omb.eop.gov.* Please mark faxes and emails to the attention of the desk officer for ACF.

VIII. Tribal Consultation Statement

ACF is committed to consulting with Indian tribes and tribal leadership to the extent practicable and permitted by law, prior to promulgating any regulation that has tribal implications. As we developed this rule, ACF engaged with tribes through multiples means. The requirements in this final rule were informed by consultations with and comments from tribal representatives.

Starting mid-2015, we began tribal consultation, conducted in accordance with the ACF Tribal Consultation Policy (76 FR 55678) with tribal representatives to obtain input on proposing additional AFCARS data elements related to ICWA. There was a conference call on May 1, 2015, that was co-facilitated by CB Associate Commissioner and the Chairperson of the ACF Tribal Advisory Committee, who also serves as the Vice Chair of the Jamestown S'Klallam Tribal Council. Tribes were informed of these consultations and conference calls through letters to tribal leaders. Comments were solicited during the call to determine essential data elements that state title IV–E agencies should report to AFCARS including, but not limited to: Whether the requirements of ICWA were applied to a child; notice for child welfare proceedings; active efforts to prevent removal or to reunify the Indian child with the child's biological or adoptive parents or Indian custodian; placement preferences in ICWA; and terminations of parental rights for an Indian child. Tribal representatives did not provide specific suggestions on the call, but noted that they would provide formal comments on the 2016 SNPRM when it was issued.

In addition to the May 2015 tribal consultation, we reviewed comments to the 2015 NPRM that suggested we include ICWA-related data elements and we used these comments to help inform the 2016 SNPRM. We received 45 comments to the 2015 NPRM that recommended collecting basic information about the applicability of ICWA for children in out-of-home care, including: Identification of American Indian and Alaska Native children and their family structure, tribal notification and intervention in state court proceedings, the relationship of the foster parents and other providers to the child, decisions to place a child in out-of-home care (including data on active efforts and continued custody), whether a placement was licensed by an Indian tribe, whether the placement preferences in ICWA were followed, and termination of parental rights (both voluntary and involuntary).

After the 2016 SNPRM was published, ACF conducted additional consultations with tribal representatives and the public via conference calls on April 22, 25, and 27, 2016 during the public comment period. Tribes were informed of these consultations and conference calls through letters to tribal leaders and emails on ACF's tribal list serves. Much of the dialogue from call attendees was supportive of the data elements proposed in the 2016 SNPRM stating they are an important step to allowing tribes, states, and federal agencies the ability to develop a more detailed understanding of the unique experiences, needs, and barriers to permanency for AI/AN children. There was also discussion regarding how state title IV–E agencies will implement specific data elements around qualified expert witnesses, how state title IV–E agencies will share the data gathered with tribes, and the process for determining whether a state title IV–E agency will be found in non-compliance with data collection. Throughout the calls, we encouraged tribal representatives to submit written comments during the public comment period. We received 41 comments from tribes and 11 comments from organizations representing tribal interests, many of which were co-signed by multiple tribes. We addressed public comments in the section-by-section discussion preamble. This final rule was informed by these consultations and comments.

List of Subjects in 45 CFR Part 1355

Adoption and foster care, Child welfare, Grant programs—social programs.

(Catalog of Federal Domestic Assistance Program Number 93.658, Foster Care Maintenance; 93.659, Adoption Assistance; 93.645, Child Welfare Services—State Grants).

Dated: October 11, 2016.

Mark H. Greenberg,

Acting Assistant Secretary for Children and Families.

Approved: October 14, 2016.

Sylvia M. Burwell,

Secretary.

For the reasons set forth in the preamble, we amend 45 CFR part 1355 as follows:

PART 1355—GENERAL

■ 1. The authority citation for part 1355 continues to read as follows:

Authority: 42 U.S.C. 620 *et seq.,* 42 U.S.C. 670 *et seq.,* 42 U.S.C. 1302.

■ 2. Amend § 1355.40 by redesignating paragraphs (a) through (e) as (b) through (f), adding a new paragraph (a), revising the second sentence of newly redesignated paragraph (b)(1), and revising newly redesignated paragraph (f) to read as follows:

§ 1355.40 Foster care and adoption data collection.

(a) *Scope.* State and tribal title IV–E agencies must follow the requirements of this section and Appendices A through E of part 1355 until September 30, 2019. As of October 1, 2019, state and tribal title IV–E agencies must comply with §§ 1355.41 through 1355.47.

(b) * * *

(1) * * * The data reporting system must meet the requirements of § 1355.40(c) and electronically report certain data regarding children in foster care and adoption. * * *

* * * * *

(f) *Substantial noncompliance.* Failure by a title IV–E agency to meet any of the standards described in paragraphs (b) through (e) of this section is considered a substantial failure to meet the requirements of the title IV–E plan.

* * * * *

§ 1355.40 [Removed and Reserved]

■ 3. Effective October 1, 2019, remove and reserve § 1355.40.

■ 4. Add §§ 1355.41 through 1355.47 to read as follows:

§ 1355.41 Scope of the Adoption and Foster Care Analysis and Reporting System.

(a) This section applies to state and tribal title IV–E agencies unless indicated for state title IV–E agencies only.

(b) An agency described in paragraph (a) of this section must report information on the characteristics and experiences of a child in the reporting populations described in § 1355.42. The title IV–E agency must submit the information collected to ACF on a semi-annual basis in an out-of-home care data file and adoption assistance data file as required in § 1355.43, pertaining to information described in §§ 1355.44 and 1355.45 and in a format according to ACF's specifications.

(c) *Definitions.* (1) Terms in 45 CFR 1355.41 through 1355.47 are defined as they appear in 45 CFR 1355.20, except that for purposes of data elements related to the Indian Child Welfare Act of 1978 (ICWA), terms that appear in § 1344.44(b)(3) through (b)(8), (c)(3), (c)(4), (c)(6), (c)(7), (d)(3), (e)(8) through (e)(11), (f)(10), and (h)(20) through (h)(23) are defined as they appear in 25 CFR 23.2 and 25 U.S.C. 1903.

(2) For state title IV–E agencies only: If the state title IV–E agency indicated ''yes'' to § 1355.44(b)(4) or indicated ''yes, ICWA applies'' to § 1355.44(b)(5), for § 1355.44(c)(1), (c)(2), (d)(4), and (d)(5), the term ''legal guardian'' includes an Indian custodian as defined in ICWA at 25 U.S.C. 1903 if the Indian custodian has legal responsibility for the child.

§ 1355.42 Reporting populations.

(a) *Out-of-home care reporting population.* (1) A title IV–E agency must report a child of any age who is in out-of-home care for more than 24 hours. The out-of-home care reporting population includes a child in the following situations:

(i) A child in foster care as defined in § 1355.20.

(ii) A child on whose behalf title IV–E foster care maintenance payments are made and who is under the placement and care responsibility of another public agency or an Indian tribe, tribal organization or consortium with which the title IV–E agency has an agreement pursuant to section 472(a)(2)(B)(ii) of the Act.

(iii) A child who runs away or whose whereabouts are unknown at the time the child is placed under the placement and care responsibility of the title IV–E agency.

(2) Once a child enters the out-of-home care reporting population, the child remains in the out-of-home care reporting population through the end of the report period in which the title IV–E agency's placement and care responsibility ends, or a child's title IV–E foster care maintenance payment pursuant to a title IV–E agreement per section 472(a)(2) of the Act ends, regardless of any subsequent living arrangement.

(b) *Adoption and guardianship assistance reporting population.* (1) The title IV–E agency must include in the adoption and guardianship assistance reporting population any child who is:

(i) In a finalized adoption under a title IV–E adoption assistance agreement pursuant to section 473(a) of the Act with the reporting title IV–E agency that is or was in effect at some point during the current report period; or

(ii) In a legal guardianship under a title IV–E guardianship assistance agreement pursuant to section 473(d) of the Act with the reporting title IV–E agency that is or was in effect at some point during the current report period.

(2) A child remains in the adoption or guardianship assistance reporting population through the end of the report period in which the title IV–E agreement ends or is terminated.

§ 1355.43 Data reporting requirements.

(a) *Report periods and deadlines.* There are two six-month report periods based on the Federal fiscal year: October 1 to March 31 and April 1 to September 30. The title IV–E agency must submit the out-of-home care and adoption assistance data files to ACF within 45 days of the end of the report period (*i.e.,* by May 15 and November 14). If the reporting deadline falls on a weekend, the title IV–E agency has through the end of the following Monday to submit the data file.

(b) *Out-of-home care data file.* A title IV–E agency must report the information required in § 1355.44 pertaining to each child in the out-of-home care reporting population, in accordance with the following:

(1) The title IV–E agency must report the most recent information for the applicable data elements in § 1355.44(a) and (b).

(2) Except as provided in paragraph (b)(3) of this section, the title IV–E agency must report the most recent information and all historical information for the applicable data elements described in § 1355.44(c) through (h).

(3) For a child who had an out-of-home care episode(s) as defined in § 1355.42(a) prior to October 1, 2019, the title IV–E agency must report only the information for the data elements described in § 1355.44(d)(1), (g)(1) and (g)(3) for the out-of-home care episode(s) that occurred prior to October 1, 2019.

(c) *Adoption and guardianship assistance data file.* A title IV–E agency must report the most recent information for the applicable data elements in § 1355.45 that pertains to each child in the adoption and guardianship assistance reporting population on the last day of the report period.

(d) *Missing information.* If the title IV–E agency fails to collect the information for a data element, the title IV–E agency must report the element as blank or otherwise missing. The title IV–E agency is not permitted to default or map missing information that was not collected to a valid response option.

(e) *Electronic submission.* The title IV–E agency must submit the required data files electronically and in a format according to ACF's specifications.

(f) *Record retention.* The title IV–E agency must retain all records necessary to comply with the data requirements in §§ 1355.41 through 1355.45. The title IV–E agency's retention of such records is not limited to the requirements of 45 CFR 92.42(b) and (c).

§ 1355.44 Out-of-home care data file elements.

(a) *General information.* (1) *Title IV–E agency.* Indicate the title IV–E agency responsible for submitting the AFCARS data in a format according to ACF's specifications.

(2) *Report date.* The report date corresponds with the end of the report period. Indicate the last month and the year of the report period.

(3) *Local agency.* Indicate the local county, jurisdiction or equivalent unit that has primary responsibility for the child in a format according to ACF's specifications.

(4) *Child record number.* Indicate the child's record number. This is an encrypted, unique person identification number that is the same for the child, no matter where the child lives while in the placement and care responsibility of the title IV–E agency in out-of-home care and across all report periods and episodes. The title IV–E agency must apply and retain the same encryption routine or method for the person identification number across all report periods. The record number must be encrypted in accordance with ACF standards.

(b) *Child information*—(1) *Child's date of birth.* Indicate the month, day and year of the child's birth. If the actual date of birth is unknown because the child has been abandoned, provide an estimated date of birth. Abandoned means that the child was left alone or with others and the identity of the parent(s) or legal guardian(s) is unknown and cannot be ascertained. This includes a child left at a ''safe haven.''

(2)(i) *Child's gender.* Indicate whether the child is ''male'' or ''female,'' as appropriate.

(ii) *Child's sexual orientation.* For children age 14 and older, indicate whether the child self identifies as ''straight or heterosexual,'' ''gay or lesbian,'' ''bisexual,'' ''don't know,'' ''something else,'' or ''decline,'' if the child declined to provide the information. Indicate ''not applicable'' for children age 13 and under.

(3) *Reason to know a child is an ''Indian Child'' as defined in the Indian Child Welfare Act.* For state title IV–E agencies only: Indicate whether the state title IV–E agency researched whether there is reason to know that the child is an Indian child as defined in ICWA in each paragraph (b)(3)(i) through (vii) of this section.

(i) Indicate whether the state title IV–E agency inquired with the child's biological or adoptive mother. Indicate ''yes,'' ''no'' or ''the biological or adoptive mother is deceased.''

(ii) Indicate whether the state title IV–E agency inquired with the child's biological or adoptive father. Indicate ''yes,'' ''no,'' or ''the biological or adoptive father is deceased.''

(iii) Indicate whether the state title IV–E agency inquired with the child's Indian custodian, if the child has one. Indicate ''yes,'' ''no,'' or ''child does not have an Indian custodian.''

(iv) Indicate whether the state title IV–E agency inquired with the child's extended family. Indicate ''yes'' or ''no.''

(v) Indicate whether the state title IV–E agency inquired with the child who is the subject of the proceeding. Indicate ''yes'' or ''no.''

(vi) Indicate whether the child is a member of or eligible for membership in an Indian tribe. Indicate ''yes,'' ''no,'' or ''unknown.''

(vii) Indicate whether the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village. Indicate ''yes,'' ''no,'' or ''unknown.''

(4) *Application of ICWA.* For state title IV–E agencies only: Indicate whether the state title IV–E agency knows or has reason to know, that the child is an Indian child as defined in ICWA. Indicate ''yes'' or ''no.'' If the state title IV–E agency indicated ''yes,'' then the state title IV–E agency must complete paragraphs (b)(4)(i) and (ii). If the state title IV–E agency indicated ''no,'' then the state title IV–E agency must leave paragraphs (b)(4)(i) and (ii) of this section blank.

(i) Indicate the date that the state title IV–E agency first discovered the information indicating the child is or may be an Indian child as defined in ICWA.

(ii) Indicate all federally recognized Indian tribe (s) that may potentially be the Indian child's tribe(s). The title IV–E agency must submit the information in a format according to ACF's specifications.

(5) *Court determination that ICWA applies.* For state title IV–E agencies only: Indicate whether a court determined that ICWA applies or that the court is applying ICWA because it knows or has reason to know a child is an Indian child as defined in ICWA in accordance with 25 CFR 23.107(b)(2). Indicate ''yes, ICWA applies,'' ''no, ICWA does not apply,'' or ''no court determination.'' If the state title IV–E agency indicated ''yes, ICWA applies,'' the state title IV–E agency must complete paragraphs (b)(5)(i) and (ii). If the state title IV–E agency indicated ''no, ICWA does not apply'' or ''no court determination,'' the state title IV–E agency must leave paragraphs (b)(5)(i) and (ii) of this section blank.

(i) Indicate the date that the court determined that ICWA applies.

(ii) Indicate the Indian tribe that the court determined is the Indian child's tribe for ICWA purposes. The title IV–E agency must submit the information in a format according to ACF's specifications.

(6) *Notification.* State title IV–E agencies only: If the state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), the state title IV–E agency must complete paragraphs (b)(6)(i) through (iii). Otherwise, leave paragraphs (b)(6)(i) through (iii) of this section blank.

(i) Indicate whether the Indian child's parent or Indian custodian was sent legal notice more than 10 days prior to the first child custody proceeding in accordance with 25 U.S.C. 1912(a). Indicate ''yes'' or ''no.''

(ii) Indicate whether the Indian child's tribe(s) was sent legal notice more than 10 days prior to the first child custody proceeding in accordance with 25 U.S.C. 1912(a). Indicate ''yes'', ''no'' or ''the child's Indian tribe is unknown''.

(iii) Indicate the Indian tribe(s) that were sent notice for a child custody proceeding as required in ICWA at 25 U.S.C. 1912(a). The title IV–E agency must report the information in a format according to ACF's specifications.

(7) *Request to transfer to tribal court.* For state title IV–E agencies only: If the state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), indicate whether either parent, the Indian custodian, or the Indian child's tribe requested, orally on the record or in writing, that the state court transfer a foster-care or termination-of-parental rights proceeding to the jurisdiction of the Indian child's tribe, in accordance

with 25 U.S.C. 1911(b), at any point during the report period. Indicate ''yes'' or ''no.'' If the state title IV–E agency indicated ''yes,'' then the state title IV–E agency must complete paragraph (b)(8) of this section. If the state title IV–E agency indicated ''no,'' the state title IV–E agency must leave paragraph (b)(8) of this section blank.

(8) *Denial of transfer.* For state title IV–E agencies only: If the state title IV–E agency indicated ''yes'' to paragraph (b)(7), indicate whether the state court denied the request to transfer the case to tribal jurisdiction. Indicate ''yes'' or ''no.'' If the state title IV–E agency indicated ''yes,'' then the state title IV–E agency must indicate in paragraphs (b)(8)(i) through (iii) of this section whether each reason for denial ''applies'' or ''does not apply.'' Otherwise leave these paragraphs blank.

(i) Either of the parents objected to transferring the case to the tribal court.

(ii) The tribal court declined the transfer to the tribal court.

(iii) The state court determined good cause exists for denying the transfer to the tribal court.

(9) *Child's race.* In general, a child's race is determined by the child, the child's parent(s) or legal guardian(s). Indicate whether each race category listed in the data elements described in paragraphs (b)(9)(i) through (viii) of this section applies with a ''yes'' or ''no.''

(i) *Race—American Indian or Alaska Native.* An American Indian or Alaska Native child has origins in any of the original peoples of North or South America (including Central America), and maintains tribal affiliation or community attachment.

(ii) *Race—Asian.* An Asian child has origins in any of the original peoples of the Far East, Southeast Asia or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand and Vietnam.

(iii) *Race—Black or African American.* A Black or African American child has origins in any of the black racial groups of Africa.

(iv) *Race—Native Hawaiian or Other Pacific Islander.* A Native Hawaiian or Other Pacific Islander child has origins in any of the original peoples of Hawaii, Guam, Samoa or other Pacific Islands.

(v) *Race—White.* A white child has origins in any of the original peoples of Europe, the Middle East or North Africa.

(vi) *Race—unknown.* The child or parent or legal guardian does not know or is unable to communicate the race, or at least one race of the child.

(vii) *Race—abandoned.* The child's race is unknown because the child has been abandoned. Abandoned means that the child was left alone or with others and the identity of the parent(s) or legal guardian(s) is unknown and cannot be ascertained. This includes a child left at a ''safe haven.''

(viii) *Race—declined.* The child or parent(s) or legal guardian(s) has declined to identify a race.

(10) *Child's Hispanic or Latino ethnicity.* In general, a child's ethnicity is determined by the child or the child's parent(s) or legal guardian(s). A child is of Hispanic or Latino ethnicity if the child is a person of Cuban, Mexican, Puerto Rican, South or Central American or other Spanish culture or origin, regardless of race. Indicate whether this category applies with a ''yes'' or ''no.'' If the child or the child's parent(s) or legal guardian(s) does not know or is unable to communicate whether the child is of Hispanic or Latino ethnicity, indicate ''unknown.'' If the child is abandoned indicate ''abandoned.'' Abandoned means that the child was left alone or with others and the identity of the parent(s) or legal guardian(s) is unknown and cannot be ascertained. This includes a child left at a ''safe haven.'' If the child or the child's parent(s) or legal guardian(s) refuses to identify the child's ethnicity, indicate ''declined.''

(11)(i) *Health assessment.* Indicate whether the child had a health assessment during the current out-of-home care episode. This assessment could include an initial health screening or any follow-up health screening per section 422(b)(15)(A) of the Act. Indicate ''yes'' or ''no.'' If the title IV–E agency indicated ''yes,'' the title IV–E must complete paragraphs (b)(11)(ii) and (b)(12); otherwise leave paragraphs (b)(11)(ii) and (b)(12) of this section blank.

(ii) *Date of health assessment.* Indicate the month, day, and year of the child's most recent health assessment, if the title IV–E agency reported ''yes'' in paragraph (b)(11)(i) of this section; otherwise leave this paragraph blank.

(12) *Timely health assessment.* Indicate whether the date reported in paragraph (b)(11)(ii) is within the timeframes for initial and follow-up health screenings established by the title IV–E agency per section 422(b)(15)(A) of the Act. Indicate ''yes'' or ''no.'' If the title IV–E agency reported ''no'' in paragraph (b)(11)(i) of this section, the title IV–E agency must leave this paragraph blank.

(13) *Health, behavioral or mental health conditions.* Indicate whether the child was diagnosed by a qualified professional, as defined by the state or tribe, as having a health, behavioral or mental health condition listed below, prior to or during the child's current out-of-home care episode as of the last day of the report period. Indicate ''child has a diagnosed condition'' if a qualified professional has made such a diagnosis and for each data element described in paragraphs (b)(13)(i) through (xii) of this section indicate ''existing condition,'' ''previous condition'' or ''does not apply,'' as applicable. Indicate ''no exam or assessment conducted'' if a qualified professional has not conducted a medical exam or assessment of the child and leave paragraphs (b)(13)(i) through (xii) blank. Indicate ''exam or assessment conducted and none of the conditions apply'' if a qualified professional has conducted a medical exam or assessment and has concluded that the child does not have one of the conditions listed below and leave paragraphs (b)(13)(i) through (xii) blank. Indicate ''exam or assessment conducted but results not received'' if a qualified professional has conducted a medical exam or assessment but the title IV–E agency has not yet received the results of such an exam or assessment and leave paragraphs (b)(13)(i) through (xii) blank.

(i) *Intellectual disability.* The child has, or had previously, significantly sub-average general cognitive and motor functioning existing concurrently with deficits in adaptive behavior manifested during the developmental period that adversely affect the child's socialization and learning.

(ii) *Autism spectrum disorder.* The child has, or had previously, a neurodevelopment disorder, characterized by social impairments, communication difficulties, and restricted, repetitive, and stereotyped patterns of behavior. This includes the range of disorders from autistic disorder, sometimes called autism or classical autism spectrum disorder, to milder forms known as Asperger syndrome and pervasive developmental disorder not otherwise specified.

(iii) *Visual impairment and blindness.* The child has, or had previously, a visual impairment that may adversely affects the day-to-day functioning or educational performance, such as blindness, amblyopia, or color blindness.

(iv) *Hearing impairment and deafness.* The child has, or had previously, an impairment in hearing, whether permanent or fluctuating, that adversely affects the child's day-to-day functioning and educational performance.

(v) *Orthopedic impairment or other physical condition.* The child has, or

had previously, a physical deformity, such as amputations and fractures or burns that cause contractures, or an orthopedic impairment, including impairments caused by a congenital anomalies or disease, such as cerebral palsy, spina bifida, multiple sclerosis, or muscular dystrophy.

(vi) *Mental/emotional disorders.* The child has, or had previously, one or more mood or personality disorders or conditions over a long period of time and to a marked degree, such as conduct disorder, oppositional defiant disorder, emotional disturbance, anxiety disorder, obsessive-compulsive disorder, or eating disorder.

(vii) *Attention deficit hyperactivity disorder.* The child has, or had previously, a diagnosis of the neurobehavioral disorders of attention deficit or hyperactivity disorder (ADHD) or attention deficit disorder (ADD).

(viii) *Serious mental disorders.* The child has, or had previously, a diagnosis of a serious mental disorder or illness, such as bipolar disorder, depression, psychotic disorders, or schizophrenia.

(ix) *Developmental delay.* The child has been assessed by appropriate diagnostic instruments and procedures and is experiencing delays in one or more of the following areas: physical development or motor skills, cognitive development, communication, language, or speech development, social or emotional development, or adaptive development.

(x) *Developmental disability.* The child has, or had previously been diagnosed with a developmental disability as defined in the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (Pub. L. 106–402), section 102(8). This means a severe, chronic disability of an individual that is attributable to a mental or physical impairment or combination of mental and physical impairments that manifests before the age of 22, is likely to continue indefinitely and results in substantial functional limitations in three or more areas of major life activity. Areas of major life activity include: Self-care; receptive and expressive language; learning; mobility; self-direction; capacity for independent living; and economic self-sufficiency; and reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated. If a child is given the diagnosis of ''developmental disability,'' do not indicate the individual conditions that form the basis of this diagnosis separately in other data elements.

(xi) *Other diagnosed condition.* The child has, or had previously, a diagnosed condition or other health impairment other than those described above, which requires special medical care, such as asthma, diabetes, chronic illnesses, a diagnosis as HIV positive or AIDS, epilepsy, traumatic brain injury, other neurological disorders, speech/language impairment, learning disability, or substance use issues.

(14) *School enrollment.* Indicate whether the child is a full-time student at and enrolled in (or in the process of enrolling in) ''elementary'' or ''secondary'' education, or is a full or part-time student at and enrolled in ''post-secondary education or training'' or ''college,'' as of the earlier of the last day of the report period or the day of exit for a child exiting out-of-home care prior to the end of the report period. A child is still considered enrolled in school if the child would otherwise be enrolled in a school that is currently out of session. An ''elementary or secondary school student'' is defined in section 471(a)(30) of the Act as a child that is: enrolled (or in the process of enrolling) in an institution which provides elementary or secondary education, as determined under the law of the state or other jurisdiction in which the institution is located; instructed in elementary or secondary education at home in accordance with a home school law of the state or other jurisdiction in which the home is located; in an independent study elementary or secondary education program in accordance with the law of the state or other jurisdiction in which the program is located, which is administered by the local school or school district; or incapable of attending school on a full-time basis due to the medical condition of the child, which incapability is supported by a regularly updated information in the case plan of the child. Enrollment in ''post-secondary education or training'' refers to full or part-time enrollment in any post-secondary education or training, other than an education pursued at a college or university. Enrollment in ''college'' refers to a child that is enrolled full or part-time at a college or university. If child has not reached compulsory school age, indicate ''not school-age.'' If the child has reached compulsory school-age, but is not enrolled or is in the process of enrolling in any school setting full-time, indicate ''not enrolled.''

(15) *Educational level.* Indicate the highest educational level from kindergarten to college or post-secondary education/training completed by the child as of the last day of the report period. If child has not reached compulsory school-age, indicate ''not school-age.'' Indicate ''kindergarten'' if the child is currently in or about to begin 1st grade. Indicate ''1st grade'' if the child is currently in or about to begin 2nd grade. Indicate ''2nd grade'' if the child is currently in or about to begin 3rd grade. Indicate ''3rd grade'' if the child is currently in or about to begin 4th grade. Indicate ''4th grade'' if the child is currently in or about to begin 5th grade. Indicate ''5th grade'' if the child is currently in or about to begin 6th grade. Indicate ''6th grade'' if the child is currently in or about to begin 7th grade. Indicate ''7th grade'' if the child is currently in or about to begin 8th grade. Indicate ''8th grade'' if the child is currently in or about to begin 9th grade. Indicate ''9th grade'' if the child is currently in or about to begin 10th grade. Indicate ''10th grade'' if the child is currently in or about to begin 11th grade. Indicate ''11th grade'' if the child is currently in or about to begin 12th grade. Indicate ''12th grade'' if the child has graduated from high school. Indicate ''GED'' if the child has completed a general equivalency degree or other high school equivalent. Indicate ''Post-secondary education or training'' if the child has completed any post-secondary education or training, including vocational training, other than an education pursued at a college or university. Indicate ''College'' if the child has completed at least a semester of study at a college or university.

(16) *Educational stability.* Indicate if the child is enrolled or is in the process of enrolling in a new elementary or secondary school prompted by an initial placement after entry into foster care or a placement change during the report period with ''yes'' or ''no'' as appropriate. If ''yes,'' indicate which of the applicable reason(s) for the change in enrollment as described in paragraphs (b)(16)(i) through (vii) of this section ''applies'' or ''does not apply;'' if ''no,'' the title IV–E agency must leave those data elements blank.

(i) *Proximity.* The child enrolled in a new school because of the distance to his or her former school.

(ii) *District/zoning rules.* The child enrolled in a new school because county or jurisdictional law or regulations prohibited attendance at former school.

(iii) *Residential facility.* The child enrolled in a new school because he or she formerly attended school on the campus of a residential facility.

(iv) *Services/programs.* The child enrolled in a new school to participate in services or programs (academic,

behavioral or supportive services) not offered at former school.

(v) *Child request.* The child enrolled in a new school because he or she requested to leave former school and enroll in new school.

(vi) *Parent/Legal guardian request.* The child enrolled in a new school because his or her parent(s) or legal guardian(s) requested for the child to leave the former school and enroll in a new school.

(vii) *Other.* The child enrolled in a new school for a reason other than those detailed in paragraphs (b)(13)(i) through (vi) of this section.

(17) *Pregnant or parenting.* (i) Indicate whether the child is pregnant as of the end of the report period. Indicate ''yes'' or ''no.''

(ii) Indicate whether the child has ever fathered or bore a child. Indicate ''yes'' or ''no.''

(iii) Indicate whether the child and his/her child(ren) are placed together at any point during the report period, if the response in paragraph (b)(17)(ii) is ''yes.'' Indicate ''yes,'' ''no,'' or ''not applicable'' if the response in paragraph (b)(17)(ii) of this section is ''no.''

(18) *Special education.* Indicate whether the child has an Individualized Education Program (IEP) as defined in section 614(d)(1) of Part B of Title I of the Individuals with Disabilities Education Act (IDEA) and implementing regulations, or an Individualized Family Service Program (IFSP) as defined in section 636 of Part C of Title I of IDEA and implementing regulations, as of the end of the report period. Indicate ''yes'' if the child has either an IEP or an IFSP or ''no'' if the child has neither.

(19) *Prior adoption.* Indicate whether the child experienced a prior legal adoption before the current out-of-home care episode. Include any public, private or independent adoption in the United States or adoption in another country and tribal customary adoptions. Indicate ''yes,'' ''no'' or ''abandoned'' if the information is unknown because the child has been abandoned. Abandoned means that the child was left alone or with others and the identity of the parent(s) or legal guardian(s) is unknown and cannot be ascertained. This includes a child left at a ''safe haven.'' If the child has experienced a prior legal adoption, the title IV–E agency must complete paragraphs (b)(19)(i) and (ii) of this section; otherwise the title IV–E agency must leave those data elements blank.

(i) *Prior adoption date.* Indicate the month and year that the most recent prior adoption was finalized. In the case of a prior intercountry adoption where the adoptive parent(s) readopted the child in the United States, the title IV–E agency must provide the date of the adoption (either the original adoption in the home country or the re-adoption in the United States) that is considered final in accordance with applicable laws.

(ii) *Prior adoption intercountry.* Indicate whether the child's most recent prior adoption was an intercountry adoption, meaning that the child's prior adoption occurred in another country or the child was brought into the United States for the purposes of finalizing the prior adoption. Indicate ''yes'' or ''no.''

(20)(i) *Prior guardianship.* Indicate whether the child experienced a prior legal guardianship before the current out-of-home care episode. Include any public, private or independent guardianship(s) in the United States that meets the definition in section 475(7) of the Act. This includes any judicially created relationship between a child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: Protection, education, care and control, custody, and decision making. Indicate ''yes,'' ''no,'' or ''abandoned'' if the information is unknown because the child has been abandoned. Abandoned means that the child was left alone or with others and the identity of the parent(s) or legal guardian(s) is unknown and cannot be ascertained. This includes a child left at a ''safe haven.'' If the child has experienced a prior legal guardianship, the title IV–E agency must complete paragraph (b)(20)(ii); otherwise the title IV–E agency must leave it blank.

(ii) *Prior guardianship date.* Indicate the month and year that the most recent prior guardianship became legalized.

(21) *Child financial and medical assistance.* Indicate whether the child received financial and medical assistance at any point during the six-month report period. Indicate ''child has received support/assistance'' if the child was the recipient of such assistance during the report period, and indicate which of the following sources of support described in paragraphs (b)(21)(i) through (xiii) of this section ''applies'' or ''does not apply.'' Indicate ''no support/assistance received'' if none of these apply.

(i) *SSI or Social Security benefits.* The child is receiving support from Supplemental Security Income (SSI) or other Social Security benefits under title II or title XVI of the Act.

(ii) *Title XIX Medicaid.* The child is eligible for and may be receiving assistance under the state's title XIX program for medical assistance, including any benefits through title XIX waivers or demonstration programs.

(iii) *Title XXI SCHIP.* The child is eligible for and receiving assistance under a state's Children's Health Insurance Program (SCHIP) under title XXI of the Act, including any benefits under title XXI waivers or demonstration programs.

(iv) *State/Tribal adoption assistance.* The child is receiving an adoption subsidy or other adoption assistance paid for solely by the state or Indian tribe.

(v) *State/Tribal foster care.* The child is receiving a foster care payment that is solely funded by the state or Indian tribe.

(vi) *Child support.* Child support funds are being paid to the title IV–E agency for the benefit of the child by assignment from the receiving parent.

(vii) *Title IV–E adoption subsidy.* The child is determined eligible for a title IV–E adoption assistance subsidy.

(viii) *Title IV–E guardianship assistance.* The child is determined eligible for a title IV–E guardianship assistance subsidy.

(ix) *Title IV–A TANF.* The child is living with relatives who are receiving a Temporary Assistance for Needy Families (TANF) cash assistance payment on behalf of the child.

(x) *Title IV–B.* The child's living arrangement is supported by funds under title IV–B of the Act.

(xi) *SSBG.* The child's living arrangement is supported by funds under title XX of the Act.

(xii) *Chafee Foster Care Independence Program.* The child is living independently and is supported by funds under the John F. Chafee Foster Care Independence Program.

(xiii) *Other.* The child is receiving financial support from another source not previously listed above.

(22) *Title IV–E foster care during report period.* Indicate whether a title IV–E foster care maintenance payment was paid on behalf of the child at any point during the report period that is claimed under title IV–E foster care with a ''yes'' or ''no,'' as appropriate. Indicate ''yes'' if the child has met all eligibility requirements of section 472(a) of the Act and the title IV–E agency has claimed, or intends to claim, Federal reimbursement for foster care maintenance payments made on the child's behalf during the report period.

(23) *Total number of siblings.* Indicate the total number of siblings of the child. A sibling to the child is his or her brother or sister by biological, legal, or marital connection. Do not include the child who is subject of this record in the total number. If the child does not have

any siblings, the title IV–E agency must indicate ''0.'' If the title IV–E agency indicates ''0,'' the title IV–E agency must leave paragraphs (b)(24) and (b)(25) of this section blank.

(24) *Siblings in foster care.* Indicate the number of siblings of the child who are in foster care as defined in § 1355.20. A sibling to the child is his or her brother or sister by biological, legal, or marital connection. Do not include the child who is subject of this record in the total number. If the child does not have any siblings, the title IV–E agency must leave this paragraph blank. If the child has siblings, but they are not in foster care as defined in § 1355.20, the title IV–E agency must indicate ''0.'' If the title IV–E agency reported ''0,'' leave paragraph (b)(25) of this section blank.

(25) *Siblings in living arrangement.* Indicate the number of siblings of the child who are in the same living arrangement as the child, on the last day of the report period. A sibling to the child is his or her brother or sister by biological, legal, or marital connection. Do not include the child who is subject of this record in the total number. If the child does not have any siblings, the title IV–E agency must leave this paragraph blank. If the child has siblings, but they are not in the same living arrangement as the child, the title IV–E agency must indicate ''0.''

(c) *Parent or legal guardian information*—(1) *Year of birth of first parent or legal guardian.* If applicable, indicate the year of birth of the first parent (biological, legal or adoptive) or legal guardian of the child. To the extent that a child has both a parent and a legal guardian, or two different sets of legal parents, the title IV–E agency must report on those who had legal responsibility for the child. We are not seeking information on putative parent(s) in this paragraph. If there is only one parent or legal guardian of the child, that person's year of birth must be reported here. If the child was abandoned indicate ''abandoned.'' Abandoned means that the child was left alone or with others and the identity of the child's parent(s) or legal guardian(s) is unknown and cannot be ascertained. This includes a child left at a ''safe haven.''

(2) *Year of birth of second parent or legal guardian.* If applicable, indicate the year of birth of the second parent (biological, legal or adoptive) or legal guardian of the child. We are not seeking information on putative parent(s) in this paragraph. If the child was abandoned, indicate ''abandoned.'' Abandoned means that the child was left alone or with others and the identity of the child's parent(s) or legal guardian(s) is unknown and cannot be ascertained. This includes a child left at a ''safe haven.'' Indicate ''not applicable'' if there is not another parent or legal guardian.

(3) *Tribal membership mother.* For state title IV–E agencies only, indicate whether the biological or adoptive mother is a member of an Indian tribe. Indicate ''yes,'' ''no,'' or ''unknown.''

(4) *Tribal membership father.* For state title IV–E agencies only, indicate whether the biological or adoptive father is a member of an Indian tribe. Indicate ''yes,'' ''no,'' or ''unknown.''

(5) *Termination/modification of parental rights.* Indicate whether the termination/modification of parental rights for each parent (biological, legal and/or putative) was voluntary or involuntary. Voluntary means the parent voluntary relinquished their parental rights to the title IV–E agency, with or without court involvement. Indicate ''voluntary'' or ''involuntary.'' Indicate ''not applicable'' if there was no termination/modification and leave paragraphs (c)(5)(i), (c)(5)(ii), (c)(6) and (c)(7) of this section blank.

(i) *Termination/modification of parental rights petition.* Indicate the month, day and year that each petition to terminate/modify the parental rights of a biological, legal and/or putative parent was filed in court, if applicable. Indicate ''deceased'' if the parent is deceased.

(ii) *Termination/modification of parental rights.* Enter the month, day and year that the parental rights were voluntarily or involuntarily terminated/modified, for each biological, legal and/or putative parent, if applicable. If the parent is deceased, enter the date of death.

(6) *Involuntary termination/modification of parental rights under ICWA.* For state title IV–E agencies only: If the state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), and indicated ''involuntary'' to paragraph (c)(5), the state title IV–E agency must complete paragraphs (c)(6)(i) through (iii) of this section.

(i) Indicate whether the state court found beyond a reasonable doubt that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child in accordance with 25 U.S.C. 1912(f). Indicate with ''yes'' or ''no.''

(ii) Indicate whether the court decision to involuntarily terminate parental rights included the testimony of one or more qualified expert witnesses in accordance with 25 U.S.C. 1912(f). Indicate ''yes'' or ''no.''

(iii) Indicate whether prior to terminating parental rights, the court concluded that active efforts have been made to prevent the breakup of the Indian family and that those efforts were unsuccessful in accordance with 25 U.S.C. 1912(d). Indicate ''yes'' or ''no.''

(7) *Voluntary termination/modification of parental rights under ICWA.* For state title IV–E agencies only: If the state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), and indicated ''voluntary'' to paragraph (c)(5) of this section, indicate whether the consent to termination of parental or Indian custodian rights was executed in writing and recorded before a court of competent jurisdiction with a certification by the court that the terms and consequences of consent were explained on the record in detail and were fully understood by the parent or Indian custodian in accordance with 25 CFR 23.125(a) and (c). Indicate ''yes'' or ''no.''

(d) *Removal information*—(1) *Date of child's removal.* Indicate the removal date(s) in month, day and year format for each removal of a child who enters the placement and care responsibility of the title IV–E agency. For a child who is removed and is placed initially in foster care, indicate the date that the title IV–E agency received placement and care responsibility. For a child who ran away or whose whereabouts are unknown at the time the child is removed and is placed in the placement and care responsibility of the title IV–E agency, indicate the date that the title IV–E agency received placement and care responsibility. For a child who is removed and is placed initially in a non-foster care setting, indicate the date that the child enters foster care as the date of removal.

(2) *Removal transaction date.* A non-modifiable, computer-generated date which accurately indicates the month, day and year each response to paragraph (d)(1) of this section was entered into the information system.

(3) *Removals under ICWA.* For state title IV–E agencies: If the state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), the state title IV–E agency must complete paragraphs (d)(3)(i) through (d)(3)(iii) for each removal reported in paragraph (d)(1) of this section.

(i) Indicate whether the court order for foster care placement was made as a result of clear and convincing evidence that continued custody of the Indian child by the parent or Indian

custodian was likely to result in serious emotional or physical damage to the Indian child in accordance with 25 U.S.C. 1912(e) and 25 CFR 121(a). Indicate ''yes'' or ''no.''

(ii) Indicate whether the evidence presented for foster care placement as indicated in paragraph (d)(3)(i) of this section included the testimony of a qualified expert witness in accordance with 25 U.S.C. 1912(e) and 25 CFR 23.121(a). Indicate ''yes'' or ''no.''

(iii) Indicate whether the evidence presented for foster care placement as indicated in paragraph (d)(3)(i) indicates that prior to each removal reported in paragraph (d)(1) of this section that active efforts have been made to prevent the breakup of the Indian family and that those efforts were unsuccessful in accordance with 25 U.S.C. 1912(d). Indicate ''yes'' or ''no.''

(4) *Environment at removal.* Indicate the type of environment (household or facility) the child was living in at the time of each removal for each removal reported in paragraph (d)(1) of this section. Indicate ''parent household'' if the child was living in a household that included one or both of the child's parents, whether biological, adoptive or legal. Indicate ''relative household'' if the child was living with a relative(s), the relative(s) is not the child's legal guardian and neither of the child's parents were living in the household. Indicate ''legal guardian household'' if the child was living with a legal guardian(s), the guardian(s) is not the child's relative and neither of the child's parents were living in the household. Indicate ''relative legal guardian household'' if the child was living with a relative(s) who is also the child's legal guardian. Indicate ''justice facility'' if the child was in a detention center, jail or other similar setting where the child was detained. Indicate ''medical/mental health facility'' if the child was living in a facility such as a medical or psychiatric hospital or residential treatment center. Indicate ''other'' if the child was living in another situation not so described, such as living independently or homeless.

(5) *Authority for placement and care responsibility.* Indicate the title IV–E agency's authority for placement and care responsibility of the child for each removal reported in paragraph (d)(1) of this section. ''Court ordered'' means that the court has issued an order that is the basis for the title IV–E agency's placement and care responsibility. ''Voluntary placement agreement'' means that an official voluntary placement agreement has been executed between the parent(s), legal guardian(s), or child age 18 or older and the title IV–E agency. The placement remains voluntary even if a subsequent court order is issued to continue the child in out-of-home care. ''Not yet determined'' means that a voluntary placement agreement has not been signed or a court order has not been issued. When either a voluntary placement agreement is signed or a court order issued, the record must be updated from ''not yet determined'' to the appropriate response option to reflect the title IV–E agency's authority for placement and care responsibility at that time.

(6) *Child and family circumstances at removal.* Indicate all child and family circumstances that were present at the time of the child's removal and/or related to the child being placed into foster care for each removal reported in paragraph (d)(1) of this section. Indicate whether each circumstance listed in the data elements described in paragraphs (d)(6)(i) through (xxxiii) ''applies'' or ''does not apply'' for each removal indicated in paragraph (d)(1) of this section.

(i) *Runaway.* The child has left, without authorization, the home or facility where the child was residing.

(ii) *Whereabouts unknown.* The child's whereabouts are unknown and the title IV–E agency does not consider the child to have run away.

(iii) *Physical abuse.* Alleged or substantiated physical abuse, injury or maltreatment of the child by a person responsible for the child's welfare.

(iv) *Sexual abuse.* Alleged or substantiated sexual abuse or exploitation of the child by a person who is responsible for the child's welfare.

(v) *Psychological or emotional abuse.* Alleged or substantiated psychological or emotional abuse, including verbal abuse, of the child by a person who is responsible for the child's welfare.

(vi) *Neglect.* Alleged or substantiated negligent treatment or maltreatment of the child, including failure to provide adequate food, clothing, shelter, supervision or care by a person who is responsible for the child's welfare.

(vii) *Medical neglect.* Alleged or substantiated medical neglect caused by a failure to provide for the appropriate health care of the child by a person who is responsible for the child's welfare, although the person was financially able to do so, or was offered financial or other means to do so.

(viii) *Domestic violence.* Alleged or substantiated violent act(s), including any forceful detention of an individual, that results in, threatens to result in, or attempts to cause physical injury or mental harm. This is committed by a person against another individual residing in the child's home and with whom such person is in an intimate relationship; dating relationship; is or was related by marriage; or has a child in common. This circumstance includes domestic violence between the child and his or her partner and applies to a child or youth of any age (including those younger and older than the age of majority. This does not include alleged or substantiated maltreatment of the child by a person who is responsible for the child's welfare.

(ix) *Abandonment.* The child was left alone or with others and the parent or legal guardian's identity is unknown and cannot be ascertained. This includes a child left at a ''safe haven.'' This category does not apply when the identity of the parent(s) or legal guardian(s) is known.

(x) *Failure to return.* The parent, legal guardian or caretaker did not or has not returned for the child or made his or her whereabouts known. This category does not apply when the identity of the parent, legal guardian or caretaker is unknown.

(xi) *Caretaker's alcohol use.* A parent, legal guardian or other caretaker responsible for the child uses alcohol compulsively that is not of a temporary nature.

(xii) *Caretaker's drug use.* A parent, legal guardian or other caretaker responsible for the child uses drugs compulsively that is not of a temporary nature.

(xiii) *Child alcohol use.* The child uses alcohol.

(xiv) *Child drug use.* The child uses drugs.

(xv) *Prenatal alcohol exposure.* The child has been identified as prenatally exposed to alcohol, resulting in fetal alcohol spectrum disorders such as fetal alcohol exposure, fetal alcohol effect or fetal alcohol syndrome.

(xvi) *Prenatal drug exposure.* The child has been identified as prenatally exposed to drugs.

(xvii) *Diagnosed condition.* The child has a clinical diagnosis by a qualified professional of a health, behavioral or mental health condition, such as one or more of the following: Intellectual disability, emotional disturbance, specific learning disability, hearing, speech or sight impairment, physical disability or other clinically diagnosed condition.

(xviii) *Inadequate access to mental health services.* The child and/or child's family has inadequate resources to access the necessary mental health services outside of the child's out-of-home care placement.

(xix) *Inadequate access to medical services.* The child and/or child's family

has inadequate resources to access the necessary medical services outside of the child's out-of-home care placement.

(xx) *Child behavior problem.* The child's behavior in his or her school and/or community adversely affects his or her socialization, learning, growth and/or moral development. This includes all child behavior problems, as well as adjudicated and non-adjudicated status or delinquency offenses and convictions.

(xxi) *Death of caretaker.* Existing family stress in caring for the child or an inability to care for the child due to the death of a parent, legal guardian or other caretaker.

(xxii) *Incarceration of caretaker.* The child's parent, legal guardian or caretaker is temporarily or permanently placed in jail or prison which adversely affects his or her ability to care for the child.

(xxiii) *Caretaker's significant impairment—physical/emotional.* A physical or emotional illness or disabling condition of the child's parent, legal guardian or caretaker that adversely limits his or her ability to care for the child.

(xxiv) *Caretaker's significant impairment—cognitive.* The child's parent, legal guardian or caretaker has cognitive limitations that impact his or her ability to function in areas of daily life, which adversely affect his or her ability to care for the child. It also may be characterized by a significantly below-average score on a test of mental ability or intelligence.

(xxv) *Inadequate housing.* The child's or his or her family's housing is substandard, overcrowded, unsafe or otherwise inadequate which results in it being inappropriate for the child to reside.

(xxvi) *Voluntary relinquishment for adoption.* The child's parent has voluntarily relinquished the child by assigning the physical and legal custody of the child to the title IV–E agency, in writing, for the purpose of having the child adopted.

(xxvii) *Child requested placement.* The child, age 18 or older, has requested placement into foster care.

(xxviii) *Sex trafficking.* The child is a victim of sex trafficking at the time of removal.

(xxix) *Parental immigration detainment or deportation.* The parent is or was detained or deported by immigration officials.

(xxx) *Family conflict related to child's sexual orientation, gender identity, or gender expression.* There is family conflict related to the child's sexual orientation, gender identity, or gender expression. This includes the child's expressed identity or perceived status as lesbian, gay, bisexual, transgender, questioning, queer, or gender non-conforming. This also includes any conflict related to the ways in which a child manifests masculinity or femininity.

(xxxi) *Educational neglect.* Alleged or substantiated failure of a parent or caregiver to enroll a child of mandatory school age in school or provide appropriate home schooling or needed special educational training, thus allowing the child or youth to engage in chronic truancy.

(xxxii) *Public agency title IV–E agreement.* The child is in the placement and care responsibility of another public agency that has an agreement with the title IV–E agency pursuant to section 472(a)(2)(B) of the Act and on whose behalf title IV–E foster care maintenance payments are made

(xxxiii) *Tribal title IV–E agreement.* The child is in the placement and care responsibility of an Indian tribe, tribal organization or consortium with which the title IV–E agency has an agreement and on whose behalf title IV–E foster care maintenance payments are made.

(xxxiv) *Homelessness.* The child or his or her family has no regular or adequate place to live. This includes living in a car, or on the street, or staying in a homeless or other temporary shelter.

(7) *Victim of sex trafficking prior to entering foster care.* Indicate whether the child had been a victim of sex trafficking before the current out-of-home care episode. Indicate ''yes'' if the child was a victim or ''no'' if the child had not been a victim.

(i) *Report to law enforcement.* If the title IV–E agency indicated ''yes'' in paragraph (d)(7), indicate whether the title IV–E agency made a report to law enforcement for entry into the National Crime Information Center (NCIC) database. Indicate ''yes'' if the agency made a report to law enforcement and indicate ''no'' if the agency did not make a report.

(ii) *Date.* If the title IV–E agency indicated ''yes'' in paragraph (d)(7)(i) of this section, indicate the date that the agency made the report to law enforcement.

(8) *Victim of sex trafficking while in foster care.* Indicate ''yes'' if the child was a victim of sex trafficking while in out-of-home care during the current out-of-home care episode. Indicate ''no'' if the child was not a victim of sex trafficking during the current out-of-home care episode.

(i) *Report to law enforcement.* If the title IV–E agency indicated ''yes'' in this paragraph (d)(8) of this section, indicate whether the agency made a report to law enforcement for entry into the NCIC database. Indicate ''yes'' if the title IV–E agency made a report(s) to law enforcement and indicate ''no'' if the title IV–E agency did not make a report.

(ii) *Date.* If the title IV–E agency indicated ''yes'' in paragraph (d)(8)(i), indicate the date(s) the agency made the report(s) to law enforcement.

(e) *Living arrangement and provider information*—(1) *Date of living arrangement.* Indicate the month, day and year representing the first date of placement in each of the child's living arrangements for each out-of-home care episode. In the case of a child who has run away, whose whereabouts are unknown, or who is already in a living arrangement and remains there when the title IV–E agency receives placement and care responsibility, indicate the date of the VPA or court order providing the title IV–E agency with placement and care responsibility for the child, rather than the date when the child was originally placed in the living arrangement.

(2) *Foster family home.* Indicate whether each of the child's living arrangements is a foster family home, with a ''yes'' or ''no'' as appropriate. If the child has run away or the child's whereabouts are unknown, indicate ''no.'' If the title IV–E agency indicates that the child is living in a foster family home, by indicating ''yes,'' the title IV–E agency must complete the data element Foster family home type in paragraph (e)(3) of this section. If the title IV–E agency indicates ''no,'' the title IV–E agency must complete the data element *Other living arrangement type* in paragraph (e)(4).

(3) *Foster family home type.* If the title IV–E agency indicated that the child is living in a foster family home in the data element described in paragraph (e)(2), indicate whether each foster family home type listed in the data elements in paragraphs (e)(3)(i) through (e)(3)(vi) of this section applies or does not apply; otherwise the title IV–E agency must leave this data element blank.

(i) *Licensed home.* The child's living arrangement is licensed or approved by the state or tribal licensing/approval authority.

(ii) *Therapeutic foster family home.* The home provides specialized care and services.

(iii) *Shelter care foster family home.* The home is so designated by the state or tribal licensing/approval authority, and is designed to provide short-term or transitional care.

(iv) *Relative foster family home.* The foster parent(s) is related to the child by biological, legal or marital connection and the relative foster parent(s) lives in the home as his or her primary residence.

(v) *Pre-adoptive home.* The home is one in which the family and the title IV–E agency have agreed on a plan to adopt the child.

(vi) *Kin foster family home.* The home is one in which there is a kin relationship as defined by the title IV–E agency, such as one where there is a psychological, cultural or emotional relationship between the child or the child's family and the foster parent(s) and there is not a legal, biological, or marital connection between the child and foster parent.

(4) *Other living arrangement type.* If the title IV–E agency indicated that the child's living arrangement is other than a foster family home in the data element *Foster family home* in paragraph (e)(2) of this section, indicate the type of setting; otherwise the title IV–E agency must leave this data element blank. Indicate ''group home-family operated'' if the child is in a group home that provides 24-hour care in a private family home where the family members are the primary caregivers. Indicate ''group home-staff operated'' if the child is in a group home that provides 24-hour care for children where the care-giving is provided by shift or rotating staff. Indicate ''group home-shelter care'' if the child is in a group home that provides 24-hour care which is short-term or transitional in nature, and is designated by the state or tribal licensing/approval authority to provide shelter care. Indicate ''residential treatment center'' if the child is in a facility that has the purpose of treating children with mental health or behavioral conditions. Indicate ''child care institution'' if the child is in a private child care institution, or a public child care institution which accommodates no more than 25 children, and is licensed by the state or tribal authority responsible for licensing or approving child care institutions. This does not include detention facilities, forestry camps, training schools or any other facility operated primarily for the detention of children who are determined to be delinquent. Indicate ''child care institution-shelter care'' if the child is in a child care institution as defined above and the institution is designated to provide shelter care by the state or tribal authority responsible for licensing or approving child care institutions and is short-term or transitional in nature. Indicate ''supervised independent living'' if the child is living independently in a supervised setting. Indicate ''juvenile justice facility'' if the child is in a secure facility or institution where alleged or adjudicated juvenile delinquents are housed. Indicate ''medical or rehabilitative facility'' if the child is in a facility where an individual receives medical or physical health care, such as a hospital. Indicate ''psychiatric hospital'' if the child is in a facility that provides emotional or psychological health care and is licensed or accredited as a hospital. Indicate ''runaway'' if the child has left, without authorization, the home or facility where the child was placed. Indicate ''whereabouts unknown'' if the child is not in the physical custody of the title IV–E agency or person or institution with whom the child has been placed, the child's whereabouts are unknown and the title IV–E agency does not consider the child to have run away. Indicate ''placed at home'' if the child is home with the parent(s) or legal guardian(s) in preparation for the title IV–E agency to return the child home permanently.

(5) *Private agency living arrangement.* Indicate the type of contractual relationship with a private agency for each of the child's living arrangements reported in paragraph (e)(1) of this section. Indicate ''private agency involvement'' if the child is placed in a living arrangement that is either licensed, managed, or run by a private agency that is under contract with the title IV–E agency. Indicate ''no private agency involvement'' if the child's living arrangement is not licensed, managed or run by a private agency.

(6) *Location of living arrangement.* Indicate whether each of the child's living arrangements reported in paragraph (e)(1) of this section is located within or outside of the reporting state or tribal service area or is outside of the country. Indicate ''out-of-state or out-of-tribal service area'' if the child's living arrangement is located outside of the reporting state or tribal service area but inside the United States. Indicate ''in-state or in-tribal service area'' if the child's living arrangement is located within the reporting state or tribal service area. Indicate ''out-of-country'' if the child's living arrangement is outside of the United States. Indicate ''runaway or whereabouts unknown'' if the child has run away from his or her living arrangement or the child's whereabouts are unknown. If the title IV–E agency indicates either ''out-of-state or out-of-tribal service area'' or ''out-of-country'' for the child's living arrangement, the title IV–E agency must complete the data element in paragraph (e)(7) of this section; otherwise the title IV–E agency must leave paragraph (e)(7) blank.

(7) *Jurisdiction or country where child is living.* Indicate the state, tribal service area, Indian reservation, or country where the reporting title IV–E agency placed the child for each living arrangement, if the title IV–E agency indicated either ''out-of-state'' or ''out-of-tribal service area'' or ''out-of-country'' in paragraph (e)(6) of this section; otherwise the title IV–E agency must leave paragraph (e)(7) blank. The title IV–E agency must report the information in a format according to ACF's specifications.

(8) *Available ICWA foster care and pre-adoptive placement preferences.* For state title IV–E agencies only: If the state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), indicate which foster care or pre-adoptive placements that meet the placement preferences of ICWA in 25 U.S.C. 1915(b) were willing to accept placement for each of the child's living arrangements reported in paragraph (e)(1) of this section. Indicate in each paragraph (e)(8)(i) through (v) of this section ''yes'' or ''no.''

(i) A member of the Indian child's extended family.

(ii) A foster home licensed, approved, or specified by the Indian child's tribe.

(iii) An Indian foster home licensed or approved by an authorized non-Indian licensing authority.

(iv) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(v) A placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child's tribe, in accordance with 25 U.S.C. 1915(c).

(9) *Foster care and pre-adoptive placement preferences under ICWA.* For state title IV–E agencies only: If the state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), for each of the Indian child's foster care or pre-adoptive placement(s) reported in paragraph (e)(1) of this section, indicate whether the placement meets the placement preferences of ICWA in 25 U.S.C. 1915(b) by indicating with whom the Indian child is placed. Indicate ''a member of the Indian child's extended family,'' ''a foster home licensed, approved, or specified by the Indian child's tribe,'' ''an Indian foster home licensed or approved by an authorized non-Indian licensing authority,'' ''an institution for children approved by an Indian tribe or operated by an Indian

organization which has a program suitable to meet the Indian child's needs,'' ''a placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child's tribe, in accordance with 25 U.S.C. 1915(c)'' or ''placement does not meet ICWA placement preferences.'' If the state IV–E agency indicated ''placement does not meet ICWA placement preferences,'' then the state IV–E agency must complete paragraph (e)(10). Otherwise, the state title IV–E agency must leave paragraph (e)(10) blank.

(10) *Good cause under ICWA.* For state title IV–E agencies only: If the state title IV–E agency indicated ''placement does not meet ICWA placement preferences'' in paragraph (e)(9), indicate whether the court determined by clear and convincing evidence, on the record or in writing, a good cause to depart from the ICWA placement preferences in accordance with 25 U.S.C. 1915(b) or to depart from the placement preferences of the Indian child's tribe in accordance with 25 U.S.C. 1915(c). Indicate ''yes'' or ''no.'' If the state title IV–E agency indicated ''yes,'' then the state title IV–E agency must indicate the basis for good cause in paragraph (e)(11) of this section. If the state title IV–E agency indicated ''no,'' then the state title IV–E agency must leave paragraph (e)(11) blank.

(11) *Basis for good cause.* For state title IV–E agencies only: If the state title IV–E agency indicated ''yes'' to paragraph (e)(10), indicate the state court's basis for determining good cause to depart from ICWA placement preferences by indicating ''yes'' or ''no'' in each paragraph (e)(11)(i) through (v) of this section.

(i) Request of one or both of the Indian child's parents.

(ii) Request of the Indian child.

(iii) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the placement preferences in ICWA at 25 U.S.C. 1915 but none has been located.

(iv) The extraordinary physical, mental or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live.

(v) The presence of a sibling attachment that can be maintained only through a particular placement.

(12) *Marital status of the foster parent(s).* Indicate the marital status of the child's foster parent(s) for each foster family home living arrangement in which the child is placed, as indicated in paragraph (e)(3) of this section. Indicate ''married couple'' if the foster parents are considered united in matrimony according to applicable laws. Include common law marriage, where provided by applicable laws. Indicate ''unmarried couple'' if the foster parents are living together as a couple, but are not united in matrimony according to applicable laws. Indicate ''separated'' if the foster parent is legally separated or is living apart from his or her spouse. Indicate ''single adult'' if the foster parent is not married and is not living with another individual as part of a couple. If the response is either ''married couple'' or ''unmarried couple,'' the title IV–E agency must complete the data elements for the second foster parent in paragraphs (e)(20) through (e)(25) of this section; otherwise the title IV–E agency must leave those data elements blank.

(13) *Child's relationships to the foster parent(s).* Indicate the type of relationship between the child and his or her foster parent(s), for each foster family home living arrangement in which the child is placed, as indicated in paragraph (e)(3) of this section. Indicate ''paternal grandparent(s)'' if the foster parent(s) is the child's paternal grandparent (by biological, legal or marital connection). Indicate ''maternal grandparent(s)'' if the foster parent(s) is the child's maternal grandparent (by biological, legal or marital connection). Indicate ''other paternal relative(s)'' if the foster parent(s) is the child's paternal relative (by biological, legal or marital connection) other than a grandparent, such as an aunt, uncle or cousin. Indicate ''other maternal relative(s)'' if the foster parent(s) is the child's maternal relative (by biological, legal or marital connection) other than a grandparent, such as an aunt, uncle or cousin. Indicate ''sibling(s)'' if the foster parent(s) is a brother or sister of the child, either biologically, legally or by marriage. Indicate ''non-relative(s)'' if the foster parent(s) is not related to the child (by biological, legal or marital connection). Indicate ''kin'' if the foster parent(s) has kin relationship to the child as defined by the title IV–E agency, such as one where there is a psychological, cultural or emotional relationship between the child or the child's family and the foster parent(s) and there is not a legal, biological, or marital connection between the child and foster parent.

(14) *Year of birth for first foster parent.* Indicate the year of birth for the first foster parent for each foster family home living arrangement in which the child is placed, as indicated in paragraph (e)(3) of this section.

(15) *First foster parent tribal membership.* Indicate whether the first foster parent is a member of an Indian tribe. Indicate ''yes,'' ''no,'' or ''unknown.''

(16) *Race of first foster parent.* Indicate the race of the first foster parent for each foster family home living arrangement in which the child is placed, as indicated in paragraph (e)(3) of this section. In general, an individual's race is determined by the individual. Indicate whether each race category listed in the data elements described in paragraphs (e)(16)(i) through (vii) of this section applies with a ''yes'' or ''no.''

(i) *Race—American Indian or Alaska Native.* An American Indian or Alaska Native individual has origins in any of the original peoples of North or South America (including Central America) and maintains tribal affiliation or community attachment.

(ii) *Race—Asian.* An Asian individual has origins in any of the original peoples of the Far East, Southeast Asia or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand and Vietnam.

(iii) *Race—Black or African American.* A Black or African American individual has origins in any of the black racial groups of Africa.

(iv) *Race—Native Hawaiian or Other Pacific Islander.* A Native Hawaiian or Other Pacific Islander individual has origins in any of the original peoples of Hawaii, Guam, Samoa or other Pacific Islands.

(v) *Race—White.* A White individual has origins in any of the original peoples of Europe, the Middle East or North Africa.

(vi) *Race—unknown.* The foster parent does not know his or her race, or at least one race.

(vii) *Race—declined.* The first foster parent has declined to identify a race.

(17) *Hispanic or Latino ethnicity of first foster parent.* Indicate the Hispanic or Latino ethnicity of the first foster parent for each foster family home living arrangement in which the child is placed, as indicated in paragraph (e)(3) of this section. In general, an individual's ethnicity is determined by the individual. An individual is of Hispanic or Latino ethnicity if the individual is a person of Cuban, Mexican, Puerto Rican, South or Central American or other Spanish culture or origin, regardless of race. Indicate whether this category applies with a ''yes'' or ''no.'' If the first foster parent does not know his or her ethnicity indicate ''unknown.'' If the individual

refuses to identify his or her ethnicity, indicate ''declined.''

(18) *Gender of first foster parent.* Indicate whether the first foster parent self identifies as ''female'' or ''male.''

(19) *First foster parent sexual orientation.* Indicate whether the first foster parent self identifies as ''straight or heterosexual,'' ''gay or lesbian,'' ''bisexual,'' ''don't know,'' ''something else,'' or ''declined'' if the first foster parent declined to identify his/her status.

(20) *Year of birth for second foster parent.* Indicate the birth year of the second foster parent for each foster family home living arrangement in which the child is placed, as indicated in paragraph (e)(3) of this section, if applicable. The title IV–E agency must leave this data element blank if there is no second foster parent according to paragraph (e)(12) of this section.

(21) *Second foster parent tribal membership.* Indicate whether the second foster parent is a member of an Indian tribe. Indicate ''yes,'' ''no,'' or ''unknown.''

(22) *Race of second foster parent.* Indicate the race of the second foster parent for each foster family home living arrangement in which the child is placed, as indicated in paragraph (e)(3) of this section, if applicable. In general, an individual's race is determined by the individual. Indicate whether each race category listed in the data elements described in paragraphs (e)(22)(i) through (vii) of this section applies with a ''yes'' or ''no.'' The title IV–E agency must leave this data element blank if there is no second foster parent according to paragraph (e)(12) of this section.

(i) *Race—American Indian or Alaska Native.* An American Indian or Alaska Native individual has origins in any of the original peoples of North or South America (including Central America) and maintains tribal affiliation or community attachment.

(ii) *Race—Asian.* An Asian individual has origins in any of the original peoples of the Far East, Southeast Asia or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand and Vietnam.

(iii) *Race—Black or African American.* A Black or African American individual has origins in any of the black racial groups of Africa.

(iv) *Race—Native Hawaiian or Other Pacific Islander.* A Native Hawaiian or Other Pacific Islander individual has origins in any of the original peoples of Hawaii, Guam, Samoa or other Pacific Islands.

(v) *Race—White.* A White individual has origins in any of the original peoples of Europe, the Middle East or North Africa.

(vi) *Race—unknown.* The second foster parent does not know his or her race, or at least one race.

(vii) *Race—declined.* The second foster parent has declined to identify a race.

(23) *Hispanic or Latino ethnicity of second foster parent.* Indicate the Hispanic or Latino ethnicity of the second foster parent for each foster family home living arrangement in which the child is placed, as indicated in paragraph (e)(3) of this section, if applicable. In general, an individual's ethnicity is determined by the individual. An individual is of Hispanic or Latino ethnicity if the individual is a person of Cuban, Mexican, Puerto Rican, South or Central American or other Spanish culture or origin, regardless of race. Indicate whether this category applies with a ''yes'' or ''no.'' If the second foster parent does not know his or her ethnicity, indicate ''unknown.'' If the individual refuses to identify his or her ethnicity, indicate ''declined.'' The title IV–E agency must leave this data element blank if there is no second foster parent according to paragraph (e)(12) of this section.

(24) *Gender of second foster parent.* Indicate whether the second foster parent self identifies as ''female'' or ''male.''

(25) *Second foster parent sexual orientation.* Indicate whether the second foster parent self identifies as ''straight or heterosexual,'' ''gay or lesbian,'' ''bisexual,'' ''don't know,'' ''something else,'' or ''declined'' if the second foster parent declined to identify his/her status.

(f) *Permanency planning*—(1) *Permanency plan.* Indicate each permanency plan established for the child. Indicate ''reunify with parent(s) or legal guardian(s)'' if the plan is to keep the child in out-of-home care for a limited time and the title IV–E agency is to work with the child's parent(s) or legal guardian(s) to establish a stable family environment. Indicate ''live with other relatives'' if the plan is for the child to live permanently with a relative(s) (by biological, legal or marital connection) who is not the child's parent(s) or legal guardian(s). Indicate ''adoption'' if the plan is to facilitate the child's adoption by relatives, foster parents, kin or other unrelated individuals. Indicate ''guardianship'' if the plan is to establish a new legal guardianship. Indicate ''planned permanent living arrangement'' if the plan is for the child to remain in foster care until the title IV–E agency's placement and care responsibility ends. The title IV–E agency must only select ''planned permanent living arrangement'' consistent with the requirements in section 475(5)(C)(i) of the Act. Indicate ''permanency plan not established'' if a permanency plan has not yet been established.

(2) *Date of permanency plan.* Indicate the month, day and year that each permanency plan(s) was established during each out-of-home care episode.

(3) *Date of periodic review.* Enter the month, day and year of each periodic review, either by a court or by administrative review (as defined in section 475(6) of the Act) that meets the requirements of section 475(5)(B) of the Act.

(4) *Date of permanency hearing.* Enter the month, day and year of each permanency hearing held by a court or an administrative body appointed or approved by the court that meets the requirements of section 475(5)(C) of the Act.

(5) *Juvenile justice.* Indicate whether the child was found to be a status offender or adjudicated delinquent by a juvenile judge or court at any time during the report period. A status offense is specific to juveniles, such as running away, truancy or underage alcohol violations. Indicate ''yes'' or ''no.''

(6) *Caseworker visit dates.* Enter each date in which a caseworker had an in-person, face-to-face visit with the child consistent with section 422(b)(17) of the Act. Indicate the month, day and year of each visit.

(7) *Caseworker visit location.* Indicate the location of each in-person, face-to-face visit between the caseworker and the child. Indicate ''child's residence'' if the visit occurred at the location where the child is currently residing, such as the current foster care provider's home, child care institution or facility. Indicate ''other location'' if the visit occurred at any location other than where the child currently resides, such as the child's school, a court, a child welfare office or in the larger community.

(8) *Transition plan.* Indicate whether a child has a transition plan that meets the requirements of section 475(5)(H) of the Act, including plans developed before the 90-day period. Indicate ''yes,'' ''no'' or ''not applicable.''

(9) *Date of transition plan.* Indicate the month, day and year of the child's transition plan, if the title IV–E agency indicated in paragraph (f)(8) of this section that the child has a transition plan that meets the requirements of section 475(5)(H) of the Act; otherwise leave this paragraph blank.

(10) *Active efforts.* For state title IV–E agencies only: If the state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), indicate whether the active efforts in each paragraph (f)(10)(i) through (xiii) ''applies'' or ''does not apply.'' The state title IV–E agency must indicate all of the active efforts that apply once the child enters the AFCARS out-of-home care reporting population per § 1355.42(a) through the child's exit per paragraph (g)(1) of this section and the active efforts made prior to the child entering the out-of-home care reporting population.

(i) Assist the parent(s) or Indian custodian through the steps of a case plan and with developing the resources necessary to satisfy the case plan.

(ii) Conduct a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal.

(iii) Identify appropriate services to help the parent overcome barriers, including actively assisting the parents in obtaining such services.

(iv) Identify, notify and invite representatives of the Indian child's tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning and resolution of placement issues.

(v) Conduct or cause to be conducted a diligent search for the Indian child's extended family members, and contact and consult with extended family members to provide family structure and support for the Indian child and the Indian child's parents.

(vi) Offer and employ all available and culturally appropriate family preservation strategies and facilitate the use of remedial and rehabilitative services provide by the child's tribe.

(vii) Take steps to keep siblings together whenever possible.

(viii) Support regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child.

(ix) Identify community resources including housing, financial, transportation, mental health, substance use and peer support services and actively assisting the Indian child's parents or when appropriate, the child's family, in utilizing and accessing those resources.

(x) Monitor progress and participation in services.

(xi) Consider alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available.

(xii) Provide post-reunification services and monitoring.

(xiii) Other active efforts tailored to the facts and circumstances of the case.

(g) *General exit information.* Provide exit information for each out-of-home care episode. An exit occurs when the title IV–E agency's placement and care responsibility of the child ends.

(1) *Date of exit.* Indicate the month, day and year for each of the child's exits from out-of-home care. An exit occurs when the title IV–E agency's placement and care responsibility of the child ends. If the child has not exited out-of-home care the title IV–E agency must leave this data element blank. If this data element is applicable, the data elements in paragraphs (g)(2) and (3) of this section must have a response.

(2) *Exit transaction date.* A non-modifiable, computer-generated date which accurately indicates the month, day and year each response to paragraph (g)(1) of this section was entered into the information system.

(3) *Exit reason.* Indicate the reason for each of the child's exits from out-of-home care. Indicate ''not applicable'' if the child has not exited out-of-home care. Indicate ''reunify with parent(s)/legal guardian(s)'' if the child was returned to his or her parent(s) or legal guardian(s) and the title IV–E agency no longer has placement and care responsibility. Indicate ''live with other relatives'' if the child exited to live with a relative (related by a biological, legal or marital connection) other than his or her parent(s) or legal guardian(s). Indicate ''adoption'' if the child was legally adopted. Indicate ''emancipation'' if the child exited care due to age. Indicate ''guardianship'' if the child exited due to a legal guardianship of the child. Indicate ''runaway or whereabouts unknown'' if the child ran away or the child's whereabouts were unknown at the time that the title IV–E agency's placement and care responsibility ends. Indicate ''death of child'' if the child died while in out-of-home care. Indicate ''transfer to another agency'' if placement and care responsibility for the child was transferred to another agency, either within or outside of the reporting state or tribal service area.

(4) *Transfer to another agency.* If the title IV–E agency indicated the child was transferred to another agency in the data element *Exit reason* described in paragraph (g)(3) of this section, indicate the type of agency that received placement and care responsibility for the child from the following options: ''State title IV–E agency,'' ''Tribal title IV–E agency,'' ''Indian tribe or tribal agency (non-IV–E),'' ''juvenile justice agency,'' ''mental health agency,'' ''other public agency'' or ''private agency.''

(h) *Exit to adoption and guardianship information.* Report information in paragraph (h) only if the title IV–E agency indicated the child exited to adoption or legal guardianship in the data element *Exit reason* described in paragraph (g)(3) of this section. Otherwise the title IV–E agency must leave the data elements in paragraph (h) blank.

(1) *Marital status of the adoptive parent(s) or guardian(s).* Indicate the marital status of the adoptive parent(s) or legal guardian(s). Indicate ''married couple'' if the adoptive parents or legal guardians are considered united in matrimony according to applicable laws. Include common law marriage, where provided by applicable laws. Indicate ''married but individually adopting or obtaining legal guardianship'' if the adoptive parents or legal guardians are considered united in matrimony according to applicable laws, but are individually adopting or obtaining legal guardianship. Indicate ''separated'' if the foster parent is legally separated or is living apart from his or her spouse. Indicate ''unmarried couple'' if the adoptive parents or guardians are living together as a couple, but are not united in matrimony according to applicable laws. Use this response option even if only one person of the unmarried couple is the adoptive parent or legal guardian of the child. Indicate ''single adult'' if the adoptive parent or legal guardian is not married and is not living with another individual as part of a couple. If the response is ''married couple'' or ''unmarried couple,'' the title IV–E agency also must complete the data elements for the second adoptive parent or second legal guardian in paragraphs (h)(9) through (14) of this section; otherwise the title IV–E agency must leave these data elements blank.

(2) *Child's relationship to the adoptive parent(s) or guardian(s).* Indicate the type of relationship, kinship or otherwise, between the child and his or her adoptive parent(s) or legal guardian(s). Indicate whether each relationship listed in the data elements described in paragraphs (h)(2)(i) through (viii) of this section ''applies'' or ''does not apply.''

(i) *Paternal grandparent(s).* The adoptive parent(s) or legal guardian(s) is the child's paternal grandparent(s), by biological, legal or marital connection.

(ii) *Maternal grandparent(s).* The adoptive parent(s) or legal guardian(s) is

the child's maternal grandparent(s), by biological, legal or marital connection.

(iii) *Other paternal relative(s).* The adoptive parent(s) or legal guardian(s) is the child's paternal relative (by biological, legal or marital connection) other than a grandparent, such as an aunt, uncle or cousin.

(iv) *Other maternal relative(s).* The adoptive parent(s) or legal guardian(s) is the child's maternal relative (by biological, legal or marital connection) other than a grandparent, such as an aunt, uncle or cousin.

(v) *Sibling(s).* The adoptive parent or legal guardian is a brother or sister of the child, either biologically, legally or by marriage.

(vi) *Kin.* The adoptive parent(s) or legal guardian(s) has a kin relationship with the child, as defined by the title IV–E agency, such as one where there is a psychological, cultural or emotional relationship between the child or the child's family and the adoptive parent(s) or legal guardian(s) and there is not a legal, biological, or marital connection between the child and foster parent.

(vii) *Non-relative(s).* The adoptive parent(s) or legal guardian(s) is not related to the child by biological, legal or marital connection.

(viii) *Foster parent(s).* The adoptive parent(s) or legal guardian(s) was the child's foster parent(s).

(3) *Date of birth of first adoptive parent or guardian.* Indicate the month, day and year of the birth of the first adoptive parent or legal guardian.

(4) *First adoptive parent or guardian tribal membership.* Indicate whether the first adoptive parent or guardian is a member of an Indian tribe. Indicate ''yes,'' ''no'' or ''unknown.''

(5) *Race of first adoptive parent or guardian.* In general, an individual's race is determined by the individual. Indicate whether each race category listed in the data elements described in paragraphs (h)(5)(i) through (vii) of this section applies with a ''yes'' or ''no.''

(i) *Race—American Indian or Alaska Native.* An American Indian or Alaska Native individual has origins in any of the original peoples of North or South America (including Central America), and maintains tribal affiliation or community attachment.

(ii) *Race—Asian.* An Asian individual has origins in any of the original peoples of the Far East, Southeast Asia or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand and Vietnam.

(iii) *Race—Black or African American.* A Black or African American individual has origins in any of the black racial groups of Africa.

(iv) *Race—Native Hawaiian or Other Pacific Islander.* A Native Hawaiian or Other Pacific Islander individual has origins in any of the original peoples of Hawaii, Guam, Samoa or other Pacific Islands.

(v) *Race—White.* A White individual has origins in any of the original peoples of Europe, the Middle East or North Africa.

(vi) *Race—Unknown.* The first adoptive parent or legal guardian does not know his or her race, or at least one race.

(vii) *Race—Declined.* The first adoptive parent, or legal guardian has declined to identify a race.

(6) *Hispanic or Latino ethnicity of first adoptive parent or guardian.* In general, an individual's ethnicity is determined by the individual. An individual is of Hispanic or Latino ethnicity if the individual is a person of Cuban, Mexican, Puerto Rican, South or Central American or other Spanish culture or origin, regardless of race. Indicate whether this category applies with a ''yes'' or ''no.'' If the first adoptive parent or legal guardian does not know his or her ethnicity, indicate ''unknown.'' If the individual refuses to identify his or her ethnicity, indicate ''declined.''

(7) *Gender of first adoptive parent or guardian.* Indicate whether the first adoptive parent self identifies as ''female'' or ''male.''

(8) *First adoptive parent or legal guardian sexual orientation.* Indicate whether the first adoptive parent or legal guardian self identifies as ''straight or heterosexual,'' ''gay or lesbian,'' ''bisexual,'' ''don't know,'' ''something else,'' or ''declined'' if the first adoptive parent or legal guardian declined to identify his/her status.

(9) *Date of birth of second adoptive parent, guardian, or other member of the couple.* Indicate the month, day and year of the date of birth of the second adoptive parent, legal guardian, or other member of the couple. The title IV–E agency must leave this data element blank if there is no second adoptive parent, legal guardian, or other member of the couple according to paragraph (h)(1) of this section.

(10) *Second adoptive parent, guardian, or other member of the couple tribal membership.* Indicate whether the second adoptive parent or guardian is a member of an Indian tribe. Indicate ''yes,'' ''no'' or ''unknown.''

(11) *Race of second adoptive parent, guardian, or other member of the couple.* In general, an individual's race is determined by the individual. Indicate whether each race category listed in the data elements described in paragraphs (h)(11)(i) through (vii) of this section applies with a ''yes'' or ''no.'' The title IV–E agency must leave this data element blank if there is no second adoptive parent, legal guardian, or other member of the couple according to paragraph (h)(1) of this section.

(i) *Race—American Indian or Alaska Native.* An American Indian or Alaska Native individual has origins in any of the original peoples of North or South America (including Central America), and maintains tribal affiliation or community attachment.

(ii) *Race—Asian.* An Asian individual has origins in any of the original peoples of the Far East, Southeast Asia or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand and Vietnam.

(iii) *Race—Black or African American.* A Black or African American individual has origins in any of the black racial groups of Africa.

(iv) *Race—Native Hawaiian or Other Pacific Islander.* A Native Hawaiian or Other Pacific Islander individual has origins in any of the original peoples of Hawaii, Guam, Samoa or other Pacific Islands.

(v) *Race—White.* A White individual has origins in any of the original peoples of Europe, the Middle East or North Africa.

(vi) *Race—Unknown.* The second adoptive parent, legal guardian, or other member of the couple does not know his or her race, or at least one race.

(vii) *Race—Declined.* The second adoptive parent, legal guardian, or other member of the couple has declined to identify a race.

(12) *Hispanic or Latino ethnicity of second adoptive parent, guardian, or other member of the couple.* In general, an individual's ethnicity is determined by the individual. An individual is of Hispanic or Latino ethnicity if the individual is a person of Cuban, Mexican, Puerto Rican, South or Central American or other Spanish culture or origin, regardless of race. Indicate whether this category applies with a ''yes'' or ''no.'' If the second adoptive parent, legal guardian, or other member of the couple does not know his or her ethnicity, indicate ''unknown.'' If the individual refuses to identify his or her ethnicity, indicate ''declined.'' The title IV–E agency must leave this data element blank if there is no second adoptive parent, legal guardian, or other member of the couple according to paragraph (h)(1) of this section.

(13) *Gender of second adoptive parent, guardian, or other member of the couple.* Indicate whether the second adoptive parent, guardian, or other member of the couple self identifies as ''female'' or ''male.''

(14) *Second adoptive parent, guardian, or other member of the couple sexual orientation.* Indicate whether the second adoptive parent or legal guardian self identifies as ''straight or heterosexual, '' ''gay or lesbian,'' ''bisexual,'' ''don't know,'' ''something else,'' or ''declined'' if the second adoptive parent or legal guardian declined to identify his/her status.

(15) *Inter/Intrajurisdictional adoption or guardianship.* Indicate whether the child was placed within the state or tribal service area, outside of the state or tribal service area or into another country for adoption or legal guardianship. Indicate ''interjurisdictional adoption or guardianship'' if the reporting title IV–E agency placed the child for adoption or legal guardianship outside of the state or tribal service area but within the United States. Indicate ''intercountry adoption or guardianship'' if the reporting title IV–E agency placed the child for adoption or legal guardianship outside of the United States. Indicate ''intrajurisdictional adoption or guardianship'' if the reporting title IV–E agency placed the child within the same state or tribal service area as the one with placing responsibility. If the title IV–E agency indicates either ''interjurisdictional adoption or guardianship'' or ''intercountry adoption or guardianship'' apply for the child's adoption or legal guardianship, the title IV–E agency must complete the data element in paragraph (h)(16) of this section; otherwise the title IV–E agency must leave it blank.

(16) *Interjurisdictional adoption or guardianship jurisdiction.* Indicate the state, tribal service area, Indian reservation or country where the reporting title IV–E agency placed the child for adoption or legal guardianship, in a format according to ACF's specifications. The title IV–E agency must complete this data element only if the title IV–E agency indicated either ''interjurisdictional adoption or guardianship'' or ''intercountry adoption or guardianship'' in paragraph (h)(15) of this section; otherwise the title IV–E agency must leave it blank.

(17) *Adoption or guardianship placing agency.* Indicate the agency that placed the child for adoption or legal guardianship. Indicate ''title IV–E agency'' if the reporting title IV–E agency placed the child for adoption or legal guardianship. Indicate ''private agency under agreement'' if a private agency placed the child for adoption or legal guardianship through an agreement with the reporting title IV–E agency. Indicate ''Indian tribe under contract/agreement'' if an Indian tribe, tribal organization or consortia placed the child for adoption or legal guardianship through a contract or an agreement with the reporting title IV–E agency.

(18) *Assistance agreement type.* Indicate the type of assistance agreement between the title IV–E agency and the adoptive parent(s) or legal guardian(s): ''Title IV–E adoption assistance agreement;'' ''State/tribal adoption assistance agreement;'' ''Adoption-Title IV–E agreement non-recurring expenses only;'' ''Adoption-Title IV–E agreement Medicaid only;'' ''Title IV–E guardianship assistance agreement;'' ''State/tribal guardianship assistance agreement;'' or ''no agreement'' if there is no assistance agreement.

(19) *Siblings in adoptive or guardianship home.* Indicate the number of siblings of the child who are in the same adoptive or guardianship home as the child. A sibling to the child is his or her brother or sister by biological, legal, or marital connection. Do not include the child who is subject of this record in the total number. If the child does not have any siblings, the title IV–E agency must indicate ''not applicable.'' If the child has siblings, but they are not in the same adoptive or guardianship home as the child, the title IV–E agency must indicate ''0.''

(20) *Available ICWA Adoptive placements.* For state title IV–E agencies only: If the state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5), indicate which adoptive placements that meet the placement preferences in ICWA at 25 U.S.C. 1915(a) were willing to accept placement. Indicate in each paragraph (h)(20)(i) through (h)(20)(iv) of this section ''yes'' or ''no.''

(i) A member of the Indian child's extended family.

(ii) Other members of the Indian child's tribe.

(iii) Other Indian families.

(iv) A placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child's tribe, in accordance with 25 U.S.C. 1915(c).

(21) *Adoption placement preferences under ICWA.* For state title IV–E agencies only: If the state title IV–E agency indicated ''yes'' to paragraph (b)(4) or indicated ''yes, ICWA applies'' to paragraph (b)(5) of this section, indicate whether the adoptive placement meets the adoptive placement preferences of ICWA in 25 U.S.C. 1915(a) by indicating with whom the Indian child is placed. Indicate ''a member of the Indian child's extended family,'' ''other members of the Indian child's tribe,'' ''other Indian families,'' ''a placement that complies with the order of preference for adoptive placements established by an Indian child's tribe, in accordance with 25 U.S.C. 1915(c),'' or ''placement does not meet ICWA placement preferences.'' If the state IV–E agency indicated ''placement does not meet ICWA placement preferences,'' then the state IV–E agency must complete paragraph (h)(22). Otherwise, leave blank.

(22) *Good cause under ICWA.* For state title IV–E agencies only: If the state title IV–E agency indicated ''placement does not meet ICWA placement preferences'' in paragraph (h)(21), indicate whether the court determined by clear and convincing evidence, on the record or in writing, a good cause to depart from the ICWA placement preferences under 25 U.S.C. 1915(a) or to depart from the placement preferences of the Indian child's tribe under 25 U.S.C. 1915(c). Indicate ''yes'' or ''no.'' If the state title IV–E agency indicated ''yes,'' then the state title IV–E agency must indicate the basis for good cause in paragraph (h)(23) of this section. If the state title IV–E agency indicated ''no,'' then the state title IV–E agency must leave paragraph (h)(23) blank.

(23) *Basis for good cause.* For state title IV–E agencies only: If the state title IV–E agency indicated ''yes'' in paragraph (h)(22), indicate the state court's basis for determining good cause to depart from ICWA adoptive placement preferences by indicating ''yes'' or ''no'' in each paragraph (h)(23)(i) through (v) of this section.

(i) Request of one or both of the child's parents.

(ii) Request of the Indian child.

(iii) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the placement preferences in ICWA at 25 U.S.C. 1915 but none has been located.

(iv) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live.

(v) The presence of a sibling attachment that can be maintained only through a particular placement.

§ 1355.45 Adoption and guardianship assistance data file elements.

A title IV–E agency must report the following information for each child in the adoption and guardianship assistance reporting population, if applicable based on § 1355.42(b).

(a) *General information*—(1) *Title IV–E agency.* Indicate the title IV–E agency responsible for submitting the AFCARS data to ACF per requirements issued by ACF.

(2) *Report date.* The report date corresponds to the end of the current report period. Indicate the last month and the year of the report period.

(3) *Child record number.* The child record number is the encrypted, unique person identification number. The record number must be encrypted in accordance with ACF standards. Indicate the record number for the child.

(b) *Child demographics*—(1) *Child's date of birth.* Indicate the month, day and year of the child's birth.

(2) *Child's gender.* Indicate whether the child is ''male'' or ''female,'' as appropriate.

(3) *Child's race.* In general, a child's race is determined by the child or the child's parent(s) or legal guardian(s). Indicate whether each race category listed in the data elements described in paragraphs (b)(2)(i) through (viii) of this section applies with a ''yes'' or ''no.''

(i) *Race—American Indian or Alaska Native.* An American Indian or Alaska Native child has origins in any of the original peoples of North or South America (including Central America), and maintains Tribal affiliation or community attachment.

(ii) *Race—Asian.* An Asian child has origins in any of the original peoples of the Far East, Southeast Asia or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand and Vietnam.

(iii) *Race—Black or African American.* A Black or African American child has origins in any of the black racial groups of Africa.

(iv) *Race—Native Hawaiian or Other Pacific Islander.* A Native Hawaiian or Other Pacific Islander child has origins in any of the original peoples of Hawaii, Guam, Samoa or other Pacific Islands.

(v) *Race—White.* A White child has origins in any of the original peoples of Europe, the Middle East or North Africa.

(vi) *Race—Unknown.* The child or parent or legal guardian does not know the race, or at least one race of the child.

(vii) *Race—Abandoned.* The child's race is unknown because the child has been abandoned. Abandoned means that the child was left alone or with others and the parent(s) or legal guardian(s)' identity is unknown and cannot be ascertained. This includes a child left at a ''safe haven.''

(viii) *Race—Declined.* The child or parent or legal guardian has declined to identify a race.

(4) *Hispanic or Latino ethnicity.* In general, a child's ethnicity is determined by the child or the child's parent(s) or legal guardian(s). A child is of Hispanic or Latino ethnicity if the child is a person of Cuban, Mexican, Puerto Rican, South or Central American or other Spanish culture or origin, regardless of race. Indicate whether this category applies with a ''yes'' or ''no.'' If the child or the child's parent or legal guardian does not know or cannot communicate whether the child is of Hispanic or Latino ethnicity, indicate ''unknown.'' If the child was abandoned indicate ''abandoned.'' Abandoned means that the child was left alone or with others and the parent(s) or legal guardian(s)' identity is unknown and cannot be ascertained. This includes a child left at a ''safe haven.'' If the child or the child's parent(s) or legal guardian(s) refuses to identify the child's ethnicity, indicate ''declined.''

(c) *Adoption and guardianship assistance agreement information*—(1) *Assistance agreement type.* Indicate whether the child is or was in a finalized adoption with a title IV–E adoption assistance agreement or in a legal guardianship with a title IV–E guardianship assistance agreement, pursuant to sections 473(a) and 473(d) of the Act, in effect during the report period. Indicate ''title IV–E adoption assistance agreement'' or ''title IV–E guardianship assistance agreement,'' as appropriate.

(2) *Adoption or guardianship subsidy amount.* Indicate the per diem dollar amount of the financial subsidy paid to the adoptive parent(s) or legal guardian(s) on behalf of the child during the last month of the current report period, if any. The title IV–E agency must indicate ''0'' if a financial subsidy was not paid during the last month of the report period.

(d) *Adoption finalization or guardianship legalization date.* Indicate the month, day and year that the child's adoption was finalized or the guardianship became legalized.

(e) *Agreement termination date.* If the title IV–E agency terminated the adoption assistance or guardianship assistance agreement or the agreement expired during the report period, indicate the month, day and year that the agreement terminated or expired; otherwise leave this data element blank.

§ 1355.46 Compliance.

(a) *Files subject to compliance.* ACF will evaluate the out-of-home care and adoption and guardianship assistance data files that a title IV–E agency submits to determine whether the data complies with the requirements of § 1355.43 and the data file submission and data quality standards described in paragraphs (c) and (d) of this section. ACF will exempt records related to a child in either data file whose 18th birthday occurred in a prior report period and will exempt records relating to a child in the adoption and guardianship assistance data file who is in a title IV–E guardianship from a compliance determination as described in paragraph (e) of this section.

(b) *Errors.* ACF will utilize the error definitions in paragraphs (b)(1) through (5) of this section to assess a title IV–E agency's out-of-home care and adoption and guardianship assistance data files. This assessment of errors will help ACF to determine if the title IV–E agency's submitted data files meet the data file submission and data quality standards outlined in paragraphs (c) and (d) of this section. ACF will develop and issue error specifications.

(1) *Missing data.* Missing data refers to instances in which a data element has a blank or otherwise missing response, when such a response is not a valid option as described in §§ 1355.44 or 1355.45.

(2) *Invalid data.* Invalid data refers to instances in which a data element contains a value that is outside the parameters of acceptable responses or exceeds, either positively or negatively, the acceptable range of response options as described in §§ 1355.44 or 1355.45.

(3) *Internally inconsistent data.* Internally inconsistent data refers to instances in which a data element fails an internal consistency check designed to validate the logical relationship between data elements within each record. This assessment will identify all data elements involved in a particular check as in error.

(4) *Cross-file errors.* A cross-file error occurs when a cross-file check determines that a response option for a data element recurs across the records in either the out-of-home care data file or adoption and guardianship assistance data file beyond a specified acceptable threshold as specified per ACF.

(5) *Tardy transactions.* Tardy transactions are instances in which the removal transaction date or exit transaction date described in § 1355.44(d)(2) and (g)(2) respectively,

are entered into the title IV–E agency's information system more than 30 days after the event.

(c) *Data file standards.* To be in compliance with the AFCARS requirements, the title IV–E agency must submit a data file in accordance with the data file standards described in paragraphs (c)(1) through (3) of this section.

(1) *Timely submission.* ACF must receive the data files on or before the reporting deadline described in § 1355.43(a).

(2) *Proper format.* The data files must meet the technical standards issued by ACF for data file construction and transmission. In addition, each record subject to compliance standards within the data file must have the data elements described in §§ 1355.44(a)(1) through (4), 1355.44(b)(1) and (b)(2)(i), 1355.45(a), and 1355.45(b)(1) and (2) be 100 percent free of missing data, invalid data and internally inconsistent data (see paragraphs (b)(1) through (3) of this section). ACF will not process a title IV–E agency's data file that does not meet the proper format standard.

(d) *Data quality standards.* (1) To be in compliance with the AFCARS requirements, the title IV–E agency must submit a data file that has no more than 10 percent total of missing, invalid, or internally inconsistent data, or tardy transactions for each data element of applicable records. These standards are in addition to the formatting standards described in paragraph (c)(2) of this section.

(2) *Acceptable cross-file.* The data files must be free of cross-file errors that exceed the acceptable thresholds, as defined by ACF.

(e) *Compliance determination and corrected data.* (1) ACF will first determine whether the title IV–E agency's out-of-home care data file and adoption and guardianship assistance data file meets the data file standards in paragraph (c) of this section. Compliance is determined separately for each data file.

(2) If each data file meets the data file standards, ACF will then determine whether each data file meets the data quality standards in paragraph (d) of this section. For every data element, we will divide the total number of applicable records in error (numerator) by the total number of applicable records (denominator), to determine whether the title IV–E agency has met the applicable data quality standards.

(3) In general, a title IV–E agency that has not met either the data file formatting standards or data quality standards must submit a corrected data file(s) no later than when data is due for the subsequent six month report period (*i.e.,* by May 15 and November 14), as applicable. ACF will determine that the corrected data file(s) is in compliance if it meets the data file and data standards in paragraphs (c) and (d) of this section. Exception: If ACF determines initially that the title IV–E agency's data file has not met the data quality standard related to tardy transactions, ACF will determine compliance with regard to the transaction dates only in the out-of-home care data file submitted for the subsequent report period.

(f) *Noncompliance.* If the title IV–E agency does not submit a corrected data file, or submits a corrected data file that fails to meet the compliance standards in paragraphs (c) and (d) of this section, ACF will notify the title IV–E agency of such and apply penalties as provided in § 1355.47.

(g) *Other assessments.* ACF may use other monitoring tools or assessment procedures to determine whether the title IV–E agency is meeting all of the requirements of §§ 1355.41 through 1355.45.

§ 1355.47 Penalties.

(a) *Federal funds subject to a penalty.* The funds that are subject to a penalty are the title IV–E agency's claims for title IV–E foster care administration and training for the quarter in which the title IV–E agency is required to submit the data files. For data files due on May 15, ACF will assess the penalty based on the title IV–E agency's claims for the third quarter of the Federal fiscal year. For data files due on November 14, ACF will assess the penalty based on the title IV–E agency's claims for the first quarter of the Federal fiscal year.

(b) *Penalty amounts.* ACF will assess penalties in the following amounts:

(1) *First six month period.* ACF will assess a penalty in the amount of one sixth of one percent (⅙ of 1%) of the funds described in paragraph (a) of this section for the first six month period in which the title IV–E agency's submitted corrected data file does not comply with § 1355.46.

(2) *Subsequent six month periods.* ACF will assess a penalty in the amount of one fourth of one percent (¼ of 1%) of the funds described in paragraph (a) of this section for each subsequent six month period in which the title IV–E agency continues to be out of compliance.

(c) *Penalty reduction from grant.* ACF will offset the title IV–E agency's title IV–E foster care grant award in the amount of the penalty from the title IV–E agency's claims following the title IV–E agency notification of ACF's final determination of noncompliance.

(d) *Appeals.* The title IV–E agency may appeal ACF's final determination of noncompliance to the HHS Departmental Appeals Board pursuant to 45 CFR part 16.

Appendices A through E to Part 1355 [Removed]

■ 5. Effective October 1, 2019, remove Appendices A through E to Part 1355.

Note: The following attachments will not appear in the Code of Federal Regulations.

ATTACHMENT A—OUT-OF-HOME CARE DATA FILE ELEMENTS § 1355.44

Category	Element	Reponses options	Section citation
General information	Title IV–E agency	Name	1355.44(a)(1).
	Report date	Date	1355.44(a)(2).
	Local agency	Name	1355.44(a)(3).
	Child record number	Number	1355.44(a)(4).
Child information	Child's date of birth	Date	1355.44(b)(1).
	Child's gender	Male	1355.44(b)(2)(i).
		Female.	
	Child's sexual orientation	Straight or heterosexual	1355.44(b)(2)(ii).
		Gay or lesbian	
		Bisexual	
		Don't know	
		Something else	
		Decline	
		Not applicable	

ATTACHMENT A—OUT-OF-HOME CARE DATA FILE ELEMENTS § 1355.44—Continued

Category	Element	Reponses options	Section citation
	Reason to know a child is an "Indian child" as defined in the Indian Child Welfare Act.		1355.44(b)(3).
	Inquired with the child's biological or adoptive mother.	Yes No The biological or adoptive mother is deceased	1355.44(b)(3)(i).
	Inquired with the child's biological or adoptive father.	Yes No The biological or adoptive father is deceased	1355.44(b)(3)(ii).
	Inquired with the child's Indian custodian.	Yes No Child does not have an Indian custodian	1355.44(b)(3)(iii).
	Inquired with the child's extended family.	Yes No	1355.44(b)(3)(iv).
	Inquired with the child	Yes No	1355.44(b)(3)(v).
	Child is a member or eligible for membership in an Indian tribe.	Yes No Unknown	1355.44(b)(3)(vi).
	Domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village.	Yes No Unknown	1355.44(b)(3)(vii).
	Application of ICWA	Yes No	1355.44(b)(4).
	The date that the state title IV–E agency first discovered information indicating the child is or may be an Indian child as defined in ICWA.	Date	1355.44(b)(4)(i).
	All federally recognized Indian tribe(s) that may potentially be the Indian child's tribe(s).	Name(s)	1355.44(b)(4)(ii).
	Court determination that ICWA applies	Yes, ICWA applies No, ICWA does not apply No court determination	1355.44(b)(5).
	Date court determined that ICWA applies.	Date	1355.44(b)(5)(i).
	Indian tribe that the court determined is the Indian child's tribe for ICWA purposes.	Name	1355.44(b)(5)(ii).
	Notification		1355.44(b)(6).
	Whether the Indian child's parent or Indian custodian was sent legal notice more than 10 days prior to the first child custody proceeding in accordance with 25 U.S.C. 1912(a).	Yes No	1355.44(b)(6)(i).
	Whether the Indian child's tribe(s) was sent legal notice more than 10 days prior to the first child custody proceedings in accordance with 25 U.S.C. 1912(a).	Yes No	1355.44(b)(6)(ii).
	The Indian tribe(s) that were sent notice for a child custody proceeding as required in ICWA at 25 U.S.C. 1912(a).	Name(s)	1355.44(b)(6)(iii).
	Request to transfer to tribal court	Yes No	1355.44(b)(7).
	Denial of transfer	Yes No	1355.44(b)(8).
	Either of the parents objected to transferring the case to tribal court.	Applies Does not apply	1355.44(b)(8)(i).
	The tribal court declined the transfer to the tribal court.	Applies Does not apply	1355.44(b)(8)(ii).
	The state court determined good cause exists for denying the transfer to tribal court.	Applies Does not apply	1355.44(b)(8)(iii).
	Child's race		1355.44(b)(9).
	Race—American Indian or Alaska Native.	Yes No	1355.44(b)(9)(i).

ATTACHMENT A—OUT-OF-HOME CARE DATA FILE ELEMENTS § 1355.44—Continued

Category	Element	Reponses options	Section citation
	Race—Asian	Yes No	1355.44(b)(9)(ii).
	Race—Black or African America	Yes No	1355.44(b)(9)(iii).
	Race—Native Hawaiian or Other Pacific Islander.	Yes No	1355.44(b)(9)(iv).
	Race—White	Yes No	1355.44(b)(9)(v).
	Race—Unknown	Yes No	1355.44(b)(9)(vi).
	Race—Abandoned	Yes No	1355.44(b)(9)(vii).
	Race—Declined	Yes No	1355.44(b)(9)(viii).
	Child's Hispanic or Latino ethnicity	Yes No Unknown Abandoned Declined	1355.44(b)(10).
	Health assessment	Yes No	1355.44(b)(11)(i).
	Date of health assessment	Date	1355.44(b)(11)(ii).
	Timely health assessment	Yes No	1355.44(b)(12).
	Health, behavioral or mental health conditions.	Child has a diagnosed condition No exam or assessment conducted Exam or assessment conducted and none of the conditions apply Exam or assessment conducted but results not received	1355.44(b)(13).
	Intellectual disability	Existing condition Previous condition Does not apply	1355.44(b)(13)(i).
	Autism spectrum disorder	Existing condition Previous condition Does not apply	1355.44(b)(13)(ii).
	Visual impairment and blindness	Existing condition Previous condition Does not apply	1355.44(b)(13)(iii).
	Hearing impairment and deafness	Existing condition Previous condition Does not apply	1355.44(b)(13)(iv).
	Orthopedic impairment or other physical condition.	Existing condition Previous condition Does not apply	1355.44(b)(13)(v).
	Mental/emotional disorders	Existing condition Previous condition Does not apply	1355.44(b)(13)(vi).
	Attention deficit hyperactivity disorder	Existing condition Previous condition Does not apply	1355.44(b)(13)(vii).
	Serious mental disorders	Existing condition Previous condition Does not apply	1355.44(b)(13)(viii).
	Developmental delay	Existing condition Previous condition Does not apply	1355.44(b)(13)(ix).
	Developmental disability	Existing condition Previous condition Does not apply	1355.44(b)(13)(x).
	Other diagnosed condition	Existing condition Previous condition Does not apply	1355.44(b)(13)(xi).
	School enrollment	Elementary Secondary Post-secondary education or training College Not school-age Not enrolled	1355.44(b)(14).
	Educational level	Not school-age Kindergarten 1st grade	1355.44(b)(15).

ATTACHMENT A—OUT-OF-HOME CARE DATA FILE ELEMENTS § 1355.44—Continued

Category	Element	Reponses options	Section citation
		2nd grade 3rd grade 4th grade 5th grade 6th grade 7th grade 8th grade 9th grade 10th grade 11th grade 12th grade GED Post-secondary education or training College	
	Educational stability	Yes No	1355.44(b)(16).
	Proximity	Applies Does not apply	1355.44(b)(16)(i).
	District/zoning rules	Applies Does not apply	1355.44(b)(16)(ii).
	Residential facility	Applies Does not apply	1355.44(b)(16)(iii).
	Services/programs	Applies Does not apply	1355.44(b)(16)(iv).
	Child request	Applies Does not apply	1355.44(b)(16)(v).
	Parent/Legal guardian request	Applies Does not apply	1355.44(b)(16)(vi).
	Other	Applies Does not apply	1355.44(b)(16)(vii).
	Pregnant or parenting		1355.44(b)(17).
	Child is pregnant as of end of report period.	Yes No	1355.44(b)(17)(i).
	Child has ever fathered or bore a child.	Yes No	1355.44(b)(17)(ii).
	Child and his/her child(re) are placed together at any point during the report period.	Yes No Not applicable	1355.44(b)(17)(iii).
	Special education	Yes No	1355.44(b)(18).
	Prior adoption	Yes No abandoned	1355.44(b)(19).
	Prior adoption date	Date	1355.44(b)(19)(i).
	Prior adoption intercountry	Yes No	1355.44(b)(19)(ii).
	Prior guardianship	Yes No Abandoned	1355.44(b)(20)(i).
	Prior guardianship date	Date	1355.44(b)(20)(ii).
	Child financial and medical assistance	Child has received support/assistance No support/assistance received	1355.44(b)(21).
	SSI or Social Security benefits	Applies Does not apply	1355.44(b)(21)(i).
	Title XIX Medicaid	Applies Does not apply	1355.44(b)(21)(ii).
	Title XXI SCHIP	Applies Does not apply	1355.44(b)(21)(iii).
	State/Tribal adoption assistance	Applies Does not apply	1355.44(b)(21)(iv).
	State/Tribal foster care	Applies Does not apply	1355.44(b)(21)(v).
	Child support	Applies Does not apply	1355.44(b)(21)(vi).
	Title IV–E adoption subsidy	Applies Does not apply	1355.44(b)(21)(vii).
	Title IV–E guardianship assistance	Applies Does not apply	1355.44(b)(21)(viii).
	Title IV–A TANF	Applies Does not apply	1355.44(b)(21)(ix).
	Title IV–B	Applies Does not apply	1355.44(b)(21)(x).
	SSBG	Applies	1355.44(b)(21)(xi).

ATTACHMENT A—OUT-OF-HOME CARE DATA FILE ELEMENTS § 1355.44—Continued

Category	Element	Reponses options	Section citation
		Does not apply	
	Chafee Foster Care Independence Program.	Applies Does not apply	1355.44(b)(xii).
	Other	Applies Does not apply	1355.44(b)(xiii).
	Title IV–E foster care during report period.	Yes No	1355.44(b)(22).
	Total number of siblings	Number	1355.44(b)(23).
	Siblings in foster care	Number	1355.44(b)(24).
	Siblings in living arrangement	Number	1355.44(b)(25).
Parent or legal guardian information	Year of birth of first parent or legal guardian.	Date	1355.44(c)(1).
	Year of birth of second parent or legal guardian.	Date	1355.44(c)(2).
	Tribal membership mother	Yes No Unknown	1355.44(c)(3).
	Tribal membership father	Yes No Unknown	1355.44(c)(4).
	Termination/modification of parental rights.	Voluntary Involuntary Not applicable	1355.44(c)(5).
	Termination/modification of parental rights petition.	Date	1355.44(c)(5)(i).
	Termination/modification of parental rights.	Date	1355.44(c)(5)(ii).
	Involuntary termination/modification of parental rights under ICWA.		1355.44(c)(6).
	State court found beyond reasonable doubt that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child in accordance with 25 U.S.C. 1912(f).	Yes No	1355.44(c)(6)(i).
	Court decision to involuntary terminate parental rights included the testimony of one or more qualified expert witnesses in accordance with 25 U.S.C. 1912(f).	Yes No	1355.44(c)(6)(ii).
	Prior to terminating parental rights, the court concluded that active efforts have been made to prevent the breakup of the Indian family and that those efforts were unsuccessful in accordance with 25 U.S.C. 1912(d).	Yes No	1355.44(c)(6)(iii).
	Voluntary termination/modification of parental rights under ICWA.	Yes No	1355.44(c)(7).
Removal information	Date of child's removal	Date	1355.44(d)(1).
	Removal transaction date	Date	1355.44(d)(2).
	Removals under ICWA		1355.44(d)(3).
	Court order for foster care placement was made as a result of clear and convincing evidence that continued custody of the Indian child by the parent or Indian custodian was likely to result in serious emotional or physical damage to the Indian child in accordance with 25 U.S.C. 1912(e) and 25 CFR 121(a).	Yes No	1355.44(d)(3)(i).
	Evidence presented for foster care placement as indicated in paragraph (d)(3)(i) included the testimony of a qualified expert witness in accordance with 25 U.S.C. 1912(e) and 25 CFR 121(a).	Yes No	1355.44(d)(3)(ii).

ATTACHMENT A—OUT-OF-HOME CARE DATA FILE ELEMENTS § 1355.44—Continued

Category	Element	Reponses options	Section citation
	Evidence presented for foster care placement as indicated in paragraph (d)(3)(i) indicates that prior to each removal reported in paragraph (d)(1) that active efforts have been made to prevent the breakup of the Indian family and that those efforts were unsuccessful in accordance with 25 U.S.C. 1912(d).	Yes No	1355.44(d)(3)(iii).
	Environment at removal	Parent household Relative household Legal guardian household Relative legal guardian household Justice facility Medical/mental health facility Other	1355.44(d)(4).
	Authority for placement and care responsibility.	Court ordered Voluntary placement agreement Not yet determined	1355.44(d)(5).
	Child and family circumstances at removal.		1355.44(d)(6).
	Runaway	Applies Does not apply	1355.44(d)(6)(i).
	Whereabouts unknown	Applies Does not apply	1355.44(d)(6)(ii).
	Physical abuse	Applies Does not apply	1355.44(d)(6)(iii).
	Sexual abuse	Applies Does not apply	1355.44(d)(6)(iv).
	Psychological or emotional abuse	Applies Does not apply	1355.44(d)(6)(v).
	Neglect	Applies Does not apply	1355.44(d)(6)(vi)
	Medical neglect	Applies Does not apply	1355.44(d)(6)(vii).
	Domestic violence	Applies Does not apply	1355.44(d)(6)(viii).
	Abandonment	Applies Does not apply	1355.44(d)(6)(ix).
	Failure to return	Applies Does not apply	1355.44(d)(6)(x).
	Caretaker's alcohol use	Applies Does not apply	1355.44(d)(6)(xi).
	Caretaker's drug use	Applies Does not apply	1355.44(d)(6)(xii).
	Child alcohol use	Applies Does not apply	1355.44(d)(6)(xiii).
	Child drug use	Applies Does not apply	1355.44(d)(6)(xiv).
	Prenatal alcohol exposure	Applies Does not apply	1355.44(d)(6)(xv).
	Prenatal drug exposure	Applies Does not apply	1355.44(d)(6)(xvi).
	Diagnosed condition	Applies Does not apply	1355.44(d)(6)(xvii).
	Inadequate access to mental health services.	Applies Does not apply	1355.44(d)(6)(xviii).
	Inadequate access to medical services.	Applies Does not apply	1355.44(d)(6)(xix).
	Child behavior problem	Applies Does not apply	1355.44(d)(6)(xx).
	Death of caretaker	Applies Does not apply	1355.44(d)(6)(xxi).
	Incarceration of caretaker	Applies Does not apply	1355.44(d)(6)(xxii).
	Caretaker's significant impairment—physical/emotional.	Applies Does not apply	1355.44(d)(6)(xxiii).
	Caretaker's significant impairment—cognitive.	Applies Does not apply	1355.44(d)(6)(xxiv).
	Inadequate housing	Applies Does not apply	1355.44(d)(6)(xxv).

ATTACHMENT A—OUT-OF-HOME CARE DATA FILE ELEMENTS § 1355.44—Continued

Category	Element	Reponses options	Section citation
	Voluntary relinquishment for adoption	Applies Does not apply	1355.44(d)(6)(xxvi).
	Child requested placement	Applies Does not apply	1355.44(d)(6)(xxvii).
	Sex trafficking	Applies Does not apply	1355.44(d)(6)(xxviii).
	Parental immigration detainment or deportation.	Applies Does not apply	1355.44(d)(6)(xxix).
	Family conflict related to child's sexual orientation, gender identity, or gender expression.	Applies Does not apply	1355.44(d)(6)(xxx).
	Educational neglect	Applies Does not apply	1355.44(d)(6)(xxxi).
	Public agency title IV–E agreement	Applies Does not apply	1355.44(d)(6)(xxxii).
	Tribal title IV–E agreement	Applies Does not apply	1355.44(d)(6)(xxxiii).
	Homelessness	Applies Does not apply	1355.44(d)(6)(xxxiv).
	Victim of sex trafficking prior to entering foster care.	Yes No	1355.44(d)(7).
	Report to law enforcement	Yes No	1355.44(d)(7)(i).
	Date	Date	1355.44(d)(7)(ii)
	Victim of sex trafficking while in foster care.	Yes No	1355.44(d)(8).
	Report to law enforcement	Yes No	1355.44(d)(8)(i).
	Date	Date	1355.44(d)(8)(ii)
Living arrangement and provider information.	Date of living arrangement	Date	1355.44(e)(1)
	Foster family home	Yes No	1355.44(e)(2)
	Foster family home type		1355.44(e)(3)
	Licensed home	Applies Does not apply	1355.44(e)(3)(i).
	Therapeutic foster family home	Applies Does not apply	1355.44(e)(3)(ii).
	Shelter care foster family home	Applies Does not apply	1355.44(e)(3)(iii).
	Relative foster family home	Applies Does not apply	1355.44(e)(3)(iv).
	Pre-adoptive home	Applies Does not apply	1355.44(e)(3)(v).
	Kin foster family home	Applies Does not apply	1355.44(e)(3)(vi).
	Other living arrangement type	Group home-family operated Group home-staff operated Group home-shelter care Residential treatment center Child care institution Child care institution-shelter care Supervised independent living Juvenile justice facility Medical or rehabilitative facility Psychiatric hospital Runaway Whereabouts unknown Placed at home	1355.44(e)(4).
	Private agency living arrangement	Private agency involvement No private agency involvement	1355.44(e)(5)
	Location of living arrangement	Out-of-state or out-of-tribal service area In-state or in-tribal service area Out-of-country Runaway or whereabouts Unknown	1355.44(e)(6).
	Jurisdiction or country where child is living.	Name	1355.44(e)(7).
	Available ICWA foster care and pre-adoptive placement preferences.		1355.44(e)(8).
	A member of the Indian's extended family.	Yes No	1355.44(e)(8)(i).

ATTACHMENT A—OUT-OF-HOME CARE DATA FILE ELEMENTS § 1355.44—Continued

Category	Element	Reponses options	Section citation
	A foster home licensed, approved, or specified by the Indian child's tribe.	Yes No	1355.44(e)(8)(ii).
	An Indian foster home licensed or approved by an authorized non-Indian licensing authority.	Yes No	1355.44(e)(8)(iii).
	An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.	Yes No	1355.44(e)(8)(iv).
	A placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child's tribe, in accordance with 25 U.S.C. 1915(c).	Yes No	1355.44(e)(8)(v).
	Foster care and pre-adoptive placements preferences under ICWA.	A member of the Indian child's extended family A foster home licensed, approved, or specified by the Indian child's tribe An Indian foster home licensed or approved by an authorized non-Indian licensing authority An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs A placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child's tribe, in accordance with 25 U.S.C. 1915(c) Placement does not meet ICWA placement preferences	1355.44(e)(9).
	Good cause under ICWA	Yes No	1355.44(e)(10).
	Basis for good cause		1355.44(e)(11)
	Request of one or both of the Indian child's parents.	Yes No	1355.44(e)(11)(i).
	Request of the Indian child	Yes No	1355.44(e)(11)(ii).
	Unavailability of suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the placement preferences in ICWA art 25 U.S.C. 1915 but none has been located.	Yes No	1355.44(e)(11)(iii).
	Extraordinary physical, mental or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live.	Yes No	1355.44(e)(11)(iv).
	Presence of a sibling attachment that can be maintained only through a particular placement.	Yes No	1355.44(e)(11)(v).
	Marital status of the foster parents	Married couple Unmarried couple Separated Single adult	1355.44(e)(12).
	Child's relationships to the foster parents.	Paternal grandparent(s) Maternal grandparent(s) Other paternal relative(s) Other maternal relative(s) Sibling(s) Non-relative(s) Kin	1355.44(e)(13).
	Year of birth for first foster parent	Date	1355.44(e)(14).

ATTACHMENT A—OUT-OF-HOME CARE DATA FILE ELEMENTS § 1355.44—Continued

Category	Element	Reponses options	Section citation
	First foster parent tribal membership	Yes No Unknown	1355.44(e)(15).
	Race of first foster parent		1355.44(e)(16).
	Race—American Indian or Alaska Native.	Yes No	1355.44(e)(16)(i).
	Race—Asian	Yes No	1355.44(e)(16)(ii).
	Race—Black or African America	Yes No	1355.44(e)(16)(iii).
	Race—Native Hawaiian or Other Pacific Islander.	Yes No	1355.44(e)(16)(iv)
	Race—White	Yes No	1355.44(e)(16)(v).
	Race—Unknown	Yes No	1355.44(e)(16)(vi).
	Race—Declined	Yes No	1355.44(e)(16)(vii).
	Hispanic or Latino ethnicity of first foster parent.	Yes No Unknown Declined	1355.44(e)(17).
	Gender of first foster parent	Female Male	1355.44(e)(18).
	First foster parent sexual orientation	Straight or heterosexual Gay or lesbian Bisexual Don't know Something else Declined	1355.44(e)(19).
	Year of birth for second foster parent	Date	1355.44(e)(20).
	Second foster parent tribal membership.	Yes No Unknown	1355.44(e)(21).
	Race of second foster parent		1355.44(e)(22).
	Race—American Indian or Alaska Native.	Yes No	1355.44(e)(22)(i).
	Race—Asian	Yes No	1355.44(e)(22)(ii).
	Race—Black or African America	Yes No	1355.44(e)(22)(iii).
	Race—Native Hawaiian or Other Pacific Islander.	Yes No	1355.44(e)(22)(iv).
	Race—White	Yes No	1355.44(e)(22)(v)
	Race—Unknown	Yes No	1355.44(e)(22)(vi).
	Race—Declined	Yes No	1355.44(e)(22)(vii).
	Hispanic or Latino ethnicity of second foster parent.	Yes No Unknown Declined	1355.44(e)(23).
	Gender of second foster parent	Female Male	1355.44(e)(24).
	Second foster parent sexual orientation.	Straight or heterosexual Gay or lesbian Bisexual Don't know Something else Declined	1355.44(e)(25).
Permanency planning	Permanency plan	Reunify with parent(s) or legal guardian(s) Live with other relatives Adoption Guardianship Planned permanent living arrangement Permanency plan not established	1355.44(f)(1)
	Date of permanency plan	Date	1355.44(f)(2).
	Date of periodic review	Date	1355.44(f)(3).
	Date of permanency hearing	Date	1355.44(f)(4).

ATTACHMENT A—OUT-OF-HOME CARE DATA FILE ELEMENTS § 1355.44—Continued

Category	Element	Reponses options	Section citation
	Juvenile justice	Yes No	1355.44(f)(5)
	Caseworker visit dates	Date	1355.44(f)(6).
	Caseworker visit location	Child's residence Other location	1355.44(f)(7).
	Transition plan	Yes No Not applicable	1355.44(f)(8).
	Date of transition plan	Date	1355.44(f)(9).
	Active efforts		1355.44(f)(10)
	Assist the parent(s) or Indian custodian through the steps of a case plan and with developing the resources necessary to satisfy the case plan.	Applies Does not apply	1355.44(f)(10)(i).
	Conduct a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal.	Applies Does not apply	1355.44(f)(10)(ii).
	Identify appropriate services and to help the parent overcome barriers, including actively assisting the parents in obtaining such services.	Applies Does not apply	1355.44(f)(10)(iii).
	Identify, notify and invite representatives of the Indian child's tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning and resolution of placement issues.	Applies Does not apply	1355.44(f)(10)(iv).
	Conduct or cause to be conducted a diligent search for the Indian child's expended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents.	Applies Does not apply	1355.44(f)(10)(v).
	Offer and employ all available and culturally appropriate family preservation strategies and facilitate the use of remedial and rehabilitative services provide by the child's tribe.	Applies Does not apply	1355.44(f)(10)(vi).
	Take steps to keep siblings together whenever possible.	Applies Does not apply	1355.44(f)(10)(vii).
	Support regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child.	Applies Does not apply	1355.44(f)(10)(viii).
	Identify community resources including housing, financial, transportation, mental health, substance use and peer support services and actively assisting the Indian child's parents or when appropriate, the child's family in utilizing and accessing those resources.	Applies Does not apply	1355.44(f)(10)(ix).
	Monitor progress and participation in services.	Applies Does not apply	1355.44(f)(10)(x).
	Consider alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available.	Applies Does not apply	1355.44(f)(10)(xi).
	Provide post-reunification services and monitoring.	Applies Does not apply	1355.44(f)(10)(xii).

ATTACHMENT A—OUT-OF-HOME CARE DATA FILE ELEMENTS § 1355.44—Continued

Category	Element	Reponses options	Section citation
	Other active efforts tailored to the facts and circumstances of the case.	Applies Does not apply	1355.44(f)(10)(xiii).
General exit information	Date of exit	Date	1355.44(g)(1).
	Exit transaction date	Date	1355.44(g)(2).
	Exit reason	Not applicable Reunify with parent(s)/legal guardian(s) Live with other relatives Adoption Emancipation Guardianship Runaway or whereabouts unknown Death of child Transfer to another agency	1355.44(g)(3)
	Transfer to another agency	State title IV–E agency Tribal title IV–E agency Indian tribe or tribal agency (non IV–E) Juvenile justice agency Mental health agency Other public agency Private agency	1355.44(g)(4)
Exit to adoption and guardianship information.	Marital status of adoptive parent(s) or guardian(s).	Married couple Married but individually adopting or obtaining legal guardianship Separated Unmarried couple Single adult	1355.44(h)(1).
	Child's relationship to the adoptive parent(s) or guardian(s).		1355.44(h)(2)
	Paternal grandparent(s)	Applies Does not apply	1355.44(h)(2)(i).
	Maternal grandparent(s)	Applies Does not apply	1355.44(h)(2)(ii).
	Other paternal relative(s)	Applies Does not apply	1355.44(h)(2)(iii).
	Other maternal relative(s)	Applies Does not apply	1355.44(h)(2)(iv).
	Sibling(s)	Applies Does not apply	1355.44(h)(2)(v).
	Kin	Applies Does not apply	1355.44(h)(2)(vi).
	Non-relative(s)	Applies Does not apply	1355.44(h)(2)(vii).
	Foster parent(s)	Applies Does not apply	1355.44(h)(2)(viii).
	Date of birth of first adoptive parent or guardian.	Date	1355.44(h)(3).
	First adoptive parent or guardian tribal membership.	Yes No Unknown	1355.44(h)(4).
	Race of first adoptive parent or guardian.		1355.44(h)(5)
	Race—American Indian or Alaska Native.	Yes No	1355.44(h)(5)(i).
	Race—Asian	Yes No	1355.44(h)(5)(ii).
	Race—Black or African America	Yes No	1355.44(h)(5)(iii).
	Race—Native Hawaiian or Other Pacific Islander.	Yes No	1355.44(h)(5)(iv).
	Race—White	Yes No	1355.44(h)(5)(v).
	Race—Unknown	Yes No	1355.44(h)(5)(vi).
	Race—Declined	Yes No	1355.44(h)(5)(vii).
	Hispanic or Latino ethnicity of first adoptive parent or guardian.	Yes No Unknown Declined	1355.44(h)(6).

ATTACHMENT A—OUT-OF-HOME CARE DATA FILE ELEMENTS § 1355.44—Continued

Category	Element	Reponses options	Section citation
	Gender of first adoptive parent or guardian.	Female Male	1355.44(h)(7).
	First adoptive parent or legal guardian sexual orientation.	Straight or Heterosexual Gay or lesbian Bisexual Don't know Something else Declined	1355.44(h)(8).
	Date of birth of second adoptive parent, guardian or other member of the couple.	Date	1355.44(h)(9)
	Second adoptive parent, guardian, or other member of the couple tribal membership.	Yes No Unknown	1355.44(h)(10).
	Race of second adoptive parent, guardian, or other member of the couple.		1355.44(h)(11).
	Race—American Indian or Alaska Native.	Yes No	1355.44(h)(11)(i).
	Race—Asian	Yes No	1355.44(h)(11)(ii).
	Race—Black or African America	Yes No	1355.44(h)(11)(iii).
	Race—Native Hawaiian or Other Pacific Islander.	Yes No	1355.44(h)(11)(iv).
	Race—White	Yes No	1355.44(h)(11)(v).
	Race—Unknown	Yes No	1355.44(h)(11)(vi).
	Race—Declined	Yes No	1355.44(h)(11)(vii).
	Hispanic or Latino ethnicity of second adoptive parent, guardian, or other member of the couple.	Yes No Unknown Declined	1355.44(h)(12).
	Gender of second adoptive parent, guardian, or other member of the couple.	Female Male	1355.44(h)(13).
	Second adoptive parent, guardian, or other member of the couple sexual orientation.	Straight or heterosexual Gay or lesbian Bisexual Don't know Something else Declined	1355.44(h)(14).
	Inter/Intrajurisdictional adoption or guardianship.	Interjurisdictional adoption or guardianship Intercountry adoption or guardianship Intrajurisdictional adoption or guardianship	1355.44(h)(15).
	Interjurisdictional adoption or guardianship jurisdiction.	Name	1355.44(h)(16).
	Adoption or guardianship placing agency.	Title IV–E agency Private agency under agreement Indian tribe under contract/agreement	1355.44(h)(17).
	Assistance agreement type	Title IV–E adoption assistance agreement State/tribal adoption assistance agreement Adoption—Title IV–E agreement non-recurring expenses only Adoption—Title IV–E agreement Medicaid only Title IV–E guardianship assistance agreement State/tribal guardianship assistance agreement No agreement	1355.44(h)(18).
	Siblings in adoptive or guardianship home.	Number	1355.44(h)(19).
	Available ICWA adoptive placements		1355.44(h)(20).
	A member of the Indian child's extended family.	Yes No	1355.44(h)(20)(i).

ATTACHMENT A—OUT-OF-HOME CARE DATA FILE ELEMENTS § 1355.44—Continued

Category	Element	Reponses options	Section citation
	Other members of the Indian child's tribe.	Yes No	1355.44(h)(20)(ii).
	Other Indian families	Yes No	1355.44(h)(20)(iii).
	A placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child's tribe, in accordance with 25 U.S.C. 1915(c).	Yes No.	1355.44(h)(20)(iv).
	Adoption placement preferences under ICWA.	A member of the Indian child's extended family Other members of the Indian child's tribe Other Indian families A placement that complies with the order of preference for adoptive placements established by an Indian child's tribe, in accordance with 25 U.S.C. 1915(c) Placement does not meet ICWA placement preferences	1355.44(h)(21).
	Good cause under ICWA	Yes No	1355.44(h)(22).
	Basis for good cause		1355.44(h)(23)
	Request of one or both of the child's parents.	Yes No	1355.44(h)(23)(i)
	Request of the Indian child	Yes No	1355.44(h)(23)(ii).
	The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the placement preferences in ICWA at 25 U.S.C. 1915 but none has been located.	Yes No	1355.44(h)(23)(iii).
	The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live.	Yes No	1355.44(h)(23)(iv).
	The presence of a sibling attachment that can be maintained only through a particular placement.	Yes No	1355.44(h)(23)(v).

ATTACHMENT B—ADOPTION ASSISTANCE DATA FILE ELEMENTS § 1355.45

Element	Reponses options	Section citation
Title IV–E agency	Name	1355.45(a)(1).
Report date	Date	1355.45(a)(2).
Child record number	Number	1355.45(a)(3).
Child's date of birth	Date	1355.45(b)(1).
Child's gender	Male Female.	1355.45(b)(2).
Child's race		1355.45(b)(3).
Race—American Indian or Alaska Native	Yes No.	1355.45(b)(3)(i).
Race—Asian	Yes No.	1355.45(b)(3)(ii).
Race—Black or African America	Yes No.	1355.45(b)(3)(iii).
Race—Native Hawaiian or Other Pacific Islander	Yes No.	1355.45(b)(3)(iv).
Race—White	Yes No.	1355.45(b)(3)(v).
Race—Unknown	Yes No.	1355.45(b)(3)(vi).
Race—Abandoned	Yes No.	1355.45(b)(3)(vii).

ATTACHMENT B—ADOPTION ASSISTANCE DATA FILE ELEMENTS § 1355.45—Continued

Element	Reponses options	Section citation
Race—Declined	Yes No.	1355.45(b)(3)(viii).
Hispanic or Latino Ethnicity	Yes No. Unknown. Abandoned. Declined.	1355.45(b)(4).
Assistance agreement type	Title IV–E adoption assistance agreement Title IV–E guardianship assistance agreement.	1355.45(c)(1).
Subsidy amount	Number	1355.45(c)(2).
Adoption finalization or guardianship legalization date	Date	1355.45(d).
Agreement termination date	Date	1355.45(e).

[FR Doc. 2016–29366 Filed 12–13–16; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 81 Wednesday,

No. 240 December 14, 2016

Part IV

Architectural and Transportation Barriers Compliance Board

36 CFR Part 1192

Americans With Disabilities Act (ADA) Accessibility Guidelines for Transportation Vehicles; Final Rule

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Part 1192

[Docket No. ATBCB 2010–0004]

RIN 3014–AA38

Americans With Disabilities Act (ADA) Accessibility Guidelines for Transportation Vehicles

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Final rule.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board or Board) is issuing a final rule that revises its existing accessibility guidelines for non-rail vehicles—namely, buses, over-the-road buses, and vans—acquired or remanufactured by entities covered by the Americans with Disabilities Act. The revised guidelines ensure that such vehicles are readily accessible to, and usable by, individuals with disabilities. The U.S. Department of Transportation (DOT) is required to revise its accessibility standards for transportation vehicles acquired or remanufactured by entities covered by the Americans with Disabilities Act (ADA) to be consistent with the final rule.

DATES: The final rule is effective January 13, 2017. Compliance with the final rule is not required until DOT revises its accessibility standards for buses, over-the-road buses, and vans acquired or remanufactured by entities covered by the ADA to be consistent with the final rule.

The incorporation by reference of one publication listed in the final rule was approved by the Director of the Federal Register as of January 13, 2017.

FOR FURTHER INFORMATION CONTACT: Scott Windley, U.S. Access Board, 1331 F Street NW., Suite 1000, Washington, DC 20004–1111. Telephone numbers: 202–272–0025 (voice) or 202–272–0028 (TTY). Email address: *Windley@access-board.gov*.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

Purpose and Legal Authority

The Americans with Disabilities Act (ADA) charges the Access Board with responsibility for the development of minimum guidelines aimed at ensuring the accessibility and usability of transportation vehicles, including buses, over-the-road buses (OTRBs), and vans. *See* 29 U.S.C. 42 U.S.C. 12204, 12149(b); *see also* 792(b)(3)(B) & (b)(10) (authorizing Access Board to ''establish and maintain'' minimum guidelines for standards issued pursuant to titles II and III of the ADA). These guidelines, once adopted by DOT, become enforceable standards. In 1991, the Access Board issued accessibility guidelines for ADA-covered transportation vehicles (including buses, vans, and fixed guideway systems), and amended these guidelines in 1998 to include accessibility requirements for OTRBs.[1] Given the passage of nearly two decades, the existing guidelines are in need of a ''refresh'' for two primary reasons: To incorporate new accessibility-related technologies, such as automated announcement systems and level boarding bus systems, and to ensure that the agency's transportation vehicle guidelines remain consistent with its other regulations that have been issued since 1998. *See, e.g.,* Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines (ADA and ABA Accessibility Guidelines), 36 CFR part 1191, apps. A–D. The final rule modifies only the existing guidelines for buses, vans, and OTRBs; the current guidelines for transportation vehicles operated in fixed guideway systems (*e.g.,* rapid rail, light rail, commuter rail, and intercity rail) will be updated in a future rulemaking. Compliance with the final rule is not required until DOT adopts these revised guidelines as enforceable accessibility standards for ADA-covered buses, OTRBs, and vans.

In this preamble, the Access Board's current accessibility requirements set forth in 36 CFR part 1192 for buses, OTRBs, and vans covered by the ADA are collectively referred to as the ''existing guidelines.'' The accessibility guidelines established in this final rule for ADA-covered buses, OTRBs, and vans are collectively referred to as the ''2016 Non-Rail Vehicle Guidelines.'' Unless otherwise noted, citations in this preamble to particular sections or subsections refer to provisions in the 2016 Non-Rail Vehicle Guidelines.

Summary of Significant Changes

The 2016 Non-Rail Vehicle Guidelines are intended to revise and update the Access Board's existing guidelines that provide scoping and technical requirements to ensure that ADA-covered buses, OTRBs, and vans are accessible to, and usable by, passengers with disabilities. Some of the key changes reflected in the final rule (relative to the existing guidelines) include:

- *New Organization and Format:* The 2016 Non-Rail Vehicle Guidelines use a new organizational approach that is modelled after the Access Board's accessibility guidelines for buildings and facilities in 36 CFR part 1191. The new format organizes the revised scoping and technical guidelines for buses, OTRBs, and vans, into seven chapters, all of which are contained in a new appendix to 36 CFR part 1192. Most of the revisions in the final rule are editorial only, and restate current requirements in plain terms that are clear and easier to understand.
- *Consistent Application of Accessibility Requirements across Different Types of Non-Rail Vehicles:* Unlike the vehicle-by-vehicle approach used in the existing guidelines, the 2016 Non-Rail Vehicle Guidelines establish accessibility requirements that, with some exceptions, apply across all covered non-rail vehicles (*i.e.,* buses, OTRBs, and vans), so that accessibility requirements between different types of vehicles are generally similar. The aim is to make these guidelines easier to understand and apply, particularly for regulated parties—such as public transit agencies—that frequently operate different types of non-rail vehicles.
- *New Requirement for Automated Announcement Systems on Large Fixed Route Buses Operated by Large Transit Entities:* Large transit entities are required under the 2016 Non-Rail Vehicle Guidelines to provide automated stop and route announcement systems on all large vehicles operating in fixed route bus service that stop at multiple designated stops. Automated announcement systems must have both audible and visible components. For purposes of this requirement, a ''large transit entity'' is defined as a provider of public transportation that operates 100 or more buses in annual maximum service for all fixed route bus modes collectively based on required annual data reported to the National Transportation Database, which is maintained by the Federal Transit Administration.
- *Revised Requirements for Maximum Running Slope of Ramps:* The 2016 Non-Rail Vehicle Guidelines revise and simplify the existing guidelines regarding running slope for ramps in non-rail vehicles. The existing guidelines specify a range of maximum running slopes for vehicle ramps depending on nature of deployment (*e.g.,* deployment to sidewalk or

[1] Over-the-road buses are buses characterized by an elevated passenger deck located over a baggage compartment. 49 CFR 37.3. Outside the context of the ADA and this regulation, over-the-road buses are also commonly referred to as ''motor coaches.''

roadway), with 1:4 being the steepest permitted maximum running slope for ramps deployed to the roadway. However, years of field experience and research studies have shown that 1:4 ramps are difficult to use and have resulted in safety concerns for many transit operators and passengers who use wheeled mobility devices. Newer vehicle and ramp designs now make deployment of ramps with lesser slopes feasible. Accordingly, the final rule specifies a maximum running slope of 1:6 for ramps deployed to roadways or curb-height bus stops, and 1:8 for ramps deployed to boarding platforms in level boarding bus systems.

• *New Accessibility Requirements for OTRBs:* Under the 2016 Non-Rail Vehicle Guidelines, OTRBs operating in fixed route service will be newly required to satisfy the following accessibility requirements: Signs for accessible seating and doorways; public address systems; stop request systems; and provision of exterior destination or route signs on the front and boarding sides of vehicles, when exterior signage is provided. These requirements are new only as applied to OTRBs; buses and vans have been covered by similar requirements since 1991.

• *Other Revisions to Reflect Changes in Technologies and Standards:* The 2016 Non-Rail Vehicle Guidelines also reflect other changes, such as establishing accessibility requirements for level boarding bus systems and incorporating updated standards for wheelchair securement systems, which did not exist when the existing guidelines were issued.

Discussion of the bases for the key changes embodied in the 2016 Non-Rail Vehicle Guidelines, as well as proposed changes that were not carried forward to the final rule, is provided in this preamble.

Costs and Benefits

Consistent with Executive Orders 12866 and 13563, the Access Board prepared a final regulatory assessment (Final RA) to assess the likely costs and benefits of new or revised accessibility requirements in the 2016 Non-Rail Vehicle Guidelines that are expected have an incremental cost impact relative to its existing guidelines. The results of the Final RA show that, over the studied 12-year regulatory timeframe, annualized costs for the 2016 Non-Rail Vehicle Guidelines are expected to range from $2.3 million to $8.0 million, depending on the cost scenario and discount rate. Presented below are estimated annualized costs for the 2016 Non-Rail Vehicle Guidelines under each of the three cost scenarios (*i.e.,* low, primary, and high) studied in the Final RA, using 3% and 7% discount rates:

TABLE 1—ANNUALIZED COST OF NEW OR REVISED ACCESSIBILITY GUIDELINES IN THE 2016 NON-RAIL VEHICLE GUIDELINES FOR BUSES, OTRBS, AND VANS, ALL REGULATORY YEARS

[3% and 7% discount rates]

Discount rate	Low scenario ($millions)	Primary scenario ($millions)	High scenario ($millions)
3%	$2.6	$5.0	$8.0
7%	2.3	4.5	7.2

The Final RA also assesses the economic impact of the 2016 Non-Rail Vehicle Guidelines from several other cost perspectives, including the cost to large transit entities of complying with the new automated announcement systems requirement, and the costs of the new accessibility requirements for OTRBs. In order to present a more refined evaluation of estimated costs to large transit entities of the automated announcement systems requirement, the Final RA models costs using three prototypical size-based categories—which are denominated Tiers I, II and III—that are intended to be representative of the range of fixed route bus fleets operated by such entities. Tier I models costs for a large transit entity that is on the ''smaller'' end of the size spectrum (*e.g.,* 130 buses operating in annual maximum fixed route service), while Tier III reflects a large transit entity on the ''larger'' end of the size spectrum (*e.g.,* 530 buses operating in annual maximum fixed route service). Based on these tiers, the Final RA estimates that per-agency annualized costs for the automated announcement system requirement will range from about $44,000 (for a Tier I agency under the low scenario) to about $430,000 (for a Tier III agency under the high scenario). Under the primary scenario, which models what are considered to be the most likely set of cost assumptions, the Final RA estimates that per-agency costs for automated announcement systems will be as follows for each respective tier: Tier I—$80,659; Tier II—$154,985; and, Tier III—$264,968.

Additionally, in terms of accessibility requirements that are newly applicable to OTRBs, the Final RA shows that the cost impact of these requirements is expected to be relatively modest. Annualized costs per vehicle are expected to range from $631 (low scenario) to $1,513 (high scenario) at a 7% discount rate. In light of this modest cost profile, the Final RA's small business analysis finds that, while the 2016 Non-Rail Vehicle Guidelines will undoubtedly affect a substantial number of ''small business''-sized OTRB firms (in light of small firms' predominance in the relevant transportation, charter, and sightseeing industry sectors), its economic impact is not expected to be significant or disproportionate relative to other, larger OTRB firms.

Benefits of the 2016 Non-Rail Vehicle Guidelines, as discussed in the Final RA, are particularly challenging to quantify or monetize due to a variety of considerations, including insufficient data, methodological constraints, and inherent difficulties in evaluating civil rights-based regulatory provisions that promote important societal values such as equity, fairness, and independence. Consequently, benefits attributable to new and revised requirements in the 2016 Non-Rail Vehicle Guidelines—which are expected to be significant—are described from a qualitative perspective.

The Final RA discusses how the new and revised provisions in the 2016 Non-Rail Vehicle Guidelines are expected to directly benefit a significant number of Americans with disabilities by ensuring that transit buses and OTRBs are accessible and usable. By addressing communication barriers (and, to a lesser extent, access barriers) encountered on such vehicles by persons with vision, hearing, mobility, and cognitive impairments, the 2016 Non-Rail Vehicle Guidelines will better enable persons with disabilities to use these modes of transportation to work, pursue an education, access health care, worship, shop, or participate in recreational activities. Other individuals and entities, such as transit agencies, are also expected to benefit from the 2016 Non-Rail Vehicle Guidelines through, for example, improved customer

satisfaction attributable to automated announcement systems.

II. Rulemaking History

The Americans with Disabilities Act (ADA) requires the Access Board to issue guidelines for transportation vehicles—including buses, OTRBs, and vans—to ensure that new, used and remanufactured vehicles are readily accessible to and usable by individuals with disabilities. *See* 42 U.S.C. 12204. These guidelines serve as the baseline for enforceable accessibility standards issued by DOT for ADA-covered transportation vehicles. 42 U.S.C. 12204.

The Access Board first issued transportation vehicle accessibility guidelines in September 1991. *See* 56 FR 45530 (Sept. 6, 1991) (codified at 36 CFR pt. 1192, subpts. A–F). These guidelines establish accessibility requirements for new, used or remanufactured transportation vehicles—which included buses, vans, and rail vehicles operated in fixed guideway systems, but excluded OTRBs—covered by the ADA. These accessibility requirements relate to, among other things, ramps and lifts, onboard circulation, wheelchair spaces and securement devices, priority seats, stop request systems, and exterior route or destination signs. Id. With respect to announcement systems, these guidelines require large buses operating in fixed route service to be equipped with public address systems that permit announcement of stops or other passenger information. *See* 36 CFR 1192.35. The same day, DOT adopted the Access Board's guidelines as enforceable accessibility standards for transportation vehicles covered by the ADA. *See* 56 FR 45584 (Sept. 6, 1991) (codified at 49 CFR pt. 37).

In 1998, the Access Board and DOT issued a joint final rule amending their respective existing transportation vehicle guidelines and standards to include accessibility requirements for OTRBs. *See* 63 FR 51694 (Sept. 28, 1998) (codified at 36 CFR pt. 1192, subpt. G & 49 CFR pt. 38, subpt. H). While many of the accessibility requirements for OTRBs in the 1998 amendments were the same as those applicable to buses and vans, they were not identical. OTRBs, for example, were not required to provide public address systems, stop request systems, or exterior signage identifying destinations or routes.

Other than these 1998 amendments, the Access Board's vehicle guidelines have not been modified since their initial issuance in 1991. Since that time, new or updated technologies (such as low floor buses, intelligent transportation systems, and automated announcement systems), transit system designs (such as bus rapid transit and level boarding bus systems), and accessibility standards have emerged. Such changes led the Access Board to begin informal efforts to update its existing transportation vehicle guidelines.

First, in April 2007, the Board published draft revisions to the existing guidelines that proposed changes to accessibility requirements for buses and vans. *See* Availability of Draft Revisions to Guidelines, 72 FR 18179 (April 11, 2007); U.S. Access Board, Draft Revisions to the ADA Accessibility Guidelines for Buses and Vans (2007) (available on the Access Board Web site) [hereafter, ''2007 Draft Revised Guidelines''].[2] Among other things, the 2007 Draft Revised Guidelines proposed that large buses used in multiple-stop, fixed route service be required to have automated stop and route announcement systems. This proposed requirement applied to all transit agencies operating fixed route buses regardless of their location or size of bus fleet. The 2007 draft also proposed to decrease the maximum running slope of vehicle ramps to 1:8 (as compared to the existing guidelines, which specify a range of ramp slopes from 1:4 to 1:12, depending on deployment), require additional maneuvering clearance where a wheelchair space is confined on three sides, and require a 36-inch wide onboard circulation path from accessible doorways to wheelchair spaces (as compared to the existing guidelines, which require ''sufficient clearance'' for passengers who use wheelchairs).

The following year, in November 2008, the Board published a notice of availability for a second set of draft revised guidelines for public review and comment. *See* Availability of Draft Revisions to Guidelines, 73 FR 69592 (Nov. 19, 2008); U.S. Access Board, Revised Draft of Accessibility Guidelines for Buses and Vans (2008) (available on the Access Board Web site) [hereafter, ''2008 Draft Revised Guidelines''].[3] Among other things, the 2008 Draft Revised Guidelines reflected a significantly revamped format and organization more akin to the Board's then-recent revisions to its revised ADA and ABA Accessibility Guidelines, rather than a ''conventional'' regulatory format. *Id.* at 69592. The 2008 Draft Revised Guidelines also incorporated changes in several proposed accessibility requirements in response to comments. Specifically, application of the automated announcement systems requirement was narrowed by proposing that only large transit agencies operating 100 or more buses in annual maximum service (referred to as ''VOMS'') be required to deploy automated announcement systems on their large, fixed-route buses. This 100-bus VOMS threshold was added at the behest of commenters, including the American Public Transportation Association (APTA), who urged the Access Board to add a ''small fleet exemption'' to the automated announcement system requirement. Additional proposed changes in the 2008 Draft Revised Guidelines included: Increasing the maximum running slope for ramps and bridgeplates to 1:6 when deployed to the roadway; decreasing the proposed maneuvering clearances for wheelchair spaces; and, decreasing the proposed minimum clear width for circulation paths to 34 inches. Additionally, the 2008 Draft Revised Guidelines included proposed accessibility requirements for OTRBs and level boarding bus systems, which the 2007 draft revised guidelines had not addressed.

In July 2010, the Access Board formally commenced the rulemaking process by issuing a notice of proposed rulemaking to update the existing guidelines for buses, OTRBs, and vans. *See* Notice of Proposed Rulemaking—Americans with Disabilities Act Accessibility Guidelines for Transportation Vehicles, 75 FR 43748 (July 26, 2010) (hereafter, ''2010 NPRM''). Aside from minor editorial changes, the proposed rule was substantively similar to the draft revised guidelines issued two years earlier. In particular, based on strong support from

[2] The 2007 Notice of Availability published in the **Federal Register** provided only notice that the Access Board's draft revised guidelines had been made available for public review and comment. The actual text of the draft revised guidelines was posted on the Access Board's Web site. *See* U.S. Access Board, [2007] Draft Revisions to the ADA Accessibility Guidelines for Buses and Vans, *https://www.access-board.gov/guidelines-and-standards/transportation/vehicles/update-of-the-guidelines-for-transportation-vehicles/draft-update/text-of-draft-revised-guidelines.*

[3] As with the draft revised guidelines issued one year earlier, the 2008 Notice of Availability published in the **Federal Register** provided notice only that the Access Board's draft revised guidelines were available for public review and comment. The actual text of the draft revised guidelines was posted on the Access Board's Web site. *See* U.S. Access Board, [2008] Revised Draft of Updated Guidelines for Buses and Vans, *https://www.access-board.gov/guidelines-and-standards/transportation/vehicles/update-of-the-guidelines-for-transportation-vehicles/revised-draft-of-updated-guidelines-for-buses-and-vans.*

commenters to the 2008 Draft Revised Guidelines, the automated announcement systems requirement (including a VOMS 100 threshold for large transit agencies) and the 1:6 maximum ramp slope requirement were carried forward to the proposed rule. To augment the written notice-and-comment process, the Board also held public hearings on the proposed rule in Chicago, IL and Washington, DC.

After the close of the comment period on the 2010 NPRM, the Access Board received reports from transit operators and a transportation consultant that some passengers who use wheelchairs were experiencing problems with new ramps that had been designed to meet the proposed 1:6 maximum running slope for ramps when deployed to the roadway. Accordingly, the Board reopened the comment period on the proposed rule and held two on-the-record public meetings to gather additional information on the feasibility and safety of the new ramp designs. *See* Notice of Public Information Meeting and Reopening of Comment Period, 77 FR 50068 (Aug. 20, 2012).

III. Major Issues

Automated Announcement Systems

The Access Board's existing guidelines require large buses (*i.e.,* more than 22 feet in length) operating in fixed route service to be equipped with onboard public address systems to announce stops and other passenger information. *See* 36 CFR 1192.35. Current DOT regulations, in turn, specify the requisite characteristics of stop and route announcements; however, there is no requirement that such announcements be provided through automated messages, as opposed to vehicle operators. *See* 49 CFR 37.167(b) & (c). Transit agency announcement programs that primarily rely on operator-based announcements have proven to be problematic. Compliance reviews conducted by DOT, as well as multiple Federal lawsuits, have shown that, in vehicle-operator-based announcement programs, compliance with the existing regulatory standards is rarely above 50% of requisite stop or route announcements. *See* Final RA, Section 3.2 (summarizing results of DOT compliance reviews of transit agency announcement programs and Federal lawsuits raising ADA challenges to vehicle operator-based announcement programs). Consequently, despite the promulgation of the existing announcement requirement more than two decades ago, transit users with disabilities, along with transportation researchers, continue to identify inadequate stop and route announcements as significant impediments to the use of public bus transportation by persons with disabilities.

Since the early 2000s, deployment of various advanced technologies in transportation—commonly referred to as ''intelligent transportation systems'' (ITS)—has grown substantially. For public transit systems, ITS deployments generally include a ''core'' set of applications for Automatic Vehicle Location (AVL) and Computer-Aided Dispatch (CAD) that facilitate management of fleet operations by providing real-time information on vehicle location. Additional functionalities, such as automated announcement systems, are also becoming increasingly common. Automated announcement systems help ensure that required stop and route announcements are made, and made consistently and clearly. Automated announcement systems also lessen the need to rely on operators of non-rail vehicles for compliance, and, thereby, allow operators to pay more focused attention on driving or other operational tasks.

Both ITS/AVL deployments generally, and deployments that include automated announcement systems, have exhibited tremendous growth in recent years. For example, as of 2013, DOT annual statistics tracking ITS deployments show that nearly 90% of fixed route buses are now equipped with AVL, which represents a 177% increase in AVL deployments since 2000.[4] Moreover, according to the annual *Public Transportation Vehicle Database* maintained by the American Public Transportation Association (APTA), the number of fixed route buses in the United States that provide automated announcements has increased from 10% in 2001 to 69% in 2015.[5]

The 2010 NPRM, as did the 2008 Draft Revised Guidelines, proposed that public entities operating 100 or more buses in annual maximum fixed route service (as reported in the National Transit Database) must provide automated stop and route announcement systems on their large buses that operate in fixed route service and stop at multiple designated stops. Automated announcement systems, as proposed, must have both audible and visible components. For route announcements, the automated messages must be audible at boarding and alighting areas and the visible component must include signs on the front and boarding sides of buses. Stop announcements must be audible within vehicles, and the visible component must include signs that are viewable by passengers seated in wheelchair spaces and priority seats. The 2010 NPRM also posed several questions seeking public input on the proposed scoping for automated announcement systems, technical requirements, and costs. *See* 2010 NPRM, Question Nos. 16–20.

Overall, the vast majority of commenters to the 2010 NPRM were strongly supportive of the Board's proposal to require automated stop and route announcements. Supporters of the requirement, who represent a broad cross-section of commenters—including persons with disabilities, advocacy organizations, academia, and transit industry associations—expressed their firm belief that automated announcement systems would bring much-needed consistency to stop and route announcements on fixed route buses and, thereby, ensure that passengers with disabilities have access to critical information needed to use public transportation systems. Supporters also noted that, by requiring audible and visible components, the proposal would broadly benefit not only passengers with vision or hearing-related disabilities, but also persons with other types of disabilities, including cognitive impairments. Automated announcement systems would also, they believe, promote universal access by aiding passengers who are unfamiliar with particular bus routes (*e.g.,* out-of-town visitors or infrequent riders) and generally improving customer satisfaction.

Commenters in favor of the automated announcement systems requirement also expressed uniform support for the VOMS 100 threshold (*i.e.,* limiting scope of requirement to large transit agencies that operate 100 or more buses in annual maximum service in fixed route systems), viewing this limitation as striking a sensible balance between accessibility and economic considerations. For example, APTA—one of the nation's largest organizations

[4] DOT, *Deployment of Intelligent Transportation Systems: A Summary of the 2013 National Survey Results* xiv, 26–27 (Aug. 2014).

[5] Historical data on automated stop announcement system deployments are based on the Appendix to APTA's *2015 Public Transportation Fact Book,* which provides data on vehicle amenities by mode of travel from 2001 through 2014. *See 2015 Public Transportation Fact Book, Appendix A: Historical Tables,* Table 30 (June 2015), available at: *https://www.apta.com/resources/statistics/Documents/FactBook/2015-APTA-Fact-Book-Appendix-A.pdf.* Data on automated atop announcement system deployments in 2015 are derived from a sample of vehicle amenity data in the *2015 APTA Public Transportation Database,* which is available for purchase from APTA.

involved in the public transportation industry—praised the VOMS 100 threshold as a reasonable approach to limiting application of the automated announcement systems requirement. Other commenters voicing support for the VOMS 100 threshold included a statewide transit organization, a large disability-rights organization, and a national association of accessibility professionals. Several large transit agencies also noted that they have already equipped (or are in the process of equipping) their buses with automated announcement systems.

Transit entities, on the other hand, had mixed views on the general notion of an automated announcement systems requirement. APTA and a statewide association of transit managers noted their general approval for this proposal. A large transit agency also expressed support for the automated announcement systems requirement, but noted that the cost for such systems might impose hardships on small transit agencies. Another large transit agency observed that, while automated announcement systems are ''a highly desired feature for improving customer information systems,'' they can be costly and technically challenging to implement in some environments. Several other transit entities took no position on automated announcement systems, but offered suggestions for improving the proposed requirement, such as clarifying its application or adding technical specifications for audio quality. Lastly, three transit agencies opposed the automated announcement systems requirement outright, expressing concern about costs and the fact that the requirement mandates use of automated announcement systems, rather than allowing transit agencies to choose among competing priorities at the local level, particularly with respect to rural bus service.

After careful considerations of these comments, the Access Board has decided to retain the automated announcement system requirement in the final rule, albeit with several, small editorial changes that respond to commenters' requests for clarification. (These editorial changes are discussed in Section IV.H below.) The Board strongly believes that automated announcement systems improve communication access for passengers with disabilities, which is a crucial factor in facilitating new or expanded use of fixed route bus transportation systems. Automated announcement systems have proven to be far superior to transit agency announcement programs that rely solely on vehicle operator-provided announcement systems. *See* Final RA, Sections 3.2 & 3.3 (discussing comparative performance of vehicle operator-based announcement programs and automated announcement systems). Indeed, even though the existing guidelines requiring stop and route announcements have been in effect since 1991, significant problems persist, as evidenced by commenters' anecdotes, DOT compliance reviews of transit agency announcement programs, and Federal ADA litigation.

Moreover, while the Access Board acknowledges that deployment of automated announcement systems by large transit agencies to comply with the final rule will necessarily impose costs (as well as lead to substantial benefits for bus passengers with disabilities), the cost impact of this requirement is tempered by several considerations. Foremost is that its application is limited to large transit entities that operate 100 or more fixed route buses in annual maximum service—a limitation that was added at the behest of APTA. *See* 2010 NPRM, 75 FR at 43753. By establishing a VOMS 100 threshold, the Board believes that the automated announcement systems requirement is appropriately and narrowly tailored to larger transit agencies that have the financial resources to deploy ITS with automated announcement system functionality and potentially serve the greatest number of passengers with disabilities.[6] Significantly, as discussed below in Section V.B (Regulatory Process Matters—Regulatory Flexibility Act), no small governmental entities (*i.e.,* public transit authorities with service or population areas under 50,000) are expected to incur compliance costs under the 2016 Non-Rail Vehicle Guidelines.

Additionally, extensive deployment of ITS in public transportation systems over the past decade means that, for most large transit agencies, the automated announcement systems requirement will not impose significant incremental costs. As noted above, transit industry statistics show that about 70% of fixed route buses nationally are already equipped with automated announcement systems, and nearly 90% are equipped with AVL. For large transit entities that have already installed (or are planning to install) automated announcement systems as part of their ITS deployment, this new requirement will impose no additional costs. For large transit agencies that have already deployed ITS/AVL system-wide, but do not yet have automated announcement systems, the incremental cost of complying with the new requirement will, in all likelihood, only be the cost of adding automated announcement system functionality, rather than purchasing an entirely new ITS system. Thus, the Access Board expects that only a few large transit agencies will have to purchase and deploy entirely ''new'' ITS with automated announcement system functionality in order to comply with the final rule.

Finally, it bears emphasis that, while DOT has sole discretion to determine whether (or to what extent) the automated announcement system requirement will apply to new, remanufactured, and existing non-rail vehicles, the Department's past practice in ADA rulemakings suggests that it is highly unlikely that existing transit buses would need to be retrofitted to comply with the automated announcement system requirement. Typically, DOT has imposed more stringent, ''full'' accessibility requirements on new or remanufactured vehicles, and exempted existing vehicles entirely. *See, e.g.,* 49 CFR 37.71, 37.75, 37.103, 37.183, 37.195 & 37.197. The only exception to this practice was the Department's 1991 ADA rulemaking, which, in pertinent part, requires public entities acquiring used vehicles for operation in fixed-route service to ensure that such vehicles are readily accessible to and usable by individuals with disabilities. However, public entities are still permitted to purchase used vehicles that are not fully accessible so long as they document good faith efforts to obtain an accessible vehicle. *See* 49 CFR 37.73. Indeed, the Access Board is not aware of any instances of DOT adopting ADA transportation regulations that required current owners of existing buses to retrofit such buses to comply with newly promulgated standards. The Board appreciates that DOT will exercise its discretion concerning application of the automated announcement system requirement to existing vehicles based on its own assessment of costs and benefits, and will do so while bearing in mind past regulatory practices.

Wheelchair Securement Systems

The Access Board's existing guidelines require buses, OTRBs, and

[6] For a detailed analysis of quantitative considerations that support promulgation of a VOMS 100 threshold (as opposed to other potential alternative VOMS thresholds for large transit agencies subject to the automated announcement systems requirement), see Final RA, Section 8 (Alternative Regulatory Approaches: Large Transit Agencies and the VOMS 100 Threshold & App. J (Key Characteristics of Transit Agencies Reporting Bus Modes of Service (2014 NTD Data)).

vans to provide wheelchair securement systems that comply with specified technical requirements at each wheelchair space. The 2010 NPRM proposed two changes to these technical specifications based on transportation research that post-dated the issuance of the existing guidelines. *See* 2010 NPRM, 75 FR at 43752. First, in large non-rail vehicles with a gross vehicle weight rating of 30,000 pounds or more, the proposed rule reduced from 4,000 pounds to 2,000 pounds the minimum force that wheelchair securement systems must be designed to restrain in the forward longitudinal direction. This proposed revision was made in light of research showing that a lower design force would be sufficient to accommodate force generated on wheelchairs and their occupants in large non-rail vehicles under common conditions (*e.g.,* maximum braking, maximum acceleration, frontal collision). Second, the proposed rule modified the technical requirements for rear-facing wheelchair securement systems by adding a specification for forward excursion barrier to the current technical requirements. The forward excursion barrier is a padded structure designed to limit forward movement of a rear-facing wheelchair and its occupant relative to the vehicle. Additionally, the 2010 NPRM also asked two questions seeking commenters' views on potential cost savings from the proposed design force reduction and proposed technical requirements for forward excursion barriers. *See* 2010 NPRM, Question Nos. 13–14.

With respect to reducing the minimum design force for wheelchair securement systems, commenters to the 2010 NPRM expressed near universal support. Commenters who supported this proposal included several vehicle manufacturers, three public transit agencies, an individual with a disability, and an accessibility consultant. They applauded the proposed reduction in design force because it would, they believed, potentially foster more innovative designs that were lighter or easier to use than currently available securement systems. These commenters further opined that reducing the minimum design force would likely produce marginal (if any) cost savings. Only two commenters opposed the proposed reduction of the minimum design force, with one commenter (an equipment manufacturer) merely stating general opposition to the proposal and the other commenter (a public transit agency) expressing concern about safety in light of larger mobility devices and rising obesity levels.

The Access Board has decided to retain the proposed reduction in minimum design force for wheelchair securement systems in the final rule. The revised design force would potentially spur greater innovation in wheelchair securement systems (which is an area in need of new approaches), but without sacrificing safety given that the 2,000-pound specification is based on findings from transportation studies.

With respect to the proposed addition of technical specifications for forward excursion barriers in rear-facing wheelchair securement systems, commenters expressed mixed views. Those who supported inclusion of specifications for forward excursion barriers (including individuals with disabilities and a transit agency), noted that, while rear-facing wheelchair spaces were not yet commonly used on fixed route buses in the United States, it was nonetheless important to specify a standard to keep pace with potential future changes in transit system designs. Other commenters (including a research center and a bus manufacturer), did not oppose inclusion of requirements for forward excursion barriers, but instead took issue with the Access Board's particular set of proposed specifications. They viewed the proposed requirements for forward excursion barriers as inadequate to protect wheelchair users. They suggested that, in the final rule, the Board should instead harmonize with international standards for rear-facing wheelchair securement systems, particularly since rear-facing wheelchair positions are much more common in Canadian and European public transportation systems. Finally, one transit agency objected outright to the inclusion of any requirement for forward excursion barriers.

In the final rule, the Access Board retains the requirement for forward excursion barriers for rear-facing wheelchair securement systems, but modifies the technical requirements for such barriers in response to commenters' expressed concerns about the specifications in the proposed rule. Specifically, T603.5 requires rear-facing wheelchair securement systems to provide forward excursion barriers complying with ISO 10865–1:2012(E), ''Wheelchair containment and occupant retention systems for accessible transport vehicles designed for use by both sitting and standing passengers—Part 1: Systems for rearward facing wheelchair-seated passengers.'' The ISO standard specifies design and performance requirements and associated test methods for forward excursion barriers. The Board has determined that the added safety research used in the development of ISO 10865–1:2012(E), and its acceptance as a global standard, provide additional benefits to transit users and agencies that warrant its incorporation in the final rule.

Running Slope of Ramps Deployed to Roadways or Curb-Height Bus Stops

In the 2010 NPRM, the Access Board proposed to simplify and update the existing guidelines addressing the running slope of ramps in non-rail vehicles by establishing a single standard—1:6 maximum (17 percent)—for ramps deployed to roadways or to boarding and alighting areas without boarding platforms (*i.e.,* curb-height bus stops). *See* 2010 NPRM, T303.8.1.[7] The Board proposed these changes for two primary reasons: To address concerns about the safety and usability of ramps when deployed at the steepest maximum slope permitted under the existing guidelines (1:4); and to update ramp slope requirements in light of the evolution of bus and ramp designs in the 25 years since the existing guidelines were promulgated. The Board's proposed 1:6 maximum ramp slope engendered the largest volume of comments of any of the proposed regulatory changes in the 2010 NPRM. Commenters overwhelmingly acknowledged the need to modernize the Board's existing guidelines for vehicle ramp slopes, but expressed differing views on the best approach for their revision. For the reasons discussed below, the final rule retains the proposed requirement that ramps in non-rail vehicles must have running slopes no steeper than 1:6 when deployed to roadways or boarding and alighting areas without boarding

[7] For ease of reference, this section discusses requirements for running slope in terms of ramps only; however, in the final rule, such requirements apply equally to ramps and bridgeplates. For ramps and bridgeplates deployed to boarding platforms in level boarding bus systems, the 2010 NPRM proposed a maximum slope of 1:8 (12.5 percent). *See* 2010 NPRM, T303.8.2. In level boarding bus systems, some or all designated stops have boarding platforms, and the design of the boarding platforms and the vehicles are coordinated to provide boarding having little or no change in level between the vehicle floor and the boarding platform. At present, there are only a handful of level boarding bus systems in the United States. The Access Board received no comments on this proposed 1:8 maximum ramp slope in the context of level boarding bus systems. This requirement has been retained in the final rule, albeit with a minor change in the wording of the rule text from ''station platform'' to ''boarding platform.'' *See* discussion *infra* Section IV.B (Summary of Comments and Responses on Other Aspects of the Proposed Rule—Chapter 1: Application and Administration—T103 Definitions) (discussing definition of ''boarding platforms'').

platforms, such as curb-height bus stops. However, the text of the final rule has been revised to make clear that the requisite maximum running slope is a design standard to be measured to ground level with the bus on a flat surface; when deployed to roadways or curb-height bus stops, ramps must have the least running slope practicable under the given field conditions.

The existing guidelines specify a range of maximum running slopes for non-rail vehicle ramps depending on the nature of their deployment. While ramps must generally have the ''least slope practicable,'' the guidelines go on to specify several different maximum running slopes depending on whether the ramp is being deployed to the roadway or to a curb-height bus stop. *See* 36 CFR 1192.23(c)(5) (ramp slope requirements for buses and vans), 1192.159(c)(5) (OTRB-related ramp slope requirements). When a ramp is deployed to the roadway, the existing guidelines require its slope to be 1:4 maximum. For ramps deployed to bus stops with an adjacent 6-inch curb, the existing guidelines specify a range of maximum ramp running slopes depending on the differential in height between vehicle floor and curb. The existing slope requirements for vehicle ramps deployed to curb-height bus stops are shown in Table 2 below. Running slopes are expressed as the ratio of the vertical rise to the horizontal run.

TABLE 2—EXISTING GUIDELINES: MAXIMUM SLOPE OF VEHICLE RAMPS DEPLOYED TO CURB-HEIGHT BUS STOPS

Height of vehicle floor above 6-inch-high curb	Maximum running slope
3 inches or less	1:4
more than 3 inches and equal to or less than 6 inches	1:6
more than 6 inches and equal to or less than 9 inches	1:8
more than 9 inches	1:12

In 1991, when the Access Board issued the existing guidelines for ramp slopes, ramp and vehicle designs were not as advanced as they are today. Standard transit buses had high floors (usually 35 inches above the roadway) and steps at doorways. For this type of bus, lifts are the only means of providing accessible boarding and alighting. Yet, in public transit settings, lifts can sometimes be slow to deploy, costly to maintain, and have reliability issues. These and other factors spurred development and adoption of ''low floor'' transit buses in the early 1990s. Low floor buses have a lower vehicle floor (typically 15 inches or less above the roadway) that permits a flat—rather than stepped—area at doorways. Most low floor buses also have a ''kneeling'' feature that hydraulically lowers the front end of the vehicle several inches closer to the curb to aid in boarding. Because of their lower floor and flat entry area, low floor buses can use ramps (instead of lifts) to provide access for passengers with disabilities. These features tend to make boarding and alighting easier and more user-friendly for all passengers and, consequently, reduce dwell times.[8] As of 1991, however, low floor bus technologies in the United States—as well as related vehicle ramp designs—were still in their infancy. Consequently, the maximum ramp slopes specified in the existing guidelines, while fairly steep for some types of deployments (such as 1:4 to the roadway), reflect what was feasible given then-existing technologies.

In the mid-2000s, when the Access Board initiated efforts to revise and update its non-rail vehicle guidelines, two related considerations prompted evaluation of ramp slopes. First, research studies demonstrated that steeper ramp slopes—particularly ramps with a 1:4 slope—are difficult to use for many individuals who use mobility devices, most notably manual wheelchairs users.[9] There were also documented incidents of wheelchairs and their occupants tipping over backwards going up bus ramps with 1:4 slopes. Second, low floor bus technologies had rapidly evolved and all major domestic bus manufacturers offered one or more models. Indeed, such buses had increasingly become public transit agencies' vehicle of choice for fixed-route bus service.[10]

In the 2010 NPRM, the Access Board thus proposed to update the ramp slope requirements in the existing guidelines by establishing a 1:6 maximum slope for ramps deployed to roadways or curb-height bus stops. *See* 2010 NPRM, T303.8.1.[11] The intent of this proposal was two-fold: To lessen the steepness of the maximum permitted ramp slope from 1:4 to 1:6, and to simplify application of the ramp slope requirements by replacing the existing deployment-based range of maximum ramp slopes with a single standard. On balance, commenters strongly supported this proposal.

The proposed ramp slope provision received broad support from a wide spectrum of commenters, including the disability community, APTA, transportation researchers, ramp manufacturers, and several transit operators. These commenters applauded the Board's efforts to simplify the existing ramp slope requirements by specifying a single standard. They also agreed that the 1:4 maximum ramp slope in the existing guidelines was outdated and too steep. A 1:6 maximum for non-rail vehicle ramp slopes, in their view, was safer and more in line with current technology. Nonetheless, some supporters of the proposed ramp slope standard cautioned that, while a 1:6 standard for maximum ramp slope was preferable and generally feasible, certain local conditions (*e.g.,* narrow urban sidewalk, roadside ditch, or excessive road crown) might make achieving a 1:6 ramp slope impractical or difficult in particular deployment situations. These commenters encouraged the Board to consider adding an exception that would permit steeper ramp slopes when necessary due to local conditions. Lastly, several ramp manufacturers observed that 1:6 ramps were commercially available, had about the same total cost of ownership (*i.e.,* purchase price and maintenance costs) as older (1:4) ramp models, and were already in service on thousands of ramp-equipped low floor buses.

Only a handful of commenters expressed outright opposition to the proposed 1:6 maximum slope for ramps in non-rail vehicles. For two transit operators, this proposal proved problematic because, in their view, a single standard cannot adequately take into account the many variables affecting ramp slope under ''real world'' operating conditions. The third transit operator expressed concern that 1:6 ramps would increase capital and maintenance costs, could require longer ramps, and might not be compatible with some bus or van models. Additionally, two bus manufacturers, while not expressly opposing a 1:6 maximum slope standard, noted that certain models of smaller non-rail vehicles—such as vans or cutaway buses—might require redesign of suspension systems or other vehicle

[8] *See, e.g.,* Transp. Research Board, *TCRP Synthesis 2—Low-Floor Transit Buses: A Synthesis of Transit Practices* (1994).

[9] *See, e.g.,* K. Frost and G. Bertocci, *Retrospective Review of Adverse Incidents Involving Passengers Seated in Wheeled Mobility Devices While Traveling in Large Accessible Transit Vehicles,* 32 Medical Engineering & Physics 230–36 (2010).

[10] *See, e.g.,* Transp. Research Board, Federal Transit Admin., *TCRP Report 41—New Designs and Operating Experiences with Low-Floor Buses* i, 44–46 (1998)

[11] The Access Board also explored the feasibility of decreasing the maximum running slope for non-rail vehicle ramps in the 2007 and 2008 Draft Revised Guidelines. *See supra* Section II (Rulemaking History); *see also* 2010 NPRM, 75 FR at 43750.

parts in order to achieve the requisite ramp slope.

After the close of the comment period on the proposed rule, the Access Board received reports that a few transit agencies were experiencing problems with the usability of some 1:6 ramp models that had been recently installed on new transit buses. Accordingly, in August 2012, the Board issued a notice that it was reopening the comment period on the proposed rule and planned to hold public meetings in Washington, DC and Seattle, Washington to receive additional information on the new ramp designs. *See* Notice of Public Information Meeting and Reopening of Comment Period, 77 FR 50068 (Aug. 20, 2012).

Information developed during the reopened comment period painted a mixed picture of these 1:6 ramps. On the one hand, several transit agencies and individuals with disabilities confirmed that a few new 1:6 ramp models were indeed creating difficulties on some ramp-equipped low floor buses. They reported that, in order to avoid extending the ramps a longer distance outside the bus, some 1:6 ramps were designed with a fixed slope inside the bus and a variable slope outside the bus. The resulting grade break in the ramp run, along with its close proximity to the vestibule area flat floor, caused some passengers who used wheeled mobility devices to have difficulty negotiating the ramps or maneuvering in the bus vestibule (*e.g.,* paying fare or turning into the aisle). Some of the affected transit agencies had taken these ramps out of service, while others were working with manufacturers to develop modifications for in-use ramps. Several commenters, while characterizing the existing 1:4 maximum ramp slope as ''unsafe,'' nonetheless urged the Access Board to delay issuance of a final rule until research or field testing documented the safety and usability of 1:6 ramps. They noted the complexity of the issue given the interplay of environmental conditions and in-vehicle space constraints.

A number of other commenters, however, expressed support for 1:6 ramps generally, as well as the particular ramp models at issue. Several bus and component manufacturers strongly supported the proposed 1:6 maximum slope requirement, stating that standard and cutaway bus models were already in production that came equipped with ramps capable of achieving a 1:6 maximum slope to roadways or curb-height bus stops. Additionally, a ramp manufacturer observed that, of the thousands of 1:6 ramps already in service on heavy-duty low floor transit buses across several hundreds of transit agencies, only about 2% of transit agencies had cited ramp grade break as a problem. This manufacturer also noted that, by 2013, it expected to have two new, redesigned 1:6 ramp models in commercial production that would address the cited problems by eliminating the grade break in the ramp run and minimizing the ramp's impact on the available level floor space within the bus at the top of the ramp. Testing of field prototypes was underway, and initial feedback had been positive.

A third group of commenters—including a disability organization and a research institution—believed that the Access Board's proposed 1:6 maximum ramp slope was still too steep. While preferable to steeper (1:4) ramps, a 1:6 ramp, they noted, was not ''user-friendly'' and could be difficult for passengers who use manual wheelchairs to use independently. These commenters urged the Board to instead adopt a 1:8 maximum ramp slope, which would make ramps usable for the vast majority of wheeled mobility device users.

Several years have passed since the comment period closed in late 2012. In the intervening years, 1:6 ramps have become well-established in the transit community. The ramp models at issue when the Access Board reopened the comment period have been replaced by a newer generation of 1:6 ramps; these ramps have been on the market—and in use—for several years without generating similar complaints. *See* Final RA, Section 3.4. Low floor non-rail vehicles equipped with 1:6 ramps are commercially available from a host of manufacturers, ranging from small cutaway buses to large, heavy-duty transit buses. *Id.* Moreover, the current version of APTA's ''Standard Bus Procurement Guidelines'' (commonly referred to as the ''APTA Whitebook''), which are widely used by transit agencies throughout the country for their bus procurements, lists 1:6 ramps as the default specification for large low floor buses. *See* APTA Standard Bus Procurement Guidelines, § TS 81.3 (May 2013). Indeed, 1:6 ramps have become so integrated into the transit marketplace that, at least for the heavy-duty low floor transit buses, these ramps are now the less expensive production models, whereas steeper (1:4) ramps are more costly special order items. *See* Final RA, Section 3.4.

After careful consideration, the Board has determined that a 1:6 maximum ramp slope—as proposed in the 2010 NPRM—strikes the appropriate balance between usability and feasibility. We believe that establishing a 1:6 maximum running slope for non-rail vehicle ramps will make such ramps more usable for most passengers who use wheeled mobility devices, while also ensuring a workable standard that manufacturers and vehicle operators can meet without undue difficulty or expense. There is near uniform agreement that the 1:4 maximum ramp slope in the existing guideline is outdated and potentially unsafe. A ramp with a 1:6 maximum slope, while perhaps not independently usable by all individuals who use wheeled mobility devices, nonetheless presents a safer and more usable method of boarding and alighting for most mobility device users. Indeed, a recent peer-reviewed transportation study validated the efficacy of 1:6 ramps in reducing ramp-related incidents and accidents on non-rail transit vehicles.[12] This study found that the odds of a passenger using a wheeled mobility device having a ramp-related incident were 5.4 times greater when the ramp slope exceeded 1:6, and the odds of needing assistance were almost as great.

The 2016 Non-Rail Vehicle Guidelines thus require the running slope of ramps in non-rail vehicles used for deployment to roadways or curb-height bus stops to be no steeper than 1:6. However, the text of the provision has been modified to address commenters' concerns about the difficulty of achieving 1:6 ramp slopes under all deployment conditions.

In the 2010 NPRM, the proposed rule simply established a 1:6 maximum slope for ramps deployed to roadways or curb-height bus stops; the provision did not, on its face, specify whether this maximum applied to a ramp's designed capability (*i.e.,* ramp must be capable of achieving a 1:6 maximum slope when deployed to the roadway or a curb-height bus stop) or to actual deployments in the field (*i.e.,* ramp cannot be steeper than 1:6 regardless of local conditions under which it is being deployed). *See* 2010 NPRM, T303.8.1. Several commenters—including some who otherwise supported the proposed 1:6 ramp slope standard—expressed concern that local conditions sometimes make achieving a 1:6 ramp slope particularly challenging or even impossible. These commenters urged the Board to add an exception that would expressly permit steeper ramp slopes when necessary due to local conditions, such as a narrow sidewalk

[12] *See* Karen L. Frost, et al., *Ramp-Related Incidents Involving Wheeled Mobility Device Users During Transit Bus Boarding/Alighting,* 96 J. Physical Med. & Rehabilitation 928–33 (2015).

abutting a building in an urban setting, a roadside ditch in a rural area, or an excessive road crown.

To address these concerns, the provisions in the final rule specifying the maximum ramp running slopes for non-rail vehicles (*i.e.,* T402.8 and its two subsections) have been revised to clarify that the specified ramp slope requirements are design standards only. For example, T402.8.1 in the final rule states that, for ramps deployed to roadways or curb-height bus stops, the 1:6 maximum is a design standard that requires such ramps to be capable of achieving this requirement only when the vehicle is resting on a flat surface and the ramp is deployed to ground level. This revision aims to clarify that, although vehicle ramps may be deployed under various roadway and environmental conditions, measurement (and assessment) of compliance with the 1:6 maximum slope requirement is to be taken under one condition *i.e.,* when the bus is on a flat (level) surface, not on a crowned roadway or any other sloping surface. Typically, these ramp slope measurements will be made in the factory or testing laboratory prior to delivery to the field or, after a ramp is serviced, in the transit agency's maintenance facilities. We believe that these modifications to the final rule text address commenters' concerns that measurements would be affected by roadway conditions.

Clear Width of Circulation Paths and Maneuvering Clearances at Wheelchair Spaces

In the 2010 NPRM, the Access Board proposed specific minimum dimensions for the clear width of circulation paths within non-rail vehicles, as well as maneuvering clearances at wheelchair spaces. For the reasons discussed below, these proposals have not been retained in the final rule. Instead, pending further research, the 2016 Non-Rail Vehicle Guidelines retain the approach in the existing guidelines by requiring ''sufficient clearances'' for passengers who use wheelchairs to move between accessible doorways and wheelchair spaces, and to enter and exit wheelchair spaces. *See* T504.1; *see also* 36 CFR 1192.23(a), 1192.159(a)(1) (existing requirements for clearances for passengers who use wheelchairs).

Since the initial issuance of the existing guidelines in 1991, various parties—including individuals with disabilities, transit operators, and vehicle manufacturers—have requested guidance on the meaning of ''sufficient clearances.'' Questions about clearances arose in the context of circulation paths that connect accessible doorways and wheelchair spaces, as well as maneuvering spaces at wheelchair positions, which, on buses, OTRBs and vans, are typically confined on three sides by seats, side walls, or wheel wells.

Over the course of this rulemaking, the Access Board has attempted to clarify the meaning of ''sufficient clearances'' by proposing specific dimensions for the clear width of circulation paths and maneuvering clearances at wheelchair spaces, as well as more clearly specifying the obligation to ensure that features along circulation paths—particularly in the front vestibule of buses (where stanchions or fare collection devices tend to be located)—do not interfere with the maneuvering of wheelchairs or other mobility devices. For example, in the 2007 Draft Revised Guidelines, the Board proposed a fixed metric for the minimum clear width of circulation paths (36 inches), as well as maneuvering clearances of 6 inches (for front or rear entry wheelchair spaces) or 12 inches (for side entry wheelchair spaces) when wheelchair spaces are confined on three sides. *See* 2007 Draft Revised Guidelines, §§ 1192.23(a)(2), 1192.23(d)(2). These clearances were in addition to the requisite 30 inch by 48 inch minimum clear floor space for each wheelchair space. The 2007 draft also proposed guidelines for clearances at turns (such as the turn needed at the front of a bus) along circulation paths. *Id.* § 1192.23(a)(2).

Many commenters to the 2007 Draft Revised Guidelines were critical of these new proposals for maneuvering clearances at wheelchair spaces and the clear width of circulation paths.[13] Accordingly, in the 2008 Draft Revised Guidelines, the Access Board modified the proposed requirements for maneuvering clearances and clear width of circulation paths. The proposed additional clearances for maneuvering in or out of wheelchair spaces were trimmed by 1 inch (front or rear entry wheelchair spaces) and 6 inches (side entry wheelchair spaces) respectively. *See* 2008 Revised Draft Guidelines, Sections T402.4.1, T402.4.2. The proposed minimum clear width of circulation paths was also decreased to 34 inches. *Id.* at Section T502.2. Additionally, the 2008 Draft Revised Guidelines did not retain the proposal for maneuvering clearances at turns; instead, the 2008 draft proposed a more general requirement that features on circulation paths should not interfere with the maneuvering of wheelchairs. *Id.* at T502.3.

In the 2010 NPRM, the proposed requirements for maneuvering clearances at wheelchair spaces and minimum clear width of circulation paths mirror the proposals in the 2008 Draft Revised Guidelines. *See* 2010 NPRM, Sections T402.4.1, T402.4.2 & 502.5. Additionally, the 2010 NPRM sought comment on a number of issues related to the proposed rule, including sufficiency of the proposals to meet the needs of persons with disabilities, feasibility of proposed clearances on different vehicle types and models, potential seat loss, and views on establishment of performance standards for passengers who use wheelchairs related to movement within vehicles and entry/exit from securement locations. *See* 2010 NPRM, 75 FR at 43751, Question Nos. 7–12.

Commenters' reactions to the proposed specifications in the 2010 NPRM for maneuvering clearances and clear width of circulation paths were decidedly mixed. The disability community, while generally applauding the Board's effort to replace the approach in the existing guidelines (*i.e.,* ''sufficient clearances'') with quantified minimum clearances, nonetheless expressed some skepticism that such clearances would be adequate to accommodate all types of mobility devices, particularly larger wheelchairs.

Reaction from the public transit community was, on the other hand, solidly opposed to the proposed specifications for minimum clear width of circulation paths and maneuvering clearances at wheelchair spaces. APTA and a large transit agency expressed support for the proposed clearance for side entry wheelchair spaces, but also noted that this clearance could result in some (unspecified) seat loss. Otherwise, the transit community uniformly opposed the clearances proposed in the 2010 NPRM. Several transit agencies submitted detailed drawings demonstrating that the proposed maneuvering clearances would, depending on various factors (*e.g.,* vehicle type, model, and seating layout), have significant consequences, such as: Elimination of some models of non-rail vehicles or costly redesign of others, seat loss, discontinuation of flip up seats at wheelchair spaces, or procurement of more expensive seating

[13] For example, several commenters stated that the proposed additional clearances would result in a significant reduction in seating capacity. *See* U.S. Access Board, Discussion of [2008] Revisions, *https://www.access-board.gov/guidelines-and-standards/transportation/vehicles/update-of-the-guidelines-for-transportation-vehicles/revised-draft-of-updated-guidelines-for-buses-and-vans/discussion-of-revisions.* Additionally, commenters submitted floor and seating plans showing that a 36-inch wide circulation path was not feasible for some vehicle models or seating layouts. *Id.*

equipment. Providers of paratransit services also urged the Board to exempt cutaway vehicles (minibuses) used for paratransit because their small size would make compliance difficult, result in loss of wheelchair spaces, or necessitate purchase of larger vehicles. There was broad support among the transit community for development of performance standards for onboard clearances for passengers who use wheelchairs.

Several bus manufacturers echoed the view that, for some bus models, compliance with the proposed requirements would require modification of designs and seating plans. One manufacturer noted some models of large buses might lose up to two seats for every side entry wheelchair space extended to meet the proposed 54-inch clearance. Another manufacturer submitted drawings showing that the proposed 34-inch minimum clear width for circulation paths would result in the loss of 10–14 seats per vehicle, depending on the model of bus. Manufacturers also noted concerns about design constraints due to current axle designs, noise level specifications, and wheel well strength requirements. There was strong support among bus and van manufacturers for establishment of performance standards.

Lastly, a university-based transportation research center stressed that development of suitable dimensions for maneuvering clearances and clear width of circulation paths on transit buses depended on multiple inter-related factors, including: Types of mobility devices, orientation of nearby seats, and relationship of wheelchair spaces to adjacent elements. Because of the complex relationship between these factors, the research center urged the Access Board to first undertake an in-depth study to better understand their interplay before promulgating criteria for clearances—criteria which, in their view, should be performance based, rather than prescriptive, to provide flexibility and foster innovation.

After careful consideration of commenters' views, the Access Board has determined that enumeration of dimensions for clearances is not advisable at this time. Ensuring that passengers who use wheelchairs and other mobility devices can safely and easily move from doorway to wheelchair space, as well as into and out of the securement system at that space, is a complex challenge that, as commenters rightly note, calls into play numerous variables and considerations. Throughout the course of this rulemaking, dating from the 2007 Revised Draft Guidelines through the 2010 NPRM, the Board has attempted to provide better guidance on the meaning of ''sufficient clearances''—as provided in the existing guidelines—by proposing various minimum dimensions for maneuvering clearances at wheelchair spaces and clear width of circulation paths. Each iteration of these regulatory proposals, however, has been met with mixed reviews. Commenters made plain that a ''one size fits all'' approach—such as the establishment of specific minimum dimensions for clearances in the proposed rule—might provide modest benefits to some passengers who use wheelchairs or other mobility devices, but would also come at a steep cost in terms of vehicle redesign or seat loss. There was also uniform agreement that, given the complex interplay of factors, performance standards for onboard circulation of passengers who use wheelchairs would be useful and preferable.

However, while there are ongoing research studies aimed at improving the interiors of transportation vehicles for passengers who use mobility aids, the current state of information does not provide a sufficient basis for development of performance standards. The Board is hopeful that these ongoing research efforts will help to inform future rulemaking efforts. For example, the Rehabilitation Engineering Research Center on Accessible Public Transportation (RERC–APT) is conducting human factors research on boarding and disembarking vehicles by passengers with disabilities, as well as improved vehicle interiors, which may provide some of the evidentiary bases needed for the development of performance standards.[14]

In the meantime, however, the 2016 Non-Rail Vehicle Guidelines do not specify a minimum clear width for accessible circulation paths or maneuvering clearances at wheelchair spaces. Instead, the final rule retains the existing requirement that the clear width of accessible circulation paths must be sufficient to permit passengers using wheelchairs to move between accessible doorways and wheelchair spaces, and to enter and exit wheelchair spaces.

[14] RERC–APT is a partnership between the Robotics Institute at Carnegie Mellon University and the Center for Inclusive Design and Environmental Access (IDeA Center) at the School of Architecture and Planning, University at Buffalo, The State University of New York, and is funded by the National Institute on Disability, Independent Living, and Rehabilitation Research. Information on the RERC on Accessible Public Transportation is available at: *http://www.rercapt.org/*.

IV. Summary of Comments and Responses on Other Aspects of the Proposed Rule

Overall, the Access Board received about 100 written comments to the 2010 NPRM, including those received during the reopening of the comment period in the fall of 2012 to address issues related to ramp designs. In addition to comments received on the major issues discussed in the preceding section, commenters also expressed views on a variety of other matters related to the proposed rule. The Access Board's response to significant comments on these other matters are discussed below on a chapter-by-chapter basis following the organization of the final rule. Also addressed below are requirements in the final rule that have been substantively revised from the proposed rule. Provisions in the final rule that neither received significant comment nor materially changed from the proposed rule are not discussed in this preamble.

A. Format and Organization

As noted previously, the formatting and organization of the 2016 Non-Rail Vehicle Guidelines differs significantly from the existing guidelines. The new format organizes the revised scoping and technical guidelines for buses, OTRBs, and vans into seven chapters, all of which are contained in a new appendix to 36 CFR part 1192. This organization is consistent with the approach used by the Access Board since the issuance of its Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines in 2004. The 2016 Non-Rail Vehicle Guidelines use a modified decimal numbering system preceded by the letter ''T'' to distinguish them from other existing guidelines and standards. Main section headings are designated by three numbers (*e.g.,* T101, T102, etc.). Under each main section heading, the text of the guidelines is organized by section levels. The first section level is designated by a two-part number consisting of the number used for the main section heading followed by a decimal point and a consecutive number (*e.g.,* T101.1, T101.2, etc.). The second section level is designated by a three-part number consisting of the two-part number assigned to the first level section followed by a decimal point and a consecutive number (*e.g.,* T101.1.1, T101.1.2, etc.).

Additionally, as part of its efforts to update its transportation vehicle guidelines, the Access Board has endeavored to write the 2016 Non-Rail Vehicle Guidelines in terms that make its requirements easier to understand.

As a consequence, most of the revisions in the final rule are editorial only, and merely restate existing guidelines in plainer language.

Commenters to the 2010 NPRM generally applauded the Access Board's efforts to revise the existing guidelines, including the format and organization of the proposed rule. Several commenters also praised the proposed rule as providing a much needed ''refresh'' of the existing guidelines, which were last amended in 1998. Some commenters did suggest that certain provisions would benefit from clarification or a retooled format. In response to such comments, many provisions in the 2016 Non-Rail Vehicle Guidelines have been consolidated, renumbered, or relocated. Even still, most of the scoping and technical requirements in the 2016 Non-Rail Vehicle Guidelines remain substantively the same as the existing guidelines, with changes in wording being editorial only. A side-by-side comparison of the 2016 Non-Rail Vehicle Guidelines and the existing guidelines is available on the Access Board's Web site (*www.access-board.gov*). Unless otherwise noted, section numbers cited below refer to provisions in the 2016 Non-Rail Vehicle Guidelines.

B. Chapter 1: Application and Administration

Chapter 1 contains provisions on the application and administration of the 2016 Non-Rail Vehicle Guidelines. Only the definitions section in this chapter received comments.

T103 Definitions

In the 2010 NPRM, the Access Board proposed to remove several outdated or redundant definitions in the existing guidelines, including the definition of the term ''common wheelchairs and mobility aids.'' Three transit agencies recommended that the Access Board retain this definition in the final rule, while another urged the Board to work with the Department of Transportation (DOT) to update the definition of ''wheelchair'' in DOT's own regulations for ADA-covered vehicles. One transit agency described the term as serving as a ''reliable measure'' for transit operators.

The Access Board believes that commenters' concerns about removal of this term from the transportation vehicle guidelines are misplaced. Deletion of the phrase ''common wheelchair and mobility aids'' will not leave transit agencies or others without guidance on what constitutes a ''wheelchair'' or other mobility aid. Rather, the practical effect of removing this definition means that the 2016 Non-Rail Vehicle Guidelines will, instead, look to the definition of ''wheelchair'' in DOT's regulations for ADA-covered transportation vehicles. *See* T103.2 (providing that undefined terms, if expressly defined in DOT regulations, shall be interpreted according to those meanings). DOT's definition of ''wheelchair,'' in turn, is similar to the definition of ''common wheelchairs and mobility aids'' in the existing guidelines, with the exception that its definition does not provide spatial and weight specifications for wheelchairs or mobility aids. *Compare* 49 CFR 37.3 (DOT definition of ''wheelchair'') *with* 36 CFR 1192.3 (definition of ''common wheelchairs and mobility aids'' in existing guidelines).[15]

The Board is aware that some transit agencies have, in the past, used the definition of ''common wheelchairs and mobility aids'' inappropriately to exclude certain wheelchairs and mobility devices from buses or vans, even when such devices could be accommodated within the vehicle. To the extent transit agencies are concerned that deletion of this definition in the Access Board's transportation vehicle guidelines will mean they can no longer determine what size wheelchairs or mobility devices are eligible for bus service, existing DOT regulation already address this issue: ''The entity may not deny transportation to a wheelchair or its user on the ground that the device cannot be secured or restrained satisfactorily by the vehicle's securement system.'' 49 CFR 36.165(d). If DOT wishes to include a definition for ''common wheelchair'' in its regulations for other reasons, DOT can certainly do so. Comments on this subject should be directed to DOT when it commences a rulemaking to update its own regulations for ADA-covered transportation vehicles.

To provide clarity and consistency, several new terms have also been added to the definitions section (T103) in the 2016 Non-Rail Vehicle Guidelines. These terms are: Boarding platform, fixed route service (or fixed route), large transit entity, large non-rail vehicle, small non-rail vehicle, and non-rail vehicle. Generally speaking, these terms (or their related concepts) were present in the proposed rule, but appeared in scattered scoping or technical provisions. For convenience and clarity, these terms are now centrally defined in T103. Each term is briefly discussed below.

''Boarding platform'' is a new term for which definition was needed because the final rule, for the first time, addresses accessibility requirements for level boarding bus systems. A ''boarding platform'' is defined as a platform ''raised above standard curb height in order to align vertically with the transit vehicle entry for level boarding and alighting.'' (Though not expressly defined, the 2010 NPRM used the term ''station platform'' in the context of requirements for level boarding bus systems.)

''Fixed route'' is defined in the 2016 Non-Rail Vehicle Guidelines because the existing definition (which is incorporated from DOT regulations) references ''fixed route systems,'' whereas the final rule refers to fixed route ''services'' or simply ''fixed routes.'' In all other respects, the definition of ''fixed route'' has the same meaning as the existing guidelines.

The term ''large transit entity'' has been added in order to simplify the scoping and technical requirements for automated announcement systems, but it does not alter their meaning or application. As before, only public transportation providers that operate 100 or more buses in annual maximum service for all fixed route bus modes, as reported to the National Transit Database, are subject to the automated announcement system requirement.

''Large non-rail vehicle'' and ''small non-rail vehicle'' had previously been defined in Chapter 2's scoping provisions. For clarity, these ''definitions'' were moved to the definitions section in the final rule. In all respects, however, the terms have the same meaning as in the proposed rule. ''Large non-rail vehicles'' are vehicles more than 25 feet in length, as measured from standard bumper to standard bumper, and ''small non-rail vehicles'' are vehicles equal to or less than 25 feet in length. In the existing guidelines, 22 feet is the maximum length for small vehicles. A manufacturer noted, in response to the 2010 NPRM, that newer van designs have safety bumpers and frontal crash protection features that increase the vehicle length beyond 22 feet, but provide no additional passenger space. Consequently, while their currently available production models of vans and small buses qualify as large vehicles under the existing 22-foot threshold, compliance with certain accessibility requirements applicable to large vehicles (*e.g.,* provision of two

[15] Specifically, ''common wheelchairs and mobility aids'' is defined as follows in the Access Board's existing guidelines: ''[Any device] belonging to a class of three or four wheeled devices, usable indoors, designed for and used by persons with mobility impairments which do not exceed 30 inches in width and 48 inches in length, measured 2 inches above the ground, and do not weigh more than 600 pounds when occupied.'' 36 CFR 1192.3.

wheelchair spaces) is not practical due to limited interior space. This commenter recommended that the Access Board increase the threshold for distinguishing between small and large vehicles from 22 feet to 25 feet. The Access Board believes this commenters' concerns are well taken, and, accordingly, has increased the size threshold for large non-rail vehicles in the final rule. The Board does not expect this change to have a cost impact. Rather, this revision to the regulatory definition of ''large non-rail vehicle'' is only intended to address the problem of small vans or buses being inadvertently ''reclassified'' as large vehicles due to exterior safety features that increase a vehicle's bumper-to-bumper length without any accompanying expansion of interior passenger space.

Lastly, a definition of ''non-rail vehicle'' has been added to the final rule to clarify that this term, when used in the context of the 2016 Non-Rail Vehicle Guidelines, is intended to collectively refer only to those types of transportation vehicles that are addressed in these revised guidelines—namely, buses, OTRBs, and vans. By so defining ''non-rail vehicle'' in the final rule, potential confusion is avoided with the far broader definition of the term in DOT's existing regulations for ADA-covered transportation vehicles, which includes, among other things, public rail transportation. *See* 49 CFR 37.3.

C. Chapter 2: Scoping Requirements

Chapter 2 in the 2016 Non-Rail Vehicle Guidelines has been substantially reorganized to present a more simplified approach. Whereas nearly all scoping provisions for buses, OTRBs, and vans in the 2010 NPRM were ''nested'' as subsections to a single section (former T203), in the final rule, each discrete feature or set of related requirements—such as, steps (T203), doorways (T204), illumination (T205), and handrails, stanchions, and handholds (T206)—has been assigned its own scoping section. Some scoping provisions have also been editorially revised for clarity. While the Access Board believes the modifications to the organization and text of provisions in Chapter 2 represent improvements, none of these changes were intended to alter the substantive scope of the final rule.

With the exception of the scoping requirements for automated announcement systems, relatively few commenters to the 2010 NPRM addressed the scoping provisions. Most matters raised by commenters related to scoping for the automated announcement system requirement are discussed above in Section III (Major Issues), and will not be repeated here. However, there remain a few scoping-related matters raised by commenters that have not been previously addressed, and these matters are discussed below. Significant comments on other proposed scoping provisions are also discussed in this section.

T201 General

Buses, OTRBs, and vans acquired or remanufactured by entities covered by the ADA must comply with the scoping requirements in Chapter 2 to the extent required by DOT's implementing regulations for ADA-covered transportation vehicles, which, when revised, are required to use the 2016 Non-Rail Vehicle Guidelines as minimum accessibility standards. Two transit agencies and a bus manufacturer expressed concern about, or requested clarification of, the application of the requirements in the final rule to existing or remanufactured non-rail vehicles. Implementation and enforcement of the 2016 Non-Rail Vehicle Guidelines is within the sole authority of DOT, not the Access Board. The Access Board is statutorily tasked under the ADA with establishing minimum guidelines for the accessibility of ADA-covered transportation vehicles. Whether DOT ultimately elects to make its regulations applicable to then-existing ADA-covered vehicles, and, if so, to what extent, remains within the sole province of that agency. Consequently, compliance with the 2016 Non-Rail Vehicle Guidelines is not required until DOT adopts these guidelines as enforceable accessibility standards.

T202 Accessible Means of Boarding and Alighting

All buses, OTRBs, and vans covered under the 2016 Non-Rail Vehicle Guidelines must provide at least one means of accessible boarding and alighting that serves all designated stops on the assigned route to which the vehicle is assigned. These vehicles must also provide access to the roadway in the event passengers must be offloaded where there is no platform or curb. Provision of accessible boarding and alighting may be accomplished through the use of ramps and bridgeplates, lifts, or level boarding and alighting systems that meet the technical requirements in Chapter 4. Accessibility requirements for level boarding bus systems are new to the 2016 Non-Rail Vehicle Guidelines because the advent of such transit systems (*e.g.,* bus rapid transit systems) post-dated the issuance of the existing guidelines in 1991. Only two commenters expressed views on this scoping section, and both supported the Access Board's inclusion of requirements for level boarding bus systems.

T206 Handrails, Stanchions, and Handholds

The 2016 Non-Rail Vehicle Guidelines, as with the existing guidelines, require handrails, stanchions, or handholds to be provided at passenger doorways, fare collection devices (where such devices are otherwise provided), and along onboard circulation paths. Large non-rail vehicles must generally provide stanchions or handholds on forward- and rear-facing seat backs. Handrails, stanchions, and handholds must comply with the technical requirements in T303.

In response to three separate comments from a bus manufacturer, seating manufacturer, and transit agency, the text of T206 has been revised and an exception for high-back seats, such as those often found on OTRBs, has been added. The text revisions clarify that, where stanchions or handholds are provided on front- and rear-facing seat backs, they must be located adjacent to the aisle so that passengers may use them when moving between aisles and seats. The new exception provides that, for high-back seats, overhead handrails are permitted in lieu of stanchions or seat-back handholds.

T207 Circulation Paths

As a matter of clarification, the proposed rule specified that, where doorways are provided on one side of a non-rail vehicle, an accessible circulation path must connect each wheelchair space to at least one doorway with accessible boarding and alighting features. *See* 2010 NPRM, Section T203.4.2. Where doorways are provided on two sides of a vehicle, the proposed rule provided that an accessible circulation path must connect each wheelchair space to at least one doorway with accessible boarding and alighting features located on each side of the vehicle. *Id.* Additionally, the proposed rule provided that an accessible circulation path must connect each wheelchair space to at least one accessible doorway (*i.e.,* a doorway from which an accessible boarding and alighting feature can be deployed to the roadway). *Id.*

The Access Board received several comments from disability rights organizations and individuals with disabilities in support of this clarifying

language, and no commenters expressed disagreement with this approach. The 2016 Non-Rail Vehicle Guidelines retain this clarification on the scoping for circulation paths.

T210 Wheelchair Spaces

Under the 2016 Non-Rail Vehicle Guidelines, large non-rail vehicles must provide at least two wheelchair spaces, and small non-rail vehicles must provide at least one wheelchair space. Wheelchair spaces must also be located as near as practicable to doorways that provide accessible boarding and alighting features and comply with the technical requirements in T602. The requirements remain unchanged from the proposed rule.

A van manufacturer suggested, in response to the 2010 NPRM, that the Access Board add language in the final rule that would allow additional spaces, even if they do not meet the minimum required dimensions. The Board declines to add this requested text. Additional wheelchair spaces are already permitted under the existing guidelines, and the same language has been carried over into the 2016 Non-Rail Vehicle Guidelines. *See* T210.3. (''Small non-rail vehicles shall provide *at least one* wheelchair space complying with T602.'') (emphasis added). Neither the existing guidelines nor the revised guidelines in the final rule preclude additional wheelchair spaces beyond the minimum, but they do require each space—for safety reasons—to provide compliant securement systems, as well as seat and shoulder belts.

T211 Wheelchair Securement Systems

Wheelchair securement systems complying with the technical requirements in T603 must be provided at each wheelchair space. The Access Board received several comments on the proposed technical provisions addressing wheelchair securement systems, and these comments are discussed under Chapter 6.

T213 Seats

The 2010 NPRM proposed that non-rail vehicles operating in fixed route systems be required to designate at least two seats as priority seats for passengers with disabilities. *See* 2010 NPRM, Section T203.10.1. The priority seats must be located as near as practicable to a doorway used for boarding and alighting. This is similar to the requirement that wheelchair spaces be located as near as practicable to a doorway used for boarding and alighting. Where aisle-facing seats and forward-facing seats are provided, at least one of the priority seats must be forward facing.

Comments were received from a bus manufacturer and a transit operator seeking clarification whether flip up seats used in wheelchair spaces could also be designated as priority seats. There is nothing in the 2016 Non-Rail Vehicle Guidelines that prohibits such an approach. The same bus manufacturer also sought clarification concerning whether aisle-facing priority seats must be provided, even if none are near a doorway. When there is one or more aisle-facing seats on a fixed route non-rail vehicle, at least one of these seats must be designated as a priority seat. If there is only one aisle-facing seat on a fixed route non-rail vehicle, then that seat must be designated as a priority seat regardless of its location. If, however, a fixed route non-rail vehicle has more than one aisle-facing seat, then the transit operator has the discretion to designate as a priority seat whichever aisle seat it deems ''as near as practicable'' to a passenger doorway.

T215 Communication Features

The scoping provisions for communication features address a number of different areas, including: Signs or markers for priority seats, identification of wheelchair spaces and doorways that provide accessible means of boarding and alighting with the International Symbol of Accessibility, provision of exterior route or destination signs, and automated announcement systems on large non-rail vehicles that operate in fixed route service with multiple designated stops.

In the 2010 NPRM, the scoping requirements for communication features were scattered throughout Chapter 2. In the 2016 Non-Rail Vehicle Guidelines, all scoping requirements related to communication features have been reorganized and consolidated under a single section, T215. Other than this reorganization and some minor editorial changes to the text of certain provisions to improve clarity, the scoping provisions in the 2016 Non-Rail Vehicle Guidelines for communication features are the same as in the proposed rule.

With respect to signage for priority seats, the 2010 NPRM proposed that priority seats for passengers with disabilities be identified by signs informing other passengers to make such seats available for passengers with disabilities. These signs would be required to comply with the technical requirements in T702. (Section T702, in turn, addresses such matters as character style and height, line spacing, and contrast.) *See* 2010 NPRM, Sections T203.10.2, T702. No commenters expressed disagreement with these scoping provisions. However, several persons with disabilities noted their frustration that priority seats on buses are often occupied by passengers who may not need them or filled with other passengers' personal belongings (such as packages or strollers), and urged the Access Board to address this issue in the final rule.

While the Board acknowledges that ensuring the availability of priority seats for passengers with disabilities is a frequent problem, resolution lies beyond this final rule. This is a programmatic and service issue that falls outside the Access Board's jurisdiction and, in any event, is a matter best left to DOT and transit operators. Disabilities are not always visible or apparent, and it can be difficult to discern whether a passenger has priority to use a designated seat. The requirement for signage at priority seats is aimed at helping to ensure that people with disabilities have priority use of these seats. However, there is nothing in the 2016 Non-Rail Vehicle Guidelines (or, for that matter, current DOT regulations) requiring other passengers to make the seats available, or mandating that vehicle operators make passengers move from priority seats when, in their view, such passengers do not need them. Nonetheless, transit operators are encouraged to make efforts, as appropriate for their systems and localities, to ensure that priority seats are available for passengers with disabilities when needed.

Section T215 in the 2016 Non-Rail Vehicle Guidelines also establishes several new communication-related scoping requirements for OTRBs. These new provisions, as applied to OTRBs, relate to: Identification of priority seats (with signs) and wheelchair spaces and accessible doorways (with the International Symbol of Accessibility) (T215.2.1, T215.2.2, and T215.2.3); exterior route or destination signs (T215.2.4); public address systems (T215.3.1); and stop request systems (T215.3.3). While these requirements are new to OTRBs, they have all been in effect for buses and vans since the existing guidelines were first promulgated in 1991. No comments were received on these scoping provisions as newly applied for OTRBs. The expected costs for these new OTRB requirements are discussed below in Section V.A (Regulatory Process Matters—Final Regulatory Assessment (E.O. 12866)).

Lastly, T215.3 in the 2016 Non-Rail Vehicle Guidelines sets forth scoping

requirements for announcement systems on large non-rail vehicles operating in fixed route service that stop at multiple designated stops. These requirements address: Public address systems, stop request systems, and automated route identification and stop announcement systems. The Access Board received a substantial number of comments relating to the issue of whether large transit agencies should be required to equip their large fixed route buses with automated announcement systems, and these comments are addressed above in Section III (Major Issues). Several other commenters sought clarification on how this requirement would apply in particular settings. These comments are discussed below.

First, a large transit agency, while noting that its fixed route bus fleet was already equipped with automated announcement systems, nonetheless expressed concern about the cost of complying with the automated announcement system requirement to the extent it would apply to its small fleet of large paratransit vehicles, which do not have such equipment installed. This commenter urged the Access Board to expressly exempt paratransit vehicles from the automated announcement system requirement. The Board declines to adopt this suggestion because no such exception is needed. By its terms, the automated announcement system requirement applies only to large non-rail vehicles operating in fixed route service with multiple designated stops. *See* T215.3, T215.3.2, and T215.4. Fixed route service, in turn, is defined as ''[o]peration of a non-rail vehicle along a prescribed route according to a fixed schedule.'' T103. Paratransit service, by nature, does not operate on either prescribed routes or fixed schedules. Accordingly, paratransit service does not qualify as ''fixed route service,'' and, therefore, is not subject to the automated announcement system requirement.

Second, a state-wide association of transit managers asked the Access Board to clarify how the VOMS 100 threshold applies to contractors that provide fixed route bus service for public transit agencies. ''Large transit entity,'' which is a newly defined term in T103, refers to providers of public transportation services that ''operat[e] . . . 100 or more buses in annual maximum service for all fixed route service bus modes collectively, through either direct operation or purchased transportation.'' Thus, for purposes of determining whether a transit operator is a ''large transit entity'' subject to the automated announcement system requirement, both directly operated and purchased (*i.e.,* contracted) transportation services ''count'' towards the VOMS 100 threshold. This approach is consistent with DOT's current accessibility standards for ADA-covered transportation vehicles, which specify that public entities entering into contractual arrangements with private entities for provision of fixed route service must ensure that the private entity satisfies the same accessibility requirements that would be applicable as if the public entity directly provided that same service. *See* 49 CFR 37.23; *see also* 49 CFR 37.3 (defining the term ''operates'' to include both directly operated and purchased transportation services).

Third, a number of commenters, including APTA and several transit agencies, sought clarification concerning application of the automated announcement system requirement to existing buses. APTA stressed that restricting the scope of this requirement to new (or newly acquired) buses was important to ensure that large transit agencies that do not yet have automated announcement systems would be able to acquire needed equipment through their regular procurement cycles, and smaller transit agencies nearing the VOMS 100 threshold were not inadvertently limited from expanding their fixed route service.

As discussed at the outset of this section (*see* T201 Scope), determining whether (or to what extent) the automated announcement system requirement will apply to existing buses falls within the purview of DOT, not the Access Board. The 2016 Non-Rail Vehicle Guidelines, as with our existing guidelines, establish minimum accessibility guidelines for buses, OTRBs, and vans acquired or remanufactured by entities covered by the ADA. *See* T101.1, T201.1. These revised guidelines, however, only become enforceable standards upon adoption by the Department of Transportation (DOT). Whether DOT elects to make its regulations applicable to then-existing ADA-covered transportation vehicles, and, if so, to what extent, remains within its sole discretionary authority. Consequently, views on the application of the automated announcement system requirement to existing buses are best directed to DOT, once it commences its own rulemaking to adopt the 2016 Non-Rail Vehicle Guidelines as enforceable accessibility standards. Regulated entities will not be required to comply with the 2016 Non-Rail Vehicle Guidelines until DOT completes its rulemaking efforts.

D. Chapter 3: Building Blocks

Chapter 3 in the 2016 Non-Rail Vehicle Guidelines has been significantly reorganized from the proposed rule. Chapter 3 in the 2016 Non-Rail Vehicle Guidelines contains the technical requirements related to three areas—walking surfaces (T302), handrails, stanchions, and handholds (T303), and operable parts (T304)—that formerly were located in a different chapter in the 2010 NPRM. *See* 2010 NPRM, Sections T802 (Surfaces), T804 (Additional Requirements for Handrails, Stanchions, and Handholds), and T805 (Operable Parts). While relatively few commenters addressed the proposed technical requirements in the 2010 NPRM relating to these three areas, some of these comments did lead the Board, as discussed below, to slightly revise the provisions in Chapter 3 of the final rule.

T302 Walking Surfaces

The technical requirements for walking surfaces include provisions on slip resistance, the maximum size of surface openings, and the maximum height of vertical surface discontinuities (*i.e.,* changes in level), with and without edge treatment. Exceptions are also provided for certain openings in wheelchair securement system components affixed to walking surfaces and for manual placement and removal of ramps and bridgeplates (as, for example, on small buses or vans in cases of emergency), as well as walking surfaces on steps that are not part of onboard passenger access routes.

With respect to slip resistance, a bus manufacturer urged the Access Board to incorporate specific measures for slip resistance (*i.e.,* maximum and minimum friction coefficients) in the final rule. The Board declines to adopt this recommendation. As with our other existing accessibility guidelines for the built environment and other areas, we do not specify in this rule any coefficients of friction because a consensus method for rating slip resistance still remains elusive. While different measurement devices and protocols have been developed over the years for use in the laboratory or the field, a widely accepted method has not yet emerged. Since rating systems are unique to the test method, specific levels of slip resistance can only be meaningfully specified according to a particular measurement protocol. Some flooring products are labeled with a slip resistance rating based on a laboratory test procedure.

Another commenter, a transportation research center, noted that the

wheelchair securement systems used in many non-rail vehicles—especially small buses and vans—are floor mounted and have openings that allow wheelchair tie downs to be attached using the openings. As a consequence, this commenter observed that most securement systems would not satisfy the proposed maximum opening in walking surfaces (*i.e.,* passage of a sphere no more than ⅝ inch or 16 mm in diameter). *See* 2010 NPRM, Section T802.3). To address this concern, an exception has been added to the final rule that allows a larger opening (⅞ inch width maximum) for wheelchair securement system components affixed to walking surfaces, provided that, where such openings are greater than ⅝ inch in width, they visually contrast with the rest of the walking surface. *See* 2016 Non-Rail Vehicle Guidelines, T302.3, Exception 1. We do not, however, adopt this commenter's additional suggestion that wheelchair securement system components be exempted from the surface discontinuity requirements, which, in their view, was needed due to concerns about the commercial availability of products that meet this standard. We have identified several recessed or flush-mounted securement systems currently on the market that would comply with the requirements in the final rule. Accordingly, the final rule does not exempt wheelchair securement systems from compliance with the technical requirements for surface discontinuities in T302.4.

T303 Handrails, Stanchions, and Handholds

The technical requirements for handrails, stanchions, and handholds include specifications on edges, cross sections, and clearances (*i.e.,* space between gripping surface and adjacent surface). We received only one comment on the proposed technical requirements in the 2010 NPRM related to the cross section of seat-back handholds. In the 2010 NPRM, we proposed that gripping surfaces with circular cross sections (such as those used on seat-back handholds) have an outside diameter of 1¼ inches minimum and 2 inches maximum. A seating manufacturer expressed concern that larger diameter handholds would result in significant industry-wide expense and lead to potential safety issues because greater rigidity would be less likely to absorb energy on impact. This commenter suggested that the Access Board instead harmonize with specifications for seat-back handholds in APTA's model bus procurement guidelines, which provide a ⅞ inch diameter (minimum) handhold with quantification of minimum energy absorption for the seat back and handhold.[16] APTA's model bus procurement guidelines are well-established in the public transportation industry, and the Board is unaware of any concerns regarding the smaller seat-back handhold minimum specified in those guidelines. Accordingly, in the final rule, the Board has lowered the minimum dimension for seat-back handhold cross sections from 1¼ inches (32 mm) to ⅞ inches (22 mm). *See* T303.3.1.

T304 Operable Parts

The technical requirements for operable parts in the 2016 Non-Rail Vehicle Guidelines remain the same as in the proposed rule; however, they have been slightly reorganized so that all requirements are consolidated into a single section, T304. The technical requirements for operable parts include provisions on height, location, and operation. Operable parts on fare collection devices serving passenger access routes, stop request systems, wheelchair spaces, and priority seats must comply with these technical requirements.

In the 2010 NPRM, the Access Board proposed to raise the minimum height of operable parts in non-rail vehicles from 15 inches to 24 inches. *See* 2010 NPRM, Section T805.2. A commenter to the 2008 Draft Revised Vehicle Guidelines noted that some operable parts—such as those on stop request devices—are small and difficult to reach for some transit users. To address the problem, the commenter suggested raising the specified minimum height for operable parts. No commenters objected to the revised minimum height (24 inches) for operable parts in the proposed rule. A transit agency did note that, based on a survey of its existing bus fleet, all operable parts on its buses were already mounted higher than 24 inches. Accordingly, the Access Board believes that compliance with this revised minimum height for operable parts—which has been retained in the final rule (*see* T304.2)—is unlikely to cause transit agencies to incur new costs or significantly alter existing practices.

E. Chapter 4: Boarding and Alighting

Chapter 4 in the 2016 Non-Rail Vehicle Guidelines, which sets forth the technical requirements for ramps and bridgeplates, accessible means of level boarding and alighting, lifts, and steps, has been significantly reorganized and revised from the proposed rule. All technical provisions related to boarding and alighting—including level boarding bus systems and steps (which formerly appeared in Chapters 2 and 5 respectively in the proposed rule)—are now consolidated in this chapter. Several provisions have also been revised at the behest of commenters. Responses to comments on the Board's proposal in the 2010 NPRM to revise the technical requirements for the slope of ramps in non-rail vehicles by specifying a single standard (1:6) for maximum running slope applicable to ramps deployed to roadways or curb-height bus stops are discussed in Section III (Major Issues). Discussed below are significant comments on other technical requirements for ramps, bridgeplates, and lifts, as well as other revisions to Chapter 4 in the final rule. (We received no comments on two provisions in Chapter 4—Level Boarding and Alighting (T404) and Steps (T405)—which are unchanged from the 2010 NPRM.)

T402 Ramps and Bridgeplates

The technical requirements for ramps and bridgeplates in the 2016 Non-Rail Vehicle Guidelines include provisions on design load, installation and operation, emergency operation, surfaces, clear width, edge guards, running slope, transitions, visual contrast, gaps, and stowage. These technical requirements are organized in similar fashion to the proposed rule; they also remain the same substantively as in the proposed rule, with the exception of the requirements for maximum ramp running slopes. Section T402 has been slightly revised to clarify that the ramps and bridgeplate barriers must be a minimum height of 2 inches, but allows them to be reduced to less than 2 inches when they are within 3 inches of the boarding end of the device. This accommodates wheelchair users' need to turn as they enter and exit the ramp and reduces the likelihood that passersby will trip on the barrier.

The Access Board received several comments relating to technical specifications for the design load of ramps. In the 2010 NPRM, the Board proposed to retain the existing requirement that ramps and bridgeplates longer than 30 inches (as well as lifts) be required to have design loads of 600 pounds (273kg) minimum. *See* 2010 NPRM, T303.2. These commenters—including a transit agency, an advocacy organization, and two transportation research centers—urged the Board to update (*i.e.,* increase) the specified design loads for lifts and ramps because, over time, occupied wheeled mobility

[16] *See, e.g., APTA, Standard Bus Procurement Guidelines RFP 2013* § TS 78–13 (May 2013) (available on APTA Web site).

devices have gotten heavier (*e.g.,* larger or more complex devices, growing obesity rates).

While the Board acknowledges the trend towards heavier wheeled mobility devices and other factors having a tendency to increase the weight of various potential ramp-based boarding and alighting scenarios, we do not believe a revision in the existing minimum design load for ramps and bridgeplates is advisable at this time. Additional research directed at evaluating design loads for ramps in buses and vans, as well as potential effects of increase in minimum design load on vehicle design or operation is needed. Moreover, it is also important that any potential revision of requirements for minimum design loads for ramps be coordinated with design loads for public lifts specified in the Federal Motor Vehicle Safety Standards (FMVSS), which are incorporated by reference in the technical specifications for lifts in the final rule. *See* 2016 Non-Rail Vehicle Guidelines, T403.1. The Board also notes that the design load specified in T403.1 is a minimum requirement. Ramp manufacturers and transit operators are free to develop and use ramps with increased design loads as they deem appropriate. Indeed, there are several commercially available ramp models that have rated load capacities that exceed 600 pounds.

A bus manufacturer commented that the Federal Motor Vehicle Safety Standards (FMVSS) permit marking of the sides of the barriers to indicate the surface boundaries and warn passersby of a tripping hazard. Nothing in the final rule prevents this additional high contrast marking.

T403 Lifts

The technical requirements for lifts have been substantially revised in the 2016 Non-Rail Vehicle Guidelines. In the 2010 NPRM, the technical requirements for lifts were set forth in five enumerated provisions, with one section (T302.5) having eleven subsections. *See* 2010 NPRM, Sections T302.1–T302.5. These provisions addressed design load, controls, manual operation, platform characteristics, gaps, threshold ramps, contrast, deflection, movement, boarding direction, standees, and handrails. *Id.* Several commenters, including transit operators and a bus manufacturer, expressed concern with certain aspects of these proposed technical provisions, including specifications for interior and exterior manual releases in the event of a power failure. These commenters urged the Access Board to instead reference existing standards for public vehicular lifts set forth in the FMVSS, which are issued by the National Highway Traffic Safety Administration. *See* 49 CFR 571.403, 571.404.

After considering this recommendation, the Board has determined that the public lift standards in the FMVSS provide a similar level of accessibility relative to the proposed rule, and, as well, provide measurable testing requirements that ensure both accessibility and safety for lift users. Section T403 of the 2016 Non-Rail Vehicle Guidelines has thus been revised to incorporate the technical requirements for public use lifts specified in Standards 403 and 404 of the FMVSS, which are codified at 49 CFR 571.403 and 571.404. We do, however, carry forward the requirement from the proposed rule that lift platforms be designed to permit passengers who use wheelchairs to board the platforms facing either toward or away from the vehicle. The public lift standards in the FMVSS are silent on boarding direction, so this requirement is set forth in a separate, stand-alone provision in the final rule. *See* 2016 Non-Rail Vehicle Guidelines, T403.2.

F. Chapter 5: Doorways, Circulation Paths, and Fare Collection Devices

Chapter 5 in the 2016 Non-Rail Vehicle Guidelines contains the technical requirements for doorways, illumination at doorways and boarding and alighting areas, passenger access routes, and, where provided, fare collection devices. Chapter 5 has been significantly reorganized since the proposed rule, with two sections being moved out of this chapter and located elsewhere in the final rule (*i.e.,* former T505 addressing handrails, stanchions, and handholds moved to scoping provisions in Chapter 2, and former T504 addressing steps moved to Chapter 4), and two other sections, which were formerly housed in other chapters of the proposed rule, now being located in this chapter (*i.e.,* T503 Illumination, T505 Fare Collection Devices). The Board believes that this reorganization makes for a more cohesive presentation of the technical requirements in this chapter. Additionally, in the final rule, the technical requirements for vertical clearances at doorways with lifts or ramps and for illumination at doorway areas have been restated using text in lieu of the tabular formats in the proposed rule. *Compare, e.g.,* 2010 NPRM, Table T503.1 (Vertical Clearance at Doorways with Lifts or Ramps) *and* Table T803 (Areas Illuminated and Illuminance Levels) *with* 2016 Non-Rail Vehicle Guidelines, Sections T502 (Doorways) *and* T503 (Illumination). Other provisions in this chapter have also undergone modest editorial changes aimed at clarifying or simplifying the regulatory text. Despite the foregoing organizational changes and editorial revisions to Chapter 5, the substance of the underlying technical requirements remains largely the same as in the proposed rule, with the exception of the requirements for passenger access routes.

T503 Passenger Access Routes

In the 2016 Non-Rail Vehicle Guidelines, passenger access routes (which were referred to as ''accessible circulation paths'' in the proposed rule) must provide clearances sufficient to permit passengers using wheelchairs to move between doorways with accessible boarding and alighting features and wheelchair spaces, and to maneuver in and out of wheelchair spaces. This requirement essentially mirrors the current provisions in the existing guidelines applicable to buses, OTRBs, and vans. *See* 36 CFR 1192.23(a) (''All [covered] vehicles . . . shall provide . . . sufficient clearances to permit a wheelchair or other mobility aid user to reach a securement location.''), 1192.159(a)(1) (establishing same requirement for OTRBs). In the 2010 NPRM, the Access Board proposed prescribing a specific dimensional standard (34 inches) for the clear width of passenger access routes. *See* 2010 NPRM, Section T502.2. For the reasons discussed previously, *see* Section III (Major Issues), the Board decided not to move forward with this proposal in the final rule. It is hoped that, in the near future, ongoing research on interior circulation on public transportation vehicles will yield a performance standard that will serve the needs of transit operators, bus and equipment manufacturers, and persons with disabilities alike. At present, however, no such performance standard exists that can be referenced in the final rule.

T504 Fare Collection Devices

Section T504 in the 2016 Non-Rail Vehicle Guidelines establishes specifications for the location of fare collection devices (to ensure that such devices do not impede wheelchair movement along passenger access routes), as well as their operable parts (to ensure such devices are reachable and usable by passengers with disabilities). These technical requirements mirror those proposed in the 2010 NPRM. However, the Access Board did not retain a proposed specification—which also appears in the existing guidelines for buses and vans—requiring fare collection devices, where

provided, to be located ''as close to the dashboard as practicable.'' *See* 2010 NPRM, Section T502.3; *see also* 36 CFR 1192.33 (''Where provided, the farebox shall be located as far forward as possible[.]''). This change recognizes the possibility that some bus systems may also provide fare collection devices at center or rear doors. Wherever located, however, fare collection devices must not interfere with passenger circulation.

A transit agency expressed concern that application of the requirements in this section, in conjunction with the maximum mounting height for operable parts specified in T304 (*i.e.,* operable parts cannot be located higher than 48 inches above the vehicle floor), would require fare collection devices to be mounted higher than the industry norm of 45 inches. The Access Board believes such concerns are misplaced, and has not modified the specified height range for operable parts on fare collection devices (or any other devices). Forty-eight inches is the *maximum* height at which parts intended for use by passengers may be located; it is not the required height for operable parts. Under the 2016 Non-Rail Vehicle Guidelines, operable parts may be located at any point within the specified range of 24 inches minimum and 48 inches maximum. Transit operators may thus continue to follow industry norm and mount fare collection devices such that their operable parts are located 45 inches above the vehicle floor.

G. Chapter 6: Wheelchair Spaces and Securement Systems

Chapter 6 in the 2016 Non-Rail Vehicle Guidelines establishes technical requirements for wheelchair spaces, wheelchair securement systems, and seat belts and shoulder belts provided for passengers who use wheelchairs. (In the 2010 NPRM, these provisions appeared in Chapter 4 of the proposed rule.) With the exception of two areas, this chapter has been neither significantly reorganized nor substantively revised from the proposed rule. The two areas in which the requirements in this chapter differ substantially from the proposed rule—wheelchair space maneuvering clearances and forward excursion barriers for rear-facing wheelchair containments systems—are detailed in Section III (Major Issues) above. Comments related to proposed technical requirements in these two areas are also discussed in that section, and are not repeated here. Discussed below are significant comments on other aspects of the technical requirements for wheelchair spaces and securement systems.

T602 Wheelchair Spaces

The technical requirements for wheelchair spaces include provisions on surfaces, approach, and size. Under the final rule, as with the existing guidelines, one full unobstructed side of each wheelchair space must adjoin or overlap a passenger access route. *See* T602.3. Wheelchair spaces must also be 30 inches minimum in width and 48 inches minimum in length. *See* T602.4. Because mobility devices vary widely in their respective dimensions and maneuverability, we note that it may be beneficial for transit operators to consider providing wheelchair spaces larger than this minimum size to meet the needs of all transit users.

An exception has been added to T602.4 in the final rule that permits the space occupied by wheelchair footrests to be located under an adjacent seat, provided that the space under such seat meets specified size requirements. *See* T602.4 Exception. This exception is also found in the existing guidelines. *See* 36 CFR 1192.23(d)(2) (providing that ''[n]ot more than 6 inches of the required clear floor space [for wheelchair spaces in buses and vans] may be accommodated for footrests under another seat''), 1192.159(d)(2) (setting forth same exception for wheelchair spaces in OTRBs). Because the 2010 NPRM proposed additional maneuvering clearances for wheelchair spaces, this exception was not germane and, therefore, did not appear in the proposed rule. *See* 2010 NPRM, Section T402. However, since these proposed maneuvering clearances have not been retained in the final rule, this exception is once again needed to permit an overlap between wheelchair spaces and the space under adjacent seats, provided such overlap satisfies certain conditions.

T603 Wheelchair Securement Systems

The technical requirements in the 2016 Non-Rail Vehicle Guidelines for wheelchair securement systems include provisions on orientation, design load, movement, and rear-facing wheelchair securement systems. In the 2010 NPRM, with respect to requirements for orientation of wheelchair spaces and their accompanying securement systems, the Access Board essentially restated requirements in the existing guidelines: Wheelchair securement systems must secure a wheelchair so that the occupant is facing the front or rear of the vehicle (*i.e.,* no ''side facing'' securement is permitted), and, on large non-rail vehicles, at least one securement system must be forward facing. *See* 2010 NPRM, Section 403.2 & Advisory T403.2 Orientation.

A joint comment submitted by a consortium of transportation research centers urged the Access Board, for safety reasons, to restrict rear-facing wheelchair securement systems to large or slower-moving vehicles, such as large intra-city transit buses. Based on this comment, the orientation requirement for wheelchair securement systems has been revised in the final rule. Section T603.2 establishes a general requirement that wheelchair securement systems must be front facing. A new exception to T603.2 permits rear-facing securement systems ''on large non-rail vehicles designed for use by both seated and standing passengers,'' provided that at least one other wheelchair securement system is front facing.

Two commenters also suggested that the Access Board clarify (or define) what ''normal operating conditions'' means in the context of the requirement that wheelchair securement systems limit movement of occupied wheelchairs. *See* 2010 NPRM, T403.4 (providing that wheelchair securement systems must limit movement of occupied wheelchairs when, among other things, ''the vehicle is operating in normal conditions''). In the 2010 NPRM, the text of this proposed section was accompanied by an advisory that states, in pertinent part: ''Normal operating conditions are specific to the area where the vehicle operates. Vehicles that operate in hilly terrain or on winding roads will have more severe constraints than those operating in flat areas.'' *See* 2010 NPRM, Advisory T403.4 Movement. These advisory materials are posted on the Access Board's Web site.[17] A similar advisory will accompany the text of T603.4 in the final rule, and will also be available on the agency's Web site.

Additionally, a few commenters responded to Question 15 in the 2010 NPRM, which sought input on whether the Access Board should address four safety-related matters in subsequent rulemakings. *See* 2010 NPRM, 75 FR at 43753–54, Question No. 15. These recommendations related to: Potential incorporation of forthcoming standards on wheelchair tiedown and occupant restraint systems used in motor vehicles

[17] The Office of the Federal Register does not permit advisory materials to be published in the Code of Federal Regulations. Consequently, only the version of the proposed rule posted on the Access Board's Web site includes advisory text and figures. The online version of the proposed rule, as well as other materials related to this rulemaking, can be found here: *https://www.access-board.gov/guidelines-and-standards/transportation/vehicles/update-of-the-guidelines-for-transportation-vehicles.*

(SAE Recommended Practice J2249 (June 1999)), wheelchair securement systems in small non-rail vehicles, movement under emergency driving conditions, and rear-facing compartmentalization.[18] Several commenters, including a joint comment submitted by a consortium of two transportation research centers, recommended that the Access Board should adopt the standards in SAE Recommended Practice J2249 (June 1999) for front-facing wheelchair securement systems. Several other commenters expressed views on compartmentalization of rear-facing wheelchair positions. A large transit agency encouraged the Access Board to consider addressing specifications for rear-facing compartmentalization, which, it believes, offers the benefits of increasing independent access, reducing occupational hazards for vehicle operators, and reduces dwell times. Two other commenters, including a disability rights organization and a transportation research center, noted safety concerns and a need for further study.

The Access Board appreciates the input provided by these commenters on these areas, and will take their views under advisement in future rulemakings concerning transportation vehicles.

H. Chapter 7: Communication Features

Chapter 7 in the 2016 Non-Rail Vehicle Guidelines establishes technical requirements for characters on signs, the International Symbol of Accessibility, and vehicular announcement systems. With the exception of requirements addressing announcement systems in T704, this chapter has been neither reorganized nor substantively changed from the proposed rule. Section T704 in the final rule has been reorganized and editorially revised to improve clarity; these modifications, however, did not materially alter its terms. We received no comments on two of the three sections in Chapter 7—namely, Signs (T702) and International Symbol of Accessibility (T703)—and so these sections are not addressed below.

T704 Announcement Systems

The technical requirements for announcement systems include provisions on automated route identification announcement systems, automated stop announcement systems, and stop request systems. These requirements are intended to ensure that passengers with disabilities have the critical information needed to make public bus transportation systems accessible, usable, and safe for independent use by persons with disabilities.

Stop request systems must provide audible and visible notification onboard the non-rail vehicle indicating that a passenger has requested to disembark at the next stop. *See* T704.3. Audible notifications may be verbal or non-verbal signals, while visible notifications must include either signs (complying with T702), lights, or other visually perceptible indicators. *Id.* There are also specifications addressing when stop request notifications must extinguish. *Id.* Parts on stop request systems intended for passenger use must comply with the technical requirements for operable parts (T304), including height, location, and ease of use. The technical requirement in the final rule for stop request systems on buses and vans are similar to the existing guidelines. *See* 36 CFR 1192.37. At the request of a transit agency, the final rule does clarify that a mechanism for requesting stops must be located within reach of each wheelchair and priority seat. *See* T704.3.2.

Automated announcement systems must also provide both audible and visible notifications. *See* T704.2, T704.4. Automated route identification systems must audibly and visibly identify the route on which the bus is operating. Automated stop announcement systems must provide audible and visible notification of upcoming stops on fixed routes. For both types of automated announcement systems, audible messages must be delivered using synthesized, recorded or digitized speech. For stop announcement systems, such messages must be audible within the bus, while, for route announcement systems, audible messages must be broadcasted externally at boarding and alighting areas. With respect to visible components, route identification systems are required to provide signs displaying route information on the front and boarding sides of the vehicle. For stop announcement systems, signs must be provided onboard and be viewable from all wheelchair spaces and priority seats. (Signs for each type of automated announcement system must also comply with T702.)

The vast majority of comments received in response to the Access Board's proposed requirements for automated announcement systems in the 2010 NPRM related to the scoping for these requirements (*i.e.,* automated announcement systems must be provided by large transit agencies that operate 100 or more buses in annual maximum service in fixed route bus modes), rather than the technical specifications for such systems. Comments related to the scoping requirements for automated announcement systems are addressed at length in Section III (Major Issues) and IV (Summary of Comments and Responses on Other Aspects of the Proposed Rule—Chapter 2: Scoping Requirements).

Several commenters, including a public transportation organization, a transit agency, and individuals with disabilities, recommended that the Access Board include standards for the volume or quality (clarity) of audible components of automated announcement systems in the final rule. Other commenters, while not specifically opining on audibility standards, noted that the volume of announcements can sometimes be inconsistent or need adjustment in real-time to account for ambient noise.

While the Access Board shares these commenters' view that the audibility of stop and route information is a critical aspect of announcement systems, we are not aware of any national standards that would provide clear, objective, and consistent measures to assess compliance. Indeed, in the 2010 NPRM, the Board requested information on standards for audio quality that could be referenced in the final rule or, in the alternative, recommended in advisory materials. *See* 2010 NPRM, 75 FR at 43754 (Question 19). No commenters suggested or cited any referenceable standards for audio quality. Absent such standards, the Board declines at this time to include specifications for audio volume or quality in the technical requirements for automated announcement systems. However, should referenceable standards for audio quality of announcements in public transportation vehicles be developed, the Board will certainly consider referencing such standards in future rulemakings. Additionally, when DOT initiates its own rulemaking process to adopt these revised guidelines as enforceable standards for buses, OTRBs, and vans, it may find that inclusion of programmatic standards for announcement audibility (which are beyond the Board's jurisdiction) would be both appropriate and useful.

With respect to the requirement that automated stop announcement systems must have signage viewable onboard from all wheelchair spaces and priority

[18] SAE Recommended Practice J2249, Wheelchair Tiedown and Occupant Restraint Systems for Use in Motor Vehicles (June 9, 1999), as noted in the 2010 NPRM, was in the process of being updated and published as a voluntary consensus standard. *See* 75 FR at 43753 n. 18. In 2012, this recommended practice was indeed formally published as ANSI/RESNA WC–4: 2012, Section 18 ''Wheelchair tiedown and occupant restraint systems for use in motor vehicles.''

seats, APTA expressed concerns about the cost of providing signs for rear-facing wheelchair positions. For several reasons, we do not believe that, in practice, such signs will pose a significant expense. First, rear-facing wheelchair spaces are not required by the 2016 Non-Rail Vehicle Guidelines. Rather, the default orientation for wheelchair spaces is front facing, with the rear-facing position being an exception permitted only on certain large non-rail vehicles so long as at least one wheelchair securement system is front facing. *See* T603.2. Second, while rear-facing wheelchair spaces are prevalent throughout Europe and Canada, they are still relatively uncommon in the United States. Only a handful of transit agencies employ rear-facing wheelchair spaces for bus transit, and, when used, it is generally on bus rapid transit systems. Together, these considerations augur against significant costs for provision of stop announcements signs for rear-facing wheelchair spaces. Moreover, we believe it is beneficial for non-rail vehicles with any rear-facing passengers to provide this important communication feature.

V. Regulatory Process Matters

A. Final Regulatory Assessment (E.O. 12866)

Executive Orders 13563 and 12866 direct agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and, in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Important goals of regulatory analysis are to (1) establish whether Federal regulation is necessary and justified to achieve a market failure or other social goal and (2) demonstrate that a range of reasonably feasible regulatory alternatives have been considered and that the most efficient and effective alternative has been selected. Executive Order 13563 also recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively those values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

The Access Board prepared a final regulatory impact analysis (Final RA) that assesses the likely benefits and costs of the 2016 Non-Rail Vehicle Guidelines. Expected benefits are discussed and likely incremental. Compliance costs for new requirements are monetized for the projected 12-year regulatory timeframe, including potential costs to small businesses offering OTRB-provided transportation, charter, and sightseeing services. The Final RA also incorporates several ''stress tests'' to assess the relative impact of hypothetical adjustments to selected cost-related assumptions on overall results. A complete copy of this final regulatory assessment is available on the Access Board's Web site (*www.access-board.gov*), as well the Federal Government's online rulemaking portal (*www.regulations.gov*).

1. Costs: Summary of Methodology and Results

On the cost side, the Final RA estimates the economic impact of new or revised requirements in the 2016 Non-Rail Vehicle Guidelines that are expected to have an incremental impact relative to the existing guidelines or current transit industry practices. As with the proposed rule, most of the changes in the 2016 Non-Rail Vehicle Guidelines are stylistic or editorial only, and thus not expected to have an incremental cost impact. There are, however, five requirements (or related sets of requirements) in the 2016 Non-Rail Vehicle Guidelines for which regulated entities are expected to incur incremental compliance costs. One of these requirements (*i.e.,* automated stop and route announcement systems) applies only to certain large transit agencies. The other four requirements—signage for accessible seating and doorways, exterior destination or route signs, public address systems, and stop request systems—while applicable to non-rail vehicles, are only ''new'' for OTRBs. (Such requirements have been in effect for buses and vans since 1991.)

For purposes of assessing the likely cost impact of these five requirements over the 12-year regulatory time horizon, the Final RA uses a unit cost approach that reflects both initial costs (*e.g.,* equipment, installation, and training) and ongoing costs (*e.g.,* operation and maintenance), as applicable for each respective requirement. While the cost methodology used in the Final RA builds on the cost methodology used in the regulatory assessment that accompanied the proposed rule, *see* U.S. Access Board, *Cost Estimates for Automated Stop and Route Announcements* (July 2010) (copy available on agency Web site), it also incorporates revisions to certain estimates, assumptions and modelling approaches. These changes were made to, among other things, address comments, reflect changes in the 2016 Non-Rail Vehicle Guidelines, and incorporate updated research or data. Revisions and updates reflected in the Final RA's cost methodology include: Use of three (rather than two) sets of cost assumptions—low, medium, and high—when estimating incremental costs of the 2016 Non-Rail Vehicle Guidelines; incorporation of the four new accessibility requirements for OTRBs into the cost model; evaluation of the cost impact of the automated announcement systems requirement using three size-based ''tiers'' (Tiers I, II and III) for large transit entities; and, addition of a small business analysis.

In sum, the Final RA estimates annual costs of the five new or revised accessibility requirements in the 2016 Non-Rail Vehicle Guidelines with incremental impacts for each of the twelve ''regulatory years'' and, within each of these years, separately for each of three (*i.e.,* ''high,'' ''medium/primary,'' and ''low'') cost scenarios. (Annual costs estimates under each cost scenario are generated by respectively indulging all applicable ''high'' cost assumptions, all ''medium'' cost assumptions, and all ''low'' cost assumptions.) Generally speaking, the ''medium'' cost estimates collectively serve as the primary scenario in the Final RA when calculating incremental costs because it models the most likely set of cost assumptions, while the ''low'' and ''high'' cost estimates respectively provide the lower- and upper-bound cost projections.

In terms of results, the Final RA evaluates the cost impact of the new accessibility requirements in the 2016 Non-Rail Vehicle Guidelines from three main perspectives: Total costs; annualized costs to large transit entities for automated announcement systems; and annualized costs for the four accessibility requirements that are newly applicable to OTRBs. The results for each of these three cost perspectives are summarized below.

Annualized Cost of New or Revised Accessibility Requirements in the 2016 Non-Rail Vehicle Guidelines

Table 3 below provides the annualized cost, under each of the Final RA's three cost scenarios, for the five new or revised accessibility requirements in the 2016 Non-Rail Vehicle Guidelines that are expected to have an incremental cost impact. All monetized costs were estimated over a 12-year time horizon using discount rates of 3% and 7%.

TABLE 3—ANNUALIZED COST OF NEW ACCESSIBILITY GUIDELINES IN THE 2016 NON-RAIL VEHICLE GUIDELINES FOR BUSES, VANS, AND OTRBS, ALL REGULATORY YEARS

[3% and 7% discount rates]

Discount rate	Low scenario ($millions)	Primary scenario ($millions)	High scenario ($millions)
3%	$2.6	$5.0	$8.0
7%	2.3	4.5	7.2

These results show that annualized costs of the 2016 Non-Rail Vehicle Guidelines will, most likely range from $4.5 million to $ 5.0 million, depending on the discount rate. Notably, even under the high scenario, annualized costs are not expected to exceed $8 million. Results from the Final RA thus demonstrate that the expected cost impact of the 2016 Non-Rail Vehicle Guidelines falls far below the threshold for economic (monetary) significance of regulatory actions provided in E.O. 12866. *See* E.O. 12866, § 3(f)(1) (defining ''significant regulatory action'' as, among other things, a rule that would likely have an ''annual effect on the economy of $100 million or more'').

Annualized Costs to Large Transit Entities for Automated Announcement Systems

Second, the Final RA also examines likely annualized costs related to the requirement that large transit entities provide automated announcement systems for stop and route identification on their large vehicles operating in fixed route bus service. Large transit agencies, in turn, are defined in the 2016 Non-Rail Vehicle Guidelines as public transportation providers operating 100 or more buses in annual maximum service in fixed route bus modes, through either direct operation or contract, based on annual data required to be reported to the National Transportation Database [hereafter, ''VOMS 100 threshold'']. *See* T104.4 (defining ''large transit entity''); *see also* 49 CFR pt. 37 (regulations governing the DOT-administered National Transportation Database). While the scope of the automated announcement systems requirement is thus necessarily limited to larger transit entities, there are still—relatively speaking—a wide range of ''sizes'' within the community of covered transit agencies, which can range in fleet size from just over 100 buses operating in fixed route bus service to hundreds.

Accordingly, to provide a more refined picture of estimated costs to large transit entities for automated announcement systems, the Final RA separately models costs for this requirement based on three prototypical size-based ''tiers''—Tiers I, II & III—with Tier I being on the smaller end of the size spectrum and Tier III on the larger end. These three size-based tiers are intended to represent the typical range of ''sizes'' of large transit agencies covered by the automated announcement system requirement. Assumptions about relevant cost-modeling characteristics for each of these three tiers of large transit agencies—namely, the number of large buses in annual maximum service in fixed route bus modes, fixed routes, garages, vehicle operators, and mechanics—along with estimates concerning the status and nature of current ITS deployments (if any) by these transit entities, serve as the framework for modeling costs.[19] As detailed in the Final RA, assumptions about the number of transit agencies per tier, as well as their respective fixed route bus fleets and current state of ITS deployments, were developed from research by Access Board staff and data reported in the 2014 National Transportation Database. *See* Final RA, Section 5.1.1.

It also bears noting that the Final RA's cost model for the automated announcement systems requirement accounts for potential growth by public transit agencies over time. That is, it is assumed that, every third year during the 12-year regulatory timeframe, one transit agency will ''cross'' the VOMS 100 threshold, and, thereby, become newly subject to the requirement for automated announcement systems. These ''new'' large transit agencies are assumed to have characteristics similar to—though slightly smaller than—large transit agencies in ''Tier I,'' based on the assumption that transit entities crossing the VOMS threshold will do so in an incremental fashion. *See* Final RA, Section 5.1.1.

Presented in Table 4 below are per-agency annualized costs for the automated announcement systems requirement under each of the Final RA's three cost scenarios. These annualized costs range from about $44,000 (for a Tier I agency under the low scenario) to about $430,000 (for a Tier III agency under the high scenario). Under the primary scenario, which models the most likely set of cost assumptions, per-agency costs for announcement systems are estimated to be as follows: Tier I—$80,659; Tier II—$154,985; and, Tier III: $264,968.

TABLE 4—ANNUALIZED PER AGENCY COSTS OF AUTOMATED ANNOUNCEMENT SYSTEMS REQUIREMENT FOR LARGE TRANSIT AGENCIES

[Tiers I, II & III]

	Low scenario	Primary scenario	High scenario
Large Transit Agency—Tier I	$44,208	$80,659	$129,305
Large Transit Agency—Tier II	76,678	154,985	248,313
Large Transit Agency—Tier III	129,444	264,968	429,715

[19] For example, under Tier I, it is assumed that the transit agency operates a fleet of 130 buses in fixed route service, while Tier III assumes a fleet of 530 vehicles in fixed route bus service. For a detailed discussion of the assumed characteristics for each of the three tiers, *see* Final RA, Section 5.1.1 & Appendix B.

These annualized cost figures underscore the logical cost corollary that per-agency costs directly relate to agency size, with the ''smallest'' large transit agencies (Tier I) experiencing the lowest annualized costs under all scenarios, and, conversely, the ''largest'' large transit agencies (Tier III) having the highest annualized costs. Nonetheless, even for Tier III agencies, costs are not estimated to exceed $450,000 annually under even the high scenario.

Annualized Costs of New Accessibility Requirements for OTRBs

The third set of cost results presented in the Final RA relates to the four new OTRB-related accessibility requirements in the 2016 Non-Rail Vehicle Guidelines. Because various transportation-related industry sectors use OTRBs for scheduled transportation services, charter services, sightseeing, and other services, these accessibility requirements (unlike the automated announcement systems requirement) do not affect a discrete a set of regulated entities. Consequently, reliable estimates of per-firm costs related to the new OTRB accessibility requirements cannot be made. Instead, the Final RA examines costs for these four requirements on a per-vehicle and per-requirement basis.

With respect to per-requirement costs, the Final RA evaluates the respective costs of each of the four new OTRB accessibility requirements under the three cost scenarios over the projected 12-year term of the 2016 Non-Rail Vehicle Guidelines. For each cost scenario, results are broken down separately (in nominal dollars) by requirement for each year, and then presented as rolled-up annualized values for all requirements at 3% and 7% discount rates. In sum, the annualized cost for these four new requirements collectively across all OTRBs is estimated to be $0.9 million under the primary scenario at a 7% discount rate, while the low and high scenarios respectively project $0.5 million and $1.4 million in annualized costs using the same discount rate. For a complete presentation of cost-per-requirement results, *see* Final RA, Section 7.1.3 & Appendices F–1 to F–3.

Second, in terms of per-vehicle costs, the Final RA examines likely costs related to the four new OTRB accessibility requirements. Annualized costs of these new requirements are examined under each of the three cost scenarios, with results presented on a per-vehicle basis using 3% and 7% discount rates. The results from these per-vehicle annualized cost analyses are presented below in Table 5.

TABLE 5—PER-VEHICLE ANNUALIZED COSTS OF NEW ACCESSIBILITY REQUIREMENTS FOR OTRBS

	Low scenario	Primary scenario	High scenario
3% Discount Rate	$631	$1,124	$1,754
7% Discount Rate	549	971	1,513

As this table demonstrates, the cost of the new OTRB accessibility requirements are expected to be quite modest, when viewed from a per-vehicle perspective, under all three cost scenarios. Indeed, annualized costs per vehicle are only expected to be about $1,100 or less (depending on the discount rate) under the primary scenario.

2. Benefits: Qualitative Summary of Benefits

Benefits of the revised accessibility requirements in the 2016 Non-Rail Vehicle Guidelines to persons with disabilities (and others)—while significant—are not quantified or monetized in the Final RA, but instead described from a qualitative perspective. Such benefits are particularly challenging to quantify or monetize due to a variety of considerations. These challenges include: (a) A lack of current, reliable statistics on ridership by persons with specific disabilities on transit buses and OTRBs; (b) the fact that persons with disabilities will experience benefits differently, depending on the nature of their respective disabilities, and the current level of accessibility provided by the transit system or OTRB they wish to use; (c) the unknown extent to which improved accessibility of transit buses and OTRBs may either spur new demand among persons with disabilities who do not currently use such vehicles due to accessibility barriers that are addressed by the 2016 Non-Rail Vehicle Guidelines, or increase demand among current passengers with disabilities; (d) the extent to which persons with disabilities have reliable access to transportation, since, even when accessible, vehicles cannot be used if a potential passenger cannot reach them; (e) personal transportation preferences of persons with disabilities, who, like all individuals, make transit decisions for multiple reasons, some of which are unrelated to accessibility; and (f) the inherent challenges posed by monetization of key benefits of the 2016 Non-Rail Vehicle Guidelines, such as equity, fairness, independence, and better integration into society.

While the foregoing factors make formal quantification or monetization of the 2016 Non-Rail Vehicle Guidelines' benefits inherently difficult, their significant benefits can still be amply described. The most significant benefits from the 2016 Non-Rail Vehicle Guidelines are expected to flow from the automated stop and route announcement systems requirement. The failure to announce stops and other identifying route information has been a recurring problem under the existing regulatory regime. *See* Final RA, Section 3.2. By requiring audible and visible notification of upcoming stops and identifying route information through automated announcements, the new requirement is expected to deliver significant benefits to passengers with vision- or hearing-related disabilities who use fixed route buses and OTRBs, or who would use such services absent communications barriers. *Id.* at Section 6.

Consistent and intelligible stop and route announcements, for example, may enable passengers who are blind or have low vision—for the first time—to use fixed route service independently, or permit them to do so more reliably and with greater frequency. Automated announcements are also expected to generate time savings by lessening (if not preventing) situations in which passengers with vision- or hearing-related disabilities disembark at the wrong stop, and then must wait for another bus (or other means of transportation) to transport them to their desired destination. In sum, the automated announcement systems requirement will not only deliver direct and substantial benefits to fixed route passengers with vision- or hearing-related disabilities, but will also promote fairness by ensuring a more consistent approach to announcements on fixed route buses across the country.

Individuals with other types of disabilities may also experience benefits

from the automated announcement system requirement. Studies have shown that individuals with cognitive or intellectual disabilities also frequently face communications barriers when using fixed route transit, and, thus will benefit from consistent, reliable stop and route announcements, such as those provided by automated announcement systems.[20] Additionally, for individuals with significant mobility impairments, automated stop announcements may mean the difference between getting off at the correct stop and getting off at the wrong stop—due to unintelligible (or non-existent) stop or route announcements—to face a physically arduous or hazardous journey to his or her intended destination (or other location that gets the trip back on track). *See* Final RA, Section 6 (summarizing findings from transportation research studies on the importance of consistent and intelligible stop and route announcements to passengers with disabilities).

For the new OTRB-related requirements, benefits are expected to be similar to, though perhaps more incremental than, the benefits accruing from automated announcement systems. These four new accessibility requirements—identification of wheelchair spaces and accessible doorways (with the International Symbol of Accessibility) and priority seats (with signs), exterior destination or route signage, public address systems, and stop request systems—are all aimed at addressing communication barriers to use of, or use of accessible features on, OTRBs. Signage of wheelchair spaces and priority seats is expected to enable passengers with disabilities to more readily locate these accessibility features. Signage for accessible seating may also aid in deterring passengers without disabilities from using priority seating or setting packages or strollers in wheelchair spaces (when such spaces are not otherwise occupied by flip-down seating), thereby keeping them available for passengers with disabilities. Similarly, having accessible stop request mechanisms within reach of passengers seated in accessible seating on fixed-route OTRBs ensures that passengers with disabilities who use such seating can independently indicate their desire to disembark at the next designated stop. Public address systems, in turn, enable passengers with hearing-related disabilities (as well as other passengers) to better understand information conveyed by the vehicle operator, which, in the event of an emergency, could be of urgent significance. Lastly, having exterior route or destination signage on the front and boarding sides of OTRBs aids passengers with disabilities by making it easier to ascertain a given vehicle's route, destination, or identity. Having such signage in both locations is particularly important, for example, at transit hubs, bus terminals, areas where multiple vehicles are parked simultaneously, or other locations where traffic or terrain make circling to the front of the vehicle difficult or hazardous.

Additionally, it bears noting that other individuals and entities, including transit agencies, may benefit indirectly from new accessibility requirements in the 2016 Non-Rail Vehicle Guidelines. Several research studies on ITS deployments and automated announcement systems have shown that such systems often have the beneficial effect of increasing both customer satisfaction and ridership.[21] For large transit agencies that do not yet have automated announcement systems, compliance costs incurred in deploying such systems might thus be offset in part by increases in fixed route ridership and fare revenue. Additionally, bus passengers who are unfamiliar with a particular route, or who are visiting from outside the area, may find the wayfinding assistance provided by automated stop and route announcements to be helpful.

3. Alternative Regulatory Approaches: Automated Announcement Systems

In promulgating a 100-bus VOMS threshold for large transit agencies subject to the automated announcement systems requirement, the Access Board considered other potential regulatory alternatives. Ideally, when determining the most appropriate numeric VOMS threshold for large transit agencies subject to the automated announcement system requirement, the Access Board would have evaluated the net (monetized) benefits of potential alternate thresholds as part of the regulatory calculus were such data available. *See, e.g.,* OMB, Circular A–4, *Regulatory Analysis* 2–3, 7–9, 16–17 (Sept. 17, 2003). However, as noted above, data constraints, along with the inherent challenges posed by formal assessment of key benefits of the final rule for persons with disabilities (*e.g.,* equity, fairness, independence, and better integration into society) precluded monetization of benefits attributable to the automated announcement systems requirement, or, more generally, the final rule. Accordingly, it was not possible to determine, from the perspective of economic efficiency, which VOMS threshold would be the most beneficial to society. The Access Board thus used other available information and considerations—such as analyzing NTD annual data—to tailor a VOMS threshold that reduces the burden of the automated announcement systems requirement on small entities, while, at the same time, ensuring that automated announcement system-equipped transit buses will be available to greatest number of persons with disabilities who use these vehicles.

As originally proposed, automated announcement systems requirement would have applied to all transit agencies regardless of the size of their large, fixed-route bus fleets. *See* Sections II (Regulatory History) & III (Major Issues—Automated Stop Announcements). The VOMS 100 threshold was initially added to the 2008 Draft Revised Guidelines at the behest of commenters who sought an exemption for smaller transit agencies. *Id.* Specification of this particular threshold was intended as a means of tailoring coverage of the automated systems requirement to larger, urbanized transit entities that were most likely to serve a significant population of persons with disabilities, as well as

[20] Arizona State Univ., Morrison Institute for Public Policy, *Stuck at Home: By-Passing Transportation Roadblocks to Community Mobility and Independence* 3 (2013), available at: *https://morrisoninstitute.asu.edu/products/stuck-home-passing-transportation-roadblocks-community-mobility-and-independence*; National Council on Disability, *Current State of Transportation for People with Disabilities in the United States* 13–14 (June 13, 2005), available at: *http://www.ncd.gov/policy/current-state-transportation-people-disabilities-united-states*.

[21] *See, e.g.,* Transportation Research Board, *TCRP Synthesis 73—AVL System for Bus Transit: Update* 3, 3, 13–43, 64–66 (2008) (noting that, among other benefits, automated stop announcements enable vehicle operators to focus on safe vehicle operation, reduce customer complaints, and ensure better compliance with ADA regulations and other legal requirements); Delaware Center for Transportation, University of Delaware, *Costs and Benefits of Advanced Public Transportation Systems at Dart First State* 23–32 & App. A (July 2004) (general benefits of ITS deployments include: Increased transit ridership and revenues from passenger fares; improved transit service; increased customer satisfaction; and, enhanced compliance with ADA requirements); DOT, ITS Joint Program Office, *Evaluation of Acadia National Park ITS Field Operational Test: Final Report* 4–13—4–17 (2003) (strong majority of visitors surveyed about automated on-board stop announcements on buses in Acadia National Park indicated that these announcements made it easier for them to get around, reduced uncertainty about bus stops, helped save them time, and played an influential role in their decision to use bus transit); *see also* National Council on Disability, *Transportation Update: Where We've Gone and What We've Learned* 39 (2015) (discussing the importance of effective stop announcements to persons with disabilities, and noting that ''lack of an effective stop announcement and route identification program can force riders onto ADA paratransit'').

have the financial and technological resources to deploy automated announcement system functionality. *Id.* In this way, the Access Board views the VOMS 100 threshold as striking a reasonable balance between competing interests (*e.g.,* improved communication accessibility versus not overburdening smaller transit agencies) while also remaining consistent with the ADA's goals of reducing transportation barriers, and, more generally, ensuring consistent accessibility standards nationwide. *See, e.g.,* 42 U.S.C. 12101.

Establishment of a VOMS 100 threshold for automated announcement systems in the final rule—as opposed to specification of a different numeric threshold—was based on not only these policy and legal considerations, but also quantitative analysis of data from the National Transportation Database (NTD). As detailed in the Final RA, the Access Board downloaded pertinent information from the 2014 NTD annual data to assess how drawing different numeric lines for the VOMS threshold might impact transit agencies of various sizes. *See* Final RA, Section 8. In sum, the resulting dataset encompassed nearly 700 urban transit entities of all sizes that reported operating one or more fixed-route bus modes. *Id.* Based on this data, the Access Board conducted comparative analyses of potential alternate VOMS thresholds (*i.e.,* VOMS 50 and VOMS 250 thresholds) from several perspectives, including projected population of persons with disabilities in transit agencies' respective service areas, estimated bus ridership by disabled passengers, and potential availability of Federal funds for ADA-related capital expenditures (such as deployment of automated announcement systems). *Id.* These comparative analyses of potential alternate VOMS thresholds showed, from a quantitative perspective, that the VOMS 100 threshold struck a reasonable, middle-ground metric in terms of the scope of covered large, urban transit agencies.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires Federal agencies to analyze the impact of regulatory actions on small entities, unless an agency certifies that the rule will not have a significant impact on a substantial number of small entities. *See* 5 U.S.C. 604, 605 (b). Based on the results from the Final RA, the Access Board does not believe that the 2016 Non-Rail Vehicle Guidelines will have a significant impact on a substantial number of small entities. Nonetheless, to promote better understanding of the 2016 Non-Rail Vehicle Guidelines as applied to small entities operating in transportation-related business sectors, the Access Board provides below a final regulatory flexibility analysis consistent with section 604 of the RFA.

Summary of the need for, and objectives of, the 2016 Non-Rail Vehicle Guidelines. The Americans with Disabilities Act (ADA) mandates that the Access Board establish accessibility guidelines for transportation vehicles that are acquired or remanufactured by entities covered by the ADA. *See* 42 U.S.C. 12204, 12149(b). The Access Board's guidelines for transportation vehicles were initially promulgated in 1991, and thereafter amended in 1998 to include accessibility requirements for OTRBs. Given the passage of nearly two decades, these existing guidelines are in need of a ''refresh'' for two primary reasons: to incorporate new accessibility-related technologies, such as automated announcement systems and level boarding bus systems, and ensure that the transportation vehicle guidelines are consistent with the agency's other guidelines and standards issued since 1998.

Most of the revisions in the 2016 Non-Rail Vehicle Guidelines are editorial only. These revised guidelines use a new organizational format that is modelled after the Access Board's current guidelines for buildings and facilities that were issued in 2004. Additionally, as part of its efforts to update the existing guidelines, the Board has also endeavored to write the final rule in terms that make its requirements simpler and easier to understand. There are, however, five areas in which technical requirements in the 2016 Non-Rail Vehicle Guidelines have substantively changed relative to the existing guidelines. One of these requirements (*i.e.,* automated stop and route announcement systems) only applies to large transit entities and, therefore, does not impact any small entities. The other four requirements—identification of wheelchair spaces and accessible doorways (with the International Symbol of Accessibility) and priority seats (with signs), exterior destination or route signage, public address systems, and stop request systems—while applicable to all non-rail vehicles, are only ''new'' for OTRBs. (Such requirements have been in effect for buses and vans since 1991.) The revisions in the 2016 Non-Rail Vehicle Guidelines will help ensure that buses, vans, and OTRBs are readily accessible to, and usable by, individuals with disabilities. Compliance with the 2016 Non-Rail Vehicle Guidelines is not required until the Department of Transportation (DOT) adopts these revised guidelines as enforceable accessibility standards for ADA-covered buses, OTRBs, and vans.

Summaries of significant issues raised by public comments in response to the initial regulatory flexibility analysis and discussion of regulatory revisions made as a result of such comments. Commenters did not raise any issues related to the initial regulatory flexibility analysis presented in the 2010 NPRM.

Estimates of the number and type of small entities to which the 2016 Non-Rail Vehicle Guidelines will apply. Small governmental jurisdictions (*i.e.,* state or local government units with a population of less than 50,000) and small businesses (*i.e.,* small private entities that meet the size standards established by the Small Business Administration (SBA)) will be affected by the 2016 Non-Rail Vehicle Guidelines only to the extent they are subject to DOT's ADA regulations covering transportation services for individuals with disabilities (49 CFR part 37), which, in turn, must be ''consistent with'' the Access Board's accessibility guidelines.

The Final RA also provides a small business analysis that evaluates the number of small entities potentially affected by the 2016 Non-Rail Vehicle Guidelines, and the likely economic impact on such entities. *See* Final RA, Sections 4.3 & 8. In sum, the Final RA's small business analysis finds as follows. First, the 2016 Non-Rail Vehicle Guidelines are only expected to have an economic impact on small (private) firms that operate OTRBs in fixed route service. No small governmental jurisdictions are expected to incur compliance costs under the 2016 Non-Rail Vehicle Guidelines given that the automated announcement systems requirement only applies to large transit entities (*i.e.,* transit agencies operating 100 or more buses in annual maximum service in fixed route bus modes). According to the current (2014) National Transit Database, none of transit entities that report operating 100 or more buses in annual maximum service in fixed route bus modes have service areas or urbanized area (UZA) populations under 50,000.[22]

Second, the Final RA's small business analysis evaluates the number of small businesses that potentially may be affected by the 2016 Non-Rail Vehicle Guidelines. Small firms operate OTRBs

[22] *See* Federal Transit Administration, 2014 National Transportation Database—Agency Information, *http://www.ntdprogram.gov/ntdprogram/datbase/2013_database/NTDdatabase.htm* (last visited Jan. 11, 2016).

for a variety of purposes, but predominant uses include: provision of fixed route passenger service within or among cities, passenger charter services, airport shuttle services, sightseeing tours, and packaged tours. While these services do not squarely align with any single business sector the under the 2012 North American Industry Classification System (NAICS), they best ''map'' to the following four 6-digit NAICS codes: 485113 (Bus and Other Motor Transit Systems); 485210 (Interurban and Rural Bus Transportation); 485510 (Charter Bus Industry); and 487110 (Scenic and Sightseeing Transportation, Land).[23] Data were compiled from the 2012 U.S. Economic Census (released in June 2015) to determine the number of small OTRB firms within each of these four transportation-related NAICS codes. The Economic Census data show that firms within these four transit/transportation/charter/sightseeing industry sectors are, based on SBA-defined size standards, overwhelmingly small businesses. The number and percentage of small businesses in each of the four NAICS codes are provided below in Table 6.

TABLE 6—NUMBER AND PERCENTAGE OF SMALL BUSINESSES IN FOUR OTRB-RELATED BUSINESS SECTORS

2012 NAICS code	NAICS description	Total firms	Small business firms	Small business firms (% of total firms)
485113	Bus and Other Motor Vehicle Transit Systems	625	584	93.4
485210	Interurban and Rural Bus Transportation	397	369	92.9
485510	Charter Bus Industry	1,265	1,211	95.7
487110	Scenic and Sightseeing Transportation, Land	543	517	95.2

It bears noting, however, that firm data in Table 6 above likely overestimates the number of small firms affected by the 2016 Non-Rail Vehicle Guidelines. This is due to the fact that the four listed NAICS codes encompass transportation, charter, and sightseeing services provided by vehicles other than OTRBs, such as trolley buses, transit buses, or historic rail cars. In other words, these NAICS codes are not restricted to transportation services provided exclusively by OTRBs. There are no NAICS codes, however, directed solely to OTRB-provided transportation or other services. Accordingly, despite their limitations, these four NAICS codes nonetheless provide the best available framework (given current data limitations) for estimating the number of small firms that may operate OTRBs and, thereby, potentially incur compliance costs under the 2016 Non-Rail Vehicle Guidelines.

Description of the projected reporting, recordkeeping and other compliance requirements of the 2016 Non-Rail Vehicle Guidelines. As noted below in Section V.E., discussing the Paperwork Reduction Act, the 2016 Non-Rail Vehicle Guidelines impose no reporting or record-keeping requirements on any entities, regardless of size. The Access Board acknowledges that there may be other minor, indirect administrative costs incurred by regulated entities—including small businesses—as a result of the 2016 Non-Rail Vehicle Guidelines, including such tasks as becoming familiar with the 2016 Non-Rail Vehicle Guidelines, or keeping track of the operational status of onboard equipment for automated announcement systems. However, such compliance costs are expected to be neither significant nor disproportionately borne by small entities.

Description of the steps taken by the Access Board to minimize the economic impact on small entities consistent with the stated objectives of the ADA. In the 2007 Draft Revised Guidelines, the Access Board considered requiring all public transit agencies to provide automated announcement systems on large fixed route buses, regardless of the size of the agency. Several commenters, including the American Public Transit Association, expressed concern that the cost of providing such announcement systems would be prohibitive for small transit agencies. Consequently, in the NPRM, the Access Board proposed to limit application of the automated announcement system requirement to large transit agencies. This limitation, as noted above, has the practical effect of excluding all small public transit agencies from the automated announcement systems requirement.

C. Executive Order 13132: Federalism

The final rule adheres to the fundamental federalism principles and policy making criteria in Executive Order 13132. The 2016 Non-Rail Vehicle Guidelines are issued pursuant to the Americans with Disabilities Act (ADA). The ADA is civil rights legislation that was enacted by Congress pursuant to its authority to enforce the Fourteenth Amendment to the U.S. Constitution and to regulate commerce. The ADA prohibits discrimination on the basis of disability in the provision of transportation services. *See* 42 U.S.C. 12101 *et seq.* The ADA requires transportation vehicles acquired or remanufactured by covered entities to be readily accessible to, and usable by, individuals with disabilities. The ADA recognizes the authority of state and local governments to enact and enforce laws that provide for greater or equal protection for the rights of individuals with disabilities.

D. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act does not apply to proposed or final rules that enforce constitutional rights of individuals or enforce statutory rights that prohibit discrimination on the basis of race, color, sex, national origin, age, handicap, or disability. Since the 2016 Non-Rail Vehicle Guidelines are issued pursuant to the ADA, which prohibits discrimination on the basis of disability, an assessment of the rule's effect on state, local, and tribal governments, and the private sector is not required.

E. Paperwork Reduction Act

Under the Paperwork Reduction Act (PRA), Federal agencies are generally prohibited from conducting or sponsoring a ''collection of information'' as defined by the PRA, absent OMB approval. *See* 44 U.S.C. 3507 *et seq.* The 2016 Non-Rail Vehicle Guidelines do not impose any new or revised collections of information within the meaning of the PRA.

F. Availability of Materials Incorporated by Reference

Regulations issued by the Office of the Federal Register (OFR) require Federal agencies to describe in their regulatory preambles the steps taken to ensure that

[23] *See* U.S Census Bureau, 2012 NAICS Definitions (undated), available at: *http://www.census.gov/eos/www/naics/2012NAICS/2012_Definition_File.pdf* (last visited: Jan. 11, 2016).

incorporated materials are reasonably available to interested parties, as well as summarize the contents of referenced standards. *See* 1 CFR part 51.

The final rule incorporates by reference one voluntary consensus standard in T603.5, a standard from the International Organization for Standardization (ISO) concerning securement systems for rear-facing wheelchair positions in transportation vehicles. In keeping with OFR regulations, the Access Board provides below the requisite information on the availability of this standard and a summary of its contents. ISO 10865–1:2012(E), Wheelchair containment and occupant retention systems for accessible transport vehicles designed for use by both sitting and standing passengers—Part 1: Systems for rearward facing wheelchair-seated passengers, First Edition, June 5, 2012 [ISO Standard 10865–1:2012(E)]. The primary purpose of this standard is to limit movements of rear-facing wheelchairs and other mobility devices that could result in hazardous contact with vehicle interiors or injury to other passengers. The standard is applicable to vehicular securement systems used mainly in fixed route service when operated under normal and emergency driving conditions, where passengers are permitted to travel both sitting and standing. Specifications include design and performance requirements and associated test methods. Availability: This standard is available for inspection at either the U.S. Access Board, 1331 F Street NW., Suite 1000, Washington, DC 20004–1111, (202) 272–0080 (voice), (202) 272–0082 (TTY), or the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* Additionally, the American National Standards Institute (ANSI) has agreed to make an online read-only version of this standard available to the public without charge. This standard is also available for purchase from the International Organization for Standardization, ISO Central Secretariat, 1, ch. de la Voie-Creuse, CP 56, CH–1211, Geneva 20, Switzerland (*http://www.iso.org/iso/home/store.htm*).

List of Subjects in 36 CFR Part 1192

Civil rights, Incorporation by reference, Individuals with disabilities, Transportation.

Approved by vote of the Access Board on May 23, 2016.

David M. Capozzi,

Executive Director.

For reasons stated in the preamble, 36 CFR part 1192 is amended as follows:

PART 1192—AMERICANS WITH DISABILITIES ACT (ADA) ACCESSIBILITY GUIDELINES FOR TRANSPORTATION VEHICLES

■ **1.** The authority citation for part 1192 is revised to read as follows:

Authority: 29 U.S.C. 792 (b) (3); 42 U.S.C. 12204.

Subpart A—General

§ 1192.3 [Amended]

■ 2. Amend § 1192.3 as follows:

■ a. In the definition of ''Bus,'' remove the phrase ''other than an over-the-road bus,''; and

■ b. Remove the definitions of ''Common wheelchairs and mobility aids,'' ''Demand responsive system,'' ''Designated public transportation,'' ''Fixed route system,'' ''New vehicle,'' ''Remanufactured vehicle,'' ''Specified public transportation,'' and ''Used vehicle.''

■ 3. In § 1192.4, revise paragraph (b), remove paragraph (c), and redesignate paragraph (d) as paragraph (c).

The revision reads as follows:

§ 1192.4 General.

* * * * *

(b) *Dimensional tolerances.* All dimensions are subject to conventional engineering tolerances for manufacturing processes, material properties, and field conditions, including normal anticipated wear not exceeding accepted industry-wide standards and practices.

* * * * *

Subpart B—Buses, Over-the-Road Buses, and Vans

■ 4. Revise the heading for subpart B to this part to read as set forth above.

■ 5. Revise § 1192.21 to read as follows:

§ 1192.21 General.

The accessibility guidelines for buses, over-the-road buses, and vans are set forth in Appendix A to this part.

§§ 1192.23, 1192.25, 1192.27, 1192.29, 1192.31, 1192.33, 1192.35, 1192.37, NS 1192.39 [Removed]

■ 6. Remove 1192.23, 1192.25, 1192.27, 1192.29, 1192.31, 1192.33, 1192.35, 1192.37, NS 1192.39.

Subpart G—[Removed and Reserved]

■ 7. Remove and reserve subpart G, consisting of §§ 1192.151 through 1192.161.

■ 8. Redesignate the appendix to part 1192 as appendix A to part 1192 and revise it to read as follows:

Appendix A to Part 1192—Accessibility Guidelines for Buses, Over-the-Road Buses, and Vans

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Chapter 1: Application and Administration

T101 Purpose

T101.1 Purpose. These Non-Rail Vehicle Guidelines, which consist of Chapters 1 through 7, contain scoping and technical requirements for new, used or remanufactured non-rail vehicles to ensure their accessibility to, and usability by, individuals with disabilities. The Non-Rail Vehicle Guidelines apply to the extent required by regulations issued by the Department of Transportation under the Americans with Disabilities Act, as amended (42 U.S.C. 12101 *et seq.*).

T102 Conventions

T102.1 Calculation of Percentages. Where the determination of the required size or dimension of an element involves ratios or percentages, rounding down for values less than one half shall be permitted.

T102.2 Units of Measurement. Measurements are stated in U.S. and metric customary units. The values stated in each system (U.S. and metric customary units) may not be exact equivalents, and each system shall be used independently of the other.

T102.3 Vehicle Length. The length of non-rail vehicles shall be measured from standard bumper to standard bumper.

T103 Definitions

T103.1 Terms Defined in Referenced Standards. Terms defined in referenced standards and not defined in T103.4 shall have the meaning as defined in the referenced standards.

T103.2 Undefined Terms. Terms not specifically defined in T103.4 or in regulations issued by the Department of Transportation (49 CFR part 37) shall be given their ordinarily accepted meaning in the sense that the context implies.

T103.3 Interchangeability. Words, terms, and phrases used in the singular include the plural; and words, terms, and phrases used in the plural include the singular.

T103.4 Defined Terms. For the purpose of the Non-Rail Vehicle Guidelines, the following terms have the indicated meaning.

Boarding platform. A platform in a level boarding bus system raised above standard curb height in order to align vertically with the transit vehicle entry for level boarding and alighting.

Fixed route service (or fixed route). Operation of a non-rail vehicle along a prescribed route according to a fixed schedule.

Large transit entity. A provider of public transportation that is required to report to the National Transportation Database (49 U.S.C. 5335), and that, for an any given calendar year, reports to such database the operation of 100 or more buses in annual maximum service for all fixed-route service bus modes collectively, through either direct operation or purchased transportation.

Large non-rail vehicle. Non-rail vehicles that are more than 25 feet (7.6 m) in length.

Level boarding bus system. A system in which buses operate where some or all of the designated stops have boarding platforms and the design of boarding platforms and non-rail vehicles are coordinated to provide boarding having little or no change in level between the vehicle floor and the boarding platform.

Non-rail vehicle. A self-propelled, rubber-tired vehicle used to provide transportation services and intended for use on city streets, highways, or busways that constitutes either a bus, over-the-road bus, or van.

Operable part. A component of a device or system used to insert or withdraw objects, or to activate, deactivate, adjust, or connect to the device or system. Operable parts include, but are not limited to, buttons, levers, knobs, smart card targets, coin and card slots, pull-cords, jacks, data ports, electrical outlets, and touchscreens.

Small non-rail vehicle. Non-rail vehicles that are equal to or less than 25 feet (7.6 m) in length.

Surface discontinuities. Differences in level between two adjacent surfaces. Elevation changes due to ramps or stairs do not, themselves, constitute surface discontinuities. However, abrupt changes in level on the walking surface of ramps or stairs are surface discontinuities.

Chapter 2: Scoping Requirements

T201 Scope

T201.1 General. Non-rail vehicles purchased, leased or remanufactured by entities covered by the Americans with Disabilities Act (ADA) shall comply with the requirements in the Non-Rail Vehicle Guidelines to the extent required by regulations issued by the Department of Transportation in 49 CFR Part 37.

T201.2 Reduction in Access Prohibited. No modifications to a non-rail vehicle shall be taken that decrease, or have the effect of decreasing, the net accessibility or usability of the vehicle below the requirements of the Non-Rail Vehicle Guidelines.

T202 Accessible Means of Boarding and Alighting

T202.1 General. Non-rail vehicles shall provide at least one means of accessible boarding and alighting that serves each designated stop on the fixed route to which the vehicle is assigned. Non-rail vehicles shall also provide at least one means of accessible boarding and alighting that can be deployed to the roadway. Provision of accessible boarding and alighting shall be made through one or more of the following methods: ramps or bridgeplates complying with T402, lifts complying with T403, or a means of level boarding and alighting complying with T404.

T203 Steps

T203.1 General. Steps on non-rail vehicles shall comply with T405.

T204 Doorways

T204.1 General. Doorways on non-rail vehicles shall comply with T204.

T204.2 Doorways with Lifts, Ramps or Bridgeplates. Doorways with lifts or ramps shall comply with T502.2.

T204.3 Doorways with Level Boarding and Alighting. Doorways with level boarding and alighting shall comply with T502.3.

T204.4 Doorways with Steps on Over-the-Road Buses. On over-the-road-buses, doorways with steps shall comply with T502.4.

T205 Illumination

T205.1 General. Non-rail vehicles shall provide illumination complying with T503 at ramps, bridgeplates, doorways, and boarding and alighting areas.

T206 Circulation Paths

T206.1 General. Circulation paths in non-rail vehicles shall comply with T302.

T207 Handrails, Stanchions, and Handholds

T207.1 General. Non-rail vehicles shall provide handrails, stanchions, and handholds in accordance with T207. Handrails, stanchions, and handholds shall comply with T303.

T207.2 Passenger Doorways. Handrails or stanchions shall be provided at passenger doorways in a configuration that permits grasping and use from outside the non-rail vehicle and throughout the boarding and alighting process.

T207.3 Fare Collection Devices. Handrails shall be provided at fare collection devices and shall be configured so that they can be used for support when at the fare collection device.

T207.4 Circulation Paths. Handrails, stanchions, and handholds shall be provided along circulation paths in accordance with T207.4.

T207.4.1. Small vehicles. Handrails, stanchions, or handholds shall be provided within small non-rail vehicles in a configuration that permits onboard circulation and assistance with seating and standing.

T207.4.2. Large vehicles. Handholds or stanchions shall be provided within large non-rail vehicles on all forward- and rear-facing seat backs located directly adjacent to the aisle.

Exception: Where high-back seats are provided, handrails located overhead or on overhead luggage racks shall be permitted instead of stanchions or handholds.

T208 Passenger Access Routes

T208.1 General. Non-rail vehicles shall provide passenger access routes that permit boarding and alighting, onboard circulation, and seating by passengers with disabilities. A passenger access route shall consist of a route complying with T208.2 between wheelchair spaces and doorways, walking surfaces complying with T302, and clearances complying with T504.

T208.2 Connection to Doorways. A passenger access route shall connect each wheelchair space to doorways that provide a means of accessible boarding and alighting in accordance with T208.2.

T208.2.1 Doorways on One Side of vehicle. Where non-rail vehicles have doorways on one side, a passenger access route shall connect each wheelchair space to a doorway that provides a means of accessible boarding and alighting in accordance with T202.

T208.2.2 Doorways on Two Sides of vehicle. Where non-rail vehicles have doorways on two sides, a passenger access route shall connect each wheelchair space to

doorways on both sides of the vehicle that provide a means of accessible boarding and alighting in accordance with T202.

T208.2.3 Deployment to Roadway. A passenger access route shall connect each wheelchair space to a doorway providing a means of accessible boarding and alighting that can be deployed to the roadway in accordance with T202.

T209 Fare Collection Devices

T209.1 General. Where non-rail vehicles provide onboard fare collection devices, at least one fare collection device shall serve a passenger access route and comply with T505.

T210 Wheelchair Spaces

T210.1 General. Non-rail vehicles shall provide wheelchair spaces in accordance with T210.

T210.2 Large non-rail vehicles. Large non-rail vehicles shall provide at least two wheelchair spaces complying with T602.

T210.3 Small non-rail vehicles. Small non-rail vehicles shall provide at least one wheelchair space complying with T602.

T210.4 Location. Wheelchair spaces shall be located as near as practicable to doorways that provide a means of accessible boarding and alighting.

T211 Wheelchair Securement Systems

T211.1 General. Non-rail vehicles shall provide wheelchair securement systems complying with T603 at each wheelchair space.

T212 Seat Belts and Shoulder Belts

T212.1 General. Non-rail vehicles shall provide seat belts and shoulder belts complying with T605 at each wheelchair space.

T213 Seats

T213.1 General. Seats on non-rail vehicles shall comply with T213.

T213.2 Priority Seats. Non-rail vehicles operated in fixed-route service shall designate at least two seats as priority seats for passengers with disabilities. Priority seats shall be located as near as practicable to a doorway used for boarding and alighting. Where non-rail vehicles provide both aisle-facing and forward-facing seats, at least one of the priority seats shall be a forward-facing seat.

T213.3 Armrests at Aisle Seats on Over-the-Road Buses. Where armrests are provided on the aisle side of seats on over-the-road buses, folding or removable armrests shall be provided on the aisle side of at least 50 percent of aisle seats. Priority seats and moveable or removable seats permitted by T602.4.1 at wheelchair spaces shall be included among the fifty percent of seats with folding or removable armrests.

T214 Operable Parts

T214.1 General. Where provided for passenger use, operable parts at wheelchair spaces and priority seats, stop request systems, and fare collection devices serving passenger access routes shall comply with T304.

T215 Communication Features

T215.1 General. Communication features on non-rail vehicles shall comply with T215.

T215.2 Signs. Signs shall comply with 215.2.

T215.2.1 Priority Seats. Priority seats shall be identified by signs informing other passengers to make the seats available for persons with disabilities. Signs at priority seats shall comply with T702.

T215.2.2 Wheelchair Spaces. Wheelchair spaces shall be identified by the International Symbol of Accessibility complying with T703.

T215.2.3 Doorways. Doorways that provide a means of accessible boarding and alighting shall be identified on the exterior of the non-rail vehicle by the International Symbol of Accessibility complying with T703.

T215.2.4 Destination and Route Signs. Where destination or route signs are provided on the exterior of non-rail vehicles, such signs shall be located at a minimum on the front and boarding sides of the vehicle. The signs shall be illuminated and comply with T702.

T215.3. Public Address and Stop Request Systems. Large non-rail vehicles that operate in fixed route service with multiple designated stops shall provide public address and stop request systems in accordance with T215.3.

T215.3.1 Public Address Systems. Public address systems shall be provided within non-rail vehicles to announce stops and other passenger information.

T215.3.2 Stop Request Systems. Where non-rail vehicles stop on passenger request, stop request systems complying with T704.3 shall be provided.

T215.4 Automated Announcement Systems. Large non-rail vehicles operated in fixed route service with multiple designated stops by large transit entities shall provide automated stop announcement systems and automated route identification systems in accordance with T215.4.

T215.4.1 Automated Stop Announcement Systems. Automated stop announcement systems shall comply with T704.3.1.

T215.4.2 Automated Route Identification Systems. Automated route identification systems shall comply with T704.3.2.

Chapter 3: Building Blocks

T301 General

T301.1 Scope. The requirements in Chapter 3 shall apply where required by Chapter 2 or where otherwise referenced in any other chapter of the Non-Rail Vehicle Guidelines.

T302 Walking Surfaces

T302.1 General. Walking surfaces in non-rail vehicles shall comply with T302.

Exception: Walking surfaces on lifts shall not be required to comply with T302.

T302.2 Slip Resistant. Walking surfaces shall be slip resistant.

T302.3 Openings. Openings in walking surfaces shall not allow the passage of a sphere more than ⅝ inch (16 mm) in diameter. Elongated openings shall be placed so that the long dimension is perpendicular to the dominant direction of travel.

Exceptions: 1. Wheelchair securement system components affixed to walking surfaces shall be permitted to have openings ⅞ inch (22 mm) maximum in width provided that, where such openings are more than ⅝ inch (16 mm) in width, they contrast visually with the rest of the walking surface either light-on-dark or dark-on-light.

2. Ramp and bridgeplate surfaces shall be permitted to have one opening 1½ inches (38 mm) maximum in width and 4½ inches (115 mm) maximum in length to allow the operator to grasp the ramp or bridgeplate for manual operation.

T302.4 Surface Discontinuities. Surface discontinuities shall be ½ inch (13 mm) high maximum and shall be beveled with a slope not steeper than 1:2.

Exceptions: 1. Surface discontinuities ¼ inch (6.4 mm) high maximum shall not be required to be beveled.

2. Steps complying with T405 shall be permitted on walking surfaces that are not part of a passenger access route.

T303 Handrails, Stanchions, and Handholds

T303.1 General. Handrails, stanchions, and handholds in non-rail vehicles shall comply with T303.

T303.2 Edges. Edges shall be rounded or eased.

T303.3 Cross Section. Gripping surfaces shall have a cross section complying with T303.3.

T303.3.1 Seat-Back Handhold Cross Section. The cross section of seat-back handholds shall have an outside diameter of ⅞ inches (22 mm) minimum and 2 inches (50 mm) maximum.

T303.3.2 Handrail and Stanchion Circular Cross Section. Handrails and stanchions with a circular cross section shall have an outside diameter of 1¼ inches (32 mm) minimum and 2 inches (50 mm) maximum.

T303.3.3 Handrail and Stanchion Non-Circular Cross Section. Handrails and stanchions with a non-circular cross section shall have a perimeter dimension of 4 inches (100 mm) minimum and 6¼ inches (160 mm) maximum, and a cross section dimension of 2¼ inches (57 mm) maximum.

T303.4 Clearance. Clearance between gripping surfaces and adjacent surfaces shall be 1½ inches (38 mm) minimum.

T304 Operable Parts

T304.1 General. Operable parts in non-rail vehicles shall comply with T304.

T304.2 Height. Operable parts shall be located 24 inches (610 mm) minimum and 48 inches (1220 mm) maximum above the floor of non-rail vehicles.

T304.3 Location. Operable parts provided at a wheelchair space shall be located adjacent to the wheelchair space 24 inches (610 mm) minimum and 36 inches (915 mm) maximum from the rear of the wheelchair space measured horizontally.

T304.4 Operation. Operable parts shall be operable with one hand and shall not require tight grasping, pinching, or twisting of the wrist. The force required to activate operable parts shall be 5 lbf (22.2 N) maximum.

Chapter 4: Boarding and Alighting

T401 General

T401.1 Scope. The requirements in Chapter 4 shall apply where required by Chapter 2 or where otherwise referenced in any other chapter of the Non-Rail Vehicle Guidelines.

T402 Ramps and Bridgeplates

T402.1 General. Ramps and bridgeplates shall comply with T402. Ramps and bridgeplates shall be permitted to fold or telescope.

T402.2 Design Load. Ramps and bridgeplates 30 inches (760 mm) or more in length shall be designed to support a load of 600 pounds (273 kg) minimum, placed at the centroid of the ramp distributed over an area of 26 inches by 26 inches. The design load of ramps and bridgeplates less than 30 inches (760 mm) in length shall be 300 pounds (136 kg) minimum. The factor of safety for ramps and bridgeplates shall be 3 or more, based on the ultimate strength of the material.

T402.3 Installation and Operation. When used for boarding and alighting, ramps and bridgeplates shall be firmly attached to the non-rail vehicle to prevent displacement. Ramps and bridgeplates provided on large non-rail vehicles shall be permanently installed and power operated.

Exception: Ramps and bridgeplates on large non-rail vehicles that serve only designated stops with boarding platforms providing level boarding and alighting shall not be required to be permanently attached and power operated provided that portable ramps or bridgeplates capable of deployment to the roadway are carried onboard.

T402.4 Emergency Operation. Power-operated ramps and bridgeplates shall be capable of manual operation in the event of a power failure.

T402.5 Surfaces. Ramp and bridgeplate surface material shall comply with T302 and extend across the full width and length of the ramp or bridgeplate.

T402.6 Clear Width. The clear width of ramps and bridgeplates shall be 30 inches (760 mm) minimum.

T402.7 Edge Guards. Ramps and bridgeplates shall provide edge guards continuously along each side of the ramp or bridgeplate to within 3 inches (75 mm) of the end of the ramp or bridgeplate that is deployed furthest from the non-rail vehicle. Edge guards shall be 2 inches (51 mm) high minimum above the ramp or bridgeplate surface.

T402.8 Running Slope. The maximum running slope of ramps and bridgeplates shall comply with T402.8.1 or T402.8.2.

T402.8.1 Deployment to Roadways or to Curb Height Boarding and Alighting Areas. The running slope of ramps and bridgeplates used for deployment to the roadway or to curb-height boarding and alighting areas shall be 1:6 maximum, as measured to ground level with the non-rail vehicle resting on a flat surface.

T402.8.2 Deployment to Boarding Platforms. The running slope of ramps and bridgeplates used for deployment to platforms shall be 1:8 maximum, as measured to the boarding platform with the non-rail vehicle resting on a flat surface.

T402.9 Transitions. Vertical surface discontinuities at transitions from boarding and alighting areas to ramps and bridgeplates shall comply with T302.4.

T402.10 Visual Contrast. The perimeter of the walking surface on ramps and bridgeplates shall be marked by a stripe. The stripe shall be 1 inch (25 mm) wide minimum and shall contrast visually with the rest of the walking surface either light-on-dark or dark-on-light.

T402.11 Gaps. When ramps or bridgeplates are deployed for boarding and alighting, gaps between the ramp or bridgeplate surface and floor of non-rail vehicles shall not permit passage of a sphere more than ⅝ inch (16 mm) in diameter.

T402.12 Stowage. Where portable ramps and bridgeplates are permitted, a compartment, securement system, or other storage method shall be provided within the non-rail vehicle to stow such ramps and bridgeplates when not in use.

T403 Lifts

T403.1 General. Lifts shall comply with T403 and the National Highway Traffic Safety Administration's Federal Motor Vehicle Safety Standards (FMVSS) for public use lifts at 49 CFR 571.403 and 571.404.

T403.2 Boarding Direction. Lift platforms shall be designed to permit passengers who use wheelchairs the option to board the platforms facing either toward or away from the non-rail vehicle.

T404 Level Boarding and Alighting

T404.1 General. Boarding and alighting at boarding platforms in level boarding bus systems shall comply with T404.

T404.2 Vehicle Floor and Boarding Platform Coordination. The design of non-rail vehicles shall be coordinated with the boarding platforms to minimize the gap between the vehicle floor and the boarding platforms.

T404.3 Ramps and Bridgeplates. Where the space between the floor of non-rail vehicles and a boarding platform is greater than 2 inches (51 mm) horizontally or 5/8 inch (16 mm) vertically when measured at 50 percent passenger load with the vehicle at rest, non-rail vehicles shall provide ramps or bridgeplates complying with T402.

T405 Steps

T405.1 General. Steps shall comply with T405.

T405.2 Surfaces. Step tread surfaces shall comply with T302.

T405.3 Visual Contrast. The outer edge of step treads shall be marked by a stripe. The stripe shall be 1 inch (25 mm) wide minimum and shall contrast visually with the rest of the step tread or circulation path surface either light-on-dark or dark-on-light.

Chapter 5: Doorways, Circulation Paths and Fare Collection Devices

T501 General

T501.1 Scope. The requirements in Chapter 5 shall apply where required by Chapter 2 or where otherwise referenced in any other chapter of the Non-Rail Vehicle Guidelines.

T502 Doorways

T502.1 General. Doorways in non-rail vehicles shall comply with T502.

T502.2 Doorways with Lifts, Ramps or Bridgeplates. The vertical clearance at doorways with lifts, ramps or bridgeplates shall comply with T502.2. Vertical clearance shall be measured from the inside finished edge of the door opening to the highest point of the deployed lift, ramp or bridgeplate below.

T502.2.1 Over-the-Road Buses. For over-the-road buses, the vertical clearance at doorways shall be 65 inches (1650 mm) minimum.

T502.2.2 Other Vehicles. For other non-rail vehicles, the vertical clearance at doorways shall be 56 inches (1420 mm) minimum on small non-rail vehicles and 68 inches (1725 mm) on large non-rail vehicles.

T502.3 Doorways with Level Boarding. Doorways on non-rail vehicles designed for level boarding bus systems shall comply with T502.3.

T502.3.1 Clear Width. Doorways shall provide a clear opening of 32 inches (810 mm) minimum.

T502.3.2 Thresholds. Thresholds at doorways shall be marked by a stripe. The stripe shall be 1 inch (25 mm) wide minimum and contrast with the rest of the walking surface either light-on-dark or dark-on-light.

T502.4 Doorways with Steps on Over-the-Road Buses. On over-the-road buses, doorways with steps shall provide an opening with a clear width of 30 inches (760 mm) minimum.

Exceptions: 1. The door opening clear width above a height of 48 inches (1220 mm) measured from the lowest step tread shall be permitted to taper so as to reduce in width to 18 inches (457 mm) minimum.

2. Where compliance with T502.4 is not structurally feasible, the door opening clear width shall be permitted to be 27 in (685 mm) minimum.

3. Hinges and other door mechanisms shall be permitted to protrude 4 inches (100 mm) maximum into the door opening clear width at or below 48 inches (1220 mm) in height measured from the lowest step tread.

T503 Illumination

T503.1 General. Illumination shall be provided at ramps, bridgeplates, doorways, and boarding and alighting areas in accordance with T503. Lights shall be shielded so as not to project directly into the eyes of entering and exiting passengers.

T503.2 Ramps and Bridgeplates. When ramps or bridgeplates are deployed, the walking surface shall be lighted with 2 foot-candles (22 lux) minimum of illumination.

T503.3 Steps at Front Doorways. The walking surface on steps serving the front doorway of non-rail vehicles shall be lighted with 2 foot-candles (22 lux) minimum of illumination when the vehicle doors are open.

T503.4 Steps at Other Doorways. The walking surface on steps serving all other non-rail vehicle doorways shall be lighted at all times with 2 foot-candles (22 lux) minimum of illumination.

T503.5 Exterior Illumination for Boarding and Alighting Areas. Exterior lighting shall

be provided to illuminate walking surfaces of boarding and alighting areas when the doors of non-rail vehicles are open. Where doorways have steps, the illumination shall be 1 foot-candle (11 lux) minimum for a distance of 3 feet (915 mm) measured beyond the outside edge of the doorway or bottom step tread. Where doorways have ramps, bridgeplates or lifts, the illumination shall be 1 foot-candle (11 lux) minimum for a distance of 3 feet (915 mm) measured beyond the edge of the ramp, bridgeplate or lift farthest from the non-rail vehicle.

T504 Passenger Access Routes

T504.1 General. Passenger access routes shall provide clearances that are sufficient to permit passengers using wheelchairs to move between wheelchair spaces and doorways that provide accessible boarding and alighting, and to enter and exit wheelchair spaces.

T505 Fare Collection Devices

T505.1 General. Fare collection devices in non-rail vehicles shall comply with T505.

T505.2 Location. Fare collection devices shall be located so as not to interfere with wheelchair movement along passenger access routes.

T505.3 Location of Operable Parts. Operable parts shall be located so that they are reachable by passengers using wheelchair when parked in a clear space 30 inches (760 mm) wide minimum and 48 inches (1220 mm) long minimum. Operable parts shall be located adjacent to the toe end of the clear space or shall be located no more than 10 inches (255 mm) measured from the centerline of the long dimension of the clear space.

Chapter 6: Wheelchair Spaces and Securement Systems

T601 General

T601.1 Scope. The requirements in Chapter 6 shall apply where required by Chapter 2 or where otherwise referenced in any other chapter of the Non-Rail Vehicle Guidelines.

T602 Wheelchair Spaces

T602.1 General. Wheelchair spaces in non-rail vehicles shall comply with T602.

T602.2 Surfaces. Wheelchair space surfaces shall comply with T302.

T602.3 Approach. One full unobstructed side of each wheelchair space shall adjoin or overlap a passenger access route.

T602.4 Size. Wheelchair spaces shall be 30 inches (760 mm) minimum in width and 48 inches (1220 mm) minimum in length.

Exception: The portion of the wheelchair space occupied by wheelchair footrests shall be permitted to be located beneath another seat provided that space beneath the seat is 30 inches (760 mm) wide minimum, 9 inches (230 mm) high minimum, and 6 inches (150 mm) deep minimum.

T602. 5 Fold-Down or Removable Seats. Fold-down or removable seats shall be permitted in wheelchair spaces, provided that, when folded up or stowed, they do not obstruct the minimum size of the wheelchair space specified in T602.4.

T603 Wheelchair Securement Systems

T603.1 General. Wheelchair securement systems in non-rail vehicles, including attachments, shall comply with T603.

T603.2 Orientation. Wheelchair securement systems shall secure the wheelchair so that the occupant faces the front of the non-rail vehicle.

*Exception: O*n large non-rail vehicles designed for use by both seated and standing passengers, rear-facing wheelchair securement systems shall be permitted provided that at least one wheelchair securement system is front facing.

T603.3 Design Load. Wheelchair securement systems shall comply with the design loads specified in T603.3.1 or T603.3.2, as applicable.

T603.3.1 Non-Rail Vehicles with Gross Vehicle Weight Rating Equal to or Greater than 30,000 lbs. On non-rail vehicles with a gross vehicle weight rating equal to or greater than 30,000 pounds (13,608 kg), wheelchair securement systems shall restrain a force in the forward longitudinal direction of 2,000 lbf (8,800 N) minimum for each wheelchair.

T603.3.2 Non-Rail Vehicles with Gross Vehicle Weight Rating Less than 30,000 lbs. On non-rail vehicles with a gross vehicle weight rating less than 30,000 pounds (13,608 kg), wheelchair securement systems shall restrain a force in the forward longitudinal direction of 5,000 lbf (22,000 N) minimum for each wheelchair.

T603.4 Movement. Wheelchair securement systems shall limit the movement of an occupied wheelchair to 2 inches (51 mm) maximum in any direction when secured in accordance with the manufacturer's instructions and when the non-rail vehicle is operating in normal conditions.

T603.5 Securement Systems for Rear-Facing Wheelchair Positions. Rear-facing wheelchair securement systems shall provide forward excursion barriers and padded head rests that comply with ISO 10865–1:2012(E), Wheelchair containment and occupant retention systems for accessible transport vehicles designed for use by both sitting and standing passengers—Part 1: Systems for rearward facing wheelchair-seated passengers, First Edition, June 5, 2012 [ISO Standard 10865–1:2012(E)]. ISO Standard 10865–1:2012(E) is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, a notice of change must be published in the **Federal Register** and the material must be made available to the public. All approved material is available for inspection at the U.S. Access Board, 1331 F Street NW., Suite 1000, Washington, DC 20004–1111, (202) 272–0080 (voice), (202) 272–0082 (TTY) and is available from the International Organization for Standardization, ISO Central Secretariat, 1, ch. de la Voie-Creuse, CP 56, CH–1211, Geneva 20, Switzerland (*http://www.iso.org/iso/home/store.htm*). It is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

T604 Stowage

T604.1 General. When wheelchair securement systems are not in use, the systems shall not protrude into the wheelchair space except as provided in T603.5, and shall not interfere with passenger movement or pose a hazard. Wheelchair securement systems shall be reasonably protected from vandalism, and shall be readily accessed then needed for use.

T605 Seat Belts and Shoulder Belts

T605.1 General. Seat belts and shoulder belts provided for passengers who use wheelchairs shall comply with 49 CFR 571.209. Seat belts and shoulder belts shall not be used in place of wheelchair securement systems complying with T603.

Chapter 7: Communication Features

T701 General

T701.1 Scope. The requirements in Chapter 7 shall apply where required by Chapter 2 or where otherwise referenced in any other chapter of the Non-Rail Vehicle Guidelines.

T702 Signs

T702.1 General. Signs on non-rail vehicles shall comply with T702.

T702.2 Character Style. Characters shall be displayed in sans serif fonts and shall not use italic, oblique, script, highly decorative, or other unusual forms.

T702.3 Character Proportions. Characters shall use fonts where the width of the uppercase letter ''O'' is 55 percent minimum and 110 percent maximum of the height of the uppercase letter ''I''.

T702.4 Character Height. Character height shall comply with Table T702.4. Character height shall be based on the uppercase letter ''I''.

TABLE T702.4—CHARACTER HEIGHT

Sign location	Minimum character height
Exterior route or destination signs on boarding side of non-rail vehicle	2 inches (51 mm).
Exterior route or destination signs on front of non-rail vehicle	4 inches (100 mm).

TABLE T702.4—CHARACTER HEIGHT—Continued

Sign location	Minimum character height
Interior signs designating wheelchair spaces or priority seats, where baseline of character is equal to or less than 70 inches (1780 mm) above the non-rail vehicle floor.	⅝ inch (16 mm).
Interior signs designating wheelchair spaces, priority seats, stop announcements, or stop requests where baseline of character is more than 70 inches (1780 mm) above the non-rail vehicle floor.	2 inches (51 mm).

T702.5 Stroke Thickness. Stroke thickness of the uppercase letter ''I'' shall be 10 percent minimum and 30 percent maximum of the height of the character.

T702.6 Character Spacing. Character spacing shall be measured between the two closest points of adjacent characters, excluding word spaces. Spacing between individual characters shall be 10 percent minimum and 35 percent maximum of character height.

T702.7 Line Spacing. Spacing between the baselines of separate lines of characters within a message shall be 135 percent minimum and 170 percent maximum of the character height.

T702.8 Contrast. Characters shall contrast with their background with either light characters on a dark background or dark characters on a light background. Where provided, protective surfaces over signs shall have a non-glare finish.

T703 International Symbol of Accessibility

T703.1 General. The International Symbol of Accessibility shall comply with Figure T703.1. The symbol shall have a background field height of 4 inches (100 mm) minimum. The symbol and its background shall have a non-glare finish. The symbol shall contrast with its background with either a light symbol on a dark background or a dark symbol on a light background.

Figure T703.1 International Symbol of Accessibility

T704 Announcement Systems

T704.1 General. Non-rail vehicles shall provide announcement systems in accordance with T704.

T704.2 Stop Request Systems. Stop request systems shall comply with T704.3.

T704.2.1 Audible and visible notification. Audible and visible notification shall be provided onboard indicating when passengers have requested to disembark at the next stop on the fixed route. Audible notifications shall be verbal or non-verbal signals and sound only once for each stop. Visible components of stop request systems shall include signs complying with T702, lights, or other visually perceptible indicators. Visible components shall illuminate or activate with a stop request, be viewable onboard from all wheelchair spaces and priority seats for passengers with disabilities, and extinguish when the doors open at a stop on non-rail vehicles.

T704.2.2 Operation. A mechanism for requesting stops shall be located at each wheelchair space and priority seat for passengers with disabilities. Operable parts on stop request systems shall comply with T304.

T704.3 Automated Announcement Systems. Automated systems for stop announcements and route identification announcements shall comply with T704.3.

T704.3.1 Automated Stop Announcements. Automated stop announcement systems shall provide audible and visible notification of upcoming stops on fixed routes. Stop announcements shall use synthesized, recorded or digitized speech and be audible within non-rail vehicles. Visible components of stop announcements shall consist of signs complying with T702. Signs shall be viewable onboard from all wheelchair spaces and priority seats for passengers with disabilities.

T704.3.2 Automated Route Identification Announcements. Automated route identification systems shall audibly and visibly identify the fixed route on which the non-rail vehicle is operating. Audible route identification announcements shall be broadcast externally at boarding and alighting areas using synthesized, recorded or digitized speech. Signs displaying route identification information shall be provided on the front and boarding sides of non-rail vehicles. Signs shall comply with T702.

[FR Doc. 2016–28867 Filed 12–13–16; 8:45 am]

BILLING CODE 8150–01–P

FEDERAL REGISTER

Vol. 81 Wednesday,

No. 240 December 14, 2016

Part V

Department of Housing and Urban Development

24 CFR Parts 5, 92, 93, Et al.

Housing Counseling: New Certification Requirements; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 5, 92, 93, 214, 570, 574, 576, 578, and 1006

[Docket No. FR 5339–F–03]

RIN 2502–AI94

Housing Counseling: New Certification Requirements

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: HUD's housing counseling program provides housing counseling to consumers seeking information about financing, maintaining, renting, or owning a home. The housing counseling statute was amended to improve the effectiveness of housing counseling in HUD programs by, among other things: establishing the Office of Housing Counseling and giving this office the authority over the establishment, coordination, and administration of all regulations, requirements, standards, and performance measures under programs and laws administered by HUD that relate to housing counseling; requiring that organizations providing housing counseling required under or in connection with HUD programs be approved to participate in the Housing Counseling Program (Housing Counseling Agencies, or HCAs) and have all individuals providing such housing counseling certified by HUD as competent to provide such services; prohibiting the distribution of housing counseling grant funds awarded to agencies participating in HUD's Housing Counseling Program that are found in violation of Federal election laws or that have employees found in violation of Federal election laws; and requiring the reimbursement to HUD of housing counseling grant funds that HUD finds were misused. HUD issued a proposed rule on September 13, 2013, to establish in regulation the statutory changes made to the housing counseling program and solicited public comment. This final rule revises HUD's Housing Counseling Program regulations to adopt the new requirements established in the housing counseling statute. Additionally, this rule amends HUD's general and other program regulations to clarify for grantees the requirement that housing counseling under Other HUD Programs must be provided by HCAs.

HUD will issue a separate **Federal Register** notice to announce the start of the testing and certification process, and entities and individuals providing housing counseling will have 36 months to be approved or certified by the Office of Housing Counseling.

DATES: *Effective Date:* January 13, 2017.

FOR FURTHER INFORMATION CONTACT: William McKee, Office of Housing Counseling, at *housing.counseling@hud.gov.* Please include ''Housing Counseling Program: New Certification Requirements'' in the subject line of the email. Requests can also be sent by mail to William McKee at Office of Housing Counseling, Office of Housing, Department of Housing and Urban Development, Santa Ana Federal Building, 34 Civic Center Plaza, Room 7015, Santa Ana, CA 92701; telephone number 702–366–2126 (this is not a toll-free number). Persons with hearing or speech challenges may access this number through TTY by calling the Federal Relay Service at 800–877–8339 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of the Regulatory Action

Section 106 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x) (Section 106) was amended by Subtitle D of title XIV of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376, approved July 21, 2010) to strengthen and improve the effectiveness of housing counseling that is required under or provided in connection with HUD programs (Section 106 amendments). Specifically, the Section 106 amendments were enacted for the purpose of improving, by the following, the quality, consistency, and effectiveness of housing counseling delivered to consumers: (1) Establishing within HUD the Office of Housing Counseling and vesting in that office responsibility for all activities and matters related to housing counseling under all programs and laws administered by HUD; (2) defining certain terms related to housing counseling for purposes of clarity and consistency; (3) requiring that the individuals providing housing counseling required under or provided in connection with HUD programs be certified by taking and passing an examination administered by HUD's Office of Housing Counseling (HUD certified housing counselors); (4) requiring that all housing counseling required under or provided in connection with HUD programs (Other HUD Programs) be provided by agencies approved to participate in HUD's Housing Counseling program, referred to as housing counseling agencies (HCAs); [1] and (5) placing new requirements on the distribution and use of housing counseling grant funds awarded to HCAs. This final rule implements the Section 106 amendments by requiring that, within 36 months of the issuance of the certification examination, ''housing counseling,'' as defined in this final rule and that is ''required by or in connection with'' HUD programs, may only be provided by HUD certified housing counselors working for HCAs that are approved to provide such housing counseling by HUD's Office of Housing Counseling.

This rule codifies the Section 106 amendments in HUD's General HUD Program Requirements, in 24 CFR part 5, and in HUD's Housing Counseling Program regulations in 24 CFR part 214. While this rule focuses on updating HUD's Housing Counseling Program regulations, the rule makes limited conforming regulatory changes to some of the HUD programs covered by these new requirements. HUD program offices administering Other HUD Programs may also issue future conforming regulations or guidance, as applicable, and advise of any procedures unique to their programs,[2] to ensure that participants in all HUD programs are fully aware of the statutory requirement to use certified housing counselors employed by HCAs.

B. Summary of the Major Provisions of the Regulatory Action

This final rule adopts the new Section 106 definitions for ''homeownership counseling,'' and ''rental housing counseling,'' and incorporates these definitions in the new definition of ''housing counseling.'' The new definition of ''housing counseling'' clarifies that homeownership counseling and rental counseling are types of housing counseling and consolidates these definitions with the existing standards of housing counseling under the Housing Counseling Program in terms of both the content of housing counseling and the process used to ensure housing counseling is effective, independent, and helpful to the consumer or household seeking to purchase or rent,

[1] The Housing Counseling regulations at 24 CFR part 214 identify agencies approved to participate in HUD's Housing Counseling program as participating agencies. An approved agency must meet HUD's requirements in 24 CFR part 214, and is considered certified for purposes of 12 U.S.C. 1701x. While the preamble for clarity refers to HUD-approved Housing Counseling Agencies as HCAs, the regulatory text maintains the participating agency language, which is defined already in the existing Housing Counseling regulations.

[2] Regulations for HUD's Native American Housing programs will be undertaken following consultation pursuant to HUD's Tribal Consultation Policy.

or seeking assistance in areas related to effective homeownership or tenancy.

This preamble clarifies that routine administrative activities (*e.g.,* program eligibility determinations, intake, case management, property management, the payment of rental assistance on behalf of a client, and the collection of rent or loans) have never been categorized as housing counseling and that neither the Section 106 amendments nor HUD's regulations make these activities housing counseling. In addition, the final rule defines a ''HUD certified housing counselor'' as an individual who works for an HCA and who has passed a certification examination administered by HUD.

This rule implements the requirement that homeownership counseling and rental housing counseling required under or provided in connection with HUD programs be provided only by organizations approved by HUD under HUD's Housing Counseling Program. In addition, this final rule implements the statutory requirement that, for an organization to be approved by HUD to participate in HUD's Housing Counseling Program, all counselors employed by the organization that provide homeownership counseling and rental housing counseling must pass the certification examination and become a HUD certified housing counselor within 36 months of HUD's announcement of the availability of the examination. The certification requires that individuals demonstrate competency by passing a standardized written examination covering six major areas of counseling that are primarily provided to prospective homeowners or tenants or existing homeowners or tenants. These areas include: (1) Financial management; (2) property maintenance; (3) responsibilities of homeownership and tenancy; (4) fair housing laws and requirements; (5) housing affordability; and (6) avoidance of, and responses to, rental and mortgage delinquency and avoidance of eviction and mortgage default. In addition to passing the certification examination, HUD requires that individuals must also work for an HCA in order to be a HUD certified housing counselor.

However, if the services provided by the individual are limited to overseeing or administering the provision of housing counseling, but do not include the provision of housing counseling services directly to the consumer, then the individual is not required to become a HUD certified housing counselor and the individual's employer is not required to be an HCA.[3] Within 36 months of the date that HUD begins administering the certification examination, entities that offer housing counseling covered by this rule will have to either become HUD-approved housing counseling agencies that employ HUD certified housing counselors, create partnerships with HCAs using certified housing counselors to deliver housing counseling services on their behalf, stop providing housing counseling services, or otherwise modify their program to comply with this rule.

Lastly, this final rule prohibits the distribution of Comprehensive Housing Counseling or Housing Counseling Training funding authorized by Section 106 to any HCA that has been convicted for a violation under Federal law relating to an election for Federal office, or any HCA that employs an individual who has been convicted for a violation under Federal law relating to an election of a Federal office. In addition, this final rule requires an HCA that has been found to have used Housing Counseling Program funds in a material violation of the regulations, statutes or other conditions associated with the Housing Counseling Program funds to reimburse HUD for the misused Housing Counseling Program funds through non-Federal funds and return any unused or unobligated grant funds. This final rule prohibits such an agency from receiving housing counseling grant funds in the future.

C. Costs and Benefits

The compliance cost of the rule will be borne to a large degree by the individual housing counselors who will be required to take and pass the Housing Counseling Certification Examination to be administered by HUD's Office of Housing Counseling. HUD is providing training for the Housing Counseling Certification Examination through its training grantees and also for free at *www.hudhousingcounselors.com.* The examination is anticipated to cost $100 for online testing at the examinee's location and $140 for an on-site proctoring center examination, and an estimated average cost of $120 per housing counselor to take the certification examination. The cost to individuals would be incurred only once if the individual passes the examination. For those that use HUD's free training materials, the time it takes to review the material will be approximately 11 hours, which is $396 of lost wages based on the average wage of a housing counselor. With an estimated 8,433 housing counselors that work for HCAs or currently provide housing counseling for or in connection with Other HUD Programs that will need to be certified, the initial nationwide cost of the examination and training would total approximately $3,936,340.[4]

In addition, some of the entities that are not currently HCAs but deliver housing counseling services now covered by this rule may choose to become HCAs, incurring a cost to the entity to bring their programs into compliance with Housing Counseling Program requirements and regulations. These entities may also choose to partner with existing HCAs to deliver services, modify their programs to comply with this rule, or eliminate the activities they perform that would be considered housing counseling from their programs. Because these entities are already delivering housing counseling services, the cost to become an HCA will primarily be in time to develop systems and train staff in HUD Housing Counseling Program requirements. They may choose to become an HCA either by applying directly to HUD, or by affiliating with a HUD-approved intermediary or state housing finance agency that participates in the Housing Counseling Program. Given the options provided to these entities that have been administering housing counseling services in Other HUD Programs and the benefits that these entities would receive if they participate in HUD's Housing Counseling Program, HUD only includes the cost of the certification exam for the employees of these entities that might pursue the certification.

There are significant benefits to implementing the final rule, especially the certification requirement. The benefits to the renter, the prospective homebuyer, or the existing homeowner are increased assurance, as a result of the certification requirements, of a more knowledgeable housing counselor providing more effective housing counseling services to the consumer. HUD expects that more knowledgeable housing counselors will lead to better identification of issues, more knowledgeable referrals, and resolution of barriers. HUD also expects that consumers will recognize the value of housing counseling delivered by

[3] An entity that participates in HUD's Housing Counseling Program must comply with 24 CFR part 214 requirements regardless of whether there are individuals performing only administration or oversight.

[4] This includes a retest rate of 20 percent for those that do not pass on the first time, and cost of loss wages for hours spent training for 80 percent of test takers

certified housing counselors, with greater ability to avoid scams, and HCAs will benefit from the greater visibility that certification and HUD approval is expected to bring to the programs. The certification will be a valuable credential to housing counselors who are seeking employment from HCAs and will help consumers avoid fraudulent offers to solve housing problems.

Housing counseling helps a borrower make an informed decision when obtaining an affordable purchase loan or an affordable loan modification and avoid foreclosure, and this type of assistance provides a net benefit to the borrower and the market. In 2014, a total of 108,875 homeowners avoided foreclosure after seeking assistance from a HUD Housing Counselor.[5] Statistically, borrowers who received loan modifications after receiving post-purchase housing counseling had an average savings of $4,980 annually.[6] In addition, foreclosures prevented as a result of housing counseling have an estimated social benefit of $40,730.[7] Consequently, if 140 loan modifications are made and 125 foreclosures are avoided over a period of 5 years as a result of this rule, the benefits of this rule will exceed the projected compliance costs.

II. Background

HUD's Housing Counseling Program, established pursuant to Section 106, authorizes HUD, through HUD-approved organizations, intermediaries,[8] multistate organizations, state housing finance agencies, and their branches and affiliates (collectively referred to as Housing Counseling Agencies, or HCAs) to provide housing counseling services to potential homebuyers, homeowners, homeowners at risk of default, renters, and the homeless. Section 106 also authorizes HUD to provide housing counseling directly or to enter into contracts with, or make grants to, eligible private or public organizations with special competence and knowledge in providing housing counseling to low- and moderate-income families. Section 106 was amended to strengthen and improve the effectiveness of HUD's Housing Counseling Program.

Sections 1441, 1442, 1443, 1444, 1445, and 1448 of the Dodd-Frank Act amended Section 106 and revised HUD's Housing Counseling Program by, among other things: (1) Defining certain terms in the program; (2) establishing the Office of Housing Counseling and giving it authority over all requirements, standards, and performance measures under programs and laws administered by HUD that relate to housing counseling; (3) ensuring that HUD certified housing counselors provide housing counseling covering the entire process of homeownership, from the purchase of a home to its disposition; (4) ensuring that rental or homeownership counseling, as defined by the Dodd-Frank Act, is administered in accordance with procedures established by HUD; and (5) requiring that all homeownership counseling and rental housing counseling[9] is delivered through HUD certified housing counselors.

III. The Proposed Rule

On September 13, 2013 (78 FR 56625), HUD published a proposed rule that set out regulations describing how HUD would implement the changes to Section 106 made by the Dodd-Frank Act. The following presents a brief summary of the key regulatory revisions proposed. A detailed description of the proposed amendments can be found in this preamble to the proposed rule at 78 FR 56625, available at *http://www.gpo.gov/fdsys/pkg/FR-2013-09-13/pdf/2013-22229.pdf.*

Definitions § 214.3

The September 2013 rule proposed to add and revise existing definitions for consistency with the definitions in Section 106. Of particular note, the proposed rule sought to revise the definitions of ''HUD-approved housing counseling agency,'' and added new definitions for ''homeownership counseling,'' ''HUD certified housing counselor,'' and ''rental housing counseling.'' Section 1443 of the Dodd-Frank Act amended Section 106(e)(3) and added Section 106(g)(1)(A) to require that homeownership counseling or rental housing counseling provided in connection with any program administered by HUD must be provided only by organizations or counselors certified by the Secretary under this subsection as competent to provide such housing counseling.

Counseling That Covers the Entire Process of Homeownership § 214.300

The September 2013 rule proposed to amend § 214.300 to reflect the new statutory requirement that homeownership counseling address the entire process of homeownership and require, as part of the home purchase counseling, that information regarding home inspections be provided to clients considering whether to purchase a home. The entire process of homeownership includes the decision to purchase a home, the selection and purchase of a home, issues arising during or affecting the period of ownership of a home (including refinancing, default, and foreclosure, and other financial decisions), and the sale or other disposition of a home.

Certification To Provide Counseling § 214.101

The September 2013 rule proposed to amend the approval criteria to require that any individual providing homeownership or rental housing counseling related to HUD programs must be a HUD certified housing counselor. In addition, the rule proposed to add a new paragraph (n) to § 214.103 to provide the certification criteria for housing counselors and HCAs. The proposed paragraph (n) also provided that HCAs and individual counselors must be in compliance with the certification requirements no later than one year after the effective date of the final rule that would follow the proposed rule.

The September 2013 rule also proposed to require that organizations providing housing counseling, and individuals providing housing counseling through such organizations, in connection with any HUD program, be certified by HUD as competent to provide housing counseling. For an organization to participate in HUD's Housing Counseling Program and be eligible for HUD certification under Section 106(e), all individuals through which the organization provides housing counseling under HUD's Housing Counseling Program must be certified to provide such counseling. The proposed rule would require that in order for an individual to become HUD certified, that individual must work for an HCA and must demonstrate

[5] HUD Form 9902 Data for Fiscal Year 2014, *http://portal.hud.gov/hudportal/documents/huddoc?id=OHC_2014Q49902020615.pdf.*

[6] National Foreclosure Mitigation Counseling Program Evaluation, Final Report, Rounds 3 Through 5, Prepared by Kenneth M. Temkin Neil S. Mayer Charles A. Calhoun Peter A. Tatian with Taz George, Prepared for NeighborWorks® America (Urban Institute: September 2014).

[7] HUD's Office of Policy Development and Research found that the total ''deadweight'' loss per foreclosure prevention cost is approximately $40,730. (See *http://www.huduser.org/periodicals/cityscpe/vol14num3/Cityscape_Nov2012_impact_lim_sellers.pdf,* at page 219.)

[8] Intermediaries provide housing counseling services through a network of affiliates or branches. See *http://portal.hud.gov/hudportal/HUD?src=/ohc_nint.*

[9] Section 1443 of the Dodd-Frank Act amended Section 106(e)(3) and added Section 106(g)(1)(A) to require that homeownership counseling or rental housing counseling provided in connection with any program administered by HUD must be provided only by organizations or counselors certified by the Secretary as competent to provide such counseling.

competency by passing a standardized written examination covering six major areas of housing counseling. These areas are included: (1) Financial management; (2) property maintenance; (3) responsibilities of homeownership and tenancy; (4) fair housing laws and requirements; (5) housing affordability; and (6) avoidance of, and responses to, rental and mortgage delinquency and avoidance of eviction and mortgage default.

Requirements Relating to Housing Grant Funds § 214.311.

The September 2013 proposed rule would prohibit the distribution of grants awarded under HUD's Housing Counseling Program to any agency that has been convicted for a violation under Federal law relating to an election for Federal office, or any agency that employs an ''applicable individual'' who has been convicted for a violation under Federal law relating to an election of a Federal office. The rule also proposed to require that an HCA that was found by HUD to have used Housing Counseling Program grant funds in a material violation of the regulations, statutes, or other conditions associated with the funds, to reimburse HUD for the misused Housing Counseling Program funds and return any unused or unobligated grant funds, and that such HCA would be ineligible to receive housing counseling grant funds in the future. Lastly, the proposed rule prohibited the distribution of assistance for counseling activities to an HCA unless the agency has been certified by HUD as competent to provide counseling.

IV. Final Rule

This final rule follows publication of the September 2013 proposed rule and takes into consideration the public comments received on the proposed rule. The final rule does not substantively revise the proposed rule; however, in response to public comments, HUD has clarified policies regarding the housing counseling certification examination, amended several provisions for consistency and clarity, and clarified the application of this rule to Other HUD Programs.

Definitions. This final rule incorporates the statutory definitions ''homeownership counseling'' and ''rental counseling'' and adds clarifying definitions for ''housing counseling'' in HUD's General part 5 requirements at § 5.100 and cross-references the definitions in § 214.3. The final rule incorporates these definitions in § 5.100, because they apply to all of HUD's programs, and includes cross-references in some other programs for clarification. The final rule is also adding a definition of ''housing counseling grant funds'' and the other definitions provided in the Section 106 amendments to § 214.3.

The definition of rental housing counseling is amended from the proposed rule by including a list of items (decision to rent, responsibilities of tenancy, affordability of renting, and eviction prevention) that may be included in rental housing counseling, similar to the homeownership counseling definition.

A new ''housing counseling'' definition is added at this final rule stage, which consolidates existing statute, regulation and handbook definitions, and incorporates the requirement that the housing counseling activity must meet both the content and process standards that are set by 24 CFR part 214 and by guidance issued by the Office of Housing Counseling. This clarification provides the framework for making clear that homeownership counseling and rental counseling are subsets of housing counseling, and what activities trigger the certification requirements under Section 106.

HUD includes a definition of ''required under or provided in connection with any program administered by HUD'' in § 5.111 to clarify for grantees whether ''housing counseling,'' as defined in this regulation, is subject to the new Section 106 requirements. This requirement is also incorporated by cross-reference, into some HUD programs.

HUD is also adding the definition of ''housing counseling grant funds'' and adopting the term through the Housing Counseling Program regulations to clarify when the provisions of the rule apply solely to grant funds awarded under HUD's Housing Counseling Program.

Lastly, HUD is removing ''the Trust Territories of the Pacific'' from the definition of ''State,'' given the United States ended its administration over the Trust Territories of the Pacific on October 21, 1986.

• *Extension of timeframe for certification.* The final rule changes the September 2013 rule's proposed requirement for Other HUD Programs, HCAs, and individual counselors to be in compliance with the certification requirements to no later than 36 months (rather than 12 months as was stated in the proposed rule) after the date that HUD announces the availability of the certification examination, in order to address concerns raised by commenters. The date that is 36 months after the date that HUD announces the availability of the certification examination is referred to as the final compliance date. The final rule outlines some of the activities that HUD, entities affected by the final rule, and individual housing counselors will undertake during the period between the publication of this rule and the final compliance date.

• *Delayed certification examination availability.* There are two requirements for housing counselor certification: (1) Passing the examination and (2) working for an HCA. Both requirements are necessary to ensure that the consumer receives knowledgeable, independent, and effective housing counseling following standards established by the Office of Housing Counseling. HUD is working to implement a new housing counselor certification structure that will link several systems—FHA Connection, HUD's online system for FHA lenders and business partners; the current HUD system for tracking housing counseling program activities (Housing Counseling System); HUD's list of approved HCAs (also supported by Housing Counseling System); and housing counselor certification examination results—in a new database. The systems' linkages will validate that the individual works for an HCA and, thus, provide HUD with the evidence required to validate the individual's eligibility for certification. The system will also maintain the database of HUD certified housing counselors and will allow users to issue certificates that confirm to consumers, lenders, and other stakeholders that homeless, rental, homeownership (prepurchase, post-purchase, and mortgage default), or reverse mortgage housing counseling meeting HUD standards has occurred. To ensure that the counselor certification database will be available when individuals take the certification examination, HUD will first publish a notice in the **Federal Register** announcing the date when the certification examination will become available and that date will start the 36-month timeframe for individuals to become HUD certified housing counselors.

• *Individual HUD Certified Housing Counselor.* The certificate that HUD issues to an individual who has passed the certification examination and whom HUD has verified works for an HCA as a housing counselor will be called a ''HUD Certified Housing Counselor'' certificate. This is a name change from the term ''Certification of Competency'' that was used in the proposed rule, and the change in terminology was adopted in §§ 214.103 and 214.311. The terminology better aligns with the purpose of the statute to improve the

quality, consistency, and effectiveness of housing counseling by providing housing counselors with a credential that confirms a level of expertise and provides consumers and stakeholders with a way to distinguish the housing counseling services of trustworthy professionals from those who are unqualified or perpetrating scams and fraud.

• *Other HUD Programs.* The Section 106 amendments require that HUD certify or approve organizations that provide housing counseling required under or provided in connection with HUD programs. Furthermore, all individuals providing housing counseling for an HCA must be certified housing counselors. HUD is implementing the new requirement that all housing counseling required under or provided in connection with HUD programs meet the regulations, requirements, standards, and performance measures set by the Office of Housing Counseling, including requirements relating to the certification of organizations and individuals. To clarify that these requirements apply to all HUD programs under which housing counseling is provided, this rule includes a new provision in § 5.111 that incorporates the statutory language into HUD's General Requirements, and cross-references to the requirements of HUD's Housing Counseling Program in part 214. This section also defines the phrase ''required under or provided in connection with any program administered by HUD''.

The discussion of the public comments in this final rule preamble adds guidance for Other HUD Programs covered by the rule that are not currently delivering housing counseling through HCAs. Entities covered by the rule will have the opportunity to choose among a number of alternatives to bring their housing counseling services into compliance prior to the Final Compliance Date, including (i) applying to HUD or to a HUD-approved intermediary or state housing finance agency in order to become HCAs and ensuring that their housing counselors become certified prior to the Final Compliance Date; (ii) partnering with an existing HCA to deliver housing counseling, homeownership counseling or rental counseling services; (iii) modifying the program in order to become compliant with this rule; or (iv) choosing to stop delivering housing counseling services before the Final Compliance Date.

The final rule clarifies that entities that provide funding or otherwise authorize housing counseling that is required under or provided in connection with Other HUD Programs, and that do not provide housing counseling services directly to consumers, do not have to become HCAs, and their employees do not have to become HUD certified housing counselors. These entities will nevertheless have the responsibility to ensure that housing counseling conducted with their funding or provided under their authority through recipients, subrecipients, grantees, or contractors complies with the statutory requirements. They may choose to apply to become HUD-approved housing counseling intermediaries, becoming eligible to participate in the Housing Counseling Grant Program and providing greater programmatic support to the housing counseling delivered under their auspices. However, they may also choose to require that housing counseling under their programs is delivered by HCAs without becoming HUD-approved housing counseling intermediaries themselves.

Many counseling services are provided in HUD-funded programs but every reference to counseling does not automatically make these services ''housing counseling'' as defined in § 5.100. It is important to note that the Section 106 amendments do not alter the meaning of ''counseling'' services as has been applied to date in these programs and not all activities that may be labeled as counseling services equate to housing counseling as defined by Section 106 and this final rule. HCAs and certified housing counselors may elect to provide any of the services listed below as part of their housing counseling program. However, entities that provide the services listed below, in the absence of providing housing counseling as defined by § 5.100, do not have to become HCAs and do not have to use certified housing counselors in order to be compliant with this final rule. The following are examples of counseling that do not constitute housing counseling:

1. Services that provide housing information, or placement or referral services, (for example, mobility-related services for the Housing Choice Voucher (HCV) program), do not constitute housing counseling and would not necessitate an individual providing these services to become a HUD certified housing counselor working for an HCA under this rule.

2. Routine administrative activities (*e.g.,* program eligibility determinations, intake, case management, property management, payment of rental assistance on behalf of a client, and the collection of rent or loans) have never been categorized as housing counseling. Neither the Section 106 amendments nor HUD's Housing Counseling Program regulations make these activities housing counseling.

3. Holistic case management for persons with special needs, for persons undergoing relocation in the course of a HUD program (including relocation and other advisory services provided pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 and other Federal laws), or for social services programs that also provide housing services as incidental to a larger case management program, are not housing counseling. Thus, the Housing Opportunities for Persons With HIV/AIDS (HOPWA) program, Emergency Solutions Grants (ESG) program, and Continuum of Care (CoC) program permit various housing and support services as eligible uses of funds. If these housing services are part of a larger set of case management services, they do not trigger the certification requirements of this rule. However, in these programs, there may be instances where housing counseling, as defined in this rule, is being provided. For example, if a participant in these program is receiving housing counseling, as defined in § 5.100, as a separate specialized service, the housing counseling has to be provided by a certified housing counselor working for an HCA.

4. Fair housing advice and advocacy offered in isolation from housing counseling as defined in § 5.100 (*i.e.,* without providing for an intake); financial and housing affordability analysis; an action plan to address other housing needs or goals; and follow-up.

HUD will maintain, in four categories, a list of ''Other HUD Programs'' that this rule covers consistent with the definition added to § 5.111 that defines ''required under or provided in connection with.'' In this rule, HUD used the programs named in Section 106 as a guide to the HUD programs that may be providing housing counseling as defined in this final rule, but removed obsolete programs or those that do not cover ''housing counseling.'' HUD has included additional programs that provide housing counseling to the list of programs consistent with § 5.111. In the future, the list of HUD programs for which housing counseling must be provided by a HUD certified housing counselor working at an HCA will be posted on HUD's Housing Counseling Web site and will be updated as appropriate to add or remove HUD programs.

The following list of programs provide housing counseling as defined

in this final rule under the four categories in § 5.111. Therefore, ''housing counseling'' provided by these programs must be provided by certified individual housing counselors that work for HCAs as of the final compliance date:

1. *HUD programs where housing counseling is required by statute, regulation, Notice of Funding Availability (NOFA), or is otherwise required by HUD.* The current list of programs that universally require housing counseling or may require housing counseling in part of the program, as identified by HUD, include the Housing Counseling Program (12 U.S.C. 1701x); Housing Choice Voucher Homeownership Option (42 U.S.C. 1437f(y)); HOME Investment Partnership—Homeownership only (42 U.S.C. 12701 *et seq.*); Housing Trust Fund—Homeownership Only (12 U.S.C. 4568(c)); FHA Single Family Mortgage Insurance Program (12 U.S.C. 1707 *et seq.*); and Home Equity Conversion Mortgage Program (12 U.S.C. 1715z–20).

2. *HUD programs where housing counseling is funded under the HUD program.* The current HUD programs that include ''housing counseling'' as an eligible funding activity or project cost, include: The Community Development Block Grant Program (42 U.S.C. 5301, *et seq.*), including Disaster Recovery; Displacement Due to Demolition and Disposition of Public Housing (42 U.S.C. 1437p(a)(4)(D)); Conversion of Distressed Public Housing to Tenant-Based Assistance (42 U.S.C 1437z–5(d)(2)(B) and 42 U.S.C. 1437t); HOME Investment Partnership Program (42 U.S.C. 12701 *et seq.*); Housing Trust Fund (12 U.S.C. 4568(c)); Housing Opportunities for Persons With AIDS (42 U.S.C. 12906); Emergency Solutions Grant (42 U.S.C. 11371, *et seq.*); the Continuum of Care program (42 U.S.C. 11381, *et seq.*); Indian Housing Block Grants and Native Hawaiian Housing Block Grants (25 U.S.C. 4132(3), 25 U.S.C. 4229(b)(2)(A)); [10] Indian Community Development Block Grant program (42 U.S.C. 5301, *et seq.*); [11] Rural Housing Stability Assistance Program (Pub.L. 111–22); Housing Choice Voucher program (42 U.S.C. 1437f(o)); and Public Housing Operating Fund (42 U.S.C. 1437g(e)).

3. *HUD Programs where housing counseling is required by a grantee or subgrantee of a HUD program as a condition of receiving assistance under the HUD program.* Any HUD program where a grantee or subgrantee elects to require housing counseling as a condition of receiving assistance under a HUD program must provide ''housing counseling'' consistent with § 5.111. An example of such a program would be the Public Housing Resident Homeownership Program (42 U.S.C. 1437z–4), where Public Housing Agencies may elect to require participants in the program to participate in housing counseling as a condition of participating in the Public Housing Resident Homeownership Program. Such housing counseling would be considered ''required under or provided in connection with a HUD program'' and the ''housing counseling'' must be provided by a certified individual housing counselors working for HCAs as of the final compliance date of the final rule. Another example of such a program would be a State Housing Finance Agency that has elected to require consumers to obtain ''housing counseling'' as a condition of eligibility for its downpayment program funded by Community Development Block Grant (CDBG). Because the downpayment program is funded by CDBG funds, the ''housing counseling'' must be provided by certified individual housing counselors working for HCAs as of the final compliance date of the final rule.

4. *HUD programs where housing counseling referrals are made by a grantee or subgrantee of the program for use by a family assisted under the program.* Any HUD program where a grantee or subgrantee makes a housing counseling referral to a family assisted under the HUD program must make the referral to an HCA consistent with § 5.111. Examples include the Family Self-Sufficiency Program (FSS); and Resident Opportunity and Self-Sufficiency Program (ROSS). In these programs, HUD funding provides for the salaries of coordinators who may refer participants to housing counseling services. While these housing counseling services are not funded through the FSS or ROSS programs and are provided by a third party, the third party must be a certified individual housing counselor working for an HCA as of the final compliance date of the final rule.

This final rule also includes language clarifying the application of this rule to a number of programs, including ESG, COC, HOPWA, CDBG, and the Native Hawaiian Housing Block Grant program. HUD program offices administering Other HUD Programs may also issue future conforming regulations or guidance, as applicable, and advise of any procedures unique to their programs to ensure that participants in all HUD programs are fully aware of the statutory requirement to use certified housing counselors employed by HCAs.

• *Housing Counseling Agency certification of competency.* HUD will not issue a separate agency ''Certificate of Competency'' as originally stated in the proposed rule. For a housing counseling agency to be HUD-approved or maintain status as an HCA under HUD's Housing Counseling Program, each individual providing housing counseling for the HCA must be a HUD certified housing counselor. This requirement will be implemented through this final rule by amending existing HUD Housing Counseling Program regulations at 24 CFR part 214 that determine if an entity is eligible to be an HCA.

HUD will notify HCAs on the OHC Web site, after publication of the final rule, of the timing and process for identifying that the housing counselors who work for them are HUD certified housing counselors. The removal of the agency certification is reflected in amendments to § 214.103(n), and the requirement for HUD certified housing counselors is clarified in §§ 214.101, 214.103(n), and 214.311(c)(2).

The discussion of public comments explains the transition process for entities that are providing housing counseling under Other HUD Programs and choose to become HUD-approved HCAs by the final compliance date. Information about the current application process for entity approval under the Housing Counseling Program may be found here: *http://portal.hud.gov/hudportal/documents/huddoc?id=OHC_9900FAQS011415.pdf.*

• *Who must be certified.* The final rule applies to the individuals that provide ''housing counseling'' services to consumers under HUD programs, including Home Equity Conversion Mortgage (HECM) counselors. The certification requirement applies to all HCAs, whether grantees or nongrantees, and whether directly approved by HUD or participating in HUD's Housing Counseling Program as an affiliate or branch of an intermediary, multi-state organization, or state housing financing agency. Individuals whose roles are limited to overseeing or administering a housing counseling program are not required to become HUD certified housing counselors. The final rule clarifies that an individual providing housing counseling under Other HUD Programs, regardless of employment status (*i.e.,* a contractor, volunteer, part-time employee, etc.), must be certified. (See §§ 5.111, 214.103(g).) In addition,

[10] Application of Section 106 amendments to the Indian Housing Block Grant program will undergo tribal consultation before applying.

[11] Application of Section 106 amendments to the Indian Community Block Grant program will undergo tribal consultation before applying.

the final rule retains language in the current regulation at § 214.103(g), which required the agency to employ staff trained in housing counseling, and that at least half the agency's counselors must have at least 6 months of experience from significantly comparable work to the job that the counselor will be performing. A clarification is also made in § 214.103, paragraph (n).

The final rule also clarifies that all individual housing counseling activity reported by HCAs on form HUD–9902,[12] whether attributed to a HUD Housing Counseling Grant or not, must be performed by HUD certified housing counselors. Lastly, while not all group education presenters are required to be certified, all group education offered by an HCA as part of its Housing Counseling Program must be overseen by a HUD certified housing counselor and all group education reported by HCAs to form HUD–9902, whether attributed to a HUD Housing Counseling Grant or not, must be overseen by a HUD certified housing counselor.

• *Housing counseling certification examination training.* Section 106 requires that HUD contract with an appropriate entity to provide training and administer the housing counselor certification. HUD's Contracting Office, therefore, published a market research notice in FedBizOpps on June 18, 2013, seeking an entity to administer the housing counselor certification and training. The Office of Housing Counseling identified a qualified certified 8(a) small business entity registered with the Small Business Administration (SBA) to conduct business with the Federal Government and awarded a contract to Bixal Solutions, Inc. (Bixal) on September 30, 2013, to develop the housing counselor certification training, examination, and to host the Web site. Information on the requisition and award is located on *FedBizOpps.gov*.

The Housing Counseling Certification Examination training was developed by Bixal, using experienced instructional designer and technology specialists, adult learning specialists, and subject matter experts in housing counseling, lending, and fair housing. Free training has been made available to the public. The training course is currently available online in an interactive format, and is also offered in a portable document format (PDF) format for those who prefer text-based instruction. The study guide is available for download onto multiple types of electronic devices. The training Web site can be accessed at *www.hudhousingcounselors.com.*

• *Housing counseling certification examination.* Bixal was also selected to administer the Housing Counseling Certification Examination. A **Federal Register** notice will be issued announcing when the certification examination will be available and at that time individuals interested in becoming HUD certified housing counselors can register for the examination. The administration of the examination will be made available through video conferencing at an examinee's location or at a commercial proctoring site identified by HUD's contractor. Those choosing to use video conferencing must have equipment available. Additional information on test locations and online proctoring will be available on HUD's Office of Housing Counseling Web site, *www.hudhousingcounselors.com,* and also at *www.hud.gov/housingcounseling.*

HUD originally estimated the training and certification examination would be approximately $500. Since the issuance of the proposed rule, HUD took into account a number of public comments expressing concern that the cost was too high. With the contractor employed by HUD, HUD has been able to significantly reduce that cost through value engineering the examination, through free training, and by adding flexibility in the administration of the certification exam. HUD has determined the cost of the examination at a commercial proctoring site will be $140 and online at the examinee's location it will be $100. This cost is based on the actual cost to administer the examination in Fiscal 2016, and changes to the cost after Fiscal 2016 will be published in the **Federal Register.**

HUD will also offer the examination in English and Spanish, and will continue to review options to add other languages. For those test takers that need a reasonable accommodation pursuant to the Americans with Disabilities Act (ADA) and subsequent amendments to the act, HUD's contractor will arrange for accommodations. Individuals who do not pass the examination will receive an email notifying them of results and indicating the subject areas that should be reviewed before retesting, and can re-register for the exam. There is no limit to the number of attempts an individual can make to pass the examination.

• *Individual housing counselor certification.* A person taking the Housing Counseling Certification Examination who successfully passes the examination will receive notification of passage by email. HUD will track the examination results, and an individual HUD certified Housing Counselor Certificate will be issued for a housing counselor that has passed the examination when HUD verifies that the counselor works for an HCA.

• *Content Standards.* At the proposed rule stage, HUD provided in paragraph (b) of § 214.300 a requirement that an HCA must offer homeownership counseling, which was more extensive than that required by the Section 106 amendments. Therefore, this final rule removes the requirement that an HCA is required to provide homeownership counseling and instead clarifies in paragraph (a) of § 214.300, which covers the basic requirements for housing counseling, that if an HCA offers homeownership counseling the HCA must do so as defined in § 214.3. This final rule also adds the same requirement for the content of rental housing counseling if an HCA offers rental counseling. This final rule also moves the home inspection requirement from paragraph (b) to paragraph (a) of § 214.300.

V. Discussion of Public Comments and HUD's Responses

This section of the preamble discusses the key issues raised by the comments submitted in response to the September 13, 2013, proposed rule. The public comment period on the proposed rule closed on December 12, 2013, and 215 public comments were received in response. All public comments can be viewed at the following Web site, *www.regulations.gov,* under docket number HUD–2013–0083. (See *http://www.regulations.gov/#!docketDetail;D=HUD-2013-0083*). Comments were submitted by advocacy groups, service providers, state and local government agencies, nonprofit organizations, private companies, and individuals. The following represents the significant issues and questions related to the proposed rule raised by the commenters.

HUD also received comments in support of the proposed rule that do not require a response. These comments expressed support for the certification process, writing that the proposed certification provided a less expensive, clearer, and less cumbersome process than the current process in which housing counselors obtained certifications from multiple agencies. Commenters also supported the introduction of training from HUD to aid counselors in learning the examination topics. A few commenters also stated that this rule will provide

[12] See *http://portal.hud.gov/hudportal/documents/huddoc?id=9902.pdf.*

additional consumer protection for homebuyers and the public. Lastly, commenters stated that certification will improve the integrity of the housing counseling profession and the quality and value of housing counseling.

Comment: Opposition. Some commenters generally opposed the proposed rule, writing that the certification requirement is unnecessary, redundant, and costly given that housing counselors are already required by HUD (and their agencies) to receive continuing education and training. One commenter added that certification will not supplement housing counselors' experience or improve the services that they provide to clients. A few commenters wrote that certification punishes housing counselors and HCAs by requiring them to pay for and pass the certification. In addition, a few commenters wrote that this industry did not cause the financial crisis and applying this certification to the industry will compound the problem by causing agencies to leave the field, resulting in fewer agencies to serve clients. Lastly, a few commenters worried about the certification displacing long-standing high quality certification programs.

HUD Response: HUD understands that many housing counselors believe that the current requirements to participate in HUD's Housing Counseling Program are sufficient. Nevertheless, the Section 106 amendments require housing counselors to pass an examination that covers the following six areas of housing counseling: Financial management; property maintenance; responsibilities of homeownership and tenancy; fair housing laws and requirements; housing affordability; and avoidance of, and responses to, rental and mortgage delinquency and avoidance of eviction and mortgage default. HUD recognizes that the Housing Counseling Program currently requires counselors to fulfill education and training obligations for successful participation in the program. The intent of the new certification and testing requirements is not redundancy but to establish a single, national baseline certification that covers the broad spectrum of housing issues required under the statute.

As noted, HUD is striving to present the housing counseling certification examination, including training and study materials, in the most cost-efficient way feasible. HUD is using online testing in its Housing Counseling Certification Examination as an economical and convenient approach. Subject to available appropriations HUD intends to allow housing counseling agencies to use HUD's Comprehensive Housing Counseling Program Grant funds to pay for the costs associated with training, testing, and certification of counselors. The housing counseling certification requirements, as were outlined in the proposed rule, are intended to benefit clients who will be assisted by housing counselors who are tested and certified in six areas of housing counseling. Consumers can, as a result, be further confident in the quality and consistency of the housing counseling services and referrals they receive.

The statutory mandate, as reflected in this final rule, is not placing responsibility for the financial crisis on the counseling agencies or discrediting existing housing counseling training programs. The new certification is designed to assure baseline housing knowledge by housing counselors, consistent service delivery by a network of HCAs, and increased consumer confidence in housing counselors through a single, government-issued national credential.

HUD recognizes that numerous training and certification programs have provided housing counselors with the instruction and information that HUD has long required for participation in HUD's Housing Counseling Program. HUD supports many training and certification programs and, while the final rule does not address existing certification programs, HUD supports and expects that housing counselors will continue to seek training and certification opportunities in areas that will complement the required HUD individual housing counselor certification.

A. New Definitions § 214.3

Comment: Definition of HUD-Approved Counseling Agency. Several commenters requested confirmation as to whether the definition of ''non-profit organizations'' found in the proposed rule includes organizations exempt from taxation under section 501(c)(4) of the Internal Revenue Code (IRC) of 1996.

HUD Response: Private or public nonprofit organizations described in IRC section 501(c) and exempt from taxation under IRC section 501(a) including section 501(c)(4) organizations, are eligible to participate in HUD's Housing Counseling Program. To be a HUD-approved housing counseling agency, however, an eligible nonprofit organization must also comply with the approval requirements in § 214.103 and all other eligibility requirements.

Comment: Definition of HUD Certified Housing Counselor, Counseling, Education, and Housing Counseling. Several commenters recommended HUD expand on the definition of a housing counselor to indicate what a housing counselor does and to distinguish counseling activities from education activities. One commenter asked HUD to distinguish between activities that must be performed by HUD certified housing counselors and activities that can be performed by noncertified personnel. In addition, a commenter recommended that only housing counseling reported on the form HUD–9902 be required to be performed by a certified housing counselor. Commenters requested clarification of the definition of housing counseling required under or provided by Other HUD Programs.

HUD Response: The proposed rule added a definition of ''HUD certified housing counselor'' in § 214.3 as a housing counselor who has passed the requisite examination, provides housing counseling services for an HCA and is certified by HUD as competent to provide housing counseling services pursuant to 24 CFR part 214. HUD clarifies in the final rule that this can include paid workers or volunteers that provide housing counseling on a full or part time basis by removing the word ''employed by'' and focusing on the provision of housing counseling services. The existing regulations provide a definition of counseling (in contrast to education) under the Housing Counseling Program, and the HUD Handbook 7610.1 [13] also clarifies what constitutes housing counseling and what constitutes education activities.

In the final rule at § 5.100 and cross-referenced at § 214.3, HUD has consolidated existing definitions of ''housing counseling'' in response to comments seeking clarification of activities in Other HUD Programs that are subject to the final rule. HUD believes that the language in § 5.100, as augmented by current descriptions of counseling and education activities in the HUD Handbook, and the new definitions of ''housing counseling,'' ''homeownership counseling'' and ''rental housing counseling'' in the regulations, are sufficient. HUD further clarifies that an activity conducted in connection with administering a program—such as intake, loan application, and eligibility assessment—that is limited in scope and that is not part of process that focuses on ways of overcoming specific obstacles to achieving a housing goal, may not be in

[13] See *http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/hsgh/7610.1.*

and of itself housing counseling, homeownership or rental counseling.

As addressed in Section IV of this preamble, HUD clarifies in this final rule that all individual providing housing counseling under HUD's Housing Counseling Program must be performed by HUD certified housing counselors, and all individual housing counseling reported by HCAs to the Office of Housing Counseling on Form HUD 9902, whether attributed to a HUD housing counseling grant or not, must be performed by HUD certified housing counselors. HUD recognizes that agencies may use other agency staff and industry professionals such as real estate agents, home inspectors and loan officers as presenters at home buyer education and other group workshops as long as the education is in compliance with HUD requirements. This final rule does not require that all group education presenters obtain individual HUD housing counselor certification. However, HUD believes it is important that housing counselors overseeing group education be tested and certified in the six areas of counseling so they can provide consumers with consistent quality education. Therefore, HUD is requiring that all group education under the HUD housing counseling program must be overseen by a HUD certified housing counselor. In addition, group education reported by HCAs to the Office of Housing Counseling on Form HUD 9902, whether attributed to a HUD housing counseling grant or not, must be overseen by a HUD certified housing counselor.

B. Counseling That Covers the Entire Process of Homeownership § 214.300

Comment: Home Inspection Materials. A commenter requested that the requirement to provide home inspection information in § 214.300 should include the specific home inspection requirements in section 1451 of the Dodd-Frank Act. The same commenter requested that HUD issue a mortgagee letter clarifying the section 1451(b) requirement that lenders provide prospective homebuyers, at first contact, the home inspection materials specified in section 1451(a). The commenter suggested HUD include how the information should be delivered and include specific documents to be provided by the agencies as prescribed in the statute in this final rule. The commenter also requested that HUD disclose a timetable for developing the documents required under section 1451(a), noting progress was being made in early 2012 but has since ceased.

HUD Response: The new language in § 214.300 requires housing counseling agencies to address the home inspection process as part of home purchase counseling and provide clients with such materials as HUD may require regarding the availability and importance of obtaining an independent home inspection. In addition, the proposed rule states that HUD may periodically update and revise the home inspection materials, as HUD deems appropriate. In order to maintain flexibility in revising the home inspection materials and training elements, HUD retains the proposed language in the final rule. HUD is continuing to develop the required publications under section 1451(a) of the Dodd-Frank Act.

C. Certification To Provide Counseling § 214.103

Comment: Programs Covered. Several commenters had questions concerning the applicability of HUD's rule to agencies, including Tribally Designated Housing Entities, that provide counseling or administrative services incidental to such programs as Family Self Sufficiency, HOME Investment Partnerships, Housing Choice Vouchers (HCV), and Indian Housing Community Development Block Grants, but that are not directly approved by HUD as Housing Counseling Agencies or participating in HUD's Housing Counseling Program through an intermediary or state housing finance agency. One commenter questioned the breadth of the definitions of homeownership counseling and rental housing counseling, to include counseling related to topics pursuant to programs such as the Public Housing Operating Fund and rental assistance under Section 8. The commenters expressed concern that the definition of rental housing counseling goes so far as to include providing referrals for renters and prospective renters to entities providing housing counseling, and that by using broad definitions, their members provide some degree of ''counseling'' as part and parcel of administering these HUD programs. The commenter requested explicit clarification that the certification requirements apply *only* to agencies receiving housing counseling funds and/or voluntarily seeking HUD approval as a housing counseling agency, and was concerned that the rule could be misconstrued to require that housing authorities must become approved housing counseling agencies, with frontline housing authority staff required to be certified housing counselors, in order to perform basic program functions such as explaining payment standards or rent determinations or even simply to provide a referral to a HUD-funded housing counseling agency.

HUD Response: As discussed in Section IV of this preamble, the Section 106 amendments added a requirement that all homeownership and rental housing counseling required under or provided in connection with all HUD programs must be provided only by HUD certified organizations and individuals, under Section 106(e). Section 106 also requires that for HUD to certify organizations, all individuals through whom the organization provides housing counseling must be certified. This final rule implements this requirement using the existing service delivery structure that housing counseling be provided by HCAs. Therefore, only HCAs that have HUD certified housing counselors can provide homeownership and rental housing counseling that is required by or provided in connection with Other HUD Programs.

HUD has expanded this preamble to elaborate upon which entities and which activities will require the use of a HUD certified housing counselor working for an HCA. HUD has also provided additional definitions in order to clarify which entities, individuals, and activities will be affected by the final rule, and adopted those definitions in § 5.111. As noted earlier in this preamble, housing counseling includes ''Housing Counseling'': (1) Required by statute, regulation, NOFA, or otherwise required by HUD; (2) funded under a HUD program; (3) required by a grantee or subgrantee of a HUD program as a condition of receiving assistance under the HUD program; or (4) to which a family assisted under a HUD program is referred, by a grantee or subgrantee of the HUD program.

HUD programs that require or provide for homeownership and rental housing counseling activities will be required to use HUD certified housing counselors that work for an HCA after the final compliance period as defined in this preamble. An activity conducted in connection with administering a program—such as intake, loan application, and eligibility assessment—that is limited in scope, and that is not customized to the individualized need of the consumer to address his or her housing barriers and achieve housing goals, is not in and of itself homeownership or rental housing counseling. HUD has added cross-references to the new definitions in § 5.100 and new Section 106 requirements in § 5.111 to a number of programs for additional clarity for those

grantees, including the ESG program, the CoC program, and CDBG.

As for tribes, however, the application will only apply after HUD undergoes tribal consultation and addresses the participation of tribes in HUD's Housing Counseling Program in future rulemaking or guidance, as appropriate.

Comment: Section heading. A commenter recommended that HUD change the heading of paragraph (n) of § 214.103 to include the definition of the term ''participating agency.'' The commenter wrote that inclusion of this term would clarify that the requirement applies to HUD-approved intermediaries, multi-state organizations, and state housing finance agencies.

HUD Response: The definition of ''participating agency'', as provided in § 214.3, includes the list the commenter seeks to be added to the heading of paragraph (n). HUD believes amending the heading to include the definition would be confusing. Therefore, HUD in the final rule retains the § 214.103(n) heading as proposed. HUD has added to this preamble the term HCA to represent all HUD-approved and HUD participating agencies, including intermediaries, state housing finance agencies, multi-state organizations, local housing counseling agencies, affiliates and branches.

Comment: Consultation in Development of Housing Counseling Certification Examination. Many commenters recommended that HUD consult with subject matter experts on all areas covered by the test to provide input on test question development, including leaders and long-term experienced housing counselors, real estate professionals, national housing counselor trainers, and existing training providers such as NeighborWorks America. Several commenters requested that HUD create subject matter expert workgroups that would convene and help manage the test. A commenter recommended that experts represent the diversity of the trade organizations, including National Association of Real Estate Brokers, Inc.; National Association of Realtors®; National Association of Hispanic Real Estate Professionals; and Asian Real Estate Association of America. One commenter recommended that HUD use formal criteria established by national housing counseling training organizations to establish the requirements for credentials as a ''HUD certified Housing Counselor.''

Several commenters asked if there will be an opportunity for existing certification programs to provide input on the new examination. Another commenter recommended that leaders and long-term housing counselors be required to administer the test prior to implementation of the final rule to make sure the questions are relevant to real life situations. Other commenters recommended the curriculum and examination should be reviewed by experienced counselors and allow for feedback on format and content to ensure that the examination will accurately gauge a housing counselor's competency. Commenters also recommended HUD allow for feedback to ensure that training meets the needs of housing counselors. One commenter suggested HUD withhold the examination requirements, material, and other items without notice and fair opportunity for public comment. Another commenter recommended an 18-month timeframe for testing development to evaluate the quality of the questions.

HUD Response: In order to preserve the integrity and fairness of the rulemaking process and testing, HUD was unable to share information with select groups on the certification process, including the training and examination. HUD agrees with commenters that the use of subject matter experts is critical for developing the housing counselor certification training and testing. Therefore, HUD selected a contractor that utilized subject matter experts in adult learning, housing counseling, lending, and fair housing to develop the housing counselor certification training, online study guide, and examination.

HUD does not believe an 18-month timeframe for the development of the test to evaluate the quality of the certification examination questions is necessary. Instead, HUD will welcome feedback from all sources, including the housing counseling and real estate industries, regarding the certification training and examination after publication of the final rule and after implementation of the Housing Counselor Certification examination. The existing training Web site, *www.hudhousingcounselors.com,* provides the opportunity for comments and feedback on the content of the training materials. Those taking the examination will be encouraged to provide immediate feedback after completing the test. Anyone interested in submitting comments regarding the training and examination may write to *housing.counseling@hud.gov* and include *Certification* in the subject line. After the examination is initiated, HUD and the contractor will evaluate test questions quarterly, and both the training and testing will be updated as needed.

Comment: Content of Housing Counselor Certification Examination. Commenters submitted numerous suggestions and questions regarding the content of the Housing Counselor Certification Examination. Commenters asked that HUD be more specific about the six areas to be tested and more clearly define how competency will be determined in each subject area. A commenter stated that knowing the level of expertise and knowledge required to pass the examination is critical. Another commenter recommended HUD provide more details regarding the test itself as soon as possible, prior to any deadlines beginning to run. Commenters requested HUD provide a sample curriculum so that national education and training providers can adjust the curriculum to provide training to new and experienced counselors.

Commenters also recommended that the test be general enough to allow housing counselors who specialize in certain types of counseling to take an alternative approach to learn the information through training, while being sufficiently stringent and comprehensive. Other commenters suggested that the test focus on general knowledge, and additional professional qualifications should be earned in specialized areas. Commenters stated that testing must be appropriate as a meaningful measurement; that is, that the test should be reasonable and passable and reflect the comprehension of material relevant to housing counseling services.

Commenters recommended specific topics to be included in the Housing Counselor Certification Examination. These topics included testing on knowledge of: Qualified mortgage standards; mortgage products, homeownership programs and regulations; financial management; loss mitigation; local, state, and regional programs; laws and conditions including rental laws; State eviction laws; home inspection documents; rental readiness; finding affordable housing; applying for Section 8 vouchers; housing for people with disabilities; finding cooperative housing; downpayment assistance; types of loan programs; foreclosures prevention; budgeting income and expenses; the bankruptcy process; and Social Security disability income. Other recommendations were that the examination should include a state-specific portion, in addition to a HUD basic portion of the examination; and that there should be optional testing on

reverse mortgage counseling areas as a possible component under the financial management subject area. Some commenters asked how a broad set of national standards can be developed in a subject area in which the rules and practices vary by locality. Other commenters asked if the examination will vary from state to state. Commenters also stated that the examination should be tailored to meet only the areas of counseling offered by the HUD-approved housing counseling agency, and recommended that housing counselors be trained to make referrals as appropriate.

Commenters also addressed the current HECM certification examination, recommending that the Housing Counselor Certification Examination mirror HUD's HECM certification test. Other commenters, however, recommended that the new test not be modeled after the original HECM examination as many counselors found it difficult to pass and the stringency and inconsistencies of the HECM examination resulted in a decrease in the availability of reverse mortgage counseling.

Several commenters mentioned existing certifications, and recommended that the certification process align with the standards for existing certification programs such as those offered by NeighborWorks® America.[14] Other commenters recommended that HUD integrate existing third-party counselor-certification exams into HUD's certification examination, and that HUD's housing counselor training not be duplicative of existing trainings or preempt existing specialized trainings.

Several commenters asked whether HUD would allow housing counselors to continue to complete other certifications in addition to the HUD Housing Counselor Certification. A commenter asked if a housing counseling agency should hold off either recertifying using other housing counselor certifications or having housing counselors receive new certifications from other entities before the final rule is published. Another commenter asked how often the examination will be updated to reflect current trends and issues.

HUD Response: To address concerns and questions put forward by commenters, HUD provided access to the online training materials at *www.hudhousingcounselors.com* prior to releasing the final rule. HUD's training is designed to provide basic knowledge on the six counseling areas, required by Section 106, that are specific to the certification examination. Under the six counseling topics required by Section 106, HUD's contractor developed content information for the training and examination after reviewing HUD's statute, regulations, and handbooks, as well as National Industry Standards for Homeownership Education and Counseling,[15] and training provided by HUD's housing counseling training NOFA grantees. The examination will focus on the knowledge base needed by a housing counselor to address basic issues related to the six areas specified in Section 106. Many of the topics suggested by commenters are addressed in the training and certification examination, such as loss mitigation, mortgages, and budgeting. However, it is HUD's view that other topics suggested by commenters are subjects that do not fall within the scope of a national examination designed to test basic knowledge related to the six counseling topics required by Section 106.

HUD will also continue to require the separate HECM Counselor Roster examination and certification pursuant to the statutory requirements of National Housing Act sections 255(d) and (f) and the HECM Roster regulations at 24 CFR part 206, subpart E. HECM counselors must, however, also pass the certification examination required by Section 106, which is applicable to all counselors. In response to comments regarding the administration of the HUD HECM Roster examination, HUD has taken prior experience with the HECM Roster examination into consideration when developing the Housing Counselor Certification Examination.

HUD intends to evaluate the examination questions quarterly and update where necessary to reflect current regulatory and policy changes. HUD also intends to evaluate the Housing Counselor Certification Examination, utilizing analyses of test results and stakeholder feedback.

The training and examination will not focus on specific state and local laws and regulations but the training will address ways to access local and state information. The training offered by HUD may include topics similar to those found in classes offered by HUD housing counseling training grant recipients such as NeighborWorks® America, National Council of La Raza, and the National Community Reinvestment Coalition. However, HUD's training is specifically designed to prepare housing counselors for the Housing Counselor Certification Examination. The learning objectives identified for each topic may be different than those offered by other entities. HUD's training is not designed to replace other training offered. HUD's training is designed to provide general knowledge on the six topics.

HUD has not changed the existing requirement that an HCA must employ staff trained in housing counseling, and that the HCA's staff must possess a working knowledge of HUD's housing and single-family mortgage insurance programs, other state and local housing programs available in the community, consolidated plans, and the local housing market. The staff should be familiar with housing programs offered by conventional mortgage lenders and other housing or related programs that may assist their clients. Existing training opportunities may be used to meet HUD's ongoing knowledge requirements and may be helpful to gain mastery of housing counseling related topics or to gain additional credentials. HUD will continue to provide funding for such activities and encourage housing counselors to take continuing education courses. HUD recommends that housing counselors continue to seek other housing counseling certifications.

Comment: Drafting of Housing Counseling Certification Examination, Format and Scoring. Commenters offered recommendations about the format of the exam, including the number of questions; that the examination require no more than 2 hours for successful completion; the possibility of taking components of the examination allowing each component area to be tested separately; and that counselors with five or more years of experience take a shorter examination.

Commenters questioned how the test will be scored, and one recommended a 70 percent passage rate, while others recommended 80 percent, the same as the National Industry Standards. Commenters also questioned whether graders will consider relative knowledge of subjects and if there is a way to compensate for areas where the counselor may test lower in one area but test higher in another. Commenters recommended that HUD require a minimum overall score rather than a minimum score in each subject area, and that the scoring methodology of the examination be transparent, and results be given instantaneously and reveal correct answers for any items that were not answered correctly. Another commenter recommended that the examination have controls or proctors to validate counselors. Another commenter

[14] See *http://www.neighborworks.org/Training-Services/Training-Professional-Development/Courses-Certifications.*

[15] See *http://www.homeownershipstandards.com/Home/Home.aspx.*

asked whether scoring will accommodate certification in one or two of the subject areas. A commenter suggested that scoring give partial or full credit for existing certifications and recommended framing the test to housing counselors based on the specialized areas of counseling offered by their agencies.

HUD Response: The Housing Counselor Certification Examination has approximately 90 multiple-choice questions. The test is administered online by a proctor either by web-cam or at a proctoring location, and the proctoring service verifies the identity of individuals taking the examination. The test is designed to be completed in two hours, and accommodations will be made for those with disabilities. Guidance on requesting accommodations will be provided by the certification examination contractor.

The examination score will be scaled based on a range from 200 to 800. The test will not have individual sections. The examination cannot be divided into topic areas, nor taken by topic area. Many examination questions relate to multiple topics, which precludes dividing up the examination ''by topic.'' Further, each examination goes through an industry standard certification review process and is considered as a whole, and scored as a whole. To pass the examination, the individual must achieve a scaled score of 500 or more. The scaled score does not represent the percentage of items correct, but is a numeric score for the overall examination.

Test takers will be notified by email whether they pass or fail the examination. If a test taker does not pass the examination, the email notification will include feedback on the learning objectives that the test taker should review before retaking the examination. The test will not be customized for each individual counselor as that would be inconsistent with the requirement that each counselor pass an examination in all six areas.

Comment: Scope of Certification; Six Testing Areas. One commenter stated it is unclear whether a housing counselor is required to be certified in all six subject areas. Another commenter recommended framing the test to counselors based on what areas their agencies specialize in.

Some commenters noted that obtaining working knowledge in the six specified areas of expertise, but not specializing in those areas, seems to be in keeping with the intent of Section 106 amendments. Another commenter stated that HUD's certification standard should assess a baseline of skills and knowledge across the range of counseling services covered by the rule, while acknowledging that individual counselors and counseling agencies often focus on specific aspects of the homeownership or rental process.

Several commenters wrote that the proposed testing is unrealistic, impractical, and that specialization is important to the industry. Commenters stated that having different types of housing counselors provides for a greater level of competence in the counselors. A commenter expressed concern about how general knowledge can impact a counselor's effectiveness within a specialized area. Commenters suggested changing the requirement that all six subject areas should be tested, and instead allow for each subject to be tested separately. Several commenters also recommended restructuring a change in the organization of the six competency areas to better reflect the various types of counseling services performed.

Commenters recommended that there be one certification system, either HUD's or the NeighborWorks Center for Homeownership Education and Counseling (NCHEC) [16] certification program, which allows for specialization. Generally, commenters suggested that HUD administer separate tests and certifications based on each subject area.

Commenters wrote that a uniform approach to rental and housing counseling ignores the uniqueness of each area, and requested that the training and examination reflect these differences. The commenters submitted that separate training and examination would be appropriate so that where the statute requires examination in the 'responsibilities of homeownership and tenancy' the homeownership counselor could be trained and tested on the former, while the rental housing counselor could be trained and tested on the latter.

HUD Response: Section 106 requires a general knowledge in each of the six competency areas. All counselors are required to take the certification examination on the six competency areas and the test will not be customized based on the specialization of each individual counselor. The intended goal of this requirement is to increase the breadth of individual housing counselors' knowledge in an effort to better assist clients with varied needs. This broad knowledge will benefit housing counselors and clients, and should not diminish the effectiveness of current specializations. Agencies can continue to determine the areas of specialization for each individual counselor, and for the agency itself, based on the workload of the agency and the needs of its client base. The Housing Counselor Certification Examination is a single comprehensive test that covers all six competency areas. The Section 106 amendments mandate that housing counselors demonstrate competency for both rental and homeownership topics. The statutory requirement reflects a basic principle that housing counselors participating in HUD's Housing Counseling Program should have general knowledge on both topics to help clients determine whether they are more suited for renting or owning, based on their circumstances, and to prepare for the eventuality that owners may become renters in the future and vice versa.

Comment: Cost; Funding for Cost of Housing Counselor Certification Examination. Commenters stated that HUD's Housing Counseling Grant Program should continue to include funding for the certification requirements. Commenters also wrote that funding is subject to available appropriations. Recommendations from commenters included: reducing other monitoring and compliance requirements to help small nonprofits using HUD funding; HUD assisting nonprofit organizations through added funding and capacity building to help them achieve maximum results; and providing separate or outside funds (for example, funds received from banks in settlement of certain mortgage-related lawsuits) to assist in certification so that existing annual HUD housing counseling funding does not need to be used to cover these expenses. Another commenter requested that HUD increase scholarship availability specifically for small nonprofits, stating that the current limitation of one scholarship per organization makes it difficult for organizations to afford expensive training and certifications.

Commenters expressed concerns that housing counseling agencies would lack the funds necessary to pay for training to prepare for the examination, and requested more funds for training, travel to training, lodging, and technical upgrades for organizations that do not have technical capacity needed for training.

Commenters stated that as grant funds continue to decrease, small community based nonprofits are unable to cover these new costs while continuing to subsidize general operation costs. A commenter stated that smaller agencies should have input determining the financial support necessary to comply

[16] See *http://www.nchec.org.*

with the final standards, and another commenter claimed that the new requirement is an unfunded mandate.

HUD Response: HUD recognizes that costs will be incurred as a result of the certification requirement. HUD's Fiscal Years 2014 and 2015 Comprehensive Housing Counseling Grant Program NOFA allowed as eligible expenses costs associated with HUD housing counseling training, testing and certification requirements. In future NOFAs, HUD intends to treat costs associated with certification as an eligible Housing Counseling Comprehensive Grant program expense, subject to statutory authorization and appropriations.

HUD is providing training for the certification examination online at no cost. In addition, HUD has strived to make certification and examination costs as minimal as possible, but cannot provide scholarships for the examination fee.

HUD cannot reduce the program requirements based on the size of an agency to help small agencies reduce costs in other areas. HUD's Housing Counseling Program requirements apply to all HCAs. HUD allows for agencies to develop revenue sources through charitable grants, lender-funded agreements, or client payment sources. HUD encourages agencies to consider these options and others to help offset the costs associated with housing counselor certification.

While several governmental entities have received settlement funds arising from national mortgage servicing settlements, and have designated a portion of those funds for housing counseling services, each entity is authorized to administer its own settlement funds. HUD has no authority over the use or distribution of these funds. Therefore, agencies should consult their State attorney general's office to determine whether settlement funds can be used for the Housing Counselor Certification Examination in their particular state.

This rule is not an unfunded mandate. The new certification does not require individuals, states, tribal governments, and the private sector to undertake any new requirements. Participation in HUD's housing counseling program and Other HUD Programs is voluntary.

Comment: Cost: Responsibility to Pay for Cost of Certification. Commenters wrote that HUD or another Federal agency should pay for the certification examination. A commenter wrote that HUD should be responsible for paying the costs of certification because certification does not provide one with a business opportunity like a professional degree does. Another recommended that HUD refund the cost of training and testing after successful passage, which will reduce impact on awards consistent, with Executive Order 13563, entitled Improving Regulation and Regulatory Review.[17] Another commenter recommended HUD mitigate the costs of the certification process, especially for agencies with small staff and budgets, by including subsidized trainings and scholarships.

Commenters stated both agencies and housing counselors will bear the cost because they are interconnected. Other commenters, however, wrote that the cost of counseling will fall on the housing counseling agency because: (1) Counselors do not control their income and are not paid on commission; (2) they do not make professional salaries; and (3) they lack mobility because of the limited job opportunities, which will cause agencies' costs to dramatically rise. Commenters wrote that the agencies will pay for the cost to maintain their certification, but the result will be that the agency will pay for less specialized training for topics such as foreclosure mitigation or other professional development training that would ultimately benefit the organizations' clients. Another commenter said that although the counseling agency will end up paying for the certification, the counseling agency cannot guarantee that a housing counselor will stay with that agency for any length of time.

Commenters recommended that the final rule be clear that the compliance costs of the rule may be borne by the individual housing counselor or by the individual counselor's sponsoring agency.

HUD Response: Individual housing counselors are responsible for paying for the examination when payment is required. The housing counseling agency, however, has the option of paying for the examination for its counselors. Passing the certification examination serves as a marketable credential for individuals seeking work at an HCA as a housing counselor. HUD recognizes that agencies are concerned about the cost of training for and taking the Housing Counselor Certification Examination and, therefore, is providing free training. HUD has determined that the cost of taking the examination will be significantly less than the cost estimated in the proposed rule. Lastly, while it is true that an agency cannot guarantee that a counselor will remain with the agency if the agency pays for the examination, such a scenario is always a possibility for any employee who receives training paid for by an employer, and employers can create incentives to retain their employees consistent with agency policies and applicable laws.

Comment: Cost: Testing Cost. Some commenters requested that the examination should be administered free of charge stating that a free examination would allow retesting without concern of costs for nonprofit agencies. A commenter proposed that existing counselors have 2 to 3 months to take the test one time for free. Others recommended waiving the cost for existing certified counselors, and having a reasonable cost for new counselors entering the field; allowing approved agencies that do not receive funds to be charged only $100 for the certification; or charging a fee for the agency instead of a fee per counselor.

Commenters requested the fee be as low as possible; that HUD keep the cost reasonable, especially for housing counselors who are serving communities of color and other underserved communities. A commenter recommended a low cost for small local practitioners providing a low volume of housing counseling annually. Another commenter wrote that HUD should consider the costs of existing continuing education in determining the cost for training and certification. Another commenter recommended a fee for training and no fee for the examination. Commenters also requested free training, or permitting training to be charged separately so it could be done in house or limited to certain subjects.

Several commenters wrote that $500 is too high a fee to pay, and requested that HUD provide information on how HUD plans to implement the testing for $500. Some commenters requested that the cost of the certification be limited to a range of $100 to $200. A commenter stated that the estimated cost is reasonable only if it includes the cost of trainings.

HUD Response: The fee charged each time an individual takes the certification examination is based on the cost of administering the examination. The cost of the examination is well below the $500 estimate. The cost is $100 for testing online at the examinee's location and $140 at a proctoring site. Any changes to the cost of the certification examination will be published in the **Federal Register**.

Comment: Cost: Consequences of Cost, Secondary Costs. Some commenters stated that certification and

[17] Signed by the President on January 18, 2011, and published in the *Federal Register* on January 21, 2011, at 76 FR 3821.

training are overly burdensome and costly and will take away from client services. Commenters also stated that this would result in fewer low-income people receiving counseling and will result in higher homelessness, and that HUD should seek ways to minimize costs to ensure that the work of housing counselors in assisting vulnerable households is not inadvertently hurt in the process.

Other commenters wrote that costs associated with certification will result in agencies leaving the business of housing counseling, counselors leaving agencies, or individuals never joining the industry. Commenters stated that the cost is high for a new housing counselor, because an agency would not want to hire someone without the certification and risk losing its agency certification. Another commenter wrote that given many counselors come from other industries and their entry is limited, a housing counseling position will be less financially attractive with the additional compliance cost, and agencies might as a result see a reduction in current staff-to-client ratios. Commenters also wrote that the cost could interfere with other specialized trainings, or that agencies will be unable to afford to send their counselors to training, which will impact passage rates and the number of agencies with HUD-approved status. Commenters also wrote that HUD should consider the cost in the context of the amount of time it will take for counselors to prepare, travel, and take the examination, and some stated that opportunity costs and HUD's cost of monitoring compliance are incurred but not included. Commenters wrote that the cost associated with compliance for entities offering housing counseling programs that are not HCAs should be disaggregated in the cost-benefit analysis.

HUD Response: The certification examination is mandated by statute. As stated previously in this preamble, HUD strived to make certification costs as minimal as feasible by providing free training and allowing for web-based testing which removes the need for individuals to travel. HUD is providing 36 months for individual counselors to become certified so that they have time to budget the cost of taking the examination. In addition, if an organization decides to help pay for certification the entity also has time to budget for the cost of ensuring their counselors are certified. Entities that are not HCAs may choose among four different options in order to become compliant, and the cost-benefit analysis includes a discussion of the costs of each option.

Comment: Difficulty of Certification for Small Rural Agencies. Commenters requested that HUD consider rule changes that help rural organizations gain certification and meet the stringent reporting requirements. Commenters wrote that requiring individual counselors and agencies to be certified is a significant burden on small rural counseling agencies already facing financial strain. Commenters stated that some agencies in urban areas have many counselors to get through the process and those agencies in rural areas with potentially fewer resources will need more time to allocate the expense of obtaining the certification.

HUD Response: HUD is keenly aware of the vital role of rural agencies in providing housing counseling. However, HUD is responsible for implementing the Section 106 certification requirement in the same manner for all agencies and the statute did not provide an exemption for smaller or rural agencies. HUD recognizes that the examination must be accessible to housing counselors in rural areas. HUD has provided two testing options: online and on-site. On-site testing is an option for those agencies and individuals with limited internet access. HUD has also worked to minimize certification costs for individuals and agencies, and delayed implementation for all entities to become compliant.

Comment: Online Testing. Several commenters requested the test be available online, stating that online testing expedites test delivery, grading, and recordation. These commenters recommended that: The test could be exclusively online which will expedite compliance and increase efficiency; the testing be offered at the convenience of the agency and a list of examination topics, study materials, and practice examinations all be made available online; and that web-cam equipment be used similar to the HECM exam. Commenters stated an online system will make it easier for HUD or the administering entity to offer re-examinations at a reduced cost, and that almost all certification programs provide for online testing, and stated it is critically important this option is provided for the certification program. A commenter suggested that the test be offered in person, once a month, to supplement online testing, increasing ease of access and the ability for an examinee to choose an examination format of their preference. Another commenter expressed opposition to the idea of on-line testing, except for counselors in more rural areas who may have a hardship getting to a testing facility.

HUD Response: HUD will be providing the Housing Counselor Certification Examination using online testing through video conferencing at the test-taker's location, or at a commercial proctoring site identified by HUD's contractor. Those choosing to use video conferencing must have equipment available at the location where they plan to take the examination. This option offers choices for test takers depending on their circumstances.

Comment: Testing Accommodations. Several commenters requested that HUD offer the certification examination in multiple languages. A few commenters recommended the examination be offered in Spanish in addition to English. Another commenter recommended the language available should be based on languages spoken by the counselors participating in the HUD Housing Counseling Program, which would provide an equal opportunity to the bi-lingual counselors. Other commenters stated that not providing the certification examination in multiple languages, will result in an adverse impact on counselors where English is their second language. These commenters wrote that it would be unfair for HUD to impose a hardship on those whose second language is English and provide no alternative vendor to provide the examination in Spanish. Other commenters recommended that additional time be provided for non-native English speakers to complete the certification test, and the test accommodate different learning styles and take into consideration cultural and linguistic diversity. Another commenter asked if accommodations would be available for special needs such as learning disabilities. Commenters recommended making materials culturally sensitive.

HUD Response: HUD understands commenters' concerns for test-takers with English as a second language. HUD reviewed data in the HUD Housing Counseling System (HCS) to identify the most frequently offered languages other than English for housing counseling services, and found 1,249 HCAs offered counseling services in Spanish. The next most frequently offered languages were American Sign Language at 78 and French at 78, followed by Creole at 58 and Vietnamese at 55. Based on this data, HUD will offer the study guide and the Housing Counselor Certification Examination in both English and Spanish. HUD, based upon available appropriations, may offer additional

translations of the study guide in other languages.

HUD conferred with its contractor concerning how the test could accommodate different learning styles and considered cultural and linguistic diversity when creating the test. The training course has also been designed to accommodate different learning styles. It is presented in an online, interactive format, and is also offered in a PDF format for those who prefer text-based instruction. The certification examination was developed according to professional standards recognized to the testing industry. The examination was designed to be free from bias and measure only approved examination content. Examination writers and reviewers, under the guidance of a psychometrician,[18] were made aware of potential bias, including cultural and linguistic bias, and ways to avoid it.

The contractor will identify procedures to address reasonable accommodation requests of test-takers with disabilities under applicable sections of the ADA [19] and subsequent amendments to the act. The Web site will also offer training in a format that is compliant with section 508 of the Rehabilitation Act.[20]

Comment: Testing Schedule and Sites. There were several comments regarding who HUD should use to administer the certification examination. Commenters recommended the administration and management of the examination by national trainers. Other commenters suggested award of contracts to suppliers with a strong diversity policy. A commenter requested that organizations other than national training organizations like NeighborWorks and National Council of La Raza be afforded opportunity to receive grant funds to administer the certification and training. The commenter stated that HUD should also allow organizations that administer certification programs to serve as examination preparation sites or compete to contract for administering the new certification examination. Conversely another commenter stated concern that a sole training and certification entity that is also a counseling agency would be a clear conflict of interest. Other commenters recommended that HUD use multiple test administrators to facilitate accessibility of taking the examination for thousands of counselors to comply in one year. A commenter expressed concern about whether HUD could handle the volume of test takers registering at the same time. Another commenter recommended the examination be easy to administer. Other commenters asked who will administer the testing.

Commenters offered several suggestions about where the HUD examination should be offered including HUD offices, HUD training grantee locations, offices of state housing finance agencies, or regional testing sites. One commenter suggested that NeighborWorks proctor examinations be at NeighborWorks training institutes or place-based training locations because NeighborWorks offers scholarships to attend such trainings. Other commenters wrote that HUD should provide regional testing sites, which would be closer to the counselors. A commenter suggested testing be available whenever the counseling agency and counselor feel the housing counselor is ready to take the certification examination.

HUD Response: Under Section 106, the Office of Housing Counseling was required to contract with one entity to develop training and certification testing for housing counselors. As discussed in Section IV of this preamble, HUD awarded a contract to Bixal to develop the housing counselor certification training, the housing counselor certification examination, and to host a Web site for the training and examination. HUD and its certification contractor will select the proctoring service(s) and determine whether offering the training at locations such as a national training institute is a viable option.

Housing counselors will now have 36 months from when HUD begins administering the examination to pass the certification examination. This change should address concerns about access to the examination for the volume of individuals seeking certification after the publication date of this final rule. Housing counselors may determine when they are ready to take the certification examination. However, testing schedules will depend on the availability of proctors.

Comment: Period Allowed for Passing Housing Counselor Certification Examination. Commenters indicated that HUD provide a 12-month period in which to pass the test, and that during the period experienced counselors should be allowed to continue counseling as if they were HUD certified, and agencies should be able to provide counseling through experienced counselors who are not HUD certified. Commenters wrote that HUD should tie the start date of the 1-year period allowed for passing the test to the date of the first time the test is administered, to provide time for all entities to take the test. A commenter wrote that if the test is not administered promptly counselors could not become certified and entities could not receive funding. The commenter also wrote that this could take into consideration any potential problems that happen with test administration.

Another commenter wrote that small counseling agencies should be allowed additional time to comply with the certification and to provide input as to how much time should be considered. Several commenters wrote that the National Industry Standards for Homeownership Education and Counseling's current benchmark for training and certification is ''as soon as reasonably possible, but not later than 18 months from the start of employment,'' and HUD should also consider the 18-month period and that would allow HUD time to evaluate and revise the test if first implementation doesn't meet meaningful measurements. Another commenter wrote that timing of the rule should consider the needs of agencies that have to consider quarterly training for NeighborWorks organizations and the burdens of sending counselors out for training and testing.

Commenters recommended expanding the timeframe to allow for adequate preparation time and ability to take the examination while counselors continue to maintain their workloads—ensuring that clients do not suffer any ill effects from implementation of the ruling. Several commenters recommended that the deadline be extended beyond 12 months to 18 months, 24 months, and other commenters recommended 36 months. A commenter recommended that counselors should have 24 months to be certified, thus allowing agencies to determine when more experienced versus less experienced employees should be certified and continue to provide counseling. The commenter also wrote that 24 months will allow agencies to spread the cost over 24 months to have lesser financial impacts on organizations. Another commenter wrote that extending the period to 36 months would ensure compliance and alleviate administrative burdens and

[18] The term psychometrics refers to the measurement of an individual's psychological attributes, including the knowledge, skills, and abilities a professional might need to work in a particular job or profession.

[19] 42 U.S.C. 12101 *et seq.*

[20] Section 508 of the Rehabilitation Act (29 U.S.C.794d) requires Federal agencies' electronic and information technology to be accessible to persons with disabilities. See *http://www.section508.gov.*

that some agencies in urban areas have many counselors to get through the process and those agencies in rural areas with potentially fewer resources will need more time to allocate the expense of obtaining the certification.

HUD Response: In response to concerns raised by commenters, individuals, and agencies will now have 36 months from when HUD begins administering the examination to be in compliance with the certification requirements. The examination will become available upon publication of a **Federal Register** notice. Until the 36-month period for becoming certified expires, individuals who have not yet been HUD certified may still continue to provide housing counseling services. However, after the expiration of the 36-month period, only those individuals who have met HUD's certification requirements may provide housing counseling services under HUD programs, including HUD's housing counseling program. In addition, no housing counseling required by or provided in connection with all HUD programs may be provided after the 36 months unless it is delivered by a HUD certified housing counselor.

The 36-month period will provide sufficient time for housing counselors to study for and pass the examination. Prior to the date of publication of this final rule, the materials specific to the certification examination, including a sample test, will be available. The certification test will become available upon publication of a notice in the **Federal Register**.

Comment: Grace Period for Agencies with Staffing Changes. Several commenters wrote that the certification requirement will have detrimental impact on agencies when staff changes, especially for smaller agencies with only one or two counselors. The commenters asked that a reasonable grace period be implemented to allow new staff to become certified without agencies losing their approval or their ability to draw down grant funds, and many commenters recommended a 12-month grace period. A few suggested that 6months would be sufficient to allow uncertified counselors to see clients and perform day-to-day tasks to enhance learning and productivity. Another commenter suggested allowing for a grace period will provide time for agencies to hire HUD certified staff or allow their current counselor time to gain 6 months of experience and pass the examination.

Commenters stated HUD should clarify the process to ensure that agencies can continue to operate and not lose certification status or be placed on probation if counselors do not pass the housing counseling certification examination, and agencies should get at least a 90-day grace period to cure the situation. A commenter recommended a temporary inactive agency list for those that are HUD-approved but do not have a HUD certified housing counselor at the time, so they do not have to go through the difficult work of being approved again.

Commenters recommended that, under proper supervision, new housing counselors should be exempted from the requirement that all staff providing homeownership or rental counseling required under or in connection with Other HUD Programs must be certified by HUD. Alternatively, many commenters stated that the final rule should encourage the entry of potential housing counselors into the field and allow new hires to work as apprentices or trainees under the supervision of a HUD certified housing counselor. A commenter stated that a trial period allows for practical implementation of providing services when faced with staff turnover or expansions given it is unlikely that applicants for positions will already be certified. Commenters recommended HUD provide new housing counselors time to develop knowledge before taking the written examination. Some commenters recommended that this timeframe for new counselors be a minimum of 60 days to 90 days, while others recommended 6 months to 1 year to gain experiential knowledge before requiring them to take the examination without risk of de-certification of the agency. Some commenters believe 12 to 24 months is needed.

Other commenters wrote that the organization may not be able to afford the cost of maintaining an employee during the time it will take for them to become certified. A commenter recommended that the same standards be adopted as the National Industry Standards for Homeownership Education and Counseling (NISHEC), and HUD should allow 18 months for a new counselor to be fully certified.

A few commenters stated that new counselors in their agency need a NeighborWorks® Center for Homeownership Education and Counseling (NCHEC) certification prior to taking the HUD examination to understand housing counseling concepts, but NeighborWorks® Training Institutes are only held every quarter.

HUD Response: HUD is implementing a statutory requirement, which requires that all counselors providing homeownership or rental counseling required under or provided in connection of HUD programs must be certified. New counselors are also subject to this requirement. A non-HUD certified housing counselor may continue to provide counseling services up to 36 months following the start of HUD administering the certification examination. After the expiration of the 36-month period, only those individuals who meet HUD's certification requirements may provide housing counseling services under HUD's Housing Counseling Programs and for HUD's programs. An individual who has not passed the certification examination may work for an HCA and assist certified housing counselors but may not provide housing counseling or oversee the group education sessions.

For an HCA to remain compliant with the HUD Housing Counseling Program, all housing counseling must be provided by a HUD certified housing counselor. If a situation occurs in which an HCA's only certified housing counselor is no longer employed with the agency, HUD will allow the agency to be placed in inactive status, consistent with § 214.200, for a period of up to 6 months or such longer time as may be approved by HUD, to allow the agency to hire a certified housing counselor. This rule does not change HUD's existing requirement that at least half the counselors must have at least 6 months of experience in the job they will perform in the agency's housing counseling program. The experience requirement for housing counselors can be met by previous relevant housing counseling employment and experience. If an agency does not meet this requirement, HUD may change the agency's status to inactive, consistent with § 214.200, for a period of time, pursuant to that section, until the agency again meets the requirement that at least half the counselors must have at least 6 months of experience. Placing an HCA in inactive status will give the HCA an opportunity, while on inactive status, to hire a new housing counselor that meets the certification and experience requirements or to ensure that an existing staff person meets the requirements.

To address the question of an agency's ability to draw down funds if an agency no longer has a HUD certified housing counselor, HUD will allow the agency to submit grant reports that support eligible costs under the applicable grant agreement, incurred during the period of time that housing counseling services were provided by a certified housing counselor, or for other eligible Housing Counseling Program expenses as determined by HUD.

Comment: Agency Certification. Commenters questioned the requirement that the agency itself must be certified, instead of just the counselors being required to be certified. A commenter recommended that the certification for agencies and counselors should be separate, because otherwise an agency's status will change any time a counselor leaves the agency, or alternatively that the rule allow for a dual certification system—a licensure for an agency, and a separate licensure for individual counselors. Another commenter recommended that in place of the ''Certification of Competency'' to the agency, HUD provide a ''Counseling Agency Certification of Competency'' when all counselors are certified.

Commenters asked for clarification on whether an agency can only achieve certification once there are counselors on staff who are certified *and* have 6 months of experience.

Commenters questioned whether the definition for being an approved housing counseling agency is limited to agencies that have only HUD certified housing counselors who have at least 6 months experience or if HUD is allowing more flexibility in this definition. Some commenters asked if the 6 months of experience could be waived if a counselor passes the certification examination. They recommended that a counselor should still be required to follow the 6 month experience requirement because the general information on the test is not necessarily sufficient to train the counselor to do full counseling services. Other commenters asked HUD to clarify that at least 6 months of experience for a counselor can be from another housing counseling agency certified by HUD. Other commenters recommended that such certification should be made as a self-certification by the agency. Commenters suggested that HUD should reconsider the restriction that agencies have a HUD certified housing counselor on staff and at least half of their counseling staff must have 6 months of experience

Commenters also asked if all the counselors employed by the agency had to be certified in order for the agency to be certified, and what would happen if one of their counselors was not certified. Commenters asked for clarification on the proposed rule requirement that all HUD certified agencies employ ''at least one'' HUD certified housing counselor at all times to maintain organizational certification. A commenter recommended HUD make reasonable allowances for small and existing housing counseling agencies with strong track records to comply with the requirement to employ at least one HUD certified housing counselor at all times.

Commenters expressed concern that HUD certified housing counselors will be much sought after by counseling agencies that find themselves with a vacancy and the laws of supply and demand will result in the poaching of counselors among agencies and that the agencies will have a harder time finding a HUD certified housing counselor to fill a vacancy. Commenters requested that HUD clarify how an independent agency demonstrates that every counselor is certified. A commenter wrote that having to develop a database or report to HUD regularly could be difficult with high counselor turnover.

A commenter recommended a temporary inactive agency list for those that are HUD-approved but do not have a HUD certified housing counselor at the time, so they do not have to go through the difficult work of being approved again. Another commenter stated that any decision regarding recertification should wait until there has been an opportunity to assess the first rounds of individual certification.

Commenters asked if a new agency applying for HUD certification will need to have all housing counseling staff certified at the time of application. An agency commenter asked about opportunities that may be available for new agencies to gain HUD approval. Several commenters asked whether the same standards for HUD approval for an agency will continue to exist so as to ensure that scam artists cannot pass the HUD counselor exam, throw up a shingle and call the entity a HUD-approved or -certified counseling agency in order to prey upon consumers.

A commenter asked whether an agency that does not have its own HUD-approved housing counseling status but is a subgrantee of a HUD Intermediary is considered a HUD-approved housing counseling agency for the purposes of housing counselor certification as long as: (1) The agency remains a subgrantee; and (2) is subject to the same requirements as a HUD-approved housing counseling agency.

Commenters wrote that HUD should further clarify compliance and oversight procedures, and any possible financial penalties for noncompliance. The commenter stated that the current rule only addresses retraction of housing counseling funds, which will not apply to all organizations.

HUD Response: The proposed rule provided that, in order to maintain or obtain HUD approval, a housing counseling agency must demonstrate that all counselors who provide counseling services for the agency are HUD certified and that upon demonstrating this the housing counseling agency would be issued an agency ''Certification of Competency.'' HUD carefully reviewed the comments that questioned the separate agency certification. Based on these comments, the final rule will not require that HUD issue a separate agency ''Certification of Competency.'' However, the final rule still requires that all counseling, including homeownership and rental counseling, performed under all HUD programs, including the Other HUD Programs and HUD's Housing Counseling Program, must be provided by counselors who are HUD certified and who also work for an HCA, and this requirement must now be met 36 months after the examination becomes available. This final rule also maintains the requirement that, to participate in HUD's Housing Counseling Program, an agency must meet HUD's approval requirements at § 214.103, as amended by this rule, as evidenced either by (1) direct approval from HUD as a local housing counseling agency, multi-state organization, state housing finance agency, or national or regional intermediary, or (2) participation as an affiliate, branch, or subgrantee of a local housing counseling agency, multi-state organization, state housing finance agency or national or regional intermediary.

Beginning 36 months after the certification examination becomes available all individuals who provide homeownership and rental housing counseling required under or provided in connection with any HUD program and all individuals providing housing counseling, including homeownership and rental housing counseling, under HUD's Housing Counseling Program must be HUD certified. Because all housing counselors who provide counseling services for an HCA must be HUD certified, if an HCA no longer has at least one certified housing counselor such agency will no longer meet HUD requirements. To participate in the HUD Housing Counseling Program, an HCA must meet all of the approval requirements at § 214.103, as amended by this rule. If an entity applies for HUD approval, the individuals providing housing counseling as part of the agency's housing counseling work plan must have passed the certification examination as a condition to HUD approving the agency. If the agency is approved, the housing counselors who have passed the examination would be

eligible for a HUD certified Housing Counselor Certificate.

An agency that is a subgrantee or affiliate of a HUD-approved intermediary or state housing finance agency is also an HCA. Any housing counseling provided by an HCA must be performed by a certified housing counselor. Individuals who work for an HCA who pass the examination will be eligible for certification. This rule does not change HUD's existing requirement that at least half the counselors must have at least 6 months of experience in the job they will perform in the agency's housing counseling program. The experience requirement for housing counselors can be met by previous relevant housing counseling employment and experience. The experience requirement may have been met by working as a housing counselor or by on-the-job training assisting a housing counselor for an agency that provides housing counseling services.

If an agency no longer has at least one certified housing counselor and therefore cannot meet the requirement that all housing counselors who provide counseling services for an HCA be HUD certified, the agency must notify HUD. HUD may change the agency's status to inactive, consistent with § 214.200, for a period until the agency again meets these requirements. If the agency fails to hire a HUD certified housing counselor within the initial 6 months of inactive status, HUD may at its discretion extend the period of inactive status, or HUD may move forward with terminating the agency's approval, pursuant to § 214.201.

If an agency needs to hire an individual to conduct housing counseling, the agency need not hire only an individual who was already certified. The agency may hire an individual who has passed the certification examination and, upon being employed by the HCA, can become HUD certified and can conduct housing counseling for the agency. HUD is not restricting individuals who can take the examination to only those counselors who work for an HCA. The absence of such a restriction will allow for agencies to hire individuals who have taken and passed the examination on their own initiative, or individuals that were previously certified at another agency, in addition to those individuals who have never taken the examination. However, an individual who has not yet passed the examination may not conduct housing counseling until he or she has passed the examination and has become HUD certified.

HUD will maintain an internal database of individuals who have passed the examination along with its current HCA list. An HCA will be required to validate employment of their housing counselors who have passed the certification examination.

Comment: Post Examination Tracking and Recognition. Several commenters requested information on how HUD plans to track the certification of individual counselors so that agencies can determine that HCAs are certified agencies. Another commenter suggested HUD use national housing counseling training organizations to track the certification process nationwide.

Several commenters suggested that HUD provide a list of HUD certified housing counselors on its Web site, and several suggested that the list be available to consumers. Some commenters recommended that HUD keep a list of HUD certified housing counselors and agencies so consumers can confirm certification, and that each counselor have a unique identification number to track examination results, training, and possible recertification.

Several commenters asked whether intermediaries will be responsible for monitoring certifications of subgrantees.

Commenters asked whether the certification would be portable and how long the certification will last. A commenter recommended that counselors should be able to take their certification with them from one housing counseling agency to another agency. Some commenters requested that HUD certified housing counselors only be considered certified when they are employed by a HUD-approved agency.

HUD Response: If an individual passes the examination, the individual will be notified. HUD will keep track of the individuals who have passed the examination. However, the list of individuals who passed the examination will not be published on HUD's Web site for access by the general public, as the requirements for certification are that the individual has both passed the examination and works for an HCA. HUD is concerned that if it publishes the names of individuals who have passed the test, but may not work for an HCA, consumers may think that an individual on the Web site list is certified to provide housing counseling in connection with HUD programs even if the individual is not working for an HCA.

HUD will continue to maintain the list of HCAs on its Web site, and consumers will still be able to visit the HUD Web site to verify that the agency is an HCA. HCAs will be notified by HUD, after publication of the final rule, of the process for identifying housing counselors who work for them and have passed the examination, and when such information will be required. HUD will issue certificates that indicate the name(s) of individual(s) that have passed the examination and that also work for an HCA. The HUD Housing Counselor Certificate will have the name of the housing counselor and the name of the HCA.

The HUD certified Housing Counselor Certificate will be valid only while the counselor works for an HCA. The HCA will verify with HUD that a housing counselor works for the agency, in order for the certificate to be issued. If a HUD certified housing counselor leaves the HCA, the individual will no longer be deemed ''Certified,'' until the individual once again works for an HCA. HCAs will be responsible for reporting to HUD when counselors have left their employment and when new counselors are hired. HUD anticipates that this reporting will occur electronically and will provide further instructions outside of this final rule as to how such reporting will be implemented.

Although passing the certification examination is a one-time requirement regardless of employment status, a housing counselor will not be considered HUD certified when the counselor is no longer working for an HCA. Intermediaries and state housing finance agencies are responsible for ensuring that their subgrantees and affiliates follow all HUD requirements, including the requirement that all housing counseling required under or provided in connection with HUD programs be conducted by HUD certified housing counselors, as well as the requirement that the subgrantee or affiliate report to HUD if a HUD certified housing counselor is no longer in their employment.

Comment: Retaking the Examination. Several commenters inquired about the course of action to be taken if a housing counselor fails the initial examination, and how many re–examinations will be permitted and the cost associated with the re-examination. Several commenters recommended that housing counselors who do not pass the examination be allowed to limit re-examination to the area(s) of the examination the housing counselor did not initially pass. A few commenters stated limiting re-examination to the deficient scored examination subject areas will reduce the expense associated with retaking the examination and reduce counselor examination time. Commenters indicated that housing counselors be provided an unlimited number of times to take the examination. One commenter addressed the frequency of the

examination, requesting that the examination be offered on a reasonably frequent basis, be easily accessible to provide for more opportunities for certifications, and be offered on a continuous schedule. Commenters requested that housing counselor re-examination be offered within a short time period. Commenters also requested a grace period to permit the continuation of client counseling during that time period.

Commenters recommended that: re-examinations be offered at no fee; there be two and up to a maximum of three re-examinations without additional financial costs; HUD waive the fees or provide a one-time fee reduction for persons who retake the examination a second time; offer training and testing at a fee. A few commenters indicated the need for clarity in determining re-examination fees.

HUD Response: HUD has made provisions for immediate re-examination in the event the housing counselor fails the examination. However, testing schedules will depend on the availability of proctors. HUD has determined that housing counselors will need to retake the entire examination because the examination is not separated into six areas. As noted in a prior response to commenter questions, the examination cannot be divided into topic areas, nor taken by topic area. However, no restrictions or limitations will be placed on the number of times the examination can be taken or on the frequency of re-examination. If an individual fails the examination, the individual will be notified of general subject deficiencies and topic areas to help focus their studies in preparation for retesting. Results of individual examination questions will not be provided. Because the compliance period has been extended to 36 months, HUD determined that a grace period is not necessary for housing counselors who fail the examination.

HUD is offering free online training, study guides, and practice exams, which HUD encourages individuals to use. While the preparatory training is highly recommended, the training is not mandatory.

HUD must charge a fee to cover the costs of administering the examination, but as noted earlier in this preamble, HUD is providing the study materials for free. The fee charged each time an individual takes the certification examination will be based on the cost of administering the examination. The initial cost of the examination and training is below the proposed rule's $500 estimate. The cost for taking the examination is $100 for online testing at the examinee's location and $140 at a proctoring site, and the training is provided for free. If it is necessary for an individual to retake the examination, a fee of $100 for online testing at the examinee's location and $140 at a proctoring site will be required each time the examination is retaken. Any changes to the cost of the certification examination will be published in the **Federal Register**.

Comment: Retesting after Passing the Test/Continuing Education. Some commenters stated that re-examination should not be required after a housing counselor has passed the test. A commenter stated that adding a recertification component at a later date will create yet another cycle of expense and delays in service delivery. Commenters stated that they already have to track training for state and national certifications, now it would be necessary to employ someone to just track the certifications and expiration dates. Commenters recommended that a housing counselor could be inactive for a certain amount of time but after that reinstatement would require retesting. Some commenters questioned why retesting is not required and stated that it should become a requirement. Another commenter asked for clarity about recertification after the 3-year period ends.

Commenters suggested that instead of retesting, HUD should implement continuing education requirements consistent with National Industry Standards (NIS). A commenter recommended a specific time frame for certification with additional annual continuing education credits. Another commenter recommended that to maintain the HUD certification a housing counselor should be allowed to complete continuing education and on the job training. One commenter recommended that HUD implement a continuing education requirement to ensure HUD certified housing counselors remain able to serve clients.

Commenters recommended that new requirements incorporate continuing education training for housing counselors with local community colleges and technical training centers; and several versions of continuing education, from a minimum of 30 hours of classroom time every 3 years to 15 hours every 2 years, to every year, as a continuing education requirement for counselor recertification. Another commenter wrote that HUD should require continuing education that is relevant to services identified in the form HUD–9902, while another commenter recommended that continuing education should include ethics.

Commenters stated that agencies should keep track of educational credits, and HUD should develop a portal for tracking purposes and certifying in-house continuing education programs. Commenters stated that HUD should require approved agencies to provide their own continuing education and that HUD should create a portal to track whether agencies are providing continuing education. Another commenter encouraged HUD to offer continuing education online. Commenters also recommended that HUD wait to require continuing education until the certification has rolled out and can be evaluated, and such requirements should be subject to formal notice and comment.

HUD Response: Section 106 does not require retesting or continuing education as a requirement for a HUD certified housing counselor to maintain certification. Neither concept was included in the proposed rule because the proposed rule was meant to only implement the new Section 106 requirements. Therefore, adding retesting or a continuing education component at this point would be outside the scope of this rulemaking. HUD may take this into consideration for future rulemaking.

HUD has not changed the existing requirement at § 214.103(h) that the agency's housing counseling staff must possess a working knowledge of HUD's housing and single-family mortgage insurance programs, other state and local housing programs available in the community, consolidated plans, and the local housing market. The staff should be familiar with housing programs offered by conventional mortgage lenders and other housing or related programs that may assist their clients. Existing training opportunities may be used to meet HUD's ongoing knowledge requirements and may be helpful to gain mastery of housing-counseling related topics or to gain additional credentials. HUD intends to continue to provide, subject to available appropriations, funding for such activities and encourages housing counselors to take continuing education courses. HUD does not currently have the resources to create a portal to track housing counselor training and will continue to expect the HCA to ensure that housing counselor knowledge and training requirements are met.

Comment: Grandfathering Prior Certifications, Experience, or Training as Alternatives to the Examination. Commenters recommended grandfathering currently certified

housing counselors who meet certain criteria, such as length of certification and level of knowledge. A commenter stated that many counselors have already attended trainings to develop specific skills (such as those of NeighborWorks® Training Institutes) and requested further guidance on whether credit from previously acquired certifications can be applied toward HUD certifications.

Several commenters asked whether HUD would recognize certifications such as those offered by NeighborWorks Training Institute, National Foundation for Credit Counseling (NFCC), Association of Independent Consumer Credit Counseling Agencies (AICCCA), National Council of La Raza Homeownership Network Learning Alliance (NHNLA), NeighborWorks Center for Homeownership Education and Counseling (NCHEC), HomeFree USA, and National Community Reinvestment Coalition (NCRC). A commenter wrote that NeighborWorks training is so comprehensive and requires continuing education, not recognizing such training, in lieu of certification, is a waste of time and resources. Another requested that HUD recognize the Homebuyer Training certification for meeting the certification requirements because it tests on the same six topics. A commenter wrote that, by HUD not accepting other trainings, HUD is making the new requirement overly burdensome for small rural and poverty stricken areas. A few commenters recommended that HUD should accept existing housing counselor certification in specific areas and only require the counselor to test in areas where they are not already certified, at a reduced cost. Commenters also stated that if grandfathering-in previous certifications is impossible, then have an extended grace period for housing counselors who have previous, unexpired certifications. In contrast to these commenters, some commenters opposed grandfathering in housing counselors, stating that it would destroy the uniformity that would be provided for the clients the counselors are being certified to serve.

Commenters requested that HUD give experience (2–10 plus years working in a HUD certified agency) some consideration or exempt those with experience from the new requirement. Another wrote that for very experienced housing counselors it would be consistent with the Section 106 requirements to provide a waiver of the testing requirements rather than have the most experienced counselor fail a well-meaning test. A commenter recommended allowing existing, experienced housing counselors to take an examination to demonstrate their current competencies and be certified.

Several commenters asked whether HUD would allow housing counselors to continue to complete other certifications in addition to the HUD Housing Counselor Certification. Another commenter asked if a housing counseling agency should hold off either recertifying other housing counselor certifications or having housing counselors receive new certifications from other entities before the final rule is published.

HUD Response: Under this final rule, HUD defines a HUD certified housing counselor as a housing counselor working for an HCA and certified by HUD as competent to provide housing counseling services pursuant to this part. HUD appreciates the work and training provided by all of the agencies providing training and national certifications. HUD also appreciates the years of experience many housing counselors have. However, Section 106 requirements are clear that HUD provide its own training and a certification examination to certify all housing counselors providing housing counseling for HUD's programs. The statute provides no exemptions or ''grandfathering'' of counselors for certification purposes. Thus, every housing counselor must take and pass the written examination in order to be certified. HUD cannot permit non-HUD certified housing counselors to provide counseling that must, by statute, be provided by certified housing counselors.

Housing counselor training and certification in other areas enhances knowledge and skills and improves the quality of counseling. HUD recommends that housing counselors continue to seek other training and certifications. Existing training opportunities may be used to meet HUD's ongoing knowledge requirements and may be helpful to gain mastery of housing counseling related topics or to gain additional credentials.

Housing counselors are not required to take HUD's training before taking the certification examination. However, HUD does recommend that all counselors, regardless of experience, complete the training for the examination, as that will contribute to the counselors' understanding of what is required by the Housing Counselor Certification Examination.

Comment: Test Preparation. A commenter stated there should be early, ongoing online training for housing counseling certification to reduce costs. Commenters wrote that the test preparation should be free, voluntary, easily accessible, and readily available; include practice tests, online study guides, an education track, and e-learning courses, and be offered in a variety of methods and languages, including in-person and online. A few commenters asked for an opportunity to provide public comment on the training materials to ensure the topics are applicable to housing counseling services on the ground. Commenters also requested that HUD provide detailed curriculum and training resources by the effective date so counselors could have the entire year to prepare for the examination. Commenters also wrote that the HECM test guide is not a good model because the HECM test guide does not reflect the materials on the test nor was it relevant to the current HECM test.

A commenter requested that HUD publish frequently asked questions (FAQs) on the examination and the content. Other commenters recommended HUD provide a space for counselors to share information on topics that will be on the test for those who may not take the training classes to help assist in studying for the examination.

HUD Response: HUD has created extensive training for the Housing Counselor Certification Examination, which is currently available. The training includes a no-cost interactive online training course and a downloadable study guide. A practice test, to help housing counselors prepare for and pass the examination, will be made available prior to the availability of the certification examination. The materials will meet the Rehabilitation Act's Section 508 accessibility guidelines. The study guide is also available for download onto multiple types of electronic devices.

The rulemaking process did not allow for HUD to consult with stakeholders as to the content of the training and the examination prior to publication of the final rule. However, after publication of this rule, HUD welcomes feedback regarding the training and the examination, which may be submitted to the housing counseling certification Web site or by sending an email to *housing.counseling@hud.gov* and including *Certification* in the subject line.

HUD plans on providing a list of FAQs on the HUD Web site and on the examination Web site.

Comment: Administering Training. Commenters recommended that local trainings be provided, and webinars should not take the place of group training. Commenters asked about qualifications of trainers and who will

provide the training. Several commenters provided recommendations for trainers including housing counselors from across the nation, housing counseling training entities, and training vendors. One commenter recommended utilizing regional and local agencies to help train on different state and local regulations and conditions. Another commenter suggested that the training coincide with national conferences of HUD's approved intermediaries. A commenter recommended that, as with the mortgage lending industry, it is best practice to have more than one approved training provider to help prepare counselors for the test.

A few commenters requested that HUD provide additional funds to state housing finance agencies, major metropolitan cities, or existing training institutes, including NeighborWorks, National Council of La Raza (NCLR), and National Reinvestment Coalition (NCRC), to provide training for certification in the areas identified by HUD.

HUD Response: Under Section 106, the Office of Housing Counseling must contract with one entity to develop training specifically for the housing counseling certification. HUD selected a qualified entity to administer and prepare the training, as described in section IV. HUD has determined that the most effective and accessible option to housing counselors for examination preparation is through a free online, interactive, and self-paced training. For those individuals that prefer a textbook style of learning, HUD is also offering a downloadable study guide. HUD will not be providing in-person training for the examination.

HUD provides funding for housing counselor training through the Housing Counseling Program's training grants. Training grantees used funds in the 2013 and the 2014 and 2015 grant cycles to provide general training on the six topic areas stated in Section 106, in addition to other training for housing counselors. Subject to need and to available appropriations, HUD may continue to provide funding through training grants for this purpose.

Comments: Who needs to be Certified: Several commenters had questions concerning the applicability of HUD's certification rule to state housing finance agency staff overseeing a Housing Counseling Program or providing direct housing counseling services or both. Additional commenters had questions about who should be taking the housing counseling certification test. A commenter asked if home buyer education must be provided by a HUD certified housing counselor, and another sought clarification on whether educators must be certified to offer group counseling.

Other commenters recommended exempting from the certification requirement agencies whose housing counselors provide only reverse mortgage counseling or another single area of recognized housing counseling. Some commenters sought clarification on whether HECM counselors will need to be tested.

A commenter requested that attorneys with separate standardized certifications be allowed to provide housing counseling services without being required to separately qualify under HUD's rule. One commenter requested that HUD add a limited provision in the certification rule that provides that housing counseling funds may be available for legal services attorneys who meet certain requirements and work with HUD certified housing counselors. Other commenters asked whether applicability of HUD's rule was limited to agencies receiving HUD funding for housing counseling services or only counseling funded by HUD grants. In addition, a commenter recommended that only housing counseling reported on the Housing Counseling Activity Report Form 9902 be required to be performed by a certified housing counselor.

HUD Response: HUD reiterates that all staff of entities providing housing counseling to clients, including HCAs participating in HUD's Housing Counseling Program and staff of state housing finance agencies, must be certified. Staff of entities who deliver housing counseling services required under or provided in connection with Other HUD Programs, will also have to be certified and as a result their employers will have to become HCAs before the final compliance date. Staff of entities whose roles are limited to funding, overseeing or administering a housing counseling program and who do not provide housing counseling services directly to clients are not required to become HUD certified housing counselors, and these entities are not required to become HCAs.

Section 106 does not authorize HUD to exempt housing counselors who provide a single type of housing counseling, or counselors who provide HECM or other types of reverse mortgage counseling exclusively, from the housing counselor certification requirements of this final rule. As discussed earlier in this preamble, all HECM Roster requirements continue to apply, pursuant to the statutory requirements of sections 255(d) and (f) of the National Housing Act and regulatory requirements at 24 CFR part 206, subpart E. All HECM counselors must meet the certification requirements of this final rule. Housing counselors and housing counseling agencies successfully meeting HUD certification requirements may still limit the counseling they provide to a single type of counseling, such as reverse mortgage counseling or rental counseling.

HUD cannot exempt attorneys who provide housing counseling under HUD's Housing Counseling program from the certification requirements.

Comment: Delay Implementation. Commenters wrote that HUD should delay implementation to determine whether the language in the President's budget will be enacted so experience can be substituted for the examination and other entities could provide the examination. Commenters wrote that by waiting it would save potential costs in time and dollars.

HUD Response: Section 106, as amended, is the law until changed. HUD cannot delay implementation of this rule based on the possibility that a change to that law could be enacted at a future date.

Comment: New Requirement for Broader Counseling. Other commenters wrote that agencies should have discretion based on capacity and mission to provide services in specific areas rather than have HUD dilute counseling that is currently being provided by masters (*i.e.,* subject matter experts) in a specific area. Another commenter requested that HUD clarify whether the new rule requires counseling agencies to offer all broad-based services if outside their chosen scope of work. The commenter wrote that this requirement could be an undue hardship and force critical smaller nonprofits out of the industry and that such smaller nonprofits offer geographic specific information necessary for foreclosure prevention and rental assistance through in-person counseling, unlike some larger nonprofits that offer only national phone counseling.

Commenters also stated that agencies should and are making referrals to other qualified HUD-approved agencies to address a consumer need that the agency currently does not cover.

HUD Response: This final rule does not require that a housing counseling agency provide services in all areas or that housing counselors change their specializations. The new certification assures baseline housing knowledge through a single, government-issued national credential. The requirement that all housing counselors have this

base of knowledge in the six areas will ensure that counselors that specialize will have the knowledge to make appropriate referrals for clients that have housing issues beyond the scope of the services that a housing counselor is providing.

Comment: What is a Housing Counseling Session. Commenters requested that HUD clarify what constitutes a session with regard to providing counseling, in contrast to education, and emphasized the innovative ways the industry is growing. In addition, the commenters wrote that HUD should take into consideration that the most important aspect to effective housing counseling is a one-on-one engagement.

HUD Response: The existing regulation at § 214.3 defines counseling with a Housing Counseling Program as counselor-to-client assistance that addresses unique financial circumstances or housing issues and focuses on ways of overcoming specific obstacles to achieving a housing goal such as repairing credit, addressing a rental dispute, purchasing a home, locating cash for a downpayment, being informed of fair housing and fair lending requirements of the Fair Housing Act, finding units accessible to persons with disabilities, avoiding foreclosure, or resolving a financial crisis. Except for reverse mortgage counseling, all housing counseling shall involve the creation of an action plan. HUD agrees that one-on-one engagement is important, and the definition specifies that it involves counselor-to-client assistance that addresses unique financial circumstances or housing issues.

D. Requirements Relating to Housing Counseling Grant Funds § 214.311

Comment: Misuse of Housing Counseling Grant Funds. Some commenters requested that HUD define the terms ''material violation'' or ''misuse.'' A few commenters requested that HUD define material violation as something intentional and nontrivial. A commenter wrote that adding a definition would lower the number of violations committed by agencies and provide a clearer understanding for agencies. Another commenter requested HUD clarify the language to require intentional misuse of funds.

Commenters requested that a material violation only be considered where there is purposeful disregard for regulations rather than where inadvertent errors have occurred or where good faith efforts have been made to comply with regulations. Commenters wrote that the misuse of funds provision is too severe a penalty for an unintentional misuse of funds. One commenter provided an example when his agency incorrectly charged the HUD account for providing counseling outside their service area, realized it during an audit, and then reimbursed HUD. The commenter wrote that under the regulations as drafted such an action could prohibit a good housing counseling agency from ever participating in the competitive grant program.

Commenters wrote that if the error was in good faith then under certain conditions the agency should again be eligible for funds.

Some commenters wrote that misuse of funds should not bar an entire agency until an investigation is complete. Commenters also requested that after an agency approval is revoked a process for recertification after the necessary safeguards are in place should be permitted. In addition, commenters recommended that if an individual employee misuses funds there should be a way for the agency to remedy the situation and continue to receive funds and serve its community. Commenters also stated that the process for remedying misuse and having access to funds again is extremely important for rural areas.

Commenters requested that HUD clarify the effect of the violation and the role of HUD certified intermediaries. Specifically, the commenters asked HUD to discuss the role of the intermediary during an investigation and whether any of its funds will be frozen during this investigation of a subgrantee. Another commenter requested clarification as to whether the intermediary will be responsible for returning the portion of overhead grant funds that the intermediary spent associated with administering the grant and will the intermediary be punished or not eligible for funds. The commenters noted that this clarification will help strengthen the relationship between HUD and intermediaries.

HUD Response: HUD appreciates the commenters concerns regarding intentionality and good faith but will make a determination of whether a violation is material based on individual circumstances using procedures outlined in the relevant grant agreement. The new requirement is consistent with the HUD policy that intermediaries and grantees share responsibility for their subgrantees' use of funds and all HCAs are responsible for their employees.

Comment: Violation of Federal Election Law. Commenters requested clarification on how HUD plans to check for compliance around the new requirement related to a violation of Federal election laws. The commenters recommended that instead of having to create a database HUD should require agencies to sign an annual representation or warranty statement for the process.

HUD Response: Like all other requirements, agencies participating in HUD's Housing Counseling program must ensure that they are in compliance with the requirement related to a violation of Federal election laws. In addition, organizations that are applying for approval to participate in the HUD Housing Counseling Program are reviewed to determine if they are in compliance with the approval requirements at § 214.103, including that they are in compliance with § 214.103(c) related to ineligible participants. Compliance with the requirement related to a violation of Federal election laws will be enforced in the same manner as existing program requirements. HUD intends to provide further guidance on this provision.

E. Recommendations: Other suggestions for the Housing Counseling Program

Comment: Require Broader Housing Counseling. A few commenters discussed the need to support more housing counseling services. One commenter suggested HUD require ongoing housing counseling for homebuyers beyond a 1-hour session to help avoid foreclosure. The commenter suggested that each new homeowner be required to attend classes for at least 8–10 sessions and once-a-year counseling after buying a home. The commenter suggested HUD explore incorporating a more comprehensive approach to housing counseling, such as requiring homebuyers to attend prepurchase counseling, prior to purchasing a home with a federally insured mortgage, followed by post-purchase follow-up and continuing education sessions.

HUD Response: This rule is not addressing the protocol for prepurchase homeownership counseling, which is outside of the scope of this final rule.

Comment: Public Education and Outreach. A commenter recommended HUD undertake a public education and outreach campaign to educate consumers about working with a legitimate HUD certified housing counselor who is currently employed by an HCA, in order to avoid misunderstanding and the potential for fraud.

Another commenter requested that HUD provide a webinar explaining the need for the certification, whether it is optional, and a basic overview of the

housing counseling certification rule and key pieces to the rule.

HUD Response: HUD agrees that public education and outreach to housing counseling agencies is important. At the time of publication of this final rule, and subject to available resources, HUD will provide webinars and other guidance for entities and individuals affected by this rule. HUD will also work with housing counselors and HCAs to help educate the public about the dangers of scams and the benefits of working with a HUD-approved housing counseling agency and a HUD-approved housing counselor.

Comment: Background/Credit checks. Some commenters recommended that, in addition to testing, housing counselors pass a criminal background check. Another commenter wrote that often housing counselors have access to sensitive information and it is important that new hires have not engaged in criminal activity in the past that may put clients in jeopardy.

Another commenter recommended that housing counselors be required to have a minimum credit score as a condition of employment, because many people in the industry have not mastered the information themselves.

HUD Response: HUD agrees that it is important that housing counselors not have been convicted of certain offenses relevant to their positions as housing counselors. The existing regulation on ineligible participants at § 214.103(c) already provides that an agency, including any of the agency's directors, partners, officers, principals, or employees, must not be: (1) Suspended, debarred, or otherwise restricted under HUD's, or any other Federal regulations; (2) indicted for, or convicted of, a criminal offense that reflects upon the responsibility, integrity, or ability of the agency to participate in housing counseling activities (these offenses include criminal offenses that can be prosecuted at a local, state, or Federal level); or (3) subject to unresolved findings as a result of HUD or other government audit or investigations. All agencies participating in the HUD Housing Counseling Program are currently responsible for ensuring compliance with this requirement. In addition, agencies that are applying for approval to participate in the HUD Housing Counseling Program and persons in a position of trust with these agencies are reviewed to determine if they are in violation of Housing Counseling Program regulations and other requirements.

An individual's personal credit score is not an element that is part of the criteria for becoming a HUD housing counselor.

Comment: Social Benefits. A commenter stated that the social benefit cannot be weighed until the examination is available for comment.

HUD Response: The certification examination will ensure that counselors have a comprehensive knowledge of the six areas identified in Section 106. HUD certified housing counselors will have the additional knowledge to provide to those they counsel, and the clients will have the additional information to make better housing decisions. Once examinations have commenced, HUD will, on an ongoing basis, evaluate feedback on the examination and will revise the examination if needed. Additional evaluation of the benefits of this rule can be found in Section VI of this preamble.

Comment: HUD's Housing Counseling Handbook. A commenter recommended that HUD provide an update to the HUD Handbook 7610.1 REV–5 to account for the requirements for the ''comprehensive counseling services'' since HUD has specified the six defined areas that all housing counselors must be proficient in and added the requirement that housing counselors pass the Housing Counselor Certification Examination. The commenter also recommended that HUD revise the handbook to account for any additional education and/or counseling topics that must be completed in the session with the client.

HUD Response: HUD agrees. HUD will at a later date update the HUD Handbook 7610.1 to reflect the new requirements contained in this final rule. This final rule does not change the types of counseling services that may be offered by HCAs.

VI. Findings and Certifications

Regulatory Review—Executive Orders 12866 and 13563

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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. This rule was determined to be a ''significant regulatory action'' as defined in section 3(f) of the Executive order, but not an economically significant regulatory action, as provided under section 3(f)(1) of Executive Order 12866.

As discussed in this preamble, this rule revises HUD's Housing Counseling Program regulations to adopt, through regulatory codification, the new requirements established in Section 106. The Section 106 amendments established the Office of Housing Counseling and gave the office the authority to establish, administer, and coordinate all regulations, requirements, standards, and performance measures related to housing counseling. In addition, the Section 106 amendments require the certification of entities and of individual housing counselors providing housing counseling services required under or in connection with all HUD Programs. Under Section 106, ''certification'' means specifically taking and passing an examination, administered by HUD, that tests knowledge on six aspects of housing counseling. While the Section 106 amendments introduced new requirements that a broader group of entities and individual housing counselors must be certified, the Housing Counseling statute has always required that approval or certification by HUD of either counseling agencies or individual counselors must be implemented through regulation. HUD already reviews and approves housing counseling agencies that voluntarily seek participation in the Housing Counseling Program. However, the requirement on Other HUD Programs is incorporated in HUD's general requirements in part 5, as well as some program specific regulations.

This rule adds the certification of individual counselors and that Other HUD Programs providing homeownership counseling and rental housing counseling, as defined in Section 106, become, partner with, or use an entity participating in HUD's Housing Counseling Program to deliver housing counseling services. HUD has attempted to minimize the costs of this regulation to individual counselors and entities. The training for the Housing Counseling Certification Examination will be free and the examination will cost $100 for online testing at the examinee's location and $140 for an on-site proctoring center examination. Currently, there are approximately 2,070 HCAs, with an estimated 7,245

individual counselors. At an estimated average cost of $120 per counselor to take the examination required for certification, the initial cost for housing counselors working for HCAs would total approximately $869,400. HUD also estimates that 20 percent may not pass the examination the first time, and adds an additional $252,960 for those that retake the examination. HUD estimates approximately 880 entities counseling in Other HUD programs will need to either: (1) Become HUD-approved housing counseling agencies that employ HUD certified housing counselors, (2) create partnerships with HCAs using certified housing counselors to deliver housing counseling services on their behalf, (3) stop providing housing counseling services, or (4) otherwise modify their program to comply with this rule. Given the options provided to these entities in Other HUD Programs and the benefits of being part of the Housing Counseling Program if chosen by those entities that are not currently HCAs, HUD only includes in its analysis the cost of the certification examination for the employees of these entities that might pursue the certification. HUD estimates that 45 percent of the 880 entities will become a HUD-approved housing counseling agency, or choose to affiliate with an existing intermediary or state housing finance agency or partner with an HCA. HUD estimates three counselors per each of these agencies with an estimated average cost of $120 per counselor taking the examination required for certification within the compliance period, totaling approximately $142,560.

As for training for the Housing Counseling Certification Examination, the training is estimated to take approximately 11 hours to complete and HUD estimates that 80 percent of test takers will be housing counselors that take the training and may experience lost wages. The average housing counselor makes on average $37,000 annually [21] for 2080 hours worked, which equates to an hourly salary of $17.79 or a rounded loaded wage of $36.00 an hour.[22] The approximate lost wages for a housing counselor undergoing 11 hours of training would be $396 and for the 6,746 counselors approximately $2,671,420.

Thus, the total initial compliance cost of the regulation in the 36 months entities have to be in compliance is estimated to be $3,936,340. Subject to available appropriations, comprehensive Housing Counseling Program grant funds may be used by grantees to help reduce the costs of compliance with standards and of the examination.

Other statutory changes to improve the effectiveness of housing counseling include increasing the breadth of counseling services so that the services are comprehensive with respect to homeownership and rental counseling. As noted earlier, the statutory mandate to provide comprehensive homeownership and rental counseling is not a significant change to HUD's pre-Section 106 Housing Counseling Program. HUD's Housing Counseling Program currently provides comprehensive homeownership and rental counseling.

The compliance costs of the rule are examination costs that primarily must be borne by the individuals becoming certified. There may, however, be indirect impacts on HCAs that decide to pay for the cost of certification. There will also be some costs to those entities that decide, amongst the four alternatives, to become an HCA and an estimate of the costs has been discussed above. The compliance cost in the proposed rule was estimated at $4 million in the first year and less in succeeding years, for an annualized compliance cost over 5 years of $1.0 million ($0.96 million). The compliance cost of the final rule is estimated to be approximately $3.9 million in the initial compliance period (3 years) plus $920,620 for year 4 and 5 for new individuals in the housing counseling industry, for an annualized compliance cost over 5 years of $1,148,250. Most of the cost will be incurred only once.

The rule generates substantial benefits to all parties that entirely or partially offset the cost. The benefits to the prospective homebuyer or existing homeowner is the more efficient and effective delivery of housing counseling services if, as a result of the certification process, one counselor may be able to assess all questions of the prospective homebuyer or existing homeowner, or make a more effective referral in order to help the client overcome housing barriers. Entities that currently conduct housing counseling but do not meet HUD standards will have the benefits of a better quality program, with access to public and private funding sources that limit eligibility to HCAs. The value of the HUD-approved HCA label is significant, and entities will be able to use their status in marketing their programs to clients and funders. These entities will have unique access to downpayment assistance programs, and public and private mortgage products that are only available to borrowers who work with HUD-approved HCAs. Individual housing counselors will also benefit from the rule. Their professional certification should make them more desirable on the job market, not only for employment with HCAs, but also for employment in other fields where the government certification will be recognized. Finally, the statutory mandate to certify individual counselors may further enhance the performance of agencies and counselors participating in HUD's Housing Counseling Program.[23]

The general benefits to the borrower and the market from housing counseling are well documented by research. Consumers who received housing counseling from a HUD-approved HCA have better outcomes, including more savings, better credit, better loan modifications, and fewer foreclosures, than similar consumers who did not receive housing counseling. Some of the studies have quantified the benefit. In 2011, a total of 126,534 loans were modified after seeking assistance from HUD housing counselors. Statistically, borrowers who received loan modifications after receiving post-purchase housing counseling had savings of $4,980 annually.[24] In addition, foreclosures prevented as a result of housing counseling have an estimated social benefit of $40,730.[25] HUD believes that housing counselor certification requirements increase assurance of a more knowledgeable housing counselor for the consumer. Certified housing counselors are expected to lead to better identification of issues, higher quality referrals, and even better resolution of client barriers to stable housing, as well as a greater ability to avoid discrimination and scams. It is not possible to project the actual value to the consumer of a certified counselor compared to the state of current counselor knowledge which is often regulated by State

[21] The average salary for a housing counselor comes from *http://www.payscale.com/research/US/Job=Housing_Counselor/Salary.*

[22] Multiplying the average salary times two to arrive at a loaded wage and rounding up from $35.58.

[23] The Obama Administration referred individuals and families to HUD housing counseling agencies and counselors as part of the Making Home Affordable programs. See *http://www.makinghomeaffordable.gov/get-started/housing-expert/Pages/default.aspx.*

[24] National Foreclosure Mitigation Counseling Program Evaluation Final Report, Rounds 3 Through 5, Prepared by Kenneth M. Temkin Neil S. Mayer Charles A. Calhoun Peter A. Tatian with Taz George, Prepared for NeighborWorks® America (Urban Institute: September 2014).

[25] An analysis HUD's Office of Policy Development and Research found that the total ''deadweight'' loss per foreclosure prevention cost is approximately $40,730. (See *http://www.huduser.org/periodicals/cityscpe/voll4num3/Cityscape_Nov2012_impact_lim_sellers.pdf* at page 219.)

requirements. Consequently, HUD expects the benefits of this rule to equal the projected compliance costs if 140 loan modifications are made and 125 foreclosures are avoided over 5 years as a result of this rule.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule would revise the regulations governing HUD's Housing Counseling Program to reflect changes to the program made by the Section 106 amendments.

The key changes made to the Housing Counseling Program by this rule are the requirement that individual housing counselors must be certified as skilled to provide counseling in HUD's Housing Counseling Program, and that Other HUD Programs providing homeownership counseling and rental housing counseling, as defined by the Dodd-Frank Act, become part of or use an entity participating in HUD's Housing Counseling Program to deliver housing counseling services.

HUD examined a number of alternatives to minimize the burden of the Dodd-Frank Act and the regulations. In order to minimize costs and administrative burden on entities and individuals, HUD has provided a free Web site offering training for the examination, structured its testing program to substantially reduce the cost of the examination from the initial proposal of $500, and made the costs of training for the examination an eligible use of HUD Housing Counseling Grants. This rule also provides for a 36-month period after availability of the certification examination to give time for entities to come into compliance.

Accordingly, given the additional time for individual counselors to be certified and for the funding made available to assist in meeting the core areas specified by statute for certification, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 13132, Federalism

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

Environmental Impact

This rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction; or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4; approved March 22, 1995) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This rule does not impose any Federal mandates on any state, local, or tribal government, or on the private sector, within the meaning of the UMRA.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance (CFDA) Program number for the Housing Counseling Program is 14.169.

List of Subjects

24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Drug abuse, Drug traffic control, Grant programs—housing and community development, Grant programs—Indians, Individuals with disabilities, Loan programs—housing and community development, Low and moderate income housing, Mortgage insurance, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 92

Administrative practice and procedure, Low and moderate income housing, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 93

Administrative practice and procedure, Grant programs—housing and community development, Low and moderate income housing, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 214

Administrative practice and procedure; Loan program-housing and community development; Organization and functions (government agencies); Reporting and recordkeeping requirements.

24 CFR Part 570

Administrative practice and procedure, American Samoa, Community development block grants, Grant programs—education, Grant programs—housing and community development, Guam, Indians, Loan programs—housing and community development, Low and moderate income housing, Northern Mariana Islands, Pacific Islands Trust Territory, Puerto Rico, Reporting and recordkeeping requirements, Student aid, Virgin Islands.

24 CFR Part 574

Community facilities, Grant programs—housing and community development, Grant programs—social programs, HIV/AIDS, Low and moderate income housing, Reporting and recordkeeping requirements.

24 CFR Part 576

Community facilities, Grant programs—housing and community development, Grant programs—social programs, Homeless, Reporting and recordkeeping requirements

24 CFR Part 578

Community development, Community facilities, Grant programs—housing and community development, Grant programs—social programs, Homeless, Reporting and recordkeeping requirements.

24 CFR Part 1006

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

Accordingly, for the reasons stated above, HUD amends 24 CFR parts 5, 92, 93, 214, 570, 574, 576, 578, and 1006 as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

■ 1. The authority citation for part 5 is revised to read as follows:

Authority: 12 U.S.C. 1701x; 42 U.S.C. 1437a, 1437c, 1437d, 1437f, 1437n, 3535(d); Sec. 327, Pub. L. 109–115, 119 Stat. 2936; Sec. 607, Pub. L. 109–162, 119 Stat. 3051 (42 U.S.C. 14043e *et seq.*); E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; and E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273.

■ 2. In § 5.100, add alphabetically the definitions for ''Homeownership counseling,'' ''Housing counseling,'' and ''Rental housing counseling'' to read as follows:

§ 5.100 Definitions.

* * * * *

Homeownership counseling means housing counseling related to homeownership and residential mortgage loans when provided in connection with HUD's Housing Counseling Program, or required by or provided in connection with HUD Programs as defined in § 5.111. Homeownership counseling is housing counseling that covers the decision to purchase a home, the selection and purchase of a home, issues arising during or affecting the period of ownership of a home (including financing, refinancing, default, and foreclosure, and other financial decisions) and the sale or other disposition of a home.

* * * * *

Housing counseling is independent, expert advice customized to the need of the consumer to address the consumer's housing barriers and to help achieve their housing goals and must include the following processes: Intake; financial and housing affordability analysis; an action plan, except for reverse mortgage counseling; and a reasonable effort to have follow-up communication with the client when possible. The content and process of housing counseling must meet the standards outlined in 24 CFR part 214. Homeownership counseling and rental counseling are types of housing counseling.

* * * * *

Rental housing counseling means counseling related to the rental of residential property, which may include counseling regarding future homeownership opportunities when provided in connection with HUD's Housing Counseling Program, or required under or provided in connection with HUD Programs as defined in § 5.111. Rental housing counseling may also include the decision to rent, responsibilities of tenancy, affordability of renting and eviction prevention.

* * * * *

■ 3. Add § 5.111 to read as follows:

§ 5.111 Housing counseling.

(a) Any housing counseling, including homeownership counseling or rental housing counseling, as defined in § 5.100, required under or provided in connection with any program administered by HUD shall be provided only by organizations and counselors certified by the Secretary under 24 CFR part 214 to provide housing counseling, consistent with 12 U.S.C. 1701x.

(b) For purposes of this section, *required under or provided in connection with any program administered by HUD* means:

(1) Housing counseling required by statute, regulation, Notice of Funding Availability (NOFA), or otherwise required by HUD;

(2) Housing counseling that is funded under a HUD program;

(3) Housing counseling that is required by a grantee or subgrantee of a HUD program as a condition of receiving assistance under the HUD program; or

(4) Housing counseling to which a family assisted under a HUD program is referred, by a grantee or subgrantee of the HUD program.

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

■ 4. The authority citation for part 92 is revised to read as follows:

Authority: 42 U.S.C. 3535(d) and 12701–12839, 12 U.S.C. 1701x.

■ 5. In § 92.2, add alphabetically the definitions for ''Homebuyer counseling'' and ''Housing counseling'' to read as follows:

§ 92.2 Definitions.

* * * * *

Homebuyer counseling has the same meaning as homeownership counseling in 24 CFR 5.100, and is a type of housing counseling.

* * * * *

Housing counseling has the meaning given the term in 24 CFR 5.100.

* * * * *

§ 92.350 [Amended]

■ 6. In § 92.350(a), remove ''and drug-free workplace'' and add in its place ''drug-free work; and housing counseling.''

PART 93—HOUSING TRUST FUND

■ 7. The authority citation for part 92 is revised to read as follows:

Authority: 42 U.S.C. 3535(d), 12 U.S.C. 1701x and 4568.

■ 8. In § 93.2, add alphabetically the definitions for ''Homeownership counseling'' and ''Housing counseling'' to read as follows:

§ 93.2 Definitions.

* * * * *

Homeownership counseling has the same meaning given the term in 24 CFR 5.100, and is a type of housing counseling.

* * * * *

Housing counseling has the meaning given the term in 24 CFR 5.100.

* * * * *

§ 93.350 [Amended]

■ 9. In § 93.350(a), remove ''and drug-free work'' and add in its place ''drug-free work; and housing counseling.''

PART 214—HOUSING COUNSELING PROGRAM

■ 10. The authority citation for part 214 continues to read as follows:

Authority: 12 U.S.C. 1701x, 1701 x–1; 42 U.S.C. 3535(d).

■ 11. Section 214.1 is revised to read as follows:

§ 214.1 Purpose.

This part implements the Housing Counseling Program authorized by section 106 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x). Section 106 authorizes HUD to make grants to, or contract with, public or private organizations to provide a broad range of housing counseling services to homeowners and tenants to assist them in improving their housing conditions and in meeting the responsibilities of tenancy or homeownership. Section 106 also directs HUD to provide housing counseling services only through agencies or individuals that have been certified by HUD as competent to provide such services. The regulations contained in this part prescribe the procedures and requirements by which the Housing Counseling Program will be administered, including the process by which agencies are approved and individuals will be certified to provide the homeownership and rental counseling, as defined by section 106. These regulations apply to all agencies participating in HUD's Housing Counseling Program, and to all organizations or entities that deliver

housing counseling, including homeownership counseling or rental housing counseling, required under or provided in connection with HUD programs.

■ 12. In § 214.3, remove the definition of ''HUD-approved housing counseling agencies'' and add alphabetically the definitions of ''Homeownership counseling,'' ''Housing counseling,'' ''Housing counseling grant funds,'' ''HUD-approved housing counseling agency,'' ''HUD certified housing counselor,'' ''Nonprofit organization,'' ''Rental housing counseling,'' ''State,'' and ''Unit of general local government'' to read as follows:

§ 214.3 Definitions.

* * * * *

Homeownership counseling. See definition at 24 CFR 5.100.

Housing counseling. See definition at 24 CFR 5.100.

Housing counseling grant funds. Grants awarded to participating agencies under section 106 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x).

* * * * *

HUD-approved housing counseling agency. Private and public nonprofit organizations that are exempt from taxation under section 501(a), pursuant to section 501(c) of the Internal Revenue Code of 1996, 26 U.S.C. 501(a) and 501(c) and approved by HUD, in accordance with this part and 106(e) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(e)), to provide housing counseling services to clients directly, or through their affiliates or branches, and which meet the requirements set forth in this part.

HUD certified housing counselor. A housing counselor who has passed the HUD Certification examination, works for a participating agency, and is certified by HUD as competent to provide housing counseling services pursuant to this part.

* * * * *

Nonprofit organization. Shall have the meaning given in section 104(5) of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12704(5)), except that subparagraph (D) of such section shall not apply.

* * * * *

Rental housing counseling. See definition at 24 CFR 5.100.

* * * * *

State. Each of the several States, the Commonwealth of Puerto Rico, the District of Columbia, the Commonwealth of the Northern Mariana Islands, Guam, the Virgin Islands, American Samoa, or any other possession of the United States.

* * * * *

Unit of general local government. Any city, county, parish, town, township, borough, village, or any other general purpose political subdivision of a State.

■ 7. In § 214.100, revise paragraph (a) to read as follows:

§ 214.100 General.

* * * * *

(a) *Approval.* The approval of a housing counseling agency and the certification of a HUD certified housing counselor does not create or imply a warranty or endorsement by HUD of the approved agency, or its employees, including counselors, to a prospective client or to any other organization or individual, nor does it represent a warranty of any housing counseling provided by the agency or a HUD certified housing counselor working for an agency. Approval means only that the agency has met the qualifications and conditions prescribed by HUD, and a HUD certified housing counselor only means the housing counselor has successfully passed an examination pursuant to these regulations and works for a participating agency.

* * * * *

■ 8. In § 214.103, revise paragraph (g)(2) and add paragraph (n) to read as follows:

§ 214.103 Approval criteria.

* * * * *

(g) * * *

(2) *Staff.* The agency must employ staff trained in housing counseling. All staff providing housing counseling, including homeownership counseling or rental housing counseling, must be HUD certified housing counselors, and at least half the agency's counselors must have at least 6 months of experience in the job they will perform in the agency's housing counseling program.

* * * * *

(n) *Certification of housing counselors.* (1) In order for an agency to participate in HUD's Housing Counseling Program, all individuals who provide counseling, including homeownership and rental housing counseling, must be HUD certified according to requirements in this section.

(2) For an individual to become a HUD certified counselor, an individual must pass a standardized written examination to demonstrate competency in each of the following areas:

(i) Financial management;

(ii) Property maintenance;

(iii) Responsibilities of homeownership and tenancy;

(iv) Fair housing laws and requirements;

(v) Housing affordability; and

(vi) Avoidance of, and response to, rental or mortgage delinquency and avoidance of eviction or mortgage default.

(3) HUD will certify an individual housing counselor who has met the requirements of paragraph (n)(1) of this section upon verification that the individual works for a participating agency.

(4) Participating agencies and housing counselors must be in compliance with requirements of paragraph (n) of this section by 36 months after HUD commences the administration of the certification examination by publication in the **Federal Register**.

■ 9. In § 214.300, add paragraphs (a)(7), (8) and (9) to read as follows:

§ 214.300 Counseling services.

* * * * *

(a) * * *

(7) All participating agencies that provide homeownership counseling, shall address the entire process of homeownership, including, but not limited to, the decision to purchase a home, the selection and purchase of a home, the home inspection process, issues arising during or affecting the period of ownership of a home (including, but not limited to, financing, refinancing, default, and foreclosure, and other financial decisions), and the sale or other disposition of a home.

(8) All participating agencies that provide rental housing counseling shall address issues related to the rental of residential property, which may include counseling regarding future homeownership opportunities, the decision to rent, responsibilities of tenancy, affordability of renting, and eviction prevention.

(9) As part of the homeownership counseling process, participating agencies shall provide clients with such materials as HUD may require regarding the availability and importance of obtaining an independent home inspection.

* * * * *

■ 10. In § 214.311, revise the section heading and paragraph (a) and add paragraphs (c) and (d) to read as follows:

§ 214.311 Housing counseling grant funds.

(a) *HUD housing counseling grant funds.* HUD approval or program participation does not guarantee housing counseling grant funding. Funding for the Housing Counseling Program depends on appropriations from Congress, and are awarded

competitively under Federal and HUD regulations and policies governing assistance programs, including the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. 3545 *et seq.*). If housing counseling grant funds become available that are to be competitively awarded, HUD will notify the public through a Notice of Funding Availability (NOFA) in the **Federal Register** and by the Internet or other electronic media.

* * * * *

(c) *Limitation on distribution of funds.* No housing counseling funds made available under the Housing Counseling Program shall be distributed to:

(1)(i) Any organization that has been convicted for a violation under Federal law relating to an election for Federal office or any organization that employs applicable individuals. For the purposes of this section, applicable individual means an individual who is:

(A) Employed by the organization in a permanent or temporary capacity;

(B) Contracted or retained by the organization; or

(C) Acting on behalf of, or with the express or apparent authority of, the organization; and

(D) Has been convicted for a violation under Federal law relating to an election for Federal office.

(ii) For the purposes of this paragraph (c)(1), a violation under Federal law relating to an election for Federal office includes, but is not limited to, a violation of one or more of the following statutory provisions related to Federal election fraud, voter intimidation, and voter suppression: 18 U.S.C. 241–242, 245(b)(1)(A), 592–611, and 42 U.S.C. 1973.

(2) A participating agency that provides housing counseling through housing counselors who are not HUD certified housing counselors in accordance with § 214.103(n).

(d) *Misuse of housing counseling grant funds.* If any participating agency that receives housing counseling grant funds under the Housing Counseling Program is determined by HUD to have used those housing counseling grant funds in a manner that constitutes a material violation of applicable statutes and regulations, or any requirements or conditions under which such funds were provided:

(1) HUD shall require that, within 12 months after the date of the determination of such misuse, the agency shall reimburse HUD for such misused amounts and return to HUD any such amounts that remain unused or unobligated for use; and

(2) Such agency shall be ineligible, at any time after the date of such determination of material misuse, to apply for or receive further funds under the Housing Counseling Program.

(3) The remedies under paragraph (d) of this section are in addition to any other remedies that may be available under law.

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

■ 11. The authority citation for part 570 is revised to read as follows:

Authority: 12 U.S.C. 1701x, 1701 x–1; 42 U.S.C. 3535(d) and 5301–5320.

§ 570.201 [Amended]

■ 12. In § 570.201:

■ a. In paragraph (e) introductory text, after the first sentence, add the sentence ''If housing counseling, as defined in 24 CFR 5.100, is provided, it must be carried out in accordance with 24 CFR 5.111.''; and

■ b. At the end of paragraph (k), add the sentence ''If housing counseling, as defined in 24 CFR 5.100, is provided, it must be carried out in accordance with 24 CFR 5.111.''

■ 13. In § 570.482, add paragraph (c)(4) to read as follows:

§ 570.482 Eligible activities.

* * * * *

(c) * * *

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

* * * * *

■ 14. Add § 570.615 to read as follows:

§ 570.615 Housing counseling.

Housing counseling, as defined in 24 CFR 5.100, that is funded with or provided in connection with CDBG funds must be carried out in accordance with 24 CFR 5.111.

PART 574—HOUSING OPPORTUNITIES FOR PERSONS WITH AIDS

■ 15. The authority citation for part 574 is revised to read as follows:

Authority: 12 U.S.C. 1701x, 1701 x–1; 42 U.S.C. 3535(d) and 5301–5320.

■ 16. In § 574.300, revise paragraph (b)(1) to read as follows:

§ 574.300 Eligible activities.

* * * * *

(b) * * *

(1) Housing information services including, but not limited to, counseling, information, and referral services to assist an eligible person to locate, acquire, finance, and maintain housing. This may also include fair housing guidance for eligible persons who may encounter discrimination on the basis of race, color, religion, sex, age, national origin, familial status, or handicap. Housing counseling, as defined in § 5.100, that is funded with or provided in connection with HOPWA funds must be carried out in accordance with § 5.111. When grantees provide housing services to eligible persons (including persons undergoing relocation) that are incidental to a larger set of holistic case management services, these services do not meet the definition of Housing counseling, as defined in § 5.100, and therefore are not required to be carried out in accordance with the certification requirements of § 5.111;

* * * * *

■ 17. Add § 574.600 to read as follows:

§ 574.660 Housing counseling.

Housing counseling, as defined in § 5.100, that is funded with or provided in connection with HOPWA funds must be carried out in accordance with § 5.111. When grantees provide housing services to eligible persons (including persons undergoing relocation) that are incidental to a larger set of holistic case management services, these services do not meet the definition of housing counseling, as defined in § 5.100, and therefore are not required to be carried out in accordance with the certification requirements of § 5.111.

PART 576—EMERGENCY SOLUTIONS GRANTS PROGRAM

■ 18. The authority citation for part 576 is revised to read as follows:

Authority: 12 U.S.C. 1701x, 1701 x–1; 42 U.S.C. 11371 *et seq.,* 42 U.S.C. 3535(d).

■ 19. In § 576.105, add paragraph (e) to read as follows:

§ 576.105 Housing relocation and stabilization services.

* * * * *

(e) *Housing counseling.* Housing counseling, as defined in § 5.100, that is funded with or provided in connection with ESG funds must be carried out in accordance with § 5.111. When recipients or subrecipients provide housing services to eligible persons that are incidental to a larger set of holistic case management services, these services do not meet the definition of housing counseling, as defined in § 5.100, and therefore are not required to be carried out in accordance with the certification requirements of § 5.111

§ 576.407 [Amended]

■ 20. In § 576.407, amend paragraph (a) by adding ''and the housing counseling requirements at 24 CFR 5.111'' at the end of the first sentence.

PART 578—CONTINUUM OF CARE PROGRAM

■ 21. The authority citation for part 578 is revised to read as follows:

Authority: 12 U.S.C. 1701x, 1701 x–1; 42 U.S.C. 11381 *et seq.,* 42 U.S.C. 3535(d).

■ 22. In § 578.53, add paragraph (e)(8)(iii) to read as follows:

§ 578.53 Supportive services.

* * * * *

(e) * * *

(8) * * *

(iii) Housing counseling, as defined in § 5.100, that is funded with or provided in connection with grant funds must be carried out in accordance with § 5.111. When recipients or subrecipients provide housing services to eligible persons that are incidental to a larger set of holistic case management services, these services do not meet the definition of Housing counseling, as defined in § 5.100, and therefore are not required to be carried out in accordance with the certification requirements of § 5.111

* * * * *

PART 1006—NATIVE HAWAIIAN HOUSING BLOCK GRANT PROGRAM

■ 22. The authority citation for part 1006 is revised to read as follows:

Authority: 12 U.S.C. 1701x, 1701 x–1; 25 U.S.C. 4221 *et seq.;* 42 U.S.C. 3535(d).

■ 23. In § 1006.210, revise paragraph (a) to read as follows:

§ 1006.210 Housing services.

* * * * *

(a) Housing counseling, as defined in § 5.100, in connection with rental or homeownership assistance must be carried out in accordance with 24 CFR 5.111;

* * * * *

■ 24. In § 1006.375, add paragraph (e) to read as follows:

§ 1006.375 Other Federal requirements.

* * * * *

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

Dated: December 7, 2016.

Edward L. Golding,

Principal Deputy Assistant, Secretary for Housing.

Nani A. Coloretti,

Deputy Secretary.

[FR Doc. 2016–29822 Filed 12–13–16; 8:45 am]

BILLING CODE 4210–67–P

FEDERAL REGISTER

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Part VI

The President

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Proclamation 9553—Human Rights Day and Human Rights Week, 2016

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Presidential Documents

Title 3—

The President

Proclamation 9552 of December 9, 2016

Death of John Glenn

By the President of the United States of America

A Proclamation

As a mark of respect for the memory of John Glenn, I hereby order, by the authority vested in me by the Constitution and the laws of the United States of America, that the flag of the United States shall be flown at half-staff at the White House and upon all public buildings and grounds, at all military posts and naval stations, and on all naval vessels of the Federal Government in the District of Columbia and throughout the United States and its Territories and possessions until sunset, on the day of interment. I also direct that the flag shall be flown at half-staff for the same period at all United States embassies, legations, consular offices, and other facilities abroad, including all military facilities and naval vessels and stations.

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

[FR Doc. 2016–30262
Filed 12–13–16; 11:15 am]
Billing code 3295–F7–P

Presidential Documents

Proclamation 9553 of December 9, 2016

Human Rights Day and Human Rights Week, 2016

By the President of the United States of America

A Proclamation

When the Universal Declaration of Human Rights was adopted on December 10, 1948, it set in motion a movement to secure liberty and justice for all people. Out of the ashes of the Second World War, the United Nations General Assembly proclaimed that ''All human beings are born free and equal in dignity and rights.'' On Human Rights Day and during Human Rights Week, we reflect on how far we have come in upholding these universal rights and resolve to continue fighting to safeguard them wherever they are threatened.

In the last few decades, our world has made great strides in advancing human rights and the institutions that protect them. More countries have pursued self-government and democracy—and more people are electing their leaders freely and fairly and holding their governments accountable through calls for increased transparency. Around the world, the United States has promoted freedom: We have worked to expand the protection of human rights, end gender-based violence, and defend the freedoms of expression, peaceful assembly, and the press. In promoting these liberties and pushing back against tyranny, corruption, and oppression, we have recognized that universal human rights and fundamental freedoms do not stop at our borders. They are the birthright of people everywhere.

History ultimately moves in the direction of justice and inclusion, but despite the great progress we have made, unprecedented and rapid change has posed great challenges. It is our collective duty to continue striving for a world where nobody is left behind, forgotten, or mistreated, and where all nations recognize that societies that draw on the contributions of every citizen are stronger. Far too many people around the world are still denied their human rights and fundamental freedoms, and we must work to end the discrimination that is too often felt by LGBT individuals, people with disabilities, immigrants, women and girls of all ages, and members of religious, ethnic, and other minorities. And we must strengthen our ongoing efforts to rid the world of violence, oppression, and hatred.

Our relationships to one another—person to person, nation to nation—are defined not by our differences, but by our shared belief in the ideals enshrined in the Universal Declaration of Human Rights. As we observe the anniversary of the affirmation that inalienable rights exist for every individual, we vow to ensure these rights are afforded to every person. Together, let us continue striving to stamp out all forms of injustice and promote dignity, humanity, and respect around the world.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim December 10, 2016, as Human Rights Day and the week beginning December 10, 2016, as Human Rights Week. I call upon the people of the United States to mark these observances with appropriate ceremonies and activities.

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

[FR Doc. 2016–30265
Filed 12–13–16; 11:15 am]
Billing code 3295–F7–P

Presidential Documents

Executive Order 13753 of December 9, 2016

Amending the Order of Succession in the Department of Homeland Security

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345, *et seq.,* it is hereby ordered as follows:

Section 1. Section 88 of Executive Order 13286 of February 28, 2003 (''Amendment of Executive Orders, and Other Actions, in Connection With the Transfer of Certain Functions to the Secretary of Homeland Security''), is amended by striking the text of such section in its entirety and inserting the following in lieu thereof:

''Sec. 88. Order of Succession.

Subject to the provisions of subsection (b) of this section, the officers named in subsection (a) of this section, in the order listed, shall act as, and perform the functions and duties of the office of, the Secretary of Homeland Security (Secretary), if they are eligible to act as Secretary under the provisions of the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345 *et seq.* (Vacancies Act), during any period in which the Secretary has died, resigned, or otherwise become unable to perform the functions and duties of the office of Secretary.

(a) Order of Succession.

(i) Deputy Secretary of Homeland Security;

(ii) Under Secretary for Management;

(iii) Administrator of the Federal Emergency Management Agency;

(iv) Under Secretary for National Protection and Programs;

(v) Under Secretary for Science and Technology;

(vi) Under Secretary for Intelligence and Analysis;

(vii) Commissioner of U.S. Customs and Border Protection;

(viii) Administrator of the Transportation Security Administration;

(ix) Director of U.S. Immigration and Customs Enforcement;

(x) Director of U.S. Citizenship and Immigration Services;

(xi) Assistant Secretary for Policy;

(xii) General Counsel;

(xiii) Deputy Under Secretary for Management;

(xiv) Deputy Commissioner of U.S. Customs and Border Protection;

(xv) Deputy Administrator of the Transportation Security Administration;

(xvi) Deputy Director of U.S. Immigration and Customs Enforcement;

(xvii) Deputy Director of U.S. Citizenship and Immigration Services; and

(xviii) Director of the Federal Law Enforcement Training Center.

(b) Exceptions.

(i) No individual who is serving in an office listed in subsection (a) in an acting capacity, by virtue of so serving, shall act as Secretary pursuant to this section.

(ii) Notwithstanding the provisions of this section, the President retains discretion, to the extent permitted by the Vacancies Act, to depart from this order in designating an acting Secretary.''

Sec. 2. Executive Order 13442 of August 13, 2007 (''Amending the Order of Succession in the Department of Homeland Security''), is hereby revoked.

THE WHITE HOUSE,
December 9, 2016.

[FR Doc. 2016–30272
Filed 12–13–16; 11:15 am]
Billing code 3295–F7–P

Presidential Documents

Executive Order 13754 of December 9, 2016

Northern Bering Sea Climate Resilience

By the authority vested in me as the President by the Constitution and the laws of the United States of America, including the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.,* it is hereby ordered as follows:

Section 1. *Purpose.* As recognized in Executive Order 13689 of January 21, 2015, (Enhancing Coordination of National Efforts in the Arctic), Arctic environmental stewardship is in the national interest. In furtherance of this principle, and as articulated in the March 10, 2016, U.S.-Canada Joint Statement on Climate, Energy, and Arctic Leadership, the United States has resolved to confront the challenges of a changing Arctic by working to conserve Arctic biodiversity; support and engage Alaska Native tribes; incorporate traditional knowledge into decisionmaking; and build a sustainable Arctic economy that relies on the highest safety and environmental standards, including adherence to national climate goals. The United States is committed to achieving these goals in partnership with indigenous communities and through science-based decisionmaking. This order carries forth that vision in the northern Bering Sea region.

The Bering Sea and Bering Strait are home to numerous subsistence communities, rich indigenous cultures, and unique marine ecosystems, each of which plays an important role in maintaining regional resilience. The changing climate and rising average temperatures are reducing the occurrence of sea ice; changing the conditions for fishing, hunting, and subsistence whaling; and opening new navigable routes to increased ship traffic. The preservation of a healthy and resilient Bering ecosystem, including its migratory pathways, habitat, and breeding grounds, is essential for the survival of marine mammals, fish, seabirds, other wildlife, and the subsistence communities that depend on them. These communities possess a unique understanding of the Arctic ecosystem, and their traditional knowledge should serve as an important resource to inform Federal decisionmaking.

Sec. 2. *Policy.* It shall be the policy of the United States to enhance the resilience of the northern Bering Sea region by conserving the region's ecosystem, including those natural resources that provide important cultural and subsistence value and services to the people of the region. For the purpose of carrying out the specific directives provided herein, this order delineates an area hereafter referred to as the ''Northern Bering Sea Climate Resilience Area,'' in which the exercise of relevant authorities shall be coordinated among all executive departments and agencies (agencies). All agencies charged with regulating, overseeing, or conducting activities in the Northern Bering Sea Climate Resilience Area shall do so with attention to the rights, needs, and knowledge of Alaska Native tribes; the delicate and unique ecosystem; the protection of marine mammals, fish, seabirds, and other wildlife; and with appropriate coordination with the State of Alaska.

The boundary of the Northern Bering Sea Climate Resilience Area includes waters within the U.S. Exclusive Economic Zone bounded to the north by the seaward boundary of the Bering Straits Native Corporation established pursuant to the Alaska Native Claims Settlement Act; to the south by the southern boundaries of the Northern Bering Sea Research Area, the St. Matthew Habitat Conservation Area, and the Nunivak-Kuskokwim Habitat Conservation Area; and to the west by the maritime boundary delimited

by the Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, signed at Washington, June 1, 1990.

Sec. 3. *Withdrawal.* Under the authority granted to me in section 12(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1341(a), I hereby withdraw from disposition by leasing for a time period without specific expiration the following areas of the Outer Continental Shelf: (1) the area currently designated by the Bureau of Ocean Energy Management as the Norton Basin Planning Area; and (2) the Outer Continental Shelf lease blocks within the Bureau of Ocean Energy Management's St. Matthew-Hall Planning Area lying within 25 nautical miles of St. Lawrence Island. The boundaries of the withdrawn areas are more specifically delineated in the attached map and, with respect to the St. Matthew-Hall Planning Area, the accompanying table of withdrawn Outer Continental Shelf lease blocks. Both the map and table form a part of this order, with the table governing the withdrawal and withdrawal boundaries within the St. Matthew-Hall Planning Area. This withdrawal prevents consideration of these areas for future oil or gas leasing for purposes of exploration, development, or production. This withdrawal furthers the principles of responsible public stewardship entrusted to this office and takes due consideration of the importance of the withdrawn area to Alaska Native tribes, wildlife, and wildlife habitat, and the need for regional resiliency in the face of climate change. Nothing in this withdrawal affects rights under existing leases in the withdrawn areas.

Sec. 4. *Task Force on the Northern Bering Sea Climate Resilience Area.* (a) There is established a Task Force on the Northern Bering Sea Climate Resilience Area (Bering Task Force), under the Arctic Executive Steering Committee (AESC) established in Executive Order 13689, to be co-chaired by an office of the Department of the Interior, the National Oceanic and Atmospheric Administration, and the U.S. Coast Guard.

(b) The membership of the Bering Task Force (member agencies) shall include, in addition to the Co-Chairs, designated senior-level representatives from:

(i) the Department of State;

(ii) the Department of Defense;

(iii) the Department of Transportation;

(iv) the Environmental Protection Agency;

(v) the U.S. Army Corps of Engineers;

(vi) the U.S. Arctic Research Commission;

(vii) the National Science Foundation; and

(viii) such agencies and offices as the Co-Chairs may designate.

(c) Consistent with the authorities and responsibilities of its member agencies, the Bering Task Force, with the purpose of advancing the United States policy in the Northern Bering Sea Climate Resilience Area as set forth in section 2 of this order, shall:

(i) Establish and provide regular opportunities to consult with the Bering Intergovernmental Tribal Advisory Council as described in section 5 of this order;

(ii) Coordinate activities of member agencies, including regulatory, policy, and research activities, affecting the Northern Bering Sea Climate Resilience Area and its value for subsistence and cultural purposes;

(iii) Consider the need for additional actions or strategies to advance the policies established in section 2 of this order and provide recommendations as appropriate to the President through the AESC;

(iv) Consider and make recommendations with respect to the impacts of shipping on the Northern Bering Sea Climate Resilience Area including those described in sections 7 and 8 of this order; and

(v) In developing and implementing recommendations, coordinate or consult as appropriate with existing AESC working groups, the State of Alaska, regional and local governments, Alaska Native tribal governments, Alaska Native corporations and organizations, the private sector, other relevant organizations, and academia.

Sec. 5. *The Bering Intergovernmental Tribal Advisory Council.* (a) The Bering Task Force, within 6 months of the date of this order, and after considering recommendations from Alaska Native tribal governments, shall, in accordance with existing law, establish a Bering Intergovernmental Tribal Advisory Council, for the purpose of providing input to the Bering Task Force and facilitating effective consultation with Alaska Native tribal governments.

(b) The Bering Intergovernmental Tribal Advisory Council shall be charged with providing input and recommendations on activities, regulations, guidance, or policy that may affect actions or conditions in the Northern Bering Sea Climate Resilience Area, with attention given to climate resilience; the rights, needs, and knowledge of Alaska Native tribes; the delicate and unique ecosystem; and the protection of marine mammals and other wildlife.

(c) The Bering Intergovernmental Tribal Advisory Council should include between 9 and 11 elected officials or their designees representing Alaska Native tribal governments with a breadth of interests in the Northern Bering Sea Climate Resilience Area, and may include such additional Federal officials and State and local government elected officials as the Bering Task Force deems appropriate. The Bering Intergovernmental Tribal Advisory Council will adopt such procedures as it deems necessary to govern its activities.

Sec. 6. *Traditional Knowledge in Decisionmaking.* It shall be the policy of the United States to recognize and value the participation of Alaska Native tribal governments in decisions affecting the Northern Bering Sea Climate Resilience Area and for all agencies to consider traditional knowledge in decisions affecting the Northern Bering Sea Climate Resilience Area. Specifically, all agencies shall consider applicable information from the Bering Intergovernmental Tribal Advisory Council in the exercise of existing agency authorities. Such input may be received through existing agency procedures and consultation processes.

Sec. 7. *Pollution from Vessels.* The Bering Task Force, within 9 months of the date of this order and after coordination as needed with existing working groups within the AESC, shall provide the AESC with recommendations on:

(a) Actions to ensure or support implementation of the International Code for Ships Operating in Polar Waters, as adopted by the International Maritime Organization, especially with respect to limitations on discharges from vessels in the Northern Bering Sea Climate Resilience Area; and

(b) Any additional measures necessary to achieve the policies established in section 2 of this order, such as the potential identification of zero-discharge zones, assessments of the pollution risks posed by increased vessel traffic, or noise reduction measures associated with sensitive ecological and cultural areas within the Northern Bering Sea Climate Resilience Area.

Sec. 8. *Shipping Routing Measures.* (a) In recognition of the United States commitment to reduce the impact of shipping within the Bering Sea and the Bering Strait and the many environmental factors in the Northern Bering Sea Climate Resilience Area that inform the best routes for navigation, safety, and the marine environment, the U.S. Coast Guard should conclude its ongoing port access route study for the Chukchi Sea, Bering Strait, and Bering Sea (Bering Sea PARS) pursuant to the Ports and Waterways Safety Act, 33 U.S.C. 1221 *et seq.*

(b) In designation of routes and any areas to be avoided, and consistent with existing authorities, consideration should be given to the Northern Bering Sea Climate Resilience Area, including the effects of shipping and vessel pollution on the marine environment, fishery resources, the seabed

and subsoil of the Outer Continental Shelf, marine mammal migratory pathways and other biologically important areas, and subsistence whaling, hunting, and fishing.

(c) In recognition of the value of participation of Alaska Native tribal governments in decisions affecting the Northern Bering Sea Climate Resilience Area, the U.S. Coast Guard should consider traditional knowledge, including with respect to marine mammal, waterfowl, and seabird migratory pathways and feeding and breeding grounds, in the development of the Bering Sea PARS, establishment of routing measures and any areas to be avoided, and subsequent rulemaking and management decisions.

(d) No later than December 30, 2016, the U.S. Coast Guard shall publish preliminary findings for the Bering Sea PARS in the *Federal Register*, including information related to its status, potential routing measures, and its projected schedule. The U.S. Coast Guard should also consider using this opportunity to provide notice of any new information or proposed measures resulting from its ongoing consultation process.

(e) Upon completion of the Bering Sea PARS, the U.S. Coast Guard shall promptly issue a notice of proposed rulemaking for any designation contemplated on the basis of the study. The U.S. Coast Guard shall coordinate as appropriate with the Department of State and other coastal nations and submit any proposed routing measures to the International Maritime Organization by 2018 for the purpose of their adoption and implementation.

Sec. 9. *Oil Spill Preparedness.* The U.S. Coast Guard, in coordination with all relevant agencies and the State of Alaska, shall update the Area Contingency plans, the Subarea Response Plans, and the Geographic Response Strategies relevant to the Northern Bering Sea Climate Resilience Area. These plans and strategies shall be consistent with the National Contingency Plan, and shall include appropriate measures to improve local response capacity and preparedness such as spill response training opportunities for local communities, including Hazardous Waste Operations and Emergency Response training for Village Public Safety Officers and other first responders.

Sec. 10. *Continuity of Existing Habitat Protection.* The area included in the Northern Bering Sea Climate Resilience Area is currently closed to commercial non-pelagic trawl gear under rules implementing the Fishery Management Plans of the Bering Sea and Aleutian Islands Management Area and the Arctic Management Area. Consistent with existing law, the National Oceanic and Atmospheric Administration, in coordination with the North Pacific Fishery Management Council, shall take such actions as are necessary to support the policy set forth in section 2 of this order, including actions to maintain the existing prohibitions on the use of commercial non-pelagic trawl gear.

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

(1) the authority granted by law to a department, agency, or the head thereof; or

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

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

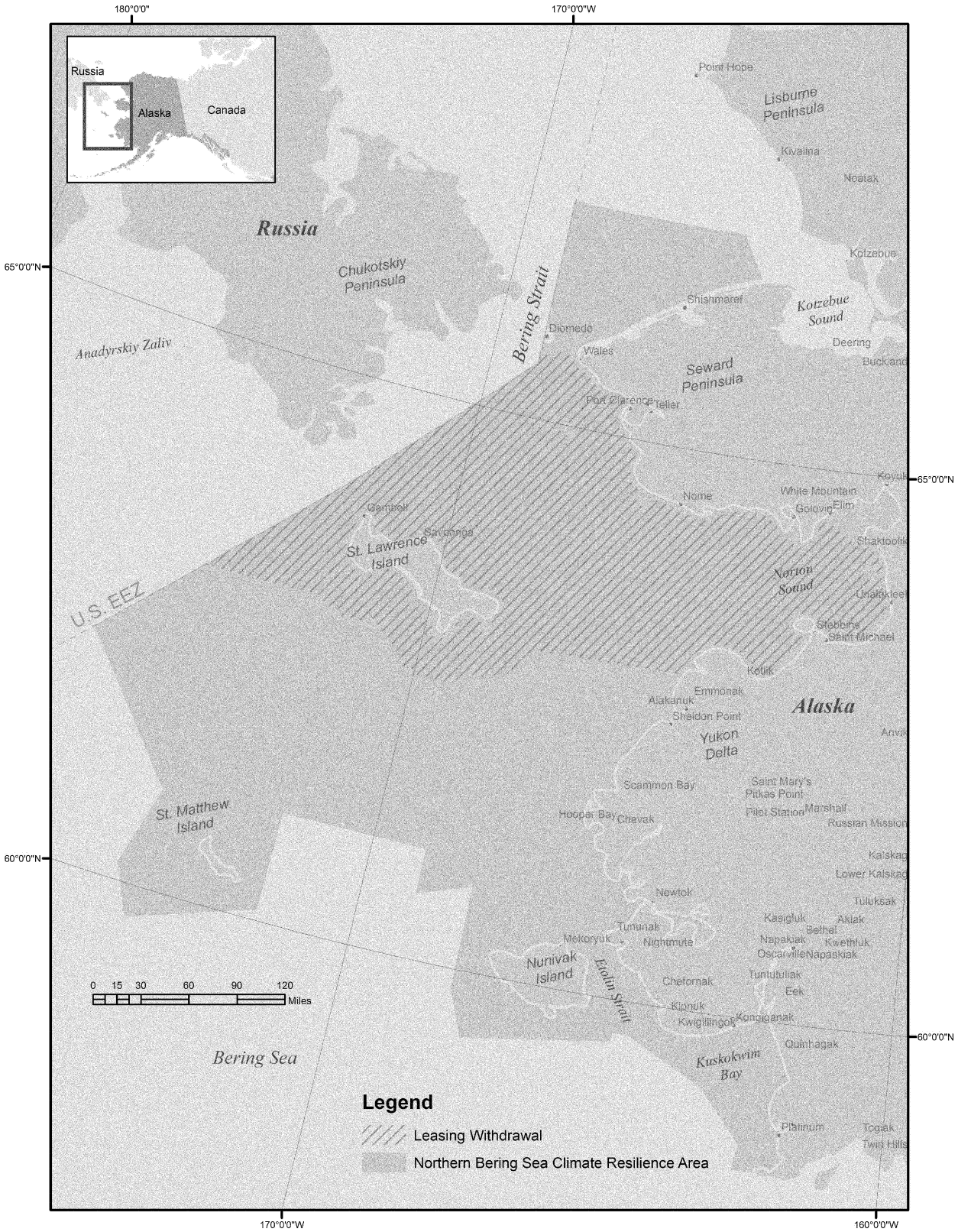
(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The policies set forth in this order are consistent with existing U.S. obligations under international law and nothing in this order shall be construed to derogate from obligations under applicable international law.

THE WHITE HOUSE,

December 9, 2016.

Billing code 3295–F7–P



[FR Doc. 2016–30277

Filed 12–13–16; 11:15 a.m.]

Billing code 4310–10–C

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